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,

Bill

Justice Rehnquist

Copies to the Conference