

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: WALTER McMILLIAN, Petitioner v. MONROE
COUNTY, ALABAMA
CASE NO: 96-542
PLACE: Washington, D.C.
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C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	BRYAN A. STEVENSON, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	PAUL M. SMITH, ESQ.	
7	On behalf of the Respondent	30
8	REBUTTAL ARGUMENT OF	
9	BRYAN A. STEVENSON, ESQ.	
10	On behalf of the Petitioner	61
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:08 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 96-542, Walter McMillian v.
5 Monroe County, Alabama.

6 Mr. Stevenson.

7 ORAL ARGUMENT OF BRYAN A. STEVENSON

8 ON BEHALF OF THE PETITIONER

9 MR. STEVENSON: Mr. Chief Justice, and may it
10 please the Court:

11 We are before the Court on the question of
12 whether an Alabama county is liable for the
13 unconstitutional actions of its sheriff where the county's
14 voters select and elect the sheriff, where the county's
15 Treasury funds the conduct of the sheriff, and where the
16 sheriff's jurisdictional authority is limited to the
17 status of the county as one of Alabama's 67 counties.

18 At the outset, I think in thinking about this
19 issue it's important to acknowledge that no one disputes
20 that the sheriff is a final policymaking -- a final
21 policymaker in the area of law enforcement.

22 The Eleventh Circuit found that the sheriff --
23 Alabama law gives the sheriff in Alabama final
24 policymaking authority in the area of law enforcement.
25 Respondent concedes that the sheriff has final

1 policymaking authority in this area.

2 The issue arises --

3 QUESTION: Well, Mr. Stevenson, I assume that
4 the plaintiff here also sued the sheriff.

5 MR. STEVENSON: That's correct.

6 QUESTION: And if there's a judgment against the
7 sheriff, who pays it in Alabama?

8 MR. STEVENSON: The evidence in this case is
9 that it will be paid by the county. That is, that the
10 county has taken out an insurance policy --

11 QUESTION: So what difference does it make
12 whether you can join the county? If you're going to get a
13 judgment against the sheriff anyway, and it's going to be
14 paid, what do you care?

15 MR. STEVENSON: Well, the policy is capped, Your
16 Honor, and because we don't know yet whether the county
17 has the option of disclaiming the conduct in question,
18 then it does make a difference.

19 QUESTION: Well, presumably if you sue the
20 sheriff and get a judgment, somehow that money is going to
21 be produced to pay the judgment.

22 MR. STEVENSON: That's not required under
23 Alabama law. That is, what happened in this case is that
24 there is evidence -- and again, the evidence is not
25 developed -- that the county has elected to take out a

1 policy which may cover the sheriff's conduct here, and
2 while we think that's relevant in deciding the county's
3 interest in this matter, it's not dispositive of whether
4 the petitioner will have access to county funds, and it's
5 certainly not required under Alabama law.

6 QUESTION: You suggest perhaps in other Alabama
7 counties there might not be an insurance policy --

8 MR. STEVENSON: That's correct, Justice --
9 Chief Justice -- Mr. Chief Justice, that there may not be.

10 QUESTION: Well, has there ever been a judgment
11 against a sheriff in Alabama in a civil case or a 1983
12 case in the history of Alabama? Has there ever been a
13 civil judgment against the sheriff in his capacity as
14 sheriff?

15 MR. STEVENSON: Yes.

16 QUESTION: And have the judgments been paid?

17 MR. STEVENSON: Not necessarily by the counties,
18 no.

19 QUESTION: But have they been paid, somehow?

20 MR. STEVENSON: It depends on the solvency of
21 the sheriff. If you mean, can the -- can a judgment be
22 collected by the individual sheriff, I think that's --
23 yes, the answer to that question is yes.

24 That is, we can recover from the sheriff, but
25 our position is obviously that where the sheriff was able

1 to effect Mr. McMillian's, the petitioner's arrest, and to
2 put him on death row pretrial, and to suppress evidence
3 that was withheld from the prosecution, he did that
4 because he had the power and status given to him by the
5 county. We think that 1983 ought not limit the remedy --

6 QUESTION: Well, maybe it was given to him by
7 State law, or by the State constitution. Certainly the
8 sheriff had the power and the authority to take the
9 actions apparently that he did.

10 MR. STEVENSON: Well, yes, but under Alabama law
11 the provisions that deal with the conduct in question here
12 make it clear that he exercises that authority for the
13 county. On page --

14 QUESTION: Well, I suppose -- correct me if I'm
15 wrong. I would suppose that if in Alabama the county is
16 liable for the acts of the -- for the judgments of the
17 sheriff, that would not necessarily follow in a 1983 suit,
18 because you'd still have to comply with Monell.

19 MR. STEVENSON: That's right, and we think
20 that's how the Eleventh Circuit dealt with this issue.
21 The Eleventh Circuit held that because the sheriff's law
22 enforcement authority is not shared with some other county
23 official, that the county is somehow not liable.

24 We think that's a misconstruction of this
25 Court's opinion in Monell and its progeny, and this Court

1 has never held that only local legislative bodies can make
2 policies for which a county is liable.

3 Just in the same way that a mayor can create a
4 policy that the city council is not responsible for, the
5 city council does not control, he nonetheless makes a
6 policy, if it's final, that would subject the city to
7 liability.

8 QUESTION: Are you asking for a rule that if the
9 final policymaker is elected by an entity -- here, the
10 county -- that entity is necessarily responsible for the
11 judgment?

12 MR. STEVENSON: Not -- it does not turn entirely
13 on the election by the county's voters. We think that's
14 an important element, Justice Kennedy, but it's not the
15 only element. Here --

16 QUESTION: What else is there? I really don't
17 see what else you rely on.

18 MR. STEVENSON: Yes. Well, there are several
19 things. The second factor, in addition to the county's
20 election, the voter's election, is that the county pays
21 for, the county equips, the county funds, the county
22 provides the resources for all of the sheriff's law
23 enforcement functions, and the county actually does that
24 with some discretionary authority. There is
25 reasonableness language in the statute that deals with the

1 commission's authority to authorize a budget and to
2 authorize expenditures.

3 The third thing --

4 QUESTION: You say the county does this, but the
5 county does this under compulsion of State law.

6 MR. STEVENSON: That's correct.

7 QUESTION: It's directed by State law. It's not
8 a matter of self-governance in which the county decides,
9 we will provide so much money to the sheriff.

10 MR. STEVENSON: That's correct, Your Honor, and
11 that's true of all of the county's functions. That is,
12 the county commission exercises its authority over roads,
13 et cetera, under --

14 QUESTION: In this State, but not in all States.

15 MR. STEVENSON: That's correct.

16 QUESTION: States do have charters in which the
17 counties are self-governing.

18 MR. STEVENSON: That's correct, and I guess our
19 position is that that's not required to trigger municipal
20 liability for these purposes.

21 The third thing is that the county's
22 authority --

23 QUESTION: Mr. Stevenson, before you get onto
24 the third thing --

25 MR. STEVENSON: Yes.

1 QUESTION: Staying with the money, do I
2 understand correctly that it's also the coroner and the
3 tax assessor that are paid by the county, but other people
4 who are elected -- say, the district attorney or local
5 judges -- are paid by the State? Is that --

6 MR. STEVENSON: That's correct. In Alabama, the
7 district attorney is not necessarily limited to a
8 particular county.

9 The judicial circuit that was created for Monroe
10 County is a judicial circuit that includes other counties,
11 and so the district attorney receives his or her check
12 from the State, from Montgomery, Alabama, and that's true
13 for the judges as well, and so there's a distinction
14 between the sheriff and those other judicial officers.

15 QUESTION: How about the coroner and the tax
16 assessor, who are paid by the county? Are they final
17 decisionmakers in their realm, unreviewable by the
18 commission, as well?

19 MR. STEVENSON: Yes, Justice Ginsburg. They are
20 county officials, paid by the county, elected by the
21 county. They get their resources from the county
22 Treasury, much like the sheriff, but yes, they have final
23 policymaking authority in their respective areas, inquests
24 for the coroner, tax assessments and that sort of thing
25 for the tax assessor.

