The Burger Court Opinion Writing Database

Oklahoma City v. Tuttle

471 U.S. 808 (1985)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

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

CHAMBERS OF
THE CHIEF JUSTICE

May 24, 1985

Re: No. 83-1919 - Okla. City v. Tuttle

Dear Bill:

I join.

Regards,

Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 19, 1985

No. 83-1919 -- Oklahoma City v. Tuttle

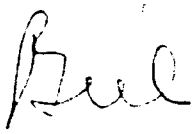
Dear Bill:

I agreed at Conference to reverse and remand in this case on the ground that the jury charge licensing the inference to a municipal policy or custom from the single incident of the use of unlawful force by a single policeman improperly violated the Monell standards by imposing a kind of strict liability on the city. I believe that your opinion on pages 1-12 adequately disposes of this issue and I would be happy to join that part of the opinion, with two exceptions. I can agree with the point made in the second sentence of footnote 4, but I do not understand the import of the remainder. Having said that the Court does not reach the issue, the opinion could safely omit the further discussion. In addition, I believe that the opinion would be clearer if a footnote were added noting that the Court does not decide (because the issue is not presented) whether "gross negligence" or "simple negligence" is sufficient to impose fault-based municipal liability in a case of this kind. If you are unable to make this change, I would write a brief concurrence making this point.

I cannot agree with your extended discussion from the second paragraph on page 12 to page 14. Much of the discussion suggests that a conscious intention to violate the Constitution is necessary to make out a §1983 violation; this contradicts our statements in Monell that "custom," as well as "policy," is sufficient and at any rate is unnecessary to the decision on the question presented here. In addition, the discussion suggests that some departure from ordinary concepts of causation is necessary in §1983 cases. This issue too is not raised in the petition in this case and is unnecessary to the decision. Finally, the discussion attempts to make a distinction between policies that themselves are unconstitutional and those that "cause" constitutional violations. I do not fully understand the purpose of this distinction, and at any rate it need not be made to dispose of the question presented here. The discussion of all of these points is not only unnecessary, it also puts the trial court in an impossible position on remand, since the court has no way to know how properly to instruct the jury after a new trial.

In short, I would be pleased to join the opinion if the discussion from pages 12 to 14 were removed and if footnote 4 were modified. Otherwise, I expect to file an opinion concurring in the judgment.

Sincerely,



Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 22, 1985

No. 83-1919

City of Oklahoma City v. Tuttle

Dear Bill:

It appears that the Court will be reaching the merits in this case, apart from whatever occurs in Criswell. Thanks for your letter of February 20 in response to mine of February 19, but I do not think that your suggestions will accommodate all of my concerns. I shall therefore file an opinion concurring in the judgment as soon as I can get around to it.

Sincerely,

Bill

Justice Rehnquist

Copies to the Conference

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: MAY 21 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1919

CITY OF OKLAHOMA, PETITIONER *v.* ROSE MARIE TUTTLE ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[May ——, 1985]

JUSTICE BRENNAN, concurring in the judgment.

Monell v. *New York Dept. of Social Services*, 436 U. S. 658 (1978), held that municipalities, like other state actors, are subject to liability under § 1983 when their policies "subject[], or cause[] to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . ." 42 U. S. C. § 1983. I agree with the Court that today we must take a "small but necessary step," *ante*, at ——, toward defining the full contours of municipal liability pursuant to § 1983.[1] However, because I believe that the Court's opinion needlessly complicates this task and in the process unsettles more than it clarifies, I write separately to suggest a simpler explanation of our result.

I

Given the result in this case, in which a jury verdict in favor of the respondent is overturned, it is useful to keep in mind respondent's theory of the case. Respondent intro-

[1] See *Monell* v. *Department of Social Services*, 436 U. S. 658, 695 (1978). Since *Monell*, of course, the contours of municipal liability have become substantially clearer. See, *e. g.*, *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247 (1981) (punitive damages not permitted); *Owen* v. *City of Independence*, 445 U. S. 622 (1980) (qualified immunity not available to municipalities).

