To: Mr. Justice Powell

From: Sam Estreicher Date: April 22, 1978

Re: No. 75-1914, Monell v. Dept of Social Services--WJB's 2d Draft

I have read WJB's revised, somewhat longer(!!) draft. I have annotated this draft to indicate how WJB responded to our suggestions. In my view, WJB has corrected most of the defects that we discerned, and I recommend that you join the opinion in its entirety. However, I do want to point out the following:

1. There are a few lingering suggestions of the "full power" point in the language of "complete remedy" (p.24) and the statement that § 1983 "provided the only civil remedy coextensive with the Fourteenth Amendment" (p.26). I have pointed this out to WJB's clerks, and I believe that they will adopt the language you suggested in your memorandum to WJB: that Congress intended the term "person: to include all officials and entities within its constitutional reach, without suggesting that other features of the statute are dictated either by the Constitution or by 1871 understandings of constitutional limits.

2. The discussion on p. 19, while an improvement over the previous draft, does not clearly explain why the Sherman Amendment is different from § 1983. WJB's argument is that the opponents of the Sherman Amendment would not have been troubled by a provision which made municipalities liable for a constitutional violation

resulting from the exercise of powers they enjoyed as a matter of state law. By contrast, the Sherman Amendment sought to impose a peace-keeping obligation on municipalities that was not derived from state law or the Federal Constitution. In other words, the Sherman Amendment sought to impose damages liability for a failure to take action when municipalities were under no obligation to take any action at all.

3. The word on p. 30 should be "policy," not "action."

4. On pp. 29-30, WJB has retained some of his "custom" and "deliberate indifference" discussion, but in a somewhat muted form. I have no objection to the "custom" discussion, as it follow from Justice Harlan's decision for the Court in Adickes, but you may wish to urge WJB to eliminate the treatment of Estelle v. Gamble in note 55.

5. WJB's new Part III on stare decisis is quite persuasive, and may obviate the writing of a separate opinion on our part. I am troubled by the discussion of the Civil Rights Attorneys' Fees Award Act of 1976 on p.39. I would simply say that the Act "allowed award of attorneys' fees" even though Monroe, Kenosha and Aldinger made the joinder of such governments impossible. I am a little puzzled, moreover, why Aldinger is mentioned in this context, for that case concerned a pendent state-law claim.

6. Footnote 68 (p.40) leaves open whether Monroe was correctly decided on its facts, and whether Moor, Kenosha and Aldinger remain good law to the extent they relied on the aspect of Monroe rejected in this decision.

Apparently JPS has insisted on this reservation, and I doubt we could budge WJB on this point.

7. Part IV contains absolutely no discussion of the validity of the common-law immunity of municipal governments, other than to say that municipalities do not enjoy absolute immunity under § 1983.

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Do you still want a separate statement of our reasons for joining this opinion?

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Sally on file
Cate Bellotti on to "personnel"