

Sally - file

MEMORANDUM

DATE: August 18, 1980

TO: Mr. Justice Powell

FROM: David

RE: Monroe v. Pape, Monell, etc.

This memo derives from the research I did in preparing the draft dissent in Owen v. City of Independence. The central issue in Owen, as in Monroe and Monell, was the proper interpretation of 42 U.S.C. § 1983. As is usual in difficult cases of statutory interpretation, the legislative history of § 1983 -- which was part of the Civil Rights Act of 1871 -- is of little assistance. The language that has been codified as § 1983 was not debated at any length. Thus, there was no direct comment on the meaning of the term "person" in the statute.

In Monroe, Justice Douglas wrote for the Court that "person" does not include municipalities. The Court was



unanimous on that point. Justice Douglas based his conclusion primarily on the defeat of an amendment to the 1871 Act proposed by Sen. Sherman. The Sherman Amendment would have imposed damages liability on any municipal entity in which a citizen's civil rights were violated. Drawn loosely from on the "riot acts" of England and some of the States, the Amendment would have imposed such liability without regard to whether the municipality actually had knowledge of the impending deprivation of rights. The Sherman Amendment was adopted by the Senate, but was rejected by the House of Representatives on two separate occasions. Justice Douglas cited the statement of Rep. Poland, a pivotal figure in the deliberations, that "the House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of state law." 365 U.S., at 190, citing Cong. Globe, 42d Cong., 1st Sess., at 804 (1871). Justice Douglas concluded that the congressional response to the Sherman Amendment was "so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include [municipalities]." 365 U.S., at 191.

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The Sherman Amendment episode is a somewhat oblique basis for determining the meaning of § 1983. The language of § 1983 was not the target of Sen. Sherman's amendment, and the terms of that provision were not altered significantly during



deliberations on the Civil Rights Act. Consequently, there seemed some basis for the decision in Monell to reverse Monroe. The most persuasive argument in favor of the holding of Monell remains the fact that municipal corporations were -- like private corporations -- considered "persons" within the law in 1871. But Justice Brennan also attempted to explain away the Sherman Amendment episode to demonstrate that Justice Douglas's conclusion was wrong. I do not believe that Justice Brennan's effort succeeded. Indeed, I think that the ultimate disposition of Sen. Sherman's proposal supports the original decision in Monroe.

*David  
Hume  
Douglas  
was  
right  
in Monroe*

Monell argues that Rep. Blair presented the underlying basis for rejecting the Sherman Amendment. 436 U.S., at 673-676. Rep. Blair complained that the Amendment would hold municipalities liable for failure to perform peace-keeping functions that the municipalities did not otherwise perform. As a result, the Amendment would create new obligations for municipalities and invade the police powers of the States. Justice Brennan conceded that "[a]ny attempt to impute a unitary constitutional theory to opponents of the Sherman Amendment is, of course, fraught with difficulties. . . ." Id., at 676. He attempted to dress this argument up, however, with a lengthy demonstration that Rep. Blair's views were consistent with the constitutional doctrines of the time. Most of that argument is



irrelevant. The proposition in Monell is most fairly and strongly put in your concurring opinion: "Of the many reasons for the defeat of the Sherman proposal, none supports Monroe's observation that the 42d Congress was fundamentally 'antagonistic,' 365 U.S., at 191, to the proposition that government entities and natural persons alike should be held accountable for the consequences of conduct directly working a constitutional violation." 436 U.S., at 706 (POWELL, J., concurring). *instrumentality for the administration of state*

My complaint with the analysis in Monell is that it is incomplete. The initial version of the Sherman Amendment was modified by a conference committee to provide a mechanism for levying judgments against municipal entities. The House still refused to accept the Amendment. A second conference committee was appointed and substituted the language that is now codified in 42 U.S.C. § 1986. It imposed liability on "any person or persons having knowledge [that a conspiracy to violate civil rights was afoot], and having power to prevent or aid in preventing the same," who did not attempt to stop the conspiracy. Cong. Globe, at 804 (emphasis supplied). I find this language so very significant because it uses the critical term from § 1983 -- "person" -- and it uses it in a context that plainly excluded municipal liability. *strong*

