

Finally, I am hesitant to add a two or twelve
To: Sam Date: May 8, 1978
From: L.F.P., Jr. I therefore suggest that
not consider possible marginal statements both in the text
and No. 75-1914 Monell v. Dept. of Social Serv.
marked portions of pages 2 and 3 to be cut from the text
and place Over the weekend, I reviewed and edited your
draft (5/1/78) of a concurring opinion. I like the opinion and am inclined to render it.
It would be ostentatious, however, for me to repeat the
substance of points or arguments already well made by
Justice Brennan. As I have not had his opinion with me, I
have not been able to check back to see whether there is
undue repetition in my concurrence. In view of your own
intimate familiarity with this whole subject, including
the Brennan opinion, I would like your considered judgment
on this question.

Also, I have some lingering doubt as to the
appropriateness of including the paragraph on Bivens. I
like the paragraph, and you are familiar with my thinking
about Bivens, but I would like your view as to whether
inclusion of the paragraph weakens the overall force of
the concurrence.

Finally, I am hesitant to add a ten or twelve page concurrence to the long opinions already written by Justices Brennan and Rehnquist. I therefore suggest that you consider possible marginal statements both in the text and notes that could be omitted. For example, I have marked portions of pages 3 and 4 to be cut from the text and placed in a note. On second thought, I believe the Brennan opinion quotes so elaborately from the debate on the Sherman Amendment, we need not include the quotations from Burchard and Blair. Perhaps the note could simply make a reference to their statements. I also invite your thought as to whether the paragraph on Moore (p. 7) can be summarized in a conclusory sentence without loss of impact. My recollection, however, is that the Brennan opinion does not deal adequately with Moore.

L.F.P., Jr.