M E M O R A N D U M

TO: Mr. Justice White

FROM: Chuck Cole

RE: No. 75-1914, Monell v. Department of Social Services

I. Overruling Monroe

Justice Brennan's memo argues that Monroe incorrectly interpreted the legislative history of the Civil Rights Act of 1871 in concluding that municipalities were not "persons" within the meaning of § 1. Justice Brennan's thesis seems to be that constitutional thinking at the time of the debates recognized a distinction between placing a new obligation on local bodies (the fault of the Sherman Amendment) and providing a federal remedy for municipal violations of an obligation already imposed by the Constitution (the role of § 1).

Although Justice Brennan's discussion of contemporary constitutional theory lacks the lucidity and cumulative force that I would have thought conducive to overruling a prior precedent, it does illuminate the legislative history provided in the amicus curiae brief of the National Education Association, especially pages 17a to 31a. I think that the NEA is correct that the fundamental objection to the Sherman Amendment among key Republicans in the House was that it imposed on municipal governments an obligation which was beyond the power of Congress to create. The quotations appearing on pages 7-8 of Justice Rehnquist's memorandum, when read in context, support rather than

undermine this theory. These remarks on the financial consequences of the Sherman Amendment were intended as demonstrations of the larger principle that the power to impose new obligations on municipalities carried with it the power to destroy them and the states as well. The debates do not evidence a specific concern for municipal treasuries apart from this larger constitutional problem. Although the debates in the Senate ranged more broadly, the explanations of the crucial congressmen in the House do focus on the point that the Sherman Amendment would have upset the traditional balance between the federal government and the states by imposing an obligation on local governments.

As Justice Brennan recognizes, this does not conclude the issue. "The question remains . . . whether the general language describing those to be liable under § 1 -- 'any person' -- covers more than natural persons." Brennan memo, at 29. I have some doubts about his analysis of this question. First, if municipalities were in fact covered by § 1, why are there no references to that fact in the extensive debates on the constitutionality of the Sherman Amendment? It seems to me that any good constitutional lawyer defending the Amendment would have begun by pointing out to the objecting Republicans that they were in agreement with the municipal liability established under § 1. He would then argue that the liability imposed under the proposed § 7 was not significantly different for constitutional purposes. Similarly, I would have thought

that opponents of the Sherman Amendment would have highlighted its constitutional weaknesses by contrasting it with the municipal liability assertedly imposed by § 1.

Second, the constitutional theory on which the Sherman Amendment was rejected might also have made it difficult to impose a liability on municipalities for constitutional violations. For example, the remarks of Congressman Poland do not seem to adopt the very thin line between "obligation" and "liability" whic Justice Brennan sees in contemporary constitutional theory:

> "As I understand the theory of our Constitution, the national Government deals either with States or with individual persons. So far as we are a national Government in the strict sense we deal with persons, with every man who is an inhabitant of the United States, as if there were no States, towns, or counties; as if the whole country were in one general mass, without any subdivisions of States, counties, or towns. We deal with them as citizens or inhabitants of this great Republic. With these local subdivisions we have nothing to do. We can impose no duty upon them; we can impose no liability upon them in any manner whatever." Globe, at 793.

I should point out, however, that these remarks are not typical. The most frequently voiced objection is that the United States could not impose a liability where no duty existed under state law. This theory might have permitted the imposition of liability on municipalities where state law accorded them sufficient power to take action and that power was abused. Nevertheless, it seems strange that no such defense of extending § 1 to municipalities was made.

On the whole, I think that Justice Brennan presents a strong but not necessarily compelling case that Monroe wrongly interpreted the word "person" in § 1 of the Act. Thus, the critical question is what burden must be satisfied in order to overturn Monroe. The principle of stare decisis is considerably weakened here by the fact that municipalities cannot claim to have relied on their nonliability under § 1983. In addition, the federal courts have traditionally taken an active role in the interpretation of the civil rights statutes. E.g., Griffin v. Breckenridge, 403 U.S. 88 (1972); Jones v. Alfred Mayer, 392 U.S. 409 (1968). Nevertheless, I lean toward Justice Rehnquist's view that the Court should not overrule a prior construction of a statute unless it is clear beyond doubt that it is wrong. Regardless of whether this is the wisest principle, it is the traditional one. 1/ I think it more important that the allocation between the Court and Congress of law-revising responsibility be clear than that it be correct in every case. Moreover, the Court's holding in Monroe has been reaffirmed in such cases as Moor, Kenosha, and Aldinger v. Howard. Finally, it seems pointless to weaken stare decisis by overruling Monroe if less drastic alternatives may be found.

1/ In order to check the truth of this assumption, I obtained a list of overruled Supreme Court decisions which is attached. There seem to be relatively few cases in which the Court has overruled a prior interpretation of a statute.

