To: Mr. Justice Blackmun 2/23/78
From: KE

I understand from Mr. Justice Stewart's memorandum of today that Monell v. Dept. of Social Services, No. 75-1914, will be discussed at tomorrow's conference. Accordingly, I thought I might offer a few comments on the case.

In his draft memorandum, Justice Rehnquist seems to assume that you have already voted to join him. P. 1, n. 1. My notes on your report from Conference suggest that his assumption is not altogether well-founded. If my notes are correct, you indicated quite strongly that you felt Justice Douglas' opinion in Monroe v. Pape, 365 U.S. 167 (1961), misconstrued the legislative history of the Sherman Amendment in holding that municipalities are not suable under §1983. You were, however, understandably, reluctant to overrule Monroe[1] or its progeny and thus depart from the stare decisis principle.

I share your aversion to departures from the stare decisis principle. After study of the various circulations, however, I am convinced that stare decisis cuts in more than one way here. A decision to adhere to the municipalities exception for §1983 (and affirm CA 2) would be as inconsistent with this Court's precedents as would a decision to overrule the exception (and reverse CA 2).

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[1] As Justice Powell's memo (at pp. 6-7) indicates (see also Justice Brennan's memo of Feb. 23 expressing agreement), Monroe and Moor v. County of Alameda, 411 U.S. 693 (1973) need not be overruled. Rather they can be limited to their facts. Only City of Kenosha v. Bruno, 412 U.S. 507 (1973) needs to be overruled.

First, an affirmance in this case requires a rejection of this Court's--admittedly sub silentio--exercise of jurisdiction over school boards in numerous cases. As Justice Rehnquist's memorandum concedes, at least three of these decisions involved claims for monetary relief. Cleveland Bd. of Education v. LaFleur, 414 U.S. 632 (1974); Cohen v. Chesterfield County School Board, 414 U.S. 632 (1974); Tinker v. Des Moines Indep. Community School District, 393 U.S. 503 (1969). Nonetheless, Justice Rehnquist's approach would require this Court to renunciate this longstanding exercise of §1983 jurisdiction over school boards--an exercise of jurisdiction that predated Monroe.

Secondly, adoption of Justice Rehnquist's view would require partial overruling of Kenosha. He suggests that the doctrine of Ex parte Young, 209 U.S. 123 (1908), should be imported in §1983 jurisprudence in order to preserve the availability of injunctive relief. This notion that injunctive but not monetary relief should be available in §1983 suits against municipal officers seems directly contrary to Kenosha (written by Justice Rehnquist) where the Court said:

> We find nothing in the legislative history discussed in Monroe, or in the language actually used by Congress, to suggest that the generic word "person" in §1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them.

412 U.S. at 513. Justice Rehnquist's theory in the instant case would result in a "bifurcated application" of §1983 to municipal officers.

Third, Justice Rehnquist's approach suggests that the Court would have to hold that Congress rejected the Sherman Amendment because it wished to preserve the financial solvency of municipalities. However, this Court's previous decisions have never identified such a concern as the principal reason for the rejection of the Sherman Amendment. Indeed, as Justice Powell points out, that consideration was minimized in Kenosha itself, which held that a municipality could not be sued for injunctive relief under §1983 even though no monetary award was sought against it.

Aside from the fact that stare decisis does not point in any single direction (contrary to Mr. Justice Rehnquist's apparent claim), there are further reasons for joining the Brennan-Powell approach to this case. For one, as Justice Powell points out (pp. 9-10), if the Court continues to deny §1983 relief against local governmental units, the argument for Bivens relief (i.e., direct actions under the Fourteenth Amendment) against these bodies is strengthened. Extending the Bivens rationale this far is a serious step and the Court should not itself create added pressure to take such a step.

Secondly, as you have realized in discussions of this case, there is obviously an advantage in being correct on an issue as important as the scope of §1983. Since--as I have tried to indicate above--stare decisis does not point unequivocally toward any given answer, the Court's task becomes the basic one of discerning the meaning of the legislative history of §1983. And, as Justice Rehnquist all but admits, Justice Brennan's research has persuasively sketched the correct interpretation of that legislative history. It is, I think, an unattractive prospect to contemplate a majority opinion by Justice Rehnquist on the grounds he has suggested with a lengthy dissent by Justice Brennan detailing with great care why the Court's opinion is incorrect and why there is no good reason to feel bound by earlier and ill-considered precedents.

For the above reasons, I recommend that you join the Powell-Brennan approach to this case.