Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 20, 1985

Re: No. 83-1919 Oklahoma City v. Tuttle

Dear Bill,

Your letter of February 19th suggests substantial modifications in the presently circulating draft opinion in this case. I can accommodate several of your suggestions, but not all of them.

I am quite willing to modify footnote 4 in some of the respects you suggest, and I would also be happy to put in a footnote indicating that the Court does not decide what degree of fault is required to impose municipal liability in a case of this kind.

I think the substance, if not all of the present language, of the discussion from the middle of page 12 through page 14 is necessary to deal with the respondent's contention that there was really only one "incident" in Monell, and why should this case be any different? I think to answer this we have to make some distinction between the kind of "policy or custom" involved in Monell, which was itself a violation of the Constitution, and the so-called "policy or custom" involved here, which no one contends of itself violated the Constitution.

In addition, I think you misread the opinion if you think it "suggests that a conscious intention to violate the Constitution is necessary to make out a §1983 violation"; the opinion, of course, only deals with what consitutes a "policy" sufficient to establish municipal liability for constitutional violations; in that regard it is hard to write an opinion about municipal "policy" without addressing, to some extent, what a "policy" is. In any event, the questions you seem concerned about are expressly reserved in footnote 6. The opinion does not discuss "custom," because respondent has no plausible claim that she

established a "custom" in this case; if you wish I would be glad to add a footnote to that effect also. Lastly, I am not sure how your resolution would leave the trial court in a better position on remand. We could not reach these difficult questions in this case because they were not sufficiently litigated, but it seems clear that they will have to be resolved at some point. If the opinion were issued as you suggest we would leave the lower courts even more in the dark than if we were to recognize the issues raised by this type of litigation.

If you could see your way clear to join if I were to modify footnote 4, and insert the statement about fault, without my totally excising the last two pages of the opinion, I will be glad to try my hand at it. If the latter is a sine qua non of your joinder, I think I will wait and see what the reaction of others is.

Sincerely,

Justice Brennan

cc: The Conference