II. Intermediate Solutions

It seems to me that the easiest way to handle Monroe is to accept that case as deciding exactly what it purported to decide -- whether municipalities are "persons" within the meaning of § 1. Monroe said nothing about the types of relief that could be obtained from a municipal official. By distinguishing Monroe in this fashion, the Court has reason to re-examine the legislative history of the 1871 Act. On this occasion, the purpose of examining the legislative history will not be to determine whether municipalities were "persons" within the contemplation of the Congress but whether, in light of the policies affirmed during the debates, municipal officials can can ever be compelled to pay over municipal funds.

At this point I think that the Court could rely on the analysis offered by Justice Brennan's memo concerning the nature of the constitutional objection to the Sherman Amendment. In all likelihood, the congressmen would not have thought unconstitutional a law requiring municipal officials to make good their transgressions of the Federal Constitution with funds from the municipal treasury. Indeed, Congressman Bingham, the author of § 1 of the Civil Rights Act, specifically noted during the debates that the statute was intended to overrule Barron v. Baltimore, 7 Pet. 243 (1834), in which "the city had taken private property for public use, without compensation . . . , and there was no redress for the wrong. . . ." Quoted in Brennan memo, at 33.

Justice Brennan suggests, at page 6, that this interpretation of § 1 would be inconsistent with the then prevalent conception of official capacity suits. I would respond to this in three ways. First, even if a suit against an officer in his official capacity is viewed as being brought against the entity, I don't see why that necessarily precludes prosecution of the suit. As Justice Brennan demonstrates, the rejection of the Sherman Amendment did not endow municipalities with a new form of sovereign immunity, but simply insured that they would not be made subject to an affirmative obligation to protect their residents. To the extent that a suit against an official in his official capacity seeks to impose liability for a different kind of constitutional transgression, the rejection of the Sherman Amendment would not seem to be a bar. Second, the prosecution of the suit against the official in his official capacity would not offend the notion that municipalities could not be sued as persons under § 1. Chief Justice Marshall had solved a similar problem under the Eleventh Amendment by permitting suit against the state officer as a means of providing the remedy. Osborn v. Bank of the United States, 9 Wheat. 738. Although this decision was soon limited by Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 11 (1828),

> "neither this nor later decisions impaired the great central principle of Osborn. It continued to be the law that where the plaintiff complained that a state officer had inflicted a trespass contrary to the Constitution or the statutes of the United States, he could have relief, even if, as in Osborn, it was necessary to follow the moneys into the treasury."

Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 23 (1963). Osborn was expressly reaffirmed (without mention of Madrazo) exactly one year after the passage of the Civil Rights Act of 1871. Davis v. Gray, 16 Wall. 203 (1872).

Finally, I have some doubts as to whether we are bound by the precise state of the law in 1871. Mr. Justice Brennan seems to regard this as an all or nothing proposition: Either we follow the legal theories of the framers in all respects or we do not concern ourselves with their views at all. But it seems to me that the real challenge of this case is to implement the basic policy judgments made during the deliberations in 1871 within the procedural framework of modern law. As long as we are not offended by an order compelling a municipal official to pay a judgment with municipal funds, and such an order is consistent with the basic purposes of § 1983, I see no reason why we should feel constrained by theories of agency which might have been in vogue at that time.

Assuming, then, that a municipal official can be ordered to pay a judgment with municipal funds, the final task is to specify the circumstances in which such an order would be appropriate. One possible rule would be that any official found guilty of constitutional wrongdoing can be required to compensate the plaintiff with official funds to which he has access. This rule may be unfair for two reasons. First, an official should not be able to escape personal liability simply because he is in

a position to control city funds. While in theory the judgment could also run against the official in his personal capacity, it is obvious that wherever the city foots the bill, the official will pay nothing (at least under federal law).

Second, it seems somewhat unfair to hold the city (and hence the taxpayers) liable under federal law for the misdeeds of an official who has strayed from official policy. Cf. Rizzo v. Goode, 423 U.S. 362 (1976). While the public may be able to control the actions of certain highly visible elected or appointed officials, the taxpayer's control over subordinate city employees is attenuated.

An alternative solution suggested by Justice Brennan is to order the payment of a judgment with official funds only where the official takes unconstitutional action pursuant to a local regulation, ordinance or "official policy." This strikes me as attractive for several reasons. First, as noted above, the taxpayers have greater control over "official policy." Second, it seems somewhat unfair to hold personally liable those lesser officials who merely execute policy rather than make it. Finally, the number of persons injured by an official policy is likely to be much greater, so that personal liability may not provide adequate compensation. 2/

2/ Also, the availability of a recovery from city funds will provide an incentive to challenge unconstitutional policies rather than the unconstitutional actions of individual officials. Given the number of civil rights suits against individuals in the federal courts, I think that this would be a healthy development.

The great drawback to this proposal is that it may contain the implication that local bodies and taxpayers are not really responsible for the actions under color of law of individual officials who are not executing local policy. This was the crucial point established by Monroe and it would seem unwise to appear to recede from that view. Nevertheless, I am confident that an opinion could be written which would emphasize that individual officials can act under color of state law even when their actions are not consistent with city policy. Cf. Rizzo v. Goode, supra.

Chuck