File

Reviewed - Excellent memo analyzing our
11/13 WHR's unfortunate decision
last Term in Tuttle (see p 3)
I have asked Mike for a brief
memo addressing my tentative
view to the contrary. I don't
think Tuttle is controlling.
I don't agree with this —
though Mike makes
the best case

See Mike's Supplemental Memo

BENCH MEMORANDUM

To: Mr. Justice Powell November 12, 1985

From: Mike

No. 84-1160 Bertold Pembaur, M.D. v. Hamilton County, Ohio et al. Cert to CA6 Set to be argued Monday, Dec. 2d

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QUESTION PRESENTED

Can a single decision of an elected county prosecutor advising a deputy sherifff to engage in an unconstitutional search of a private business fairly be said to represent official policy so as to render a county liable under 42 USC § 1983?

I. BACKGROUND

Two deputy county sheriffs with writs of attachment (called capiases in Ohio) naming two of petr's employees and giving their home addresses came to petr's office and demanded entrance. Petr refused, and barricaded his door. The deputies called the Assistant County Prosecutor, who in turn called the County Prosecutor; he

instructed the Assistant to tell the deputies to "go in and get them." J.A. 23-25. The deputies attempted to batter down the door, but could not. A Cincinnati police officer obtained an axe and chopped down the door. The persons named in the capiases were not found.

Petr brought this §1983 action in DC (SD Ohio) against Hamilton County, the City of Cincinnati, and against the individuals involved. The DC held that the individual defendants were entitled to qualified immunity, and that the County and the City were not liable because the petr had not demonstrated that the violation occurred pursuant to an official policy. The CA6 aff'd as to the County but rev'd as to the City. The City did not appeal.

The CA6 decision characterized this as an "obvious constitutional violation," Pet. App. 6a n.1. However, the CA6 noted that a County is not liable under a theory of respondeat superior, but that a §1983 plaintiff must demonstrate that the constitutional violation occurred pursuant to an official custom or policy. Although the CA6 stated that "there appears to be no dispute" that both the Prosecutor and the Sheriff establish county policy, Pet. App. 7a n.3, it reasoned that the single decision of the County Attorney here did not amount to such a policy. The crux of the CA opinion appears to be that petr could only point to this single, isolated incident of such a decision by the Prosecutor, and that was "insufficient, by itself,

to establish that the Prosecutor ... [was] implementing a governmental policy." Pet App 8a.

II. DISCUSSION

Section 1983 establishes liability against "every person" who, under color of State law or custom, violates the civil rights of another. In Monell v. Department of Social Services of the City of New York, 436 US 658 (1978) the Court held that local units of government not protected by eleventh amendment immunity (such as counties) are "persons" within the meaning of §1983. The limiting principle in that opinion was that local government units cannot be held liable under §1983 based on theories akin to respondeat superior. Instead, the Monell Court stated that local governing bodies can be sued directly under §1983 only when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers," 437 US at 690. The Court concluded:

> [i]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983.

Other than those general guidelines, the Court did not specifically address the parameters of local government liability. It has not added much to those general guidelines over the intervening years, until last Term's decision in City of Oklahoma City v. Tuttle, 105 S.Ct. 2427

(1985) (you took no part in the decision). In Tuttle the challenged instruction permitted the jury to infer an official city policy of inadequate police training from an isolated incident of excessive use of force by a police officer. Justice Rehnquist writing for a plurality noted that "the inference allows a §1983 plaintiff to establish municipal liability without submitting proof of a single action taken by a municipal policymaker." 105 S.Ct. at 2435. In its actual holding, Tuttle simply reiterates the principle in Monell that a local government unit cannot be made liable based on the actions of nonpolicymakers. However, both the plurality opinion of Justice Rehnquist and the concurring opinion of Justice Brennan answer in dicta an important question in this case--whether a single act of a policymaking official is sufficient to establish §1983 liability. The answer appears to be yes.

Wrong

In Justice Rehnquist's opinion, while he stated that proof of a single incident of unconstitutional activity by a nonpolicymaker was insufficient to establish liability, he suggested that proof of a single incident could establish liability if the proof were that the incident "was caused by an existing, unconstitutional policy, which policy can be attributed to a municipal policymaker." Justice Brennan was even clearer:

WHR

"A §1983 cause of action is as available for the first victim of a policy or custom that would foreseeably and avoidably cause an individual to be subjected to deprivation of a constitutional right as it is for the second and subsequent victims."

There are compelling logical rationale that support the dicta in Tuttle. The foremost of these is

pointed out by the ACLU in its amicus brief, where they explain that the CA6 opinion confuses "policies" with "customs." The CA6 holding reflects an unwillingness to rely on evidence of a single incident of unconstitutional activity to establish liability. That unwillingness would be proper in a case where the plaintiff is alleging that his rights were violated under color of a state "custom," because a custom, by definition, depends on establishing a history of prior actions. But in this case the plaintiff-petr has alleged that the unconstitutional action took place under color of a state "policy." If such a policy existed, it is irrelevant whether this is the first manifestation of that policy: "Obviously, it requires only one application of such a policy such as this to satisfy fully Monell's requirement that a municipal corporation be held liable only for constitutional violations resulting from the municipality's official policy." Tuttle, 105 S.Ct. at 2436.

