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