WHR

p. 1, 6

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: MAY 2 ? 1985

5/22/85

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1919

CITY OF OKLAHOMA, PETITIONER *v.* ROSE MARIE TUTTLE ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[May ——, 1985]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in the judgment.

Monell v. *New York Dept. of Social Services*, 436 U. S. 658 (1978), held that municipalities, like other state actors, are subject to liability under § 1983 when their policies "subject[], or cause[] to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . ." 42 U. S. C. § 1983. I agree with the Court that today we must take a "small but necessary step," *ante*, at ——, toward defining the full contours of municipal liability pursuant to § 1983.[1] However, because I believe that the Court's opinion needlessly complicates this task and in the process unsettles more than it clarifies, I write separately to suggest a simpler explanation of our result.

I

Given the result in this case, in which a jury verdict in favor of the respondent is overturned, it is useful to keep in

[1] See *Monell* v. *Department of Social Services*, 436 U. S. 658, 695 (1978). Since *Monell*, of course, the contours of municipal liability have become substantially clearer. See, *e. g.*, *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247 (1981) (punitive damages not permitted); *Owen* v. *City of Independence*, 445 U. S. 622 (1980) (qualified immunity not available to municipalities).

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 29, 1985

No. 83-1919

City of Oklahoma v. Tuttle, etc.

Dear Harry,

You'll note that I've made the helpful change which you suggested in footnote 4.

Sincerely,

Bill

Justice Blackmun

Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: MAY 29 1985

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 1, 8

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1919

CITY OF OKLAHOMA, PETITIONER *v.* ROSE MARIE TUTTLE ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[May ——, 1985]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring in the judgment.

Monell v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), held that municipalities, like other state actors, are subject to liability under § 1983 when their policies "subjec[t], or caus[e] to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . ." 42 U. S. C. § 1983. I agree with the plurality that today we must take a "small but necessary step," *ante*, at ——, toward defining the full contours of municipal liability pursuant to § 1983.[1] However, because I believe that the plurality opinion needlessly complicates this task and in the process unsettles more than it clarifies, I write separately to suggest a simpler explanation of our result.

I

Given the result in this case, in which a jury verdict in favor of the respondent is overturned, it is useful to keep in

[1] See *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 695 (1978). Since *Monell*, of course, the contours of municipal liability have become substantially clearer. See, *e. g.*, *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247 (1981) (punitive damages not permitted); *Owen* v. *City of Independence*, 445 U. S. 622 (1980) (qualified immunity not available to municipalities).

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 30, 1985

No. 83-1919

Oklahoma City v. Tuttle

Dear Bill,

I would like to join your Part II in the above. I'll be changing one sentence of my opinion to say that.

Sincerely,

Bill

Justice Rehnquist

Copies to the Conference

p. 1

Chief Justice
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: _____

Recirculated: MAY 3 1 1985

SUPREME COURT OF THE UNITED STATES

No. 83-1919

CITY OF OKLAHOMA CITY, PETITIONER *v.*
ROSE MARIE TUTTLE ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[June 3, 1985]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring in the judgment.

I agree that the "single incident" instruction, *ante*, at ——, is properly before us and therefore join Part II of JUSTICE REHNQUIST's opinion. Although I concur in the judgment reached by the Court today, I am unable to join the balance of the plurality opinion.

Monell v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), held that municipalities, like other state actors, are subject to liability under § 1983 when their policies "subjec[t], or caus[e] to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . ." 42 U. S. C. § 1983. I agree with the plurality that today we must take a "small but necessary step," *ante*, at ——, toward defining the full contours of municipal liability pursuant to § 1983.[1] However, because I believe that the plurality opinion needlessly complicates this task and in the process unset-

[1] See *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 695 (1978). Since *Monell*, of course, the contours of municipal liability have become substantially clearer. See, *e. g.*, *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247 (1981) (punitive damages not permitted); *Owen* v. *City of Independence*, 445 U. S. 622 (1980) (qualified immunity not available to municipalities).