1 QUESTION: The county commission, then -- and
2 that's your form of county government in Alabama?

3 MR. STEVENSON: That's correct.

4 QUESTION: -- could not instruct the tax
5 assessor to do things in a particular way?

6 MR. STEVENSON: Not in compliance with Alabama
7 law. There is no statutory authority for the county
8 commission to direct the conduct of any of these county
9 officials, and that's why we contend that there need not
10 be some sharing of authority before the county be liable.

11 The third thing, Justice Scalia, would be --

12 QUESTION: I knew you'd get back to me.

13 MR. STEVENSON: Yes.

14 (Laughter.)

15 MR. STEVENSON: The third thing would be the
16 jurisdiction of the county. Alabama law has created 67
17 counties. They have legal status. That legal status
18 matters in the area of law enforcement because the sheriff
19 here cannot conduct any law enforcement functions outside
20 that jurisdiction.

21 The fourth thing --

22 QUESTION: Well now, wait, let's talk about the
23 third for a minute.

24 MR. STEVENSON: Okay.

25 QUESTION: Are you saying anything other than

1 the sheriff has no authority outside the geographical
2 limits of the county?

3 MR. STEVENSON: Well --

4 QUESTION: I don't see why that makes him
5 necessarily a county official. Certainly you can have
6 State officials, each of whom has jurisdiction within each
7 of the various counties.

8 MR. STEVENSON: Yes, but I guess my point would
9 be that if they're State officials that are part of some
10 State command, then their jurisdiction and their authority
11 and their ability to perform the functions which they have
12 been trained and prepared for aren't necessarily limited
13 to that jurisdiction. The chief of command may pull them
14 to another division.

15 For example, we have a Department of Public
16 Safety in Alabama that has ABI agent, Alabama Bureau of
17 Investigation agents dispersed across the State. They may
18 be assigned to a particular area, but if the head of that
19 division decides to move them to another part, to
20 Birmingham or Mobile, there's nothing about their status
21 or their function or their jurisdiction which limits that.

22 QUESTION: What about the prosecutors you
23 referred to earlier, the State prosecutors, whose
24 jurisdiction exceeds the county but does not exceed the
25 judicial district? Can they be moved to another judicial

1 district?

2 MR. STEVENSON: Yes, Your -- I don't know that
3 they could be moved in the sense that someone can assign
4 them, but they have authority to prosecute cases in other
5 counties at the direction of the court.

6 They have the authority to sometimes be sort of
7 prosecutors when there's some conflict between another
8 local prosecutor in another jurisdiction, and the
9 defendant or the victim in a particular case, so in that
10 sense I think they're more properly seen as state
11 officials who might be able to exercise some legal
12 authority in some other area.

13 QUESTION: Are they elected by the county?

14 MR. STEVENSON: They're elected by the judicial
15 circuit. That is, if the judicial circuit is bigger than
16 the county, then everyone in that judicial circuit would
17 be the voting --

18 QUESTION: Is that any different from the
19 sheriff of one county being able to enter into another
20 county in hot pursuit? Do you have any hot pursuit law?

21 MR. STEVENSON: Well, I think it's different in
22 this way, Justice Scalia. There may be exceptions where
23 exigencies might give the sheriff the opportunity to
24 conduct some conduct, but they're recognized as
25 exceptions. They're recognized in some ways as giving

1 permission to the sheriff to exceed lawful authority.

2 QUESTION: I understand that, but it seems to me
3 that the instances you were describing of the prosecutors
4 being able to act elsewhere were also exceptional
5 instances. Basically, they were limited to the judicial
6 district to which they're assigned.

7 MR. STEVENSON: I think that's a fair criticism,
8 but I think it's less exceptional both as a matter of
9 practice and as a matter of law, for the prosecutor to
10 engage in this kind of conduct some place else.

11 And I think this point is emphasized by the next
12 thing I'd stress, which is that Alabama law requires that
13 another elected county official take over law enforcement
14 functions if the sheriff cannot perform them. That is,
15 the county coroner under Alabama law assumes law
16 enforcement functions for those circumstances and times
17 when the sheriff can't do that.

18 I think that's because the State law recognizes
19 that the county, the county's residents, have some
20 investment, have some stake, have some authority over at
21 least the selection in that limited circumstance of who
22 should be performing the law enforcement functions in that
23 particular community.

24 The other things that I would point to would be
25 the many references in Alabama law that clearly designate

1 the sheriff as a county official. We've cited in our
2 brief, and I'll cite again or just acknowledge again that
3 the Alabama code -- and this is at our brief at page 21 --
4 expressly identifies as county officers the sheriff of
5 Alabama -- the sheriff of a particular county.

6 QUESTION: The constitution I think identifies
7 him as a State official.

8 MR. STEVENSON: What the constitution does,
9 Justice Breyer, is identify him as a member of the
10 executive department, and we don't dispute that.

11 When you look at that language, however, what
12 the constitution says is that the sheriff is a member of
13 the executive department, and the words they use are,
14 sheriff for the county.

15 QUESTION: I'd like to get your answer to this,
16 which is the problem that's bothering me the most from
17 your point of view.

18 If I looked at Alabama law, the supreme court of
19 Alabama, in what I'd think is the most closely analogous
20 area, the most closely analogous question would be, for
21 State law purposes, is this sheriff a person under tort
22 principles where the county is held liable under
23 respondeat superior, and the Alabama supreme court says
24 no.

25 It says the sheriff of a county for jail

1 purposes is not considered an employee of the county for
2 purposes of imposing liability upon the county, so if
3 that's Alabama law, and they're saying for purposes of
4 imposing liability, respondeat superior in tort, he's not
5 a county official, how do you get around that problem?

6 MR. STEVENSON: Well, I think that Alabama law
7 is in conflict on the question, on that particular
8 question in part because the Alabama courts have clearly
9 said that they want to immunize both the State and
10 counties from tort judgments for this kind of conduct.

11 We don't think, though -- obviously that's not
12 going to resolve the Federal question, which, as this
13 Court has always acknowledged --

14 QUESTION: But what would the -- but when you
15 say conflict, I have a case here called King v. Colbert
16 County, May 7, 1993, and it seems to say quite clearly the
17 sheriff is not considered an employee for purposes of
18 imposing liability upon the county.

19 MR. STEVENSON: That's right, Justice Breyer.

20 QUESTION: Is that in conflict?

21 MR. STEVENSON: That's not in -- there's no
22 conflict about the tort liability of the State or the
23 county with regard to --

24 QUESTION: All right, so then why should 1983
25 impose respondeat superior constitutional tort liability

1 upon a body that States do not impose respondeat superior
2 liability upon?

3 MR. STEVENSON: It shouldn't. The Federal
4 question here does not require this Court to impose
5 respondeat superior liability.

6 If you accept our view, you recognize that the
7 sheriff is the county official who engages in law
8 enforcement authority for the county, so in that sense, he
9 is the master. He's the superior. No one is under his
10 control in a way, or he's not under someone else's control
11 that we're asking you to make that party liable.

12 What the Alabama counties have done is shield
13 counties and States from liability. That's something they
14 can do under State law.

15 But it's our position that Federal -- section
16 1983 was intended to provide Federal remedies for people
17 like petitioner --

18 QUESTION: But you are asking us to hold the
19 county liable for the actions of the sheriff. It's not as
20 if you were saying, we're just after the sheriff.

21 MR. STEVENSON: No, that's right, but --

22 QUESTION: So that is respondeat superior in a
23 sense.

24 MR. STEVENSON: Mr. Chief Justice, our position
25 is that it's not in this respect. We're -- our position

1 is that because the sheriff is a county official, because
2 he does exercise final policymaking authority for the
3 county, and the county controls that sheriff in the sense
4 that they elect him, the county funds that sheriff in the
5 sense that they pay for his or her conduct, and that that
6 sheriff is tied to that jurisdiction, that there is this
7 nexus between the county and the sheriff that does not
8 make this respondeat superior.

