

lfp/ss 3/24/80

MEMORANDUM

TO: David DATE: March 22, 1980
FROM: Lewis P. Powell, Jr.

Owen

Reviewing your draft of 3/20 in the above case has
illuminated and cheered this Saturday at the Court for me.

I think your draft is excellent, persuasive, and
reflects an enormous amount of imaginative and painstaking
research. My editing has been minimal, and I have suggested
no substantive changes. I am suggesting some revision in the
introductory portion, but otherwise - for a change - I have
had no urge to rewrite what seems to me to be quite well
written.

My one concern is that expressed by you: it is
terribly long, especially for a dissent. When I noted the 31
pages of text and another dozen pages or so of notes, I
commenced my review with the thought that one way or the
other we should cut out about one third. Even with this
thought in mind, I have not wielded the ax.

The questions are whether there was a
constitutional violation, and - if so - whether the
municipality enjoyed any immunity. I think we should retain
the discussion of both. One possible way to eliminate

perhaps four pages from the text of the opinion itself would be to include a good part of the history of the Sherman amendment, and the views of members of Congress, in an appendix. Take a look at pages 21-24, inclusive, with this in mind. Scholars who are interested will have the appendix. Others, with less patience, will welcome a 12% reduction in the length of the opinion. Although I detected no real "fat" in the notes, there are couple of rather long ones that you might be able to condense somewhat.

The draft does not explicitly refer to federalism. This is a concept that seems to "turn off" those who believe that all wisdom resides in an ever larger federal government and an ever expanded federal judiciary. But I do think sound constitutional doctrine requires a continued recognition of the doctrine. At some appropriate place, perhaps in the discussion of policy considerations, we should say that the Court's decision impinges seriously on the prerogatives of municipal entities that are the creation of state governments, and subject primarily to regulation by the states. To be sure, the Court is relying on an Act of Congress adopted pursuant to the post Civil War amendments. But, as you point out, and this could be emphasized even more, there is not one word in §1983 that suggests this intrusion into traditional state jurisdiction. You do make

clear, also, that there is nothing in the legislative history of 1983 to justify it. At the very least, an intrusion of this magnitude should not be found to exist in the absence of explicit congressional action, taken after full hearings had explored the policy considerations.

In the margin at one point, I suggested you ask me about publication of ATLA (American Trial Lawyers Association). I believe the Library has its publications. This is the plaintiffs' trial lawyers association, and its magazine regularly carries - at least it used to - accounts or tabulations of verdicts. The motto of ATLA is "the more abundant jury verdict". Perhaps the Library could identify from that, or some other source, examples of tort liability verdicts particularly against municipalities. I heard on the radio this morning of a seven million dollar verdict was rendered, as I understood it, against a hospital. Whether the hospital was municipal or private, was not stated.

I would like to circulate my dissent as soon as possible following the Court's opinion. I therefore suggest the following procedure. Have your "editor" review the present draft. Then convert it on Atex to short paper double spaced and give it to the printer for the usual Chambers Draft. But hold the Atex draft available for immediate

circulation if the Court opinion comes out before we complete the printing process. The draft refers, in a number of places, to the Court's opinion - on the assumption that we can anticipate what it will say. No doubt some changes in these will be required, although I can accompany a circulation of the Atex draft with a caveat that there will be further editing.

L.F.P., Jr.

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