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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 6, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 76-1914 - Monell v. Department of Social Services

This memorandum replies to Lewis' circulation of February 23rd; the pressures of preparation for oral argument and Conference have prevented me from circulating it sooner. As to the sense of what the Congress meant by the word "person" when it enacted § 1983 in 1971, I think issue is pretty well joined between Bill Brennan and me. I would quite frankly concede that if at the time of Monroe v. Pape, 365 U.S. 167, the same thorough canvass of the legislative history had been made as we have done this Term, the Court should have concluded that the word "person" in 1983 did not exclude municipal corporations. But it seems to me that the exchange of memoranda has likewise shown that this is by no means an open and shut question, and that the balance is about sixty-forty -- a balance which I do not regard as meeting the requirement for overruling an issue of statutory construction, as stated by

John Harlan in his concurring opinion in Monroe, that "it appear beyond doubt from the legislative history of the . . . statute" that previous decisions "misapprehended the meaning of the controlling provision . . ." 365 U.S. 167, 192.

There is a certain parallel here between stare decisis and the doctrine of immunity which we discussed at Conference on Friday. One does not logically reach the question of a defendant's immunity until one assumes or decides that the plaintiff has stated or proved a claim for relief. Likewise, one does not reach the question of whether a doctrine should be retained because of the principle of stare decisis until one concludes that the case was wrongly decided in the first place. There is no need of a doctrine of stare decisis to preserve the holdings or the reasoning of opinions which a presently sitting Court concludes were correct.

But this simply brings us to the meaning and importance of stare decisis in statutory cases, and that is where I take issue with much of Lewis' memorandum.

Some parts of his memorandum suggest that because the parties may not have argued the "person" definitional issue well in Monroe, the doctrine of stare decisis is less applicable to Monroe than it would be to a case where counsel in briefs and oral argument had fully explored the issue. Since only Bill Brennan and Potter were

on the Court at the time of Monroe, I suppose it is idle for the rest of us to speculate as to what went on in Conference at that case; but I had never understood the principle of stare decisis to depend on how well counsel presented to the Court the issue which it undertook and did decide. Rather, the principle recognizes that the law should be settled, even though wrongly, so that persons and their counsel can govern their actions accordingly.

In this regard, while municipal counsel cannot predict this Court's future views on the quality of advocacy in prior cases, they can certainly tell the difference between dictum and holding. There surely is no question but what Bill Douglas' opinion for the Court in Monroe clearly holds that a municipal corporation is not a "person" for purposes of § 1983. Indeed, one need only to look at the last headnote to the case, on page 168, to find the holding that "the city of Chicago is not liable under § 1979 [predecessor to § 1983] because Congress did not intend to bring municipal corporations within the ambit of that section." The headnote indicates that five pages of the Court's opinion were devoted to that point.

In this connection, I recall sitting around the Conference table two years ago where several of us wished to overturn another part of the decision in Monroe v. Pape deciding that there was no

requirement of exhaustion of administrative remedies under § 1983. The headnote to the case lists this, too, as one of the holdings, but indicates that only one page was devoted to its discussion; reference to that page (365 U.S., at 183) shows that one paragraph of very conclusionary analysis was devoted to the point. Nonetheless in spite of what I thought at the time a majority felt were serious practical difficulties with the rule, a majority nonetheless refused to overturn it because of stare decisis.

Lewis' memorandum says that we should not "overrule" the holding of Monroe, but justify its result for other reasons. I think this represents only a semantical difference from Bill Brennan's approach. Here we are not being asked to disavow dicta, in the sense that my memorandum in Bankers Trust v. Mallis urges the Court to disregard dicta in United States v. Indrelunas, 411 U.S. 216 (1973). I think dicta, particularly in an unargued per curiam, have always stood on a different footing with respect to stare decisis than the process of reasoning necessary to reach the Court's result. To say that to now hold that a municipal corporation is a "person" within the meaning of § 1983 would not be to overrule that part of Monroe v. Pape because the same result could be justified on a doctrine that § 1983 does not permit imposition of respondeat superior liability would be somewhat

analogous to deciding that the doctrine of judicial review enunciated in Marbury v. Madison is no longer the law, but saying at the same time that we were not overruling Marbury because the rule to show cause could have been discharged on a different ground. Preserving only the result of Monroe does nothing to protect the settled expectations of municipalities which have fashioned their indemnity ordinances and their insurance coverage in reliance on this Court's holding that they are not "persons" under § 1983.

