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~~CJR~~ VB
Hold for Tuttle No 83-1919
VB

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R/H Tuttle 83-1919/e?

Response requested & received. See attached

PRELIMINARY MEMORANDUM

~~March 15~~ 4/3, 1985 Conference
List 3, Sheet 2

No. 84-1160 CJX

PEMBAUR (§1983 Plaintiff) Cert to CA6 (Kennedy, Jones, Cohn [dj])

v.

CITY OF CINCINNATI, et al. Federal/Civil Timely

SUMMARY: Can a single, discrete decision of an elected county official which directly causes an unconstitutional search fairly be said to represent official policy so as to render a county liable under 42 U.S.C. §1983?

FACTS AND HOLDING BELOW: The petitioner in this case is a doctor who operates a medical clinic. At the time of the search that led to this case, he was under investigation by a state grand jury, apparent-

ly for suspected fraudulent practices in billing the state for treating welfare patients.

On May 19, 1977, two non-uniformed deputy sheriffs arrived at petr's clinic with capiases to bring two of petr's employees before the grand jury. The deputies asked the petr to let them into the private areas of the clinic to look for the employees; petr denied entry when he learned that the deputies had no search warrants.

Shortly thereafter, Cincinnati police officers arrived. Petr also denied them entry. The policemen's sergeant then came to the clinic; petr again refused to allow entry.

The deputies then called an assistant county prosecutor. The assistant prosecutor then consulted with the prosecutor, who told the assistant to instruct the deputies to "go in and get them." The deputies then tried to batter the door down. When this failed, they used a fire axe to chop through the door. They then entered the private areas of the clinic, searching for the employees sought in the capiases. The persons sought were not found.

Petr then brought this lawsuit in the DC. The DC ruled in favor of the respondents, finding that the individual defendants were entitled to immunity, and that the County and City were not liable because petr had not suffered a constitutional deprivation pursuant to some official policy.

The CA6 affirmed with regard to the individual defendants and the County, but reversed with regard to the City. The CA6 recognized that while the prosecutor's instructions to the deputy sheriffs "accorded with the law as it stood in 1977," subsequent cases--notably Steagald v. United States, 451 U.S. 204 (1981)--showed that plaintiffs had suf-

fered an "obvious constitutional violation." The CA6 also found that the Sheriff was a public official who could establish county policy in some areas, and whose acts could represent official policy so as to lead to liability. The court nonetheless upheld the DC's judgment for the County on the ground that a "single, discrete decision is insufficient, by itself, to establish that the Prosecutor, the Sheriff, or both were implementing a governmental policy." The CA6 also held that the Sheriff could not have ratified his employees' conduct absent evidence of "acquiescing in a prior pattern of conduct."

CONTENTIONS: Petr argues that a single, discrete decision made by an elected, policy-making official is sufficient to support liability against a governmental unit under Monell v. Department of Social Services, 436 U.S. 658 (1978) and Owen v. City of Independence, 445 U.S. 622 (1980). Petr argues, in essence, that whenever a policy-maker gives an order, that constitutes an official policy or decision sufficient under Monell and Owen.

Petr distinguishes his case from those cases where "the plaintiff seeks to find official policy in some custom, practice or inaction." He urges that courts which have denied liability based on inaction would recognize liability for a single, discrete decision by a policy making official. See Gilmere v. City of Atlanta, 737 F.2d 894 (CA11 1984); Turpin v. Mailet, 619 F.2d 196, 202 n.7 (CA2 1980). While a single discrete act by a deputy sheriff does not amount to an official policy, a single discrete act by a policy-making official does.

Petr argues that the decision below directly conflicts with other CA decisions. Sanders v. St. Louis County, 724 F.2d 665, 668 (CA8 1983); Bennett v. City of Slidell, 728 F.2d 762, 767 (CA5 1984); Van

Ooteghem v. Gray, 628 F.2d 488, 495 (CA5 1980), modified en banc, 654 F.2d 204 (CA5 1981), cert. denied, 455 U.S. 909 (1982); Familias Unidas v. Briscoe, 619 F.2d 391, 404 (CA5 1980).

DISCUSSION: Petr's argument is consistent with language in Monell, which referred to those officials "whose edicts or acts may be said to represent official policy." Neither Monell nor any case from this Court since, however, has actually imposed minicipal liability based solely on the discrete, isolated action of one policy-maker. Most of the lower court cases cited by petr address the issue only in dicta, although there is an apparent conflict with Van Ooteghem v. Gray, 628 F.2d 488, 495 (CA5 1980), modified en banc, 654 F.2d 204 (CA5 1981), cert. denied, 455 U.S. 909 (1982).

Although petr's brief nowhere refers to No. 83-1919, Oklahoma City v. Tuttle, it seems clear that Tuttle is relevant to this case. In Tuttle, the issue before the Court is whether a single, isolated act by a lower-level municipal employee is sufficient to establish municipal liability; the rather different but related issue presented by this petition is whether municipal liability can be established by a single, isolated act by an official policymaker. While the issues are sufficiently distinct that Tuttle need not reach the issue presented by this case, the general discussion in Tuttle of what constitutes an official policy will bear on this case.

At present, JUSTICE REHNQUIST's proposed draft in Tuttle supports the distinction drawn by petr between isolated acts of lower level employees and isolated acts of official policy makers. On page 11 of the draft, JUSTICE REHNQUIST suggests that liability can only be imposed when "wrong could be ascribed to municipal decisionmakers."

But at other points JUSTICE REHNQUIST's draft suggests that even when policymakers are involved, an "existing" policy rather than an isolated act is required for liablility to be imposed. The final paragraph of the proposed draft now circulating states:

> Proof of a single incident of unconstitutional activity is not sufficient to impose liablity under Monell, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker.

Because the form that Tuttle takes will bear on the disposition of this case, I recommend calling for a response, then holding for Tuttle.

There is no response.

March 11, 1985 Campbell Ops in petn

The quotes from J. Rehnquist's draft are the dicta that I have suggested you should not join. This case provides the best example of why the dicta is inappropriate - like Mr Campbell, the lower cts may seize on such words as "existing" to limit the law of municipal liability.

The question when the acts of a high-level official with policy-making authority constitute a policy under Monell is raised in Bennett v. City of Slidell, which is being held for Tuttle. I suggest that this case be held as well, with an eye toward granting either Bennett or this case after Tuttle is decided

CJR / Hold for Tuttle

VB 3/12/85