9 When Congress was talking about respondeat
10 superior, this kind of vicarious liability in 1871, they
11 were dealing with the Sherman amendment which was trying
12 to make counties liable for any conduct by any persons
13 riotously or tumultuously assembled in the community.
14 That was liability, you know, for everyone by anyone.

15 The sheriff is not anyone. He is a government
16 official. He has been elected and empowered by the local
17 government to do the conduct that we're complaining about,
18 and under those facts and circumstances --

19 QUESTION: But as Justice Breyer pointed out in
20 his question the supreme court of Alabama has said he is
21 not a county official for tort purposes.

22 MR. STEVENSON: For tort purposes, that's
23 correct, Your Honor.

24 QUESTION: Well, this is a constitutional tort
25 that you're suing for, isn't it?

1 MR. STEVENSON: That's true, Your Honor, but
2 with regard to whether the State law immunities bind this
3 Court, it is certainly our position that that's not true.
4 This Court has always held that Federal law cannot be
5 decided on the way in which a State may choose to limit
6 remedies under these kinds of actions.

7 QUESTION: Well, suppose it were the other way
8 around. Supposing the Alabama supreme court in the case
9 that Justice Breyer has discussed said that the county is
10 liable for what the sheriff -- it seems to me that you
11 would certainly cite that, and you would have an open and
12 shut case.

13 MR. STEVENSON: Well --

14 QUESTION: So why doesn't it work the other way
15 around?

16 MR. STEVENSON: Well, I think if that was all
17 that was said, that is, if the sheriff was not elected by
18 the county's officials, if the sheriff did not have this
19 relationship to the county government, the county
20 Treasury, the county as a jurisdiction, we might still
21 have a problem, and I guess that's why I'm saying that the
22 Congress doesn't resolve this issue.

23 Under Regents and all of these Court's -- this
24 Court's decision in the Eleventh Amendment context and in
25 other contexts we've always made clear that Federal law

1 resolves these kinds of questions, and I think that's
2 consistent with what Congress was trying to get at.

3 Certainly Congress did not intend, in 1871, to
4 provide this Federal remedy only to have State courts then
5 decide that the constitutional officers or the county
6 officials involved in this kind of conduct can be shielded
7 from Federal remedies by designating them as something
8 other than the county officials that the rest of the code
9 identifies them as being.

10 And Justice Breyer, my conflict term was a term
11 not about tort law per se, but about all of these other
12 provisions in the Alabama code that clearly designate the
13 sheriff as a county officer, and the supreme court, the
14 same State court has held the county sheriff to be a
15 county official in other contexts.

16 When there's a question of pension or employment
17 he's a county official. When there's a question about the
18 discretion that the county commission has to not make
19 payments for law enforcement functions, the sheriff is a
20 county official that then has legal authority to make the
21 county commission give him or her the resources to do
22 those -- do that kind of conduct.

23 QUESTION: Mr. Stevenson, I want to know who we
24 bracket the sheriff with, and so I'd like to go back to
25 the coroner and the tax assessor to see.

1 MR. STEVENSON: Yes.

2 QUESTION: Is the same -- is the answer to
3 Justice Breyer's question about respondeat superior the
4 same thing with respect to those officers, or is the
5 county liable for their common law torts?

6 MR. STEVENSON: The county is liable for the
7 coroner's conduct. I'm not aware of any State law that
8 deals with the tax assessor in that context.

9 QUESTION: So the State does have -- the county
10 has respondeat superior liability for the coroner.

11 MR. STEVENSON: Yes. Again, I would resist the
12 framing of that liability as respondeat superior. In our
13 view, the tax assessor and the coroner are different parts
14 of the power structure of the county government, just like
15 the mayor and the city council and the aldermen.

16 QUESTION: If it's not respondeat superior, what
17 is it? If the president of a corporation does something
18 wrong, and the corporation is sued, don't we say that's
19 respondeat superior, or am I missing something?

20 MR. STEVENSON: No, that's right, but if a
21 body --

22 QUESTION: And if the mayor of a city does
23 something, and the city is held liable on the judgment,
24 isn't that respondeat superior?

25 MR. STEVENSON: I don't -- in my understanding,

1 no. That would be basically the city being liable for the
2 conduct of one of its officials, and when they'll use this
3 terminology --

4 QUESTION: But why? The city itself hasn't done
5 it, other than through a human agent.

6 MR. STEVENSON: Yes, and so in that sense the
7 city is the person that is represented by its official.
8 In that context the official --

9 QUESTION: If it's not respondeat superior, what
10 is it, some semantic legal category that I've never seen
11 before?

12 MR. STEVENSON: Well, I guess it would be the
13 city's officials making policy for the city in a way that
14 creates liability for the city.

15 QUESTION: Isn't it simply imputed liability?

16 MR. STEVENSON: I think that's a fair statement
17 of --

18 QUESTION: I mean, any corporation is liable
19 only by imputation from its officers, and the only reason
20 we're worried about respondeat superior here is that we've
21 got a case that says we don't have respondeat superior
22 liability under 1983 in the sense that there's got to be a
23 policy condition met, but respondeat superior is a
24 variety, certainly, of imputed liability, and this is
25 imputed liability, right?

1 MR. STEVENSON: That's correct, Your Honor.

2 QUESTION: And in Alabama they say there is no
3 imputed liability as between the sheriff and the county.

4 MR. STEVENSON: With regard to State law.

5 QUESTION: With respect to State law, and you
6 say that's a Federal question, and that does not bind us.

7 MR. STEVENSON: That's correct, because the
8 county does engage in the kind -- the same relationship
9 that exists between the county commission, about whom I
10 think we'd have to concede does have authority to make
11 policy that would create liability for the county, the
12 same relationship between the county commission and the
13 county, that entity.

14 And you're right, that county, that city, can't
15 go out and arrest somebody, or subject someone to the kind
16 of conduct that our client was subjected to. The same --

17 QUESTION: When we're interpreting Monell, why
18 don't we use -- why aren't the same policies that inform
19 that decision as to respondeat superior applicable equally
20 as well to imputed liability?

21 MR. STEVENSON: Because I think that the
22 Congress intended to make localities liable. That is, the
23 Treasury of the locality liable --

24 QUESTION: It intended to make municipalities
25 liable because they were like corporations. That's why we

1 decided Monell the way we did, that in fact they were
2 municipal corporations, but surely it is an essential
3 characteristic of a corporation that its board of
4 directors can decide what happens within that corporation.

5 But you're coming before us here and saying that
6 this is a corporation which should be liable under 1983.
7 However, the sheriff is not subject to the commands of the
8 board of directors of the corporation, namely the
9 governing body of the county. That's what troubles me the
10 most, that this doesn't fit into the whole theory of
11 section 1983 liability for municipalities, which is that
12 they are like corporations.

13 MR. STEVENSON: Well, I think two things,
14 Justice Scalia. I think in imagining the structure of
15 this corporation we have to imagine a board that has not
16 only a county commission but a sheriff, a tax assessor,
17 and a coroner, so in that sense we're not asking for you
18 to do anything different than you would do in that
19 traditional context.

20 This is just a corporate structure that has four
21 elements: a county commission here, dealing with one
22 part, a sheriff over here dealing with another part, and a
23 coroner and a tax assessor.

24 QUESTION: You say just a corporate structure
25 that has four elements. That's a corporation I never

1 heard of.

2 MR. STEVENSON: Well, I think --

3 QUESTION: You're saying it's just a person that
4 has four heads. I mean --

5 MR. STEVENSON: Well, that's the second thing
6 I'd say. That is, when Congress passed this law they made
7 it clear they were talking about bodies politic and
8 corporate to embrace just these kinds of jurisdictions
9 where the power is separated, where the power is directed
10 to various officials.

11 I mean, in some ways it would be I think sort of
12 exceeding the Court's authority to impose on
13 municipalities a single view of governance, that single
14 view meaning that you have to have a single corporate body
15 that makes all of your policy decisions in order for that
16 municipality to govern.

17 I mean, Alabama has chosen to divide these
18 powers in the ways that provide the sheriff with some
19 functions, the county commission with some other
20 functions, and the tax assessor and coroner other
21 functions, and I don't think that the Federal law would
22 require that to change.