I also disagree with Lewis' statement in his memorandum that the cases on this subject are in confusion, and that this case presents an opportunity to clarify the law. In my opinion, the cases are in no confusion whatsoever as to whether a municipal corporation is a "person" for purposes of § 1983. On every one of the four occasions which this Court has addressed that issue -- Monroe v. Pape, Moor v. County of Alameda, City of Kenosha v. Bruno, and Mt. Healthy City Board of Education v. Doyle -- we have said that it was not. The cases which Lewis refers to as creating confusion, and which Bill Brennan and I both discussed at length in our memoranda, are the school board cases. But none of the results in these cases would have come out differently had the Court in them expressly addressed the question of whether a municipal corporation is a "person" under § 1983; and since the Court

did not address that issue in any of the school board cases referred to in the memoranda, there is nothing in any of them that would have to be overruled. Thus, to my mind, there simply is no "confusion" in the cases; the most that can be said is that in some cases involving school board defendants, those defendants did not raise a possible defense which was available to the school corporation, and the Court therefore did not pass upon or discuss such a defense. The Court's silence in this regard, unlike its holding in Monroe, cannot have given rise to any false expectations. Since 1954, every school board has known it is subject to the equitable relief granted by our cases, but, since Monroe in 1961 no municipal corporation has had any reason to believe it could be held liable in damages.

Lewis also expresses greater satisfaction with the practical consequences that would result from adoption of his position than would from retaining the reasoning of Monroe. There may be a good deal to be said for his position if the Court in this case were willing to state that municipal corporations had the same good faith-reasonable defense to liability as was established for municipal officials in Wood v. Strickland, 420 U.S. 308 (1975). To me, that is a rather large "if". Byron, who wrote Wood and who recently authored Procunier v. Navarette for the

Court, is unwilling to commit himself in this case to such a defense. Since Bill and John have expressed that same view in circulating memoranda, I foresee some doubt as to whether there would be five votes to impose it. And of course, once the holding of Monroe as to "person" is overruled, those who join in that holding but wish to incorporate a good faith defense for municipal corporations have given up whatever bargaining chips they have when the availability of the defense actually comes before us in an argued case.

In the meantime, municipalities will have no clear guidance from this Court as they attempt to insure against the financial consequences of their officers' good faith inability to predict this Court's applications of the Fourteenth Amendment. The magnitude of the consequences of indecision in this area of the law can be grasped by a brief glance at the number and variety of cases being held for Monell, which was itself held for Mt. Healthy.

I guess we have all been judges long enough to know that practical considerations may influence us to a greater or lesser extent, and that if one feels the practical results of a prior statutory holding are outrageous, he will find some reason to vote to overrule it notwithstanding stare decisis. But it seems to me this is an area where the doctrine of stare decisis itself is

an important practical argument against taking the position that Lewis does. In the first place, it is not, as he suggests at page 3 of his memorandum, a question of "six of one, half a dozen of the other," so far as practical results are concerned. In a case like the present one, where the municipal corporation would not be liable under Monroe, and the officials sued have a good faith immunity defense under Wood v. Strickland (unless that is overruled), there simply will be no judgment against anyone upon which plaintiffs may collect.