I conclude that a local government unit can be liable under §1983 on evidence of a single incident of unconstitutional action taken pursuant to official county policy. In the present case, petr has demonstrated just such an instance of unconstitutional action. There can be no dispute that the action was unconstitutional.[1] It is

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[1] Resps contend that at the time the Prosecuting Attorney advised the deputies to "go in and get them" that advice may have been consistent with the state of the law at the time. It was not until four years after the actions complained of by petr that this Court held that authorities may not legally search for the subject of an arrest warrant in the home or office of a third party without first obtaining a search warrant, Steagald v. United States, 451 US 204 (1981). Petr counters by arguing that

(Footnote continued)

also undisputed that both the Sheriff and the County Prosecutor hold policymaking positions in the County, under state statute and holdings of the Ohio Supreme Court, see Petr Br. at 8 n.8. The CA6 reached the same conclusion, see Pet. App. 7a & n.3. If the actions alleged amount to a "policy," then petr has demonstrated a §1983 violation by the County. The sole remaining question is whether the facts in this case establish the existence of a county policy sufficient to impose §1983 liability.

Petr heavily relies on the language in Monell that "it is when the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983." 436 US at 694 (emphasis added). Petr contends that the advice of the Prosecuting Attorney to the Sheriff, both of whom were in a policymaking position in the County and acting within the

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(Footnote 1 continued from previous page)
a capias never could be rightfully viewed as the equivalent of an arrest warrant, even though the Ohio Court of Appeals only recently so held, in a criminal prosecution arising out of these same facts, see Petr Br. at 3 n.1. Resps point is buttressed by the holding of the courts below that the individual defendants, particularly the prosecutor involved, were entitled to qualified immunity because their actions did not violate any clearly established constitutional right at the time they were made, Harlow v. Fitzgerald, 457 US 800 (1982). In any event the Prosecuting Attorney's qualified immunity is not in dispute here, and under Owen v. City of Independence, 445 US 622 (1980) liability against the County only depends on a showing that the challenged policy was later determined to be unconstitutional, a fact that is not in dispute here. You dissented from this "strict liability" for constitutional torts in Owen. If that issue is not foreclosed in your mind, I will be happy to pursue further the notion that the County should not be liable in this case because the action may not have been patently unconstitutional when taken.

scope of their authority, neatly fits within the language of Monell about "edicts or acts" of those who represent official policy. The gist of petr's argument is that the analysis focuses on the authority of the actor. If the challenged action was taken at the instigation of one in a policymaking position, and that policymaker was acting within the scope of his authority, then his "edicts or acts" constitute official policy.

Does one impetuous order constitute a "policy"?

Resps contend that petr has failed to show the existence of a policy. While resps concede that both the Prosecutor and the Sheriff were in a policymaking position in the County, resps would require more than just proof that a decision was made by a policymaker. Specifically, resps rely on the argument that the Prosecutor had no authority to order a forcible entry or to in any way direct the activities of the deputies.

Petr clearly has the better of this argument. Resps miss the point--it is not essential that the Prosecutor be in a position of control over the deputies, or that he have direct line authority over them. The concept of "policy" is not coextensive with the concept of "control." The point is that the Prosecutor made a decision about the proper reaction to a refusal to allow entry to deputies armed with a capias, and the Prosecutor was the person entrusted by the County to make precisely such decisions. I conclude that a decision by one in a policymaking position in the local government unit, made

within the scope of the decisionmaker's authority, is sufficient to establish a "policy" as that term is used in Monell. It is not necessary to show a history of such decisions, nor is it necessary to establish a written, promulgated rule. In practical terms, I suspect that many of the decisions by local government units that have the greatest impact on individual civil liberties derive from informal decisions of policymakers, as opposed to formal rules.

Perhaps - but not pursuant to a "policy". Thus wise local municipalities at the mercy of any act of stupidity by a single minor official.

Resps make a final argument derived from dicta in Justice Rehnquist's opinion in Tuttle, where he suggests that "a policy that itself is not unconstitutional ... [may not satisfy] the policy requirement of Monell." 105 S.Ct. at 2436 n.7. I support Justice Rehnquist's attempts to derive some principle that protects local government units from theories of §1983 liability based on policies that are not themselves unconstitutional. But I think that Justice Rehnquist was talking about facially neutral policies, and not policies that are later found to violate the constitution on their face. Justice Rehnquist suggests that the less clear it is that a policy existed, the greater the evidence that plaintiff must produce in order to establish an affirmative link between the policy and the alleged constitutional violation. These are valid concerns, but they are not strictly presented by this case. Justice Rehnquist is actually writing about cases like Tuttle where the policy is never determined to be

unconstitutional, but plaintiff alleges that some action by a nonpolicymaker taken pursuant to the policy was unconstitutional. This case presents a very different question--a policy that is admittedly unconstitutional, but that did not appear to violate any existing constitutional norms when it was given. This case raises the "strict liability" issue that formed the subject of your dissent in Owen, and which I mention in footnote 1.

III. CONCLUSION

This case involved a decision by a County Prosecutor, in a policymaking position in the County and within the scope of his authority, to advise a forcible entry of a third-party business based on a capias that did not name the owner of the business nor list his business address. That advice was given to a Deputy Sheriff, also in a position of policymaking in the County and acting within the scope of his authority, who acted on that advice in a manner that directly violated petr's constitutional rights. I conclude that the decision about what advice to give, and the decision about what to do with the advice, constituted formulations of County policy. Because the challenged actions were taken pursuant to policy and not custom, I conclude that petr need only demonstrate a single incident of violation of rights.