23 QUESTION: But the decision was not to make
24 counties liable. That was not the 1983 decision. The
25 decision was to make corporations liable. Counties became

1 liable only because they were corporations. That was the
2 whole basis of our analysis.

3 MR. STEVENSON: Well, I guess our position would
4 be it was also to make these political bodies that have
5 status, that have power to engage in the kind of
6 unconstitutional conduct, to empower someone to do the
7 kind of unconstitutional conduct that took place here, to
8 make those municipalities liable for that conduct.

9 Tom Tate the individual could not have subjected
10 our client to threats of summary execution, suppressed the
11 evidence that resulted in his wrongful conviction and 6
12 years on death row for a crime he didn't commit by
13 himself. He could only do that with the power given to
14 him by the voters of Monroe County.

15 QUESTION: Mr. Stevenson, do we have cases
16 involving actors who are admittedly county actors who are
17 not responsible, not answerable to any board of the
18 county, but who are -- have been held final decisionmakers
19 they are, who trigger Monell liability?

20 MR. STEVENSON: Yes. I think this Court's
21 decision in Pembaur is precisely such a situation, where
22 this Court found that the county sheriff and the district
23 attorney had final policymaking authority in the area of
24 search and seizure and arrest, and that the county could
25 be held liable for that conduct, and in a variety of

1 contexts this Court has done that.

2 So it's not a novel notion to hold some other
3 entity, other than the local legislative body, as a final
4 policymaker who can create policy that makes -- that binds
5 the municipality or the county liable for that
6 unconstitutional conduct, particularly where here the
7 ability to do that is dependent on the power, the
8 authority, the status, and the resources provided by that
9 municipality.

10 I mean, again, Tom Tate the individual could not
11 have done what he did to petitioner without the resources,
12 without the funds, without the power given to him by the
13 county, and under those circumstances it's our view that,
14 you know, Federal remedy ought not turn on the personal
15 sovereignty of the individual wrongdoer.

16 QUESTION: Yet the county commission has no
17 authority over him.

18 MR. STEVENSON: That's correct, in the same way
19 that they have no authority for other -- over other county
20 officials, and in that --

21 QUESTION: So to say that he couldn't have done
22 what he did without the county really is not quite
23 accurate. He couldn't have done what he did without the
24 authority vested in him by the Alabama statutes to be a
25 law enforcer.

1 MR. STEVENSON: And the resources provided to
2 him by the county commission. That is, in that sense, his
3 relationship to the county -- that is, we distinguish
4 between the county commission and the county, the body
5 politic. In that respect the county commissioners'
6 relationship to the county is no different from the
7 sheriff.

8 If the county commission creates a policy that's
9 unconstitutional, the same control questions would exist,
10 the same access questions to the county's Treasury would
11 exist. There's no difference functionally between the
12 relationship between the county commission and the county
13 and the sheriff and the county.

14 QUESTION: Of course, there's another --

15 QUESTION: The sheriff does not enforce county
16 law. I mean, the county doesn't make policy in the sense
17 of enacting any ordinances which the sheriff enforces. He
18 enforces only State law.

19 MR. STEVENSON: That's true, Justice Scalia.

20 QUESTION: And it doesn't make any policy in the
21 sense of controlling his actions, either. It can't give
22 him any directions, can it?

23 MR. STEVENSON: No, that's right. He is the
24 final policymaker in this area.

25 QUESTION: Can you give me an example of some

1 policies that the sheriff in one county might make that a
2 sheriff in another county might not?

3 MR. STEVENSON: Certainly. The policies here.
4 A policy that would subject someone to racial threats and
5 assaults. A policy that would remove them from the county
6 jail --

7 QUESTION: Any other legitimate -- give me some
8 examples of some legitimate policies.

9 MR. STEVENSON: Well, I mean, there are a whole
10 range of legitimate policies. They might have a procedure
11 for arresting people who are charged with DUI that
12 requires that they either do a --

13 QUESTION: And this can vary from one county to
14 another because the sheriff sets that policy?

15 MR. STEVENSON: Yes, that's correct. That's
16 correct.

17 QUESTION: Going back to the sense in which he
18 speaks by and might perhaps -- or speaks for and might be
19 controlled by the county, the most important sense, I
20 suppose, is that in which he is elected.

21 You've given a whole laundry list of sort of
22 characteristics on the basis of which you say we should
23 conclude that he's a county official. Would you put the
24 fact that he's elected by the voters at the top of the
25 list?

1 MR. STEVENSON: Absolutely, Justice Souter,
2 because that is the most meaningful control over this
3 sheriff. This sheriff engaged in this conduct and was
4 reelected by the county. That election says something
5 about the county's approval, if you will, of his conduct,
6 and we certainly believe that 1983 ought to play a role in
7 deterring that.

8 QUESTION: But even if there were no basis to
9 say that they had approved --

10 MR. STEVENSON: That's correct.

11 QUESTION: -- they at least would have the power
12 to disapprove.

13 MR. STEVENSON: Absolutely.

14 QUESTION: And I suppose that's what we're
15 getting at with imputed tort liability.

16 MR. STEVENSON: Absolutely.

17 QUESTION: Can they disapprove? They have no
18 power to impeach him.

19 MR. STEVENSON: They have no power to --

20 QUESTION: He's impeached by State officers,
21 isn't he?

22 MR. STEVENSON: Like --

23 QUESTION: By the attorney general, or the
24 legislature?

25 MR. STEVENSON: That's correct, Justice Scalia,

1 like --

2 QUESTION: So they really have a -- I mean, gee,
3 the power just to elect somebody without the power to
4 remove him --

5 MR. STEVENSON: Well --

6 QUESTION: I don't know that that's real
7 control.

8 MR. STEVENSON: Well, I think that removal power
9 is regulated every 4 years.

10 QUESTION: Do they have to vote for him the next
11 time?

12 MR. STEVENSON: No, they do not, and every 4
13 years they will have the opportunity to exercise that
14 removal discretion.

15 I'd like if I can to reserve the rest of my time
16 for rebuttal.

17 QUESTION: Very well, Mr. Stevenson.

18 Mr. Smith, we'll hear from you.

19 ORAL ARGUMENT OF PAUL M. SMITH

20 ON BEHALF OF THE RESPONDENT

21 MR. SMITH: Mr. Chief Justice, and may it please
22 the Court:

23 Our position is that an Alabama county cannot be
24 held liable under section 1983 for the actions of the
25 sheriff for two principal reasons.

1 First, the State constitution, as has been
2 noted, expressly designates sheriffs as State officials,
3 and follows up that designation by treating them as State
4 officials for such purposes as the procedure for removal
5 from office, and the absolute immunity that is only given
6 to State constitutional officers, immunity from State tort
7 liability.

8 QUESTION: But you -- I take it you accept the
9 fact that it's ultimately a Federal question, not a State
10 law question.

11 MR. SMITH: Well, this Court has held repeatedly
12 that the identification of municipal policymakers turns on
13 an analysis of State law.

14 QUESTION: The identification of the
15 policymakers does, but whether, in fact, the policy is to
16 be imputed to the county, or to any municipal corporation,
17 is a question of Federal law, is it not?

18 MR. SMITH: Well, I think it's kind of an
19 intersection between State and Federal law. You have a
20 Federal statute that says we'll hold you liable under
21 certain circumstances. One of the circumstances is where
22 the municipal -- the government has enacted a policy, and
23 then the court says, to determine whether it's a municipal
24 policy we're going to look at State law to determine --

25 QUESTION: No, I think we look to State law to

1 find out who in fact has control over the policy. Who is
2 in fact the policymaker.

3 MR. SMITH: Correct.

4 QUESTION: We look to State law for that.

5 MR. SMITH: Right.

6 QUESTION: But whether in fact, having
7 identified the policymaker, the policymaker will be
8 treated as a State official or as a municipal official of
9 some sort, that is ultimately a question of Federal law,
10 is it not?

