Reversed - Excellent & to the point.
I agree there was no
"policy" & CA 6 should be
affirmed.

(SUPPLEMENTARY) BENCH MEMORANDUM

To: Mr. Justice Powell November 26, 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

---

QUESTION PRESENTED

Can a single decision of an elected county prosecutor advising a deputy sheriff 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

The issue in this case turns on the interpretation of a single phrase in Monell v. Department of Social Services of the City of New York, 436 US 658 (1978), where the Court held that local units of government 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, in the key phrase 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.

This case involves "acts" by a "lawmaker," that is, one in a position to make policy for the county. But the question is not as simple as I posed it in the first memo. Monell's limit to local government liability under §1983 requires an examination to determine if the "acts" here can "fairly be said to represent official policy." In this case, the answer is no.

To answer whether something can fairly be described as a official policy requires some definition of "policy." Justice Rehnquist hinted at such a definition in City of Oklamoma City v. Tuttle, 105 S.Ct. 2427, 2436 n.6: "ONe well-known dictionary, for example, defines "policy" as "a definite course or method of action chosen from among

alternatives and in light of given conditions to guide and determine present and future decisions." Webster's Ninth New Collegiate Dictionary 910 (1983) (emphasis added). The key point is that a policy is intended for a more general application than an ad hoc decision; it is intended to cover a class of cases both present and future. In order for the "acts" of a "lawmaker" to "fairly be said to represent official policy" requires some indication that those acts intend to determine the proper course of action in all similar cases over a long period of time. Nothing in this case demonstrates such a "policy." It is plain that what happened here involved a spur-of-the-moment decision, not a general policy intended to dictate police response in a large number of cases.

The argument might be made that if isolated decisions by policymakers acting within the scope of their authority do not amount to policy, then cities can insulate themselves from §1983 liability simply by dealing with such situations on an ad hoc basis without ever setting any general policy. Once again, that confuses "policy" liability with "custom" liability. The fact that an isolated decision does not amount to policy does not mean that a pattern of such decisions will not be sufficient to demonstrate a "custom." A city can be liable under §1983 for depriving persons of their rights under color of state law or custom. But petr in this case has not demonstrated anything like a custom of such alleged violations. In

fact, the question presented is phrased in such a way as to concede "custom" liability.

Petr has not demonstrated that the harm he suffered was caused by a city "policy." The acts of the sherrif and the county prosecutor cannot fairly be said to represent official policy. I recommend affirming the CA6 for reasons different than those expressed in the CA opinion.