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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

February 23, 1978

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

Dear Lewis:

I very much appreciate your helpful and welcome comments on the Monell memoranda. I certainly cannot disagree with the first reservation you voice to my position, namely that we need not overrule Monroe and Moor but might simply restrict those cases to their facts. See my Memorandum at 8. I find your second suggestion--that in this case we should "recognize a defense for policies promulgated in good faith that affect adversely constitutional rights not clearly defined at the time of violation"--a bit more troublesome. What particularly bothers me about it is that the question of what type of immunity should be afforded municipal or quasi-municipal bodies if such bodies are suable directly under § 1983 has not been briefed in this case. I'd not like to repeat here the earlier errors of rushing to decision without adequate briefing. The possible confusion that can arise from such lack of briefing is painfully evident from the treatment given the question of the "personhood" of municipalities under § 1983 in Monroe, Moor, and Kenosha. Although I have a good deal of sympathy for affording municipal bodies the type of good faith defense you propose, I really do believe that the lower courts should grapple with the issue first, so that when the issue returns here, it will have been fully considered and fully briefed. I am not adverse, however, explicitly to direct the attention of the lower court on remand to the qualified immunity question, and provide the court with our views on the contours of the issue.

Parenthetically, I would like to voice my agreement with your observation, at pp. 9-10 of your memorandum, that "[i]f we continue to deny § 1983 relief against local governmental units, we strengthen the argument for Bivens relief [against these bodies]."

Sincerely,

Bill

Mr. Justice Powell

Copies to the Conference