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 18, 1985

83-1919 - City of Oklahoma v. Tuttle

Dear Bill,

Please join me.

Sincerely yours,

Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 21, 1985

Re: No. 83-1919-City of Oklahoma v. Tuttle

Dear Bill:

Please join me in your concurring opinion.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 14, 1985

Re: No. 83-1919, City of Oklahoma City v. Tuttle

Dear Bill:

My concerns about your opinion in this case are similar to those expressed by Bill Brennan in his letter of February 19. I, therefore, shall await his separate writing. I am not disturbed by your Part II and am advising John that I would prefer to proceed to the merits in the Criswell case rather than DIG.

There is one further detail. On page 10 you state that the respondent has not claimed that the city had a policy of authorizing the use of excessive force, and you point out that the CA10 commented that the officer admitted at trial that he violated Police Department policy in shooting Mr. Tuttle.

I question the accuracy of the statement in the CA10's opinion, for it seems to be out of line with the officer's testimony set forth on page 227 of the appendix. Thus, if the first 10 pages of your opinion are retained, I would be somewhat happier if the second and third sentences and the first word of the fourth sentence of the first full paragraph on page 10 were omitted.

Sincerely,

Harry

Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 28, 1985

Re: No. 83-1919, Oklahoma City v. Tuttle

Dear Bill:

By separate note, I am joining your concurring opinion in this case. I would feel a little easier, however, if the first sentence of footnote 4 on page 6 were omitted or modified. My concern is that that sentence might be interpreted to rule out the possibility that inaction may constitute a policy. Do you agree?

Sincerely,

Harry

Justice Brennan

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 28, 1985

Re: No. 83-1919, Oklahoma City v. Tuttle

Dear Bill:

Please join me in your separate opinion concurring in the judgment.

Sincerely,

Harry

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 1, 1985

83-1919 City of Oklahoma v. Tuttle

Dear Bill:

Please add at the end of your opinion that I took no part in the consideration or decision of this case.

Sincerely,

Lewis

Justice Rehnquist

lfp/ss

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: 2/15/85

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1919

CITY OF OKLAHOMA CITY, PETITIONER *v.*
ROSE MARIE TUTTLE ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[February ——, 1985]

JUSTICE REHNQUIST delivered the opinion of the Court.

In *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), this Court held that municipalities are "persons" subject to damages liability under § 1 of the Ku Klux Klan Act of 1871, 42 U. S. C. § 1983, for violations of that Act visited by municipal officials. The Court noted, however, that municipal liability could not be premised on the mere fact that the municipality employed the offending official. Instead, we held that municipal liability could only be imposed for injuries inflicted pursuant to government "policy or custom." *Id.*, at 694. We noted at that time that we had "no occasion to address . . . the full contours of municipal immunity under § 1983 . . . ," and expressly left such development "to another day." Today we take a small but necessary step toward defining those contours.

I

On October 4, 1980, Officer Julian Rotramel, a member of the Oklahoma City police force, shot and killed Albert Tuttle outside the We'll Do Club, a bar in Oklahoma City. Officer Rotramel, who had been on the force for ten months, had responded to an all points bulletin indicating that there was a robbery in progress at the Club. The bulletin, in turn, was the product of an anonymous telephone call. The caller had reported the robbery in progress, and had described the rob-

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 20, 1985

Re: No. 83-1919 Oklahoma City v. Tuttle

Dear Bill,

Your letter of February 19th suggests substantial modifications in the presently circulating draft opinion in this case. I can accommodate several of your suggestions, but not all of them.

I am quite willing to modify footnote 4 in some of the respects you suggest, and I would also be happy to put in a footnote indicating that the Court does not decide what degree of fault is required to impose municipal liability in a case of this kind.

I think the substance, if not all of the present language, of the discussion from the middle of page 12 through page 14 is necessary to deal with the respondent's contention that there was really only one "incident" in Monell, and why should this case be any different? I think to answer this we have to make some distinction between the kind of "policy or custom" involved in Monell, which was itself a violation of the Constitution, and the so-called "policy or custom" involved here, which no one contends of itself violated the Constitution.