The managers of the Civil Rights Act conceded that the eventual version of the Sherman Amendment ( § 1986 ) did not



reach municipalities. Because my view of the legislative history is so unpopular, I reproduce their statements at length. *David's "unpopular" view*

Rep. Poland stated: *any one about to be committed, it shall be his duty to see all reasonable diligences within his*

"I did understand from the action and vote of the House that the House had solemnly decided in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of State law. We informed the conferees on the part of the Senate that the House had taken a stand on that subject and would not recede from it; that the section imposing liability upon towns and counties must go out or we should fail to agree. At the same time we said to them there was a disposition on the part of the House, in our judgment, to reach everybody who was connected, either directly or indirectly, positively or negatively, with the commission of any of these offenses and wrongs, and we would go as far as they chose to go in inflicting any punishment or imposing any liability upon any man who should fail to do his duty in relation to the suppression of those wrongs.

"The result was this section which we have reported in lieu of the Sherman amendment. The substance of it is that any person who has knowledge of

*strong*



any of the offenses named, any of the wrongs already described, any of the conspiracies indicated in the second section are about to be committed, it shall be his duty to use all reasonable diligence within his power to prevent it' and if he fails to do so, so much damage as is occasioned to anybody in consequence of his failure, so much shall he be responsible in an action."

Cong. Globe, at 804 (emphasis supplied). Mr. Shellabarger, who had supported the Sherman amendment, described the compromise measure in the following terms:

"[This reaches] any person having knowledge that [civil rights deprivations] are to be committed and having power to prevent. . . . Now I submit to the House and the country these things we have been saying on our side of the House are to the effect that many of the people must know of these outrages to some extent. Having that guilty knowledge and refusing to inform does make them liable in damages. . . ."

Ibid. (emphasis supplied).

Rep. Willard asked about the meaning of the compromise provision. Would liability attach to "an individual [who] receives he notice that we frequently read of being sent to these Union men that he must leave the district or be killed or



whipped," but who did nothing to prevent such reprisals? Rep. Shellabarger and Rep. Bingham replied in the affirmative. Id., at 805. Rep. Garfield described the compromise provision in the following terms: "[I]t is made the duty of all citizens to aid in repressing these outrages; and any citizen knowing that an outrage is threatened, and not aiding to prevent it, is made liable for the wrong and damages done." Id., at 807 (emphasis supplied).

If anything, the Senate debate on the compromise measure was even more clear that the term "person" did not include municipalities. Senator Edmunds delivered the crucial statement on the bill:

"[T]he conferees of the Senate found it impossible to bring the Representatives of the House to agree to [the Sherman Amendment] in the form in which it stood, on account of difficulties which had occurred to a majority of the House of Representatives respecting our power to deal with the particular organization in a State called a county or a town and for such other reasons as it is not necessary now to state. Thereupon, in order to aid in the repression of these outrages by tumults and conspiracies, the conferees on the part of the House of Representatives and ourselves agreed to substitute for that the provision which the Secretary has read, the substance



and effect of which is to make the whole body of the inhabitants of the vicinity who have knowledge that a conspiracy is formed to destroy the property or to injure the person of any peaceable inhabitant, and who refuse or neglect to exert all lawful means to repress it, having the power to assist in preventing it, responsible. It is, in other words, dealing with the citizen under the Constitution.

"Every citizen in the vicinity where any such outrages. . . are likely to be perpetrated, he having knowledge of any such intention and organization, is made a peace officers, and it is made his bounden duty as a citizen of the United States to render positive and affirmative assistance in protecting the life and property of his fellow citizens in that neighborhood against unlawful aggression; and if, having this knowledge and having power to assist by any reasonable means in preventing it or putting it down or resisting it, he fails to do so, he makes himself an accessory, or rather a principal in the outrage itself, and his fellow-citizen, who is thus wronged on account of his refusal to help him protect himself, is made responsible for it. I think, Mr. President, that in substance and effect this reaches the same result; and I am not at all sure but that it is quite as effectual



as the redress against the county, without liability against the inhabitants of it, would have been. . . ."

