

MEMORANDUM

TO: Sam DATE: April 24, 1978
FROM: Lewis F. Powell, Jr.

Monell

Sally will give you a rough draft of a proposed letter to Bill Brennan.

I found your annotation of his opinion quite helpful, and I am generally in accord with your thoughts. I believe my proposed letter to WJB identifies the only changes that are preconditions to joining. But I would appreciate your most careful advice. I know from experience that WJB has a demonstrated ability (that I admire) to shape future decisions by the inclusion of general language unnecessary to the present opinion but apparently free from serious objection.

Although Bill's revisions have substantially reduced what I would have said in a concurring opinion, I would still like for you to try your hand at a draft - perhaps no more than four or five pages. We can explain more clearly why the Sherman Amendment is different from §1983. Also, I would like to incorporate some of my thoughts as to the choice of two lines of authority - in discussing stare decisis. In addition I would like to include the point that we made in my original memorandum to the Conference with respect to incongruity of distinguishing

between the municipality or agency thereof and the individuals who implement policy as officers and employees. Recognizing this incongruity, it is now widespread practice for the governmental entities to indemnify officers and employees who suffer 1983 damage awards for the performance of their duties.

Unless Bill Brennan changes what he has written about the Attorneys Fees Award Act, I will want to say something about that.

In general, this is an historic case; I have given it a good deal of thought and attention over the many months since we granted it, with enormously helpful assistance and insight from you; I think our views have helped shape WJB's thinking and opinion, and possibly will help put a Court together. I would, therefore, like to say something if it may be useful as an additional gloss as to what is said in the Court opinion.

L.F.P., Jr.

P.S. In my concurring opinion, when we talk about the meaning of "persons", I will want to cite Bellotti, and quote WJB's statement on p. 26.

ss