In addition, I think you misread the opinion if you think it "suggests that a conscious intention to violate the Constitution is necessary to make out a §1983 violation"; the opinion, of course, only deals with what consitutes a "policy" sufficient to establish municipal liability for constitutional violations; in that regard it is hard to write an opinion about municipal "policy" without addressing, to some extent, what a "policy" is. In any event, the questions you seem concerned about are expressly reserved in footnote 6. The opinion does not discuss "custom," because respondent has no plausible claim that she

established a "custom" in this case; if you wish I would be glad to add a footnote to that effect also. Lastly, I am not sure how your resolution would leave the trial court in a better position on remand. We could not reach these difficult questions in this case because they were not sufficiently litigated, but it seems clear that they will have to be resolved at some point. If the opinion were issued as you suggest we would leave the lower courts even more in the dark than if we were to recognize the issues raised by this type of litigation.

If you could see your way clear to join if I were to modify footnote 4, and insert the statement about fault, without my totally excising the last two pages of the opinion, I will be glad to try my hand at it. If the latter is a sine qua non of your joinder, I think I will wait and see what the reaction of others is.

Sincerely,

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 22, 1985

Re: No. 83-1919 Oklahoma City v. Tuttle

Dear John,

I said at Conference today that I would write you about why I thought this case, in which I have circulated a proposed opinion, is different from Western Airlines v. Criswell, which has been assigned to you to write an opinion explaining a DIG. On second thought, I really think that is not my province; I think there are differences between this case and Criswell, which I will mention as I go along, but the main purpose of this letter is to defend the procedural position I have taken in Tuttle. If my view of the procedural matter in that case commands the support of a majority, it is still up to you to decide how Criswell should be written in the light of that view. If my view does not command the support of a majority, a fortiori it is up to you in Criswell.

The basis for my treatment of the procedural issue in Tuttle is my strong feeling--and I think it is one shared by others--that it is a great waste of time to dismiss a case as improvidently granted after full briefing and argument on one or more issues which the Court wishes to decide on the merits. To this end, I would try to concentrate any claims that such issues could not be reached if the Court took the case at the certiorari stage of our deliberations, rather than waiting until after briefing and argument on the merits. By analogy, I think our decision in Michigan v. Long with respect to "independent and adequate state grounds" has been very successful in focusing the parties' attention on this issue at the certiorari stage of the case, and as I recall we have not taken any case since Michigan v. Long which we have felt obligated to DIG because the state court decision rested upon an adequate and independent state ground.

With this end in mind, I think the approach taken by the draft opinion in Tuttle is the appropriate way to handle non-jurisdictional defects such as failure to object to jury instructions. If the Court of Appeals for the Tenth Circuit had refused to consider the jury instruction because an objection to it was not properly preserved, I cannot imagine anyone having voted to grant certiorari in the case. But the Court of Appeals did consider the instruction in the face of a dubious preservation of an objection on the record. Respondent had the opportunity to raise the Rule 51 problem in the Court of Appeals, and in its brief in opposition to the petition for certiorari. It did neither. We should not open ourselves up to being sandbagged like this after we have committed ourselves to deciding a case, when there was no way, short of calling for the trial transcript, that we could have known when we granted certiorari that this problem was lurking below the surface. In addition, our statement of reasons for reaching the merits in Tuttle should alert litigants to their responsibilities to bring this type of problem to our attention, and to utilize the brief in opposition to certiorari to present contentions of this sort.

I hasten to add that the Tuttle opinion makes clear that what we are talking about here is non-jurisdictional defects, which the Court of Appeals has treated on the merits and which we are likewise free to treat in that manner.

I would also note that Tuttle makes it a matter of our discretion whether or not to reach the merits of a claim such as the one presented there. Although respondents in Criswell just like the respondent in Tuttle failed to bring the Rule 51 problem to our attention, part of the reason that I voted to DIG in Criswell certainly was that there had not been a proper objection to the jury instruction. But added to that in Criswell was my general feeling that the litigants, and the petitioner in particular, did a very poor job of briefing and arguing the case, and that the burden of proof question said to be presented in Criswell was really not presented on the record.