11 MR. SMITH: Well, I'm not sure I understand the
12 distinction. It seems to me what you have to do is, you
13 have a certain Federal standard that has to be met and
14 then you match that up against a set of State
15 requirements, or State structural features of the State
16 government and you decide ultimately does the Federal law,
17 does the statute that Congress passed in 1871, was it
18 intended to impose liability under these circumstances?

19 QUESTION: Right, but I think the distinction is
20 simple. We look to State law to find out who, in fact,
21 under State law is setting policy. Once we have found out
22 who that person is, since there is a difference between
23 State immunity and municipal liability under 1983, we then
24 say, as a question of Federal law, is the person so
25 identified a State officer or a municipal officer, and

1 that latter question is one of Federal law, isn't it?

2 MR. SMITH: Your Honor, I really don't think you
3 can answer that question without looking at State law as
4 well to determine --

5 QUESTION: Well, you have looked at -- you mean
6 State law binds the question whether for 1983 liability an
7 individual is a State officer or a county officer? I'm
8 not talking here about whether it presents interesting
9 evidence. I'm asking whether it is dispositive, whether
10 State law is dispositive on that question.

11 MR. SMITH: Well, I guess --

12 QUESTION: And I would have thought it clearly
13 was not.

14 MR. SMITH: If what you're asking is, can there
15 be a situation where we would -- where the Court would
16 properly disregard a label that says he's a State
17 official, based on other circumstances that are present
18 such as the fact that he actually day-by-day works for the
19 county commission and so therefore there's a concern that
20 the State statute that designates him a State official is
21 fictitious, I think under those circumstances that would
22 be appropriate.

23 Because the two factors that I was going to
24 outline at the beginning were 1) what the law says the
25 scope of the municipal corporation is expressly, and 2)

1 who does this official work for and is he -- who is he
2 controlled by, and I do think there are situations where
3 if, in fact, the person is controlled by the governing
4 body of the municipal corporation, that fact would be
5 enough to make him a municipal policymaker regardless of
6 the express statements of law.

7 QUESTION: But the converse would not
8 necessarily be true, would it?

9 MR. SMITH: Well, I think --

10 QUESTION: If he is not controlled by in this
11 case the county commissioners, it does not follow that he
12 is not a county official for purposes of 1983 liability.

13 MR. SMITH: That's true, too. I think if it
14 were true that he was expressly designated a county
15 official by law, and the court determined that the State
16 statute said this is the county policymaker for X area of
17 governmental activity but we want him to be autonomous
18 from this other governing body over here, I can imagine
19 State law doing that, too, defining the --

20 QUESTION: Suppose they said just the latter?
21 They said, we want him to be autonomous from the county
22 governing body, but we're calling him what he is, a county
23 officer that works within the county, not outside, but
24 he's not in any sense answerable to the commission.

25 MR. SMITH: Right.

1 QUESTION: Okay. Is he a final policymaker for
2 the county for whom there is Monell liability?

3 MR. SMITH: If the Court were to determine that
4 the State law establish the contours of the municipal
5 corporation such that the corporation includes not only a
6 governing body but another autonomous board or official
7 who was supposed to be part of that municipal corporation,
8 that you have a kind of hydra-headed corporation under
9 State law, if the Court were to conclude that's what State
10 law said, then yes, he would be a municipal policymaker.

11 So you can have a situation where autonomous
12 boards or officials are within the scope of the municipal
13 corporation because that's what the State decided to do,
14 and it may be fairly frequent in big cities.

15 QUESTION: So if this person were designated
16 county officer, as I take it the coroner and tax assessor
17 are, then you would not have any question about --

18 MR. SMITH: Well, I --

19 QUESTION: -- Monell liability.

20 MR. SMITH: If you're asking about those
21 specific individuals, I think that there's -- there are --
22 those are kind of border-line cases where there's
23 indications that go both ways.

24 For example, the tax assessor works for the State
25 as well as for the county, collects taxes for the State as

1 well as for the county. He's supervised very closely by
2 the State, but you don't have anything like the express
3 designation of a State official that we have here with the
4 sheriff.

5 QUESTION: All right. Let's stay with the
6 coroner then.

7 MR. SMITH: As to the coroner, he's elected in
8 the county, and he's called a county coroner. He performs
9 inquest functions which kind of work with the State
10 judiciary.

11 QUESTION: Yes, but so -- but you're saying that
12 that officer would be considered a decisionmaker, final
13 decisionmaker, although not responsible to the county
14 commission, and there would be municipal liability or
15 county liability.

16 MR. SMITH: My position, Justice Ginsburg, is
17 that's certainly possible, that if the full analysis of
18 the law about the coroner came to the conclusion that the
19 State intended him to be a county officer making policy
20 for the county, his autonomy from the county commission
21 would not by itself preclude that conclusion that he is
22 a --

23 QUESTION: All right. So he's not a -- he has
24 that autonomy. Now, what else would we look to to
25 determine whether he was a county officer?

1 MR. SMITH: Well, you would look at what State
2 law says about whether he's part of the municipal
3 corporation or not, and here the State law's quite
4 explicit on that subject and says not only is he
5 autonomous from the county commission, but he is a State
6 officer who is a member of the State executive department.

7 QUESTION: Mr. Smith, your second point, as I
8 understand it, was the label itself is not enough. You
9 couldn't just pass a statute calling somebody a State
10 officer, as I understand you.

11 You look at actual control to have significance,
12 and in this case if you ask about the day-to-day
13 activities of the sheriff, not things that would justify
14 impeachment or failure to reelect, but whether he assigns
15 four officers to a district or two patrol cars and so
16 forth, who controls him in that regard?

17 MR. SMITH: Well, with respect to his day-to-
18 day activities, many of them are controlled by other State
19 officials. The one you mentioned about where he's going
20 to put his patrol cars he's got a fair amount of
21 discretion.

22 QUESTION: The law officer's activities,
23 assigning his a personnel to different tasks.

24 MR. SMITH: On those issues he's not supervised
25 by anyone.

1 QUESTION: He's the final authority on those
2 issues.

3 MR. SMITH: Yes, but there are several things
4 you should understand. Much of his work is under the
5 supervision of State officials, State prosecutors, the
6 DA's are State officials, the judges --

7 QUESTION: No, but I'm talking about assigning
8 policemen to arrest people, and what part of the city to
9 patrol, and how long hours they work and that sort of
10 thing.

11 MR. SMITH: Right. Well, to the extent that he
12 stays --

13 QUESTION: He's the final authority on that.

14 MR. SMITH: -- within the confines of what would
15 be an impeachable offense in Alabama, he's got final say
16 on that, sure.

17 QUESTION: Yes, but I mean, within the confines
18 of. Isn't anyone ultimately within the supervision and
19 control of whoever has power to remove him from office?

20 MR. SMITH: Yes.

21 QUESTION: If the sheriff, for example, decides
22 to have no police cars, and the attorney general says, we
23 have a whole county here that is not being policed, they
24 have no police cars, wouldn't the attorney general tell
25 the sheriff, get some police cars or you're out of there?

1 MR. SMITH: That's exactly what would happen,
2 and then the Governor would say you --

3 QUESTION: But again, you're assuming --

4 MR. SMITH: -- I want a report on my desk in the
5 morning about what you're doing.

6 QUESTION: He has to do something sufficiently
7 serious to justify impeachment.

8 MR. SMITH: But the impeach --

9 QUESTION: But just working 8 hours instead of 9
10 hours, or 7 hours instead of 6, that sort of thing he's
11 the boss.

12 MR. SMITH: But the list of grounds for
13 impeachment, Justice Stevens, include incompetence,
14 neglect of duty --

15 QUESTION: Yes, but how often are these county
16 officials impeached? Very rarely, I assume, but they run
17 their offices 8 hours a day, 7 days a week, 30 days a
18 month, and they make hundreds and hundreds of decisions
19 that are not supervised by anyone else.

20 MR. SMITH: That's precisely -- that's precisely
21 why he's treated as a final policymaker, and that is the
22 way government is set up in many places.

