

File

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 12, 1978

Re: #75-1914 - Monell, et al v. Department of
Social Services of City of New
York, et al

Dear Bill,

Under your draft, as I understand it, a local governmental entity may be sued under § 1983 for its own transgressions but not for the fault purely of its employees or agents. The line between official policy for which the cities may be sued and vicarious responsibility for the sins of others is not immediately obvious. I take it, however, that the city would not be exposed to § 1983 liability where under its policies, such as those expressed in ordinances, its officials are given general missions together with some or a great deal of discretion as to how to implement them and the executing official, in good or bad faith, then invades an individual's constitutional rights. Officers authorized to make arrests on probable cause inevitably make mistakes, and it may be held in such cases that the Fourth

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Amendment has been violated. Under your draft, I would not think the city would be responsible in such situations since it was not its policy to make arrests except on probable cause.

Similarly, under a city wiretap ordinance, the city would not be liable for an officer's mistaken view that the ordinance did not require his superior's consent before applying for a warrant; but if the ordinance itself is held unconstitutional and it is for this reason that a citizen's protected privacy is invaded, the city would be liable unless otherwise immune from suits for damages under § 1983.

Although this oversimplifies the matter, I am sure, I gather that a city would never be liable when its officer or agent exceeds his authority under statute, ordinance or regulation or when he exercises discretionary authority of the kind given to him by the city but in good or bad faith, exercises it so as to invade the constitutional rights of the citizen. It is only when the city's policy, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, itself inflicts the injury or itself authorizes or directs the specific act charged against its officer that the city is responsible under § 1983.

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It is only then that it would be necessary to consider municipal immunity.

You are convinced, I gather, that foreclosing suits against a city for the wrongful acts of its officers or employees as well as shielding the city from liability for its failure to curb the lawlessness of some of its citizens, is required by the legislative history of § 1983. I am tentatively prepared to go along with you but will be very interested in the views of others on this matter.

I have no objection to Part III or Part II-C, but neither would I object if you modified or eliminated them.

I am in agreement with Lewis Powell's remarks directed at indicated matters on pages 24 and 25, on pages 29-30, and in footnote 55.

Sincerely yours,



Mr. Justice Brennan

Copies to the Conference