I would hope that the views I have expressed in Tuttle on this procedural issue would prevail, and if so that they would afford a guide to you, insofar as they speak to the question, with respect to the approach you take to Criswell.

I would obviously welcome your comments as well as those of others on this aspect of the opinion.

Sincerely,

WHR/JE

Justice Stevens
cc: The Conference

PP 8+10 AND

STYLISTIC CHANGES THROUGHOUT

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: MAR 18 1985

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1919

CITY OF OKLAHOMA CITY, PETITIONER *v.*
ROSE MARIE TUTTLE ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[March ——, 1985]

JUSTICE REHNQUIST delivered the opinion of the Court.

In *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), this Court held that municipalities are "persons" subject to damages liability under § 1 of the Ku Klux Klan Act of 1871, 42 U. S. C. § 1983, for violations of that Act visited by municipal officials. The Court noted, however, that municipal liability could not be premised on the mere fact that the municipality employed the offending official. Instead, we held that municipal liability could only be imposed for injuries inflicted pursuant to government "policy or custom." *Id.*, at 694. We noted at that time that we had "no occasion to address . . . the full contours of municipal immunity under § 1983 . . . ," and expressly left such development "to another day." Today we take a small but necessary step toward defining those contours.

I

On October 4, 1980, Officer Julian Rotramel, a member of the Oklahoma City police force, shot and killed Albert Tuttle outside the We'll Do Club, a bar in Oklahoma City. Officer Rotramel, who had been on the force for ten months, had responded to an all points bulletin indicating that there was a robbery in progress at the Club. The bulletin, in turn, was the product of an anonymous telephone call. The caller had reported the robbery in progress, and had described the rob-

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: MAR 25 1985

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1919

CITY OF OKLAHOMA CITY, PETITIONER *v.*
ROSE MARIE TUTTLE ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[March ——, 1985]

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STYLISTIC CHANGES THROUGHOUT

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: MAR 27 19_____

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–1919

CITY OF OKLAHOMA CITY, PETITIONER *v.*
ROSE MARIE TUTTLE ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[March ——, 1985]

JUSTICE REHNQUIST delivered the opinion of the Court.

In *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), this Court held that municipalities are "persons" subject to damages liability under § 1 of the Ku Klux Klan Act of 1871, 42 U. S. C. § 1983, for violations of that Act visited by municipal officials. The Court noted, however, that municipal liability could not be premised on the mere fact that the municipality employed the offending official. Instead, we held that municipal liability could only be imposed for injuries inflicted pursuant to government "policy or custom." *Id.*, at 694. We noted at that time that we had "no occasion to address . . . the full contours of municipal immunity under § 1983 . . . ," *id.*, at 695, and expressly left such development "to another day." Today we take a small but necessary step toward defining those contours.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 28, 1985

Re: 83-1919 - City of Oklahoma v. Tuttle

Dear Bill:

I do not anticipate making any response to your concurring opinion.

Sincerely,

WHR/JE

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 12, 1985

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 83-1919 Oklahoma City v. Tuttle

Three cases were held for Oklahoma City v. Tuttle:

(3) Pembaur v. City of Cincinnati, et al, no. 84-1160. Petitioner, a doctor operating a medical clinic, was under investigation by respondent county for alleged welfare fraud. Two deputy sheriffs arrived at the clinic, without warrants, to execute capiases to bring two of petitioner's employees before a grand jury. When petitioner refused to allow the deputies to enter the deputies called the county prosecutor, who, through a subordinate, told the deputies to "go in and get them." This they did, with the aid of a fire axe.