23 QUESTION: All right, so if he's a final --

24 QUESTION: So if you don't -- I'm sorry. Go
25 ahead.

1 QUESTION: Going back to Justice Souter's
2 question before, if that's the test of the -- if the
3 question is who can control him, I suppose the people who
4 have the greatest power, just as Justice Souter mentioned
5 before, to control the actions of the sheriff are the
6 county voters, because if he doesn't do the right thing
7 they won't elect him again.

8 And so if that's the test, why isn't he then a
9 county official? Indeed, any State official who is
10 elected on a county basis would become for Monell purposes
11 a county official. Why not? That's fairly clear. People
12 who pay the piper call the tune, and they're paid at a
13 county level and he's elected at a county level.

14 MR. SMITH: Local election doesn't tell you
15 anything about whether a particular official is part of a
16 municipal corporation separate and apart from State
17 government --

18 QUESTION: No, no, no, that's all quite right,
19 but you'd say that the person -- all we're interested in
20 really is what hat is he wearing when he performs these
21 actions? Is he wearing his State hat, or his county hat,
22 and there isn't much to tell us --

23 MR. SMITH: But --

24 QUESTION: -- except for the fact that the
25 county people elect him and they pay.

1 MR. SMITH: But with respect, Justice Breyer,
2 the reason that we have public liability under Monell is
3 because there are separate corporate structures that
4 exist, and so saying that he's locally elected and locally
5 funded may be relevant to the question of whether he's a
6 local official --

7 QUESTION: He was a separate -- I just think
8 that probably Monell basically -- well, different
9 people -- I don't know if we'll go into that in great
10 depth, but basically you're trying to say the people, or
11 at least where it's policy, whom you work for normally
12 pay, but of course they don't if it's the State --

13 MR. SMITH: Well, of course, they don't --

14 QUESTION: -- because there's sovereign
15 immunity, so the real question is, should the sovereign
16 immunity principle apply here, and you say why should it
17 when they're elected at a county level.

18 MR. SMITH: The reason that the State doesn't
19 pay under 1983 is not sovereign immunity, Justice Breyer.
20 It's that the statute only imposes liability on persons,
21 and the only reason there's liability on anybody other
22 than the individual wrongdoer in any case is because
23 municipal corporations are treated as persons. In order
24 to get there you have to look at whether or not we have a
25 person here, which is --

1 QUESTION: Well, we do. He's the sheriff, and
2 which hat is he wearing?

3 MR. SMITH: Well, the sheriff is clearly being
4 held liable. The question is whether there's some other
5 person that he is acting for when he acts, and that
6 person, the county under State law has nothing to do with
7 him. He's not part of the corporate structure.

8 QUESTION: No, but you're --

9 QUESTION: Mr. Smith, I assume that the members
10 of the Alabama legislature, are they elected locally?

11 MR. SMITH: Absolutely, Your Honor.

12 QUESTION: And can they be removed from office
13 by the local voters?

14 MR. SMITH: I believe it happens, yes.

15 QUESTION: And are they considered local
16 officers?

17 MR. SMITH: Well, under the rule of local
18 election I suppose they would be.

19 QUESTION: They would be.

20 MR. SMITH: But clearly one needs to look beyond
21 that.

22 QUESTION: I thought Justice Breyer said it was
23 at least pay, local election and local pay which would
24 distinguish your district attorney, a State judge, and
25 your legislature, right?

1 MR. SMITH: Your Honor, it wouldn't distinguish
2 the local district attorney and the local district judge.
3 They are elected locally, they work in a building that is
4 paid for and operated by the county commission --

5 QUESTION: Who pays their salary?

6 MR. SMITH: -- and their salaries are
7 supplemented routinely by county commissions.

8 QUESTION: Supplemented.

9 MR. SMITH: Yes. Not all of their salary, but
10 part of their salary, so we're getting down to a fairly
11 small --

12 QUESTION: Well, let's take these two things:
13 election plus full pay, not supplement.

14 MR. SMITH: My position, Your Honor, would be
15 that those factors tell you literally nothing about
16 whether that official is inside the municipal corporation
17 or outside the municipal corporation, because both of
18 those things could exist and State law could still make it
19 really clear that this is a State person who's answerable
20 to the State and not part of the way they decided to set
21 up their municipal corporation.

22 Counties are very narrow things in Alabama.
23 They have these specific functions. They don't have home
24 rule, and for purposes of State law the county commission
25 and the county are really indistinguishable, so the notion

1 that there's this sort of free-floating geography that
2 includes everybody into a corporate structure --

3 QUESTION: Is there any individual for whom a
4 county in Alabama would have Monell liability other than a
5 member of the county commission?

6 MR. SMITH: Certainly. There's a county
7 administrator who's essentially there, keeps the paperwork
8 flowing and deals with routine matters within the scope of
9 the areas that are run by the county commission. They run
10 the road systems, a lot of different kinds of things that
11 could be done by people who work for the county in the
12 strict sense of the county commission.

13 QUESTION: But only if they are executing, on
14 your view, county commission policy, right?

15 MR. SMITH: Correct, yes.

16 QUESTION: Okay.

17 QUESTION: Then let me amend my question and
18 say, is there any person who makes final policy, which I
19 take it the sheriff and the coroner would do in their
20 realm, for whom a county in Alabama would be liable?

21 MR. SMITH: As I think I said earlier, it's
22 possible that one could come to that conclusion about the
23 coroner, depending on the overall analysis of whether or
24 not the State intended to treat them as independent county
25 officers. I don't --

1 QUESTION: I don't understand the intended,
2 because we're not talking about a particular case. We're
3 talking about an office.

4 MR. SMITH: Yes.

5 QUESTION: I mean you would say that a member of
6 the county commission, there would be liability, and you
7 wouldn't look to depend on the particular case. We have
8 all the law that there is about coroners already on the
9 books, so how do -- I mean, you are very clear about how
10 you type the sheriff. Why shouldn't you be equally clear
11 one way or another about how you type these other
12 officers?

13 MR. SMITH: I think the law on the coroner is
14 much less clear. I mean, I think you have factors
15 pointing in different directions. You have autonomy,
16 which is one of my factors, pointing in one way, and you
17 have some laws which say he's a county official pointing
18 another way.

19 Here, however, we have autonomy of an official
20 expressing designated and consistently treated as a State
21 official under State law, so the factors are pointing the
22 same way.

23 QUESTION: Well, you say he's consistently
24 treated. He's called that in some places.

25 Let me go back on the question of policy to an

1 answer you gave earlier. I think the hypothesis was, what
2 if the sheriff doesn't want any patrol cars on the roads,
3 and the attorney general comes along and says yes, you
4 ought to have cars out there, or five cars out there, or
5 what-not. Was it your answer that the attorney general
6 could make that policy decision and make it binding on the
7 sheriff?

8 MR. SMITH: I do not think that the attorney
9 general could call him up and order him to add an extra
10 squad car to his patrol.

11 QUESTION: Right, no --

12 MR. SMITH: Or patrol more carefully.

13 If he had decided to not carry out his law
14 enforcement functions, which is what the question was,
15 certainly that would be an impeachable offense. The
16 Governor -- well, short of that --

17 QUESTION: Right. It would not give policy
18 control to anyone in particular. It would simply mean
19 that he was impeachable by whoever does impeachment in
20 Alabama. I forget who it is, but it would not follow from
21 that that there was any policy control from the impeaching
22 authority to the sheriff, or else we would be subject to
23 the policy of the Senate.

24 MR. SMITH: The reason I focus on the
25 impeachment provision, Your Honor, is not because I think

1 it makes the attorney general the policymaker, but because
2 the law in the Constitution expressly differentiates
3 between State and local officials on the kind of
4 impeachment procedure that applies, and they centralize
5 control in 1901 over sheriffs by making them impeachable
6 only at the State level based on the attorney general's
7 initiation.

8 QUESTION: But one -- one reason --

9 QUESTION: Is there any reason why the
10 impeaching official cannot warn the person who's subject
11 to impeachment, unless you do something, I will impeach
12 you?

13 MR. SMITH: Of course not, Your Honor.

14 QUESTION: The Senate can't do that to us,
15 presumably, but that has to do with the separation of
16 powers. Could the Senate do that to a senatorial -- a
17 congressional officer?