Cong. Globe, at 820 (emphasis supplied).

Sen. Sherman complained bitterly about the compromise measure. He insisted that it would be ineffective. "What is the remedy now proposed for these wrongs? No judgment against the county, no remedy against the community, but a private suit, where all the chances are against the plaintiff." Id., at 821.

Sen. Edmunds replied to Sen. Sherman's lament:

"I suggest to my friend that that phraseology is adopted from the Maryland [riot act] statute, which all parties thought was a very fair index of this municipal responsibility, as applied to corporations, which requires that in order to make the corporation liable as a body it must appear in some way to the satisfaction of the jury that the officers of the corporation, those persons whose duty it was to repress tumult, if they could, had reasonable notice of the fact that there was a tumult, or was likely to be one, and neglected to take all the necessary means to prevent it. Now, all that section does really, let me assure my friend, is to dispense with the organized political community and take up the whole body of individuals, officers, and everybody else, privates and officers, everybody who stands around or who are in the



vicinity, and who know the thing is likely to occur. So I submit to him that that criticism, a difficulty of proof, is one which has existed in all the State statutes making committees responsible for this sort of thing. To be sure, it is in different language, and perhaps is more limited in that respect than the amendment which we agreed to before; but in order to get anything we were obliged to make some concessions as to the limitation under which the body of the community, either individually or politically, should answer; and the only real change, aside from those limitations, is the fact that we now go against the whole body of the community personally, while before we went against them politically."

Ibid. Sen. Sherman responded that he was sure the conferees had done the best they could, but the result was still a provision permitting suits only against "private individuals." Ibid.

In his final speech on the measure, Sen. Edmunds urged that the compromise that replaced the Sherman amendment was "in a large degree, if not entirely," an effectual and a practical" substitute for Sherman's proposal.

"It is true corporate responsibility is set aside, but it is equally true that there is brought into play the very provision that was contained in the original amendment of the Senator from Ohio, that of individual



responsibility on the part of every man who should have failed to exert his full duty as a citizen to prevent an outrage upon his fellow-citizen. That is what it is. There may be difficulties of proof. There were under the other section. There are always difficulties of proof. But in a real and substantial sense, going into a court of justice under either section, the first or the last [the original Sherman Amendment or the compromise version], you have the case that the property of every man is a guarantee to the sufferer; that every man shall have exhausted his whole duty as one citizen in assisting to keep the peace against outrages of which he had notice, or of which he might have read by reasonable diligence, which he would be bound to assist in preventing."

Id., at 824.

Thus, my argument is simple. When the Forty-Second Congress wished to exclude municipal liability for the failure to act, it used the phrase "any person or persons." The repeated references to "citizen," "individual," and use of personal pronouns buttress the inescapable conclusion that "any person or persons" did not include local governments. Since the term "any person" was used in the predecessor to § 1983, 17 Stat. 13, it is logical that that phrase also excludes municipal



liability.

There are two points against this argument. First, the phrases in the two provisions are slightly different -- "any person" in the predecessor to § 1983, as opposed to "any person or persons." I do not believe that minor difference undermines my argument. The phrase "any person or persons" was appropriate to the conspiracy provision established in the forerunner of § 1986, while the singular construction was more apt for the predecessor to § 1983. Moreover, in their current codification as § 1986 and § 1983, both provisions use the phrase "Every person." The second point against my argument is that it still does not involve any direct evidence with respect to the meaning of § 1983. That's true. Nevertheless, I believe the argument in this memorandum considers fully all the evidence available on § 1983, and suggests strongly that Congress in 1871 did not think it was creating municipal liability.