Petitioner sued various individuals and the county under §1983, alleging a violation of his Fourth Amendment rights. The DC ruled in favor of the county on the ground that the deprivation was not pursuant to official policy. The CA6 affirmed. The court noted that the sheriff and the prosecutor, who authorized the entry, were public officials who could establish county policy under certain circumstances. However, the CA6 noted that in this case petitioner "has failed to establish ... anything more than that, on this one occasion, the Prosecutor and the Sheriff decided to force entry into his office. ... That single, discrete decision is insufficient, by itself, to establish

Deny
-Dan

that the Prosecutor, the Sheriff, or both were implementing a governmental policy." (Emphasis in original.)

Once again, the principal issues in this case do not involve the "inadequate training" scenario of Tuttle, but instead center on identifying when a particular official can be said to have set municipal policy. I think the CA6's decision is consistent with Bennett on that score; Bennett requires proof that the county governing body delegated authority to establish a certain course of action before the political subdivision can be held liable for the official's acts. To the extent that this is a "single incident" case, I think the CA6's analysis is consistent with the plurality opinion in Tuttle. That opinion establishes that a single incident can be enough to justify municipal liability if there is also proof of an "existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." The CA6 merely held that a single action by someone who might be a municipal policymaker does not establish that he was guided by a "policy" intended to apply in a certain class of situations. There was no indication that the county governing body had decided to break doors down to execute capiases under these or any other circumstances, nor was there any indication that the prosecutor or sheriff were authorized to adopt such a policy. Because I find the CA6 opinion consistent with Tuttle, and because I regard it as consistent with Bennett and the evolving law on identifying a muncipal policy, I will vote to deny.

Sincerely,

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 21, 1985

Re: 83-1919 - Oklahoma City v. Tuttle

Dear Bill:

Consistent with my vote at Conference, I plan to try my hand at a dissent as soon as I can get to it.

I might note that I am particularly troubled by the holding that the city can obtain reversal on the basis of an error in the instructions that was not properly preserved in the district court. I have prepared a rough draft of a DIG in Western Airlines v. Chriswell, 83-1545, that is based entirely on the Airlines' failure to make a proper record of its objections to the trial court's instructions to the jury. If the Court accepts your opinion--which I assume it will--perhaps we should also reach the merits in that case.

Respectfully,

John

Justice Rehnquist

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: MAR 18 19

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1919

CITY OF OKLAHOMA CITY, PETITIONER *v.*
ROSE MARIE TUTTLE ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[March ——, 1985]

JUSTICE STEVENS, dissenting.

When a police officer is engaged in the performance of his official duties, he is entrusted with civic responsibilities of the highest order. His mission is to protect the life, the liberty and the property of the citizenry. If he violates the Federal Constitution while he is performing that mission, I believe that federal law provides the citizen with a remedy against his employer as well as a remedy against him as an individual. This conclusion is supported by the text of 42 U. S. C. § 1983, by its legislative history, and by the holdings and reasoning in several of our major cases construing the statute. The Court's contrary conclusion rests on nothing more than a recent judicial fiat that no litigant had asked the Court to decree.

I

As we have frequently noted, § 1983 "came onto the books as § 1 of the Ku Klux Act of April 20, 1871. 17 Stat. 13."[1] The law was an especially important, remedial measure, drafted in expansive language.[2] The class of potential de-

[1] *Monroe* v. *Pape*, 365 U. S. 167, 171 (1961).

[2] The section reads:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, priv-

STYLISTIC CHANGES THROUGHOUT
New footnote 30; footnotes thereafter renumbered
pp. 4-5, 8, 9, 10

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: MAR 28

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1919

CITY OF OKLAHOMA CITY, PETITIONER *v.*
ROSE MARIE TUTTLE ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[March ——, 1985]

JUSTICE STEVENS, dissenting.

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STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 1, 9, 11

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–1919

CITY OF OKLAHOMA CITY, PETITIONER *v.*
ROSE MARIE TUTTLE ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[April ——, 1985]

JUSTICE STEVENS, dissenting.

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 25, 1985

Re: 83-1919 City of Oklahoma City, v. Tuttle, etc.

Dear Bill,

Please join me.

Sincerely,

Sandra

Justice Rehnquist

Copies to the Conference