18 MR. SMITH: Sure. Sure. Here, though, because
19 he's a State constitutional officer as well, the Governor
20 has the authority to make him report on any of his
21 activities, and the way the Constitution was set up in
22 1901, any false report that was made to the Governor is by
23 itself automatically an impeachable offense, so that in
24 practice what can happen much more easily than impeachment
25 is that you get called on the carpet by the Governor and

1 your misconduct or your misfeasance would then be
2 publicized and the Governor has a fair amount of practical
3 control over sheriffs.

4 QUESTION: Oh, lots of influence, sure, but I
5 take it -- I'm sorry. I take it it's still your position
6 that the impeaching authority in Alabama is not the
7 policy-setting authority over the operation of sheriffs'
8 departments in Alabama counties.

9 MR. SMITH: No, I --

10 QUESTION: That's not your position, is it?

11 MR. SMITH: That's absolutely right. I don't
12 quarrel with the idea that he has a fair amount of
13 discretion to make his own policies about how he's going
14 to carry out --

15 QUESTION: And nobody else does, so far as law
16 enforcement policy by the sheriff's department for that
17 county. No one else has it, does he?

18 MR. SMITH: Which is precisely why it would seem
19 strange to me just to take a law which is supposed to have
20 a much narrower rule of liability than respondeat superior
21 and apply it in this context.

22 QUESTION: Well, it is narrower in the sense
23 that there has got to be a policy function condition met.
24 That is the sense in which it is narrower.

25 MR. SMITH: Yes.

1 QUESTION: And that condition would be met if,
2 in fact, the sheriff is the policymaker for that county.

3 But then you would have -- I don't care whether
4 you call it respondeat superior, call it imputed
5 liability, whatever label you put on it, at that point
6 1983 says yes, the county may be held liable.

7 MR. SMITH: Sure, but the -- what I'm saying is,
8 State law doesn't say that, and --

9 QUESTION: State law doesn't say that, but 1983
10 and Monell does.

11 MR. SMITH: No, no, no, no, State law doesn't
12 say that he is a county policymaker. It says he's a State
13 policymaker expressly, so --

14 QUESTION: But nobody at the State level can
15 control the policy.

16 MR. SMITH: Well, that's because he's got
17 delegated authority under State law, which is what defines
18 a policymaker.

19 QUESTION: Do you concede that --

20 MR. SMITH: The DA is a State policymaker, too,
21 when he prosecutes somebody. Lots of people have
22 policymaking authority.

23 QUESTION: But everybody's authority under
24 Alabama law, or I presume the law of any other State, is
25 ultimately, if -- is ultimately delegated by State law.

1 MR. SMITH: Sure.

2 QUESTION: Counties have the authority that
3 State law gives them. Governors do. Sheriffs do. So the
4 fact that there is ultimately a State law answer to who
5 has the policymaking authority and what is its extent,
6 that doesn't get you anywhere for Monell purposes, because
7 that's a wash item. That's going to be true everywhere,
8 all the time.

9 MR. SMITH: But the aspect of State law I was
10 referring to is saying that he's a member of --

11 QUESTION: The content of State law.

12 QUESTION: Mr. Smith, let me be sure I got one
13 point in mind. You say because he's a state official he's
14 implementing State policies when he decides how many
15 patrol cars to put out and so forth, but that means, then,
16 if I understand you, all 67 sheriffs have different
17 policies within their own countries. You have 67
18 different State policies because they're all State
19 officials.

20 MR. SMITH: Which is true with respect --

21 QUESTION: And I suppose it's theoretically
22 possible, but that's really the theory that all of these
23 differing policies are all State policy.

24 MR. SMITH: Well, all locally based State
25 officials can -- that have policymaking --

1 QUESTION: Right.

2 MR. SMITH: -- authority can set -- within the
3 confines of State law set certain policies.

4 QUESTION: But really the State policy is that
5 they've delegated the authority to the sheriff to do what
6 he wants to do. That's --

7 MR. SMITH: Well, that's what a locally based
8 State official does. He has discretion.

9 QUESTION: Is that -- I mean, is there any sense
10 in which there's a general State policy? What I'm
11 thinking is, if you have perhaps the State representative
12 for city streets, the highway commission, State highway
13 commission, there will be some official in each county
14 who's in charge of highways, and I bet they have a certain
15 amount of discretion, but I would imagine also they meet
16 from time to time at the State level and there are more
17 general State policies, too. Is there anything like that
18 here?

19 MR. SMITH: I'm not familiar with a particular
20 thing where all the sheriffs come to Montgomery and meet
21 about what they're going to focus on.

22 There is a certain amount of coordination that
23 occurs. For example, there are drug task forces that
24 regionally occur, and sheriff's officials in fact do go
25 outside their counties and work collectively in a

1 particular region.

2 QUESTION: Anything in the State capital, or any
3 group of people at the State level who would feel that
4 they have the responsibility, even at a highly general
5 level, for coordinating the policies of the individual
6 county sheriffs?

7 MR. SMITH: Well, you have the attorney general.

8 QUESTION: Does he actually do something?

9 MR. SMITH: Well --

10 QUESTION: Has he ever written a paper, or has
11 he ever issued an order or a suggestion which says I think
12 that the sheriffs in these counties should follow the
13 following policy at a very general level? Is there any
14 document like that that's ever been written?

15 MR. SMITH: I think you're exceeding my
16 knowledge about how things work in practice in Alabama. I
17 do know, though, that the sheriffs work very closely with
18 the district attorneys, which themselves work closely with
19 the attorney general's office, and so there's going to be
20 a certain de facto coordination.

21 You know, law enforcement can't be separated
22 completely from prosecutorial activity in that those are
23 State officials. The district attorney is locally
24 elected, partly locally funded, working in a county
25 building, but they're State officials, so --

1 QUESTION: Suppose a State, or a sheriff in the
2 State of Alabama runs on a platform and he says he's going
3 to have five different policies, one of which is going to
4 be to interpret Federal constitutional rights at their
5 narrowest when he's interrogating prisoners.

6 Certainly in a lay -- and if the voters vote him
7 in, certainly in a lay sense, in a common sense use of the
8 term, we could say this is the policy of the voters of
9 that county, couldn't we not?

10 MR. SMITH: You sure could, yes, but that
11 wouldn't be the test that should be applied under Monell.
12 I mean, obviously, with any elected official, State or
13 local, there's -- you can make the argument that the
14 voters are responsible for what they get, and they ought
15 to be -- ultimately have to pay for it, but that policy
16 doesn't make any more sense at a local level than it does
17 at a State level.

18 QUESTION: Well --

19 QUESTION: You could say the same thing, I
20 suppose, about the local district attorney, or the local
21 judges of the circuit that the county people vote for. If
22 they had a certain platform you could say that that was
23 the county or the circuit's policy.

24 MR. SMITH: That's why I say, Mr. Chief Justice,
25 that local election doesn't really move the ball down the

1 field. It doesn't tell you whether he's in the municipal
2 corporation or not. It may be statistically more likely.

3 QUESTION: Mr. Smith, is there any purpose for
4 which the sheriff ranks as a county officer? Is there any
5 capacity in which under Alabama law he counts as a county
6 rather than a State officer?

7 MR. SMITH: Not that I can think of. If you
8 look at his other hats that he wears, it's much clearer in
9 all of those contexts that he's a State official. He
10 takes direct supervision from the State circuit judge in
11 the circuit. He works directly with and for the State
12 district attorney. He supervises a jailer primarily by
13 the State Department of Corrections.

14 QUESTION: Are you saying he's all one or all
15 the other, so there's no people who are sometimes county
16 officers and sometimes State officers?

17 MR. SMITH: I'm saying that in this instance
18 he's not. It's possible one could set the law up that
19 way, that people have two different functions and in one
20 context they're supervised by the county commission over
21 here and they're setting county policy, and in another
22 context they're working with the judges over here and
23 they're fully implementing State policy.

24 QUESTION: Well, let's take the supervision out
25 of it, because the one thing that we have to have is a

1 final policymaker, otherwise there's no case here, right?

