February 21, 1985

Mr. Justice:

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

I have serious problems with J. Rehnquist's draft, because it reaches out unnecessarily to limit what may be considered a "policy" under Monell. I agree with J. Brennan that the discussion from the 2nd paragraph of page 12 on should be deleted. I suggest that you indicate to J. Rehnquist that you share some of J. Brennan's concerns, and that you will await J. Brennan's writings. My specific concerns are as follows, in decreasing order of importance:

1. On page 13, J. Rehnquist suggests that the word "policy" generally implies a course of action consciously chosen from among various alternatives, and it is therefore difficult to accept the submission that someone pursues a "policy" of inadequate training. Page 11 contains a similar reference to a policy being "action taken" by a policymaker. J. Rehnquist's suggestion flows from the implication in Rizzo v. Goode, 423 U.S. 362 (1976) that a failure to act cannot constitute a policy. You, of course, dissented from Rizzo, and as I argued in my bench memo, to hold that only affirmative, conscious decisions can constitute a policy or custom would ignore the history of §1983, which was passed "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced, and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by

the Fourteenth Amendment might be denied by state agencies." Monroe v. Pape, 365 U.S. 167, 180 (1961) (emphasis added).

2. Also on page 13, J. Rehnquist states that at "the very least there must be an affirmative link between the policy and the particular constitutional violation alleged." The statement is repeated in footnote 7 on page 14. Again, that concept is borrowed from Rizzo, and you found it objectionable there. The trial judge here instructed the jury that it must find that the policy or custom of inadequate training caused the deprivation of Tuttle's rights, and petr never challenged the sufficiency of the evidence of causation. Thus, the discussion of causation is totally unnecessary. In addition, because J. Rehnquist never explains what an "affirmative link" is, or why it might not be present in this case, the discussion is extremely unhelpful. On remand, the trial judge probably will be completely befuddled about whether he should supplement his causation charge with language about an "affirmative link," and will really be at a loss if the jury asks what that means.

3. Page 14 states "considerably more proof than the single incident" of excessive force "will be necessary in every case" to impose liability under Monell. That statement goes beyond holding that the evidence in this case was insufficient to support the jury charge that a policy of inadequate training could be inferred from a single incident of excessive force. As indicated in my bench memo, pages 23-24, there may be situations in which a single incident is sufficiently outrageous to support the inference of inadequate training. See, e.g., Owen v. Haas, 601 F.2d

1242, 1247 (CA2), cert. denied, 444 U.S. 980 (1979). I would leave open that possibility.

4. The next sentence on page 14 states that unless proof of the incident includes proof that it was caused by an existing, unconstitutional policy, the existence of the unconstitutional policy, and "its origin," must be separately proved. I don't know what J. Rehnquist is getting at by requiring proof of the origin of a policy.

5. I agree with J. Brennan that the discussion in footnote 4 is unnecessary and inappropriate. The testimony regarding the City's excessive force policy was quite confused, and it's not at all clear that it required the officer to "reasonably believe" that the suspect posed a threat of serious physical harm. Thus, the fact that jury found that the officer acted in good faith does not necessarily mean that it found his belief that he was in danger reasonable.

6. On page 10, J. Rehnquist states that resp did not claim that the City had a policy of authorizing the use of excessive force. That is incorrect; one of issues at trial was whether the officer had followed the City's policy on the use of force to effect arrests. See Resp's brief, at 4-8, 29-33. In addition, the draft states that the CA10 commented that the officer admitted at trial that he violated Police Department policy in shooting Mr. Tuttle. I was very bothered by that statement in the CA10's opinion, because it is simply not backed up by the officer's testimony. In fact, the officer testified as follows:

Q. If you had to do it over, would you do it again?
A. Yes, sir. I would have to.
Q. Without any hesitation?
A. Yes, sir.
Q. That's the way they trained you, isn't it?
A. I believe so. J.A. 227. See also J.A. 184.

I suggest, therefore, that those two sentences be omitted from page 10.

I understand from J. Brennan's clerks that he plans to write separately because at present, J. Rehnquist plans to retain the discussion on pages 12-14. I suggest that you wait for his writing, but that you indicate to J. Rehnquist that you share similar concerns. That might push J. Rehnquist to modify his stance, because he may be unable to get more than four to join his opinion as it now stands.

Thanks,

Vicki