

No. 75-1914 Monell

Dear Bill:

I now have had an opportunity to read your revised draft, circulated April 21.

Thank you for the revisions directed to the points raised in my letter of April 11. The new part III on stare decisis is quite persuasive, and includes much of what I would have said on this question in a concurring opinion. Moreover, if I could persuade you to accept my suggestions below, I can join Part II. It contains a helpful - and I think correct - explanation of why §1983 does not impose liability on government entities for the unauthorized misconduct of employees. In view of the fact that our previous cases --with the exception of Kenosha v. Bruno-- primarily involved claims of respondeat superior liability against municipalities and counties, I think it appropriate for the Court to make clear that that theory does not support a §1983 claim against entities of government.

In sum, I believe my previously expressed concerns have now been reduced to the following narrowly focused suggestions:

1. As you know, I do not view §1983 as coextensive with the full power of Congress under the Fourteenth Amendment. A number of scholars share this view, including Gunther and Monaghan. I would therefore appreciate your considering the following clarifications:

(a) Page 24, first sentence in full paragraph: I would substitute "broad" for "complete".

(b) Page 25, the long paragraph in footnote 45: Rather than say that §1983 "represented an attempt broadly to exercise the power conferred by §5 of the Fourteenth Amendment", I would simply say that §1983 "represented an attempt to include all officials and entities within the constitutional reach of Congress". It is unnecessary to suggest that other features of §1983 are dictated either by the Constitution or by 1871 understandings of constitutional limits.

(c) Page 26, middle of first full paragraph: I would modify the description of §1 as the only civil remedy "coextensive" with the Fourteenth Amendment. Perhaps you could say that the section provided a "broad" or "expansive" civil remedy to implement the guarantees of the Fourteenth Amendment.

2. Page 30, last sentence in footnote 55, ~~page~~
~~248 footnote 66~~: I concur in Potter's view that explicit
reference to Estelle v. Gamble is undesirable in this
opinion. There may well be several tenable ways to read
our decision in Estelle, but I am unwilling to suggest in
this case that the "deliberate indifference" standard has
application in contexts other than that of prisons, where
the inmate is wholly dependent on the prison officials for
satisfaction of basic human needs. Your discussion on pp.
29-30 makes quite clear that official policy can be
expressed as unwritten, informal "custom." I can accept
this where the custom is unmistakably sanctioned by the
municipality. And your language at the top of p.34 does
not foreclose a "deliberate indifference" theory in an
Eighth Amendment context, where a prison department's
established policy or "custom" with regard to prisoner
medical needs "itself inflicts [constitutional]
injury...." In short, I hope you will be willing to drop
~~the Estelle sentence in Note 55~~
~~note 55~~ as unnecessary, reserving all mention of the reach
of Estelle until we have a specific case.

3. I also agree with Potter that footnote 57 on
page 32 (with respect to "fault") is unnecessary and

previously expressed view remains firm.

touches on an issue yet to be resolved. While the footnote, as amended in your letter of April 25 to Potter, does not commit the Court to any particular proposition of law, it may be read as a "signal". In light of our reservation of the negligence issue in Procunier v. Navarette, I would remain silent here. We will have to confront the negligence issue soon enough without inviting it.

4. Page 38, discussion of the Attorneys' Award Act of 1976: You describe this as allowing "prevailing parties in §1983 suits to obtain attorneys' fees from the losing party". I am sure you intend only to state, in accord with the statutory language, that the Act merely confers discretion on the Court to allow such fees. Also, in light of Hutto v. Finney, I am somewhat troubled by your characterization of the congressional intent on page 39. I would simply say that Congress has "attempted to allow" such awards, not that Congress has "attempted to limit Monroe."

5. Your revision of Part IV as to immunity - leaving the issue entirely open - is quite acceptable. I no longer will write on the immunity issue, although my previously expressed view remains firm.

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I appreciate your efforts to accommodate the various suggestions from other Brothers and me. This is, however, a major new precedent and I am strongly disposed to move cautiously. If you will make the changes suggested above, I will be happy to join you - although I do not foreclose the possibility of having minor editing suggestions as I reread your comprehensive opinion.

Also, I still may write briefly to emphasize a point or two where we may have shades of difference that do not go to the essential merits of your opinion. This would not prevent me from joining you.

Sincerely,