

Argued: Nov. 8, 1988

For Conference Nov. 10

Vote: Reverse and Remand

Law Clerk: Eric

In my view, a municipality can be held liable under § 1983 for a policy or custom of inadequate training or other nonfeasance if constitutional violations resulting from that policy or custom were foreseeable and if municipal policymakers can be said to have done nothing to prevent their occurrence because ^{as Sanchez has used} of their deliberate indifference to or reckless disregard for the injuries caused by municipal employees. [NOTE: This is the language O'Connor has been using.] I do not think that negligence on the part of municipal policymakers suffices for liability, but nor do I think that intent to commit constitutional injuries is required. I also do not believe that municipal policymakers must have been aware of a series of constitutional violations in order for the municipality to incur liability, although if a plaintiff could show that they were aware, she would have an easier time proving that they acted with deliberate indifference or reckless disregard. There should be no rule of "one free bite."

In this case, I would remand with instructions to have the district court apply this test at a new trial. Respondent pointed out -- quite rightly -- that the first trial was conducted under a different understanding of the proper standard under § 1983; respondent should therefore have a chance on remand to in-

troduce evidence that this standard was met. So I would reverse and remand.

If, however, there are four votes to DIG this case, I might be willing to go along with that resolution.

Law Clerk: Eric