Lewis suggests that the results in Monroe and Moor could be justified by the "42d Congress' rejection of vicariou liability as an operative principle of the 1871 Civil Rights Act". LFP memo, page 7. Bill's memorandum, too, at pp. 46-47, makes the statement that municipal corporations still could not be held on a theory of respondeat superior for acts of low level officials under § 1983. As I understand it, the justification for this rejection of respondeat superior liability is that although the 42d Congress' rejection of the Sherman Amendment is not an adequate basis for excluding municipal corporations from the definiti of "person" under the Act, it is an adequate basis for saying they may not be held on a respondeat superior theory for actions of lower-level employees. But if Bill's version of the legislative

history, which as I have stated above is in my opinion a somewhat more careful and accurate version than that contained in Monroe, is correct, it affords no basis for saying that, although cities are "persons" within the Act, they are not liable on a respondeat superior basis for actions of their numerous employees. The Sherman Amendment was not an effort to impose vicarious liability on cities and counties for acts of their employees; it was a far more drastic measure, intended to impose liability on "persons"' as defined in § 1983 for mere failure to prevent private vandals from committing crimes against persons or property within the municipal jurisdiction. Just as Congress could quite consistently have rejected it and still intended that municipal corporations be "persons" within § 1983, Congress could have rejected the amendment and still intended that "persons", including municipal corporations if they are to be included within that definition, are liable for affirmative acts of their employees under a respondeat superior theory. In short, I think that once municipal corporations are included within the definition of "person" in § 1983, it is doctrinally very difficult to say that they are not liable on a respondeat superior because Congress rejected the Sherman Amendment.

When one considers the situation, quite different from that

presented here but at the core of Congressional concern in enacting § 1983, of police officers breaking down doors at night, serious inequities will result if Monroe is to be overruled on its definition of "person" and a doctrinally difficult exclusion of respondeat superior liability substituted in its place. The middle level municipal official will find himself at the close of all the evidence being the sole defendant in many cases, since the municipal corporation will have been dismissed for lack of a respondeat superior theory. However, the top dogs in the municipal hierarchy, (for example, the school board members in this case) because of their very broad discretionary authority over all of the municipal corporation's affairs, and because of the fact that the corporation can act only through them, will through their acts invariably subject the corporation itself to liability if the proposed overruling of Monroe is to have any practical consequence. The result will be that in many cases a low level municipal employee has a judgment against him without a counterpart judgment against his city employer, while the city councilmen against whom judgment is rendered will all but invariably have a counterpart judgment rendered against the city itself. None of us who have practiced need to be told that the plaintiff in such a case will first pursue the municipal corporation, rather than the individual, however

prosperous he may be. Thus the middle level employee will frequently have to respond to a judgment by himself, subject only to such insurance protection or indemnity protection as the city or state has chosen to give him, while the head honcho will as a practical matter never have to respond because, every time a judgment may be rendered against him, it may also be rendered against the city.

Finally, like Lewis, I would prefer to avoid the pressure inherent in having to decide whether a Bivens remedy should be implied against municipalities under the Fourteenth Amendment. But that aversion is no reason for disregarding ordinary principles of stare decisis and disrupting the settled expectations of municipalities. Congress is empowered to enforce the Fourteenth Amendment through appropriate legislation, and it is presently considering a bill to provide precisely the relief sought by these plaintiffs. Through hearings and investigations, Congress is in a far better position than this Court to assess the practical impact of the overruling of Monroe.

In conclusion, I think Lewis' memorandum suggesting that we would not be violating the policy of stare decisis nor actually overruling the holding of Monroe is wrong. I say this with genuine deference and respect, since I know that he has devoted

as much if not more time and thought to the matter than I have. But I cannot believe that countless arrangements by way of indemnity ordinances and statutes, insurance policies and rates, and the like, have not been made in reliance on headnote 4 of Monroe v. Pape, 365 U.S. 167, 168:

> "The city of Chicago is not liable under § 1979, because Congress did not intend to bring municipal corporations within the ambit of that section."

And we have reaffirmed that statement of the law three times in the intervening sixteen years -- in Moor, City of Kenosha, and Mt. Healthy. Whatever conclusion the Court reaches in this case, it must overrule Monroe on this point and admit that other factors have prevailed over the doctrine of stare decisis to reach the result which Lewis and Bill support.

Sincerely,

WRW