2 MR. SMITH: Sure, but that doesn't mean that the
3 final policymaker has to be without anybody who could come
4 in and check what they've done or supervise them. I
5 mean --

6 QUESTION: But --

7 MR. SMITH: Power is delegated by one body to
8 another. The second body can't still be a final
9 policymaker. It's relevant, I think, where the power
10 comes from.

11 QUESTION: Yes, but you've already clarified, I
12 think, that you don't have to have a policy -- a
13 commission over you in order to be a final decisionmaker
14 for a county within Monell.

15 MR. SMITH: Yes. If State law is express and
16 clear enough that we're still going to treat them as part
17 of one single municipal corporation, that's true.

18 Now --

19 QUESTION: Mr. Smith, can you tell me again what
20 are the -- you say in some respects the sheriff -- in some
21 of his activities he is supervised by other State
22 officers --

23 MR. SMITH: Clearly -- clearly --

24 QUESTION: -- and in none of his activities is
25 he supervised by county officials.

1 MR. SMITH: That's absolutely right.

2 QUESTION: Which ones is he supervised by --

3 MR. SMITH: Well, he is -- he serves process for
4 the State judges. He executes judgments, all of that.
5 There's a specific statute that says that general
6 supervision for all of those activities is with the State
7 circuit judge and that clearly he's following orders from
8 the State circuit judge or the State district judges in
9 that capacity, and when he's working with the district
10 attorneys, and once they get involved in the law
11 enforcement activities, he's working for them as well.

12 So there is a fair amount of activity there, and
13 the operations of the jail, the Department of Corrections
14 has reports. They come in, they inspect, that sort of
15 thing, so there is all these different ways in which he
16 intersects and is supervised by State officials.

17 In no respect, however, does the county
18 commission have anything to do with what he does, other
19 than having his obligation to give him money, and
20 certainly the law is clear that that obligation can't be
21 turned into leverage to control his activities.

22 If a county commission were to say we think you
23 need to be putting more emphasis on drug policy in your
24 law enforcement in this county, and we're not going to
25 give you all your money till you do, there'd be an

1 injunction in State court within hours. It's just clearly
2 grossly improper them to attempt to do that, and there's
3 no indication that it's ever been done.

4 QUESTION: Mr. Blackburn, do I understand from
5 your argument both on brief and here this morning that you
6 think that the First Circuit in the Blackburn v. Snow case
7 reached the wrong conclusion?

8 MR. SMITH: I do. I think it was focusing on a
9 county as a unit of geography and not as a municipal
10 corporation and said, to the extent that he's elected by
11 the county voters, we're going to treat him as a county
12 official, and I think that test is both unjustified under
13 the principles of Monell and proves far too much, because
14 you have lots of locally elected State officials who under
15 any theory, other than just looking at election, wouldn't
16 be viewed as part of the municipal corporation.

17 QUESTION: No, but you could have -- I mean, not
18 that I necessarily want to defend an opinion in which I
19 was on the panel --

20 (Laughter.)

21 QUESTION: Nonetheless, I guess in that, what I
22 thought that that was involving is that you can't have a
23 county official or a city official who is not responsible
24 to anyone else in the city or county for the policy.

25 MR. SMITH: Yes.

1 QUESTION: The question here is what hat is the
2 sheriff wearing, his county hat, or a State hat, not
3 whether there's some other person in the county government
4 who might control his action.

5 MR. SMITH: Right.

6 QUESTION: All right. Then that being so, it's
7 clear, isn't it, that the Eleventh Circuit's reasoning was
8 wrong? I mean, they were looking for somebody else in the
9 county that had this policy, so one possible thing would
10 be to tell them they're wrong and let them work it out.

11 MR. SMITH: Well, no, I --

12 QUESTION: Is that right?

13 MR. SMITH: No, I don't think that's right.
14 What they were looking at is whether or not, in exercising
15 his discretion to enforce the law, he was acting for the
16 county, and they said the county doesn't have anything to
17 do with law enforcement. Counties don't have the
18 authority to --

19 QUESTION: All right, but that wouldn't be the
20 issue, whether county -- the question is, did the sheriff
21 have something to do with law enforcement? Clearly he
22 did.

23 MR. SMITH: Yes.

24 QUESTION: And then what hat is he wearing?

25 MR. SMITH: And it can't be a county hat if the

1 county isn't -- doesn't have any role in law enforcement.
2 That's what they were saying.

3 I mean, you could say it different ways and
4 arrive at the same conclusion, which is to say, he's a
5 State official by law. He's got authority that's
6 unrelated to the county commission's control. When those
7 two things point in the same direction, you come to the
8 conclusion, I think, that this is not county policy.

9 QUESTION: Well, Mr. Smith, if you're right and
10 the sheriff in Alabama is purely a State official, then
11 should the action have been dismissed against -- insofar
12 as it was brought against the sheriff --

13 MR. SMITH: Not as --

14 QUESTION: -- under 1983?

15 MR. SMITH: In his individual capacity he
16 certainly could be held liable if there's --

17 QUESTION: But not in his official capacity --

18 MR. SMITH: That's true.

19 QUESTION: -- is your position.

20 MR. SMITH: That's correct, Your Honor. They
21 only brought it against him in his official capacity on
22 the theory that he was a county official, and I think the
23 courts properly looked at the suit against the county and
24 the suit against him in his official capacity as being
25 essentially identical, because obviously you can't sue him

1 in his official capacity to the extent he's a State
2 official, because the Eleventh Amendment and the statute
3 wouldn't authorize it.

4 QUESTION: Does the --

5 QUESTION: What about the insurance?

6 Mr. Stevenson mentioned when he was asked who would be
7 liable for the ordinary torts, and he said he thought the
8 county would under some insurance policy.

9 MR. SMITH: There is an insurance program which
10 covers sheriffs for certain torts -- not other torts, not
11 intentionally torts. There's a serious question here
12 whether he would be covered, but I think the fact that the
13 county, in addition to paying his salary and providing all
14 of his equipment and everything else he uses, has also
15 bought insurance for him doesn't by any means indicate
16 that -- doesn't have any great significance. It doesn't
17 make much difference one way or the other, in terms of
18 indicating which hat he was wearing.

19 QUESTION: But why would they do that? Why
20 would they buy the insurance?

21 MR. SMITH: Well --

22 QUESTION: If they have no interest in law
23 enforcement, why would they buy this insurance?

24 MR. SMITH: Well, they -- for the same reason
25 they pay for his salary and all the other things they do.

1 They provide what he needs to get the law enforced in the
2 county.

3 QUESTION: But they're required to pay the
4 salary.

5 MR. SMITH: They're required also to provide for
6 his reasonable needs.

7 Thank you, Your Honor.

8 QUESTION: Thank you, Mr. Smith.

9 Mr. Stevenson, you have 2 minutes remaining.

10 REBUTTAL ARGUMENT OF BRYAN A. STEVENSON

11 ON BEHALF OF THE PETITIONER

12 MR. STEVENSON: I'd like to at least suggest
13 that the Court not accept this notion that the sheriff is
14 a State policymaker under the law that's been provided.

15 There are two provisions which point to the
16 sheriff having some State identity, the constitutional
17 provision, which we contend is a label and is at best
18 ambiguous, because the label says, sheriff for the county,
19 and then the State tort law judgments, which we contend
20 are not relevant here.

21 The rest of Alabama law repeatedly refers to the
22 sheriff as a county officer, and the Eleventh Circuit did
23 not hold the sheriff makes policy for the State precisely
24 because, as Justice Stevens suggests, that's kind of a
25 difficult notion. He is not like the Department of Public

1 Safety employees who are subject to some State
2 hierarchical command.

3 What the respondent then tries to say is,
4 because there is this removal authority, somehow the State
5 exercises control. The removal authority in Alabama is
6 applicable to all county, municipal, and State officials.
7 They can remove a mayor, a county commissioner, a city
8 commissioner, and in that sense does not help us resolve
9 this question.

10 The third thing is that we have identified in
11 our brief at pages 23 and 24 all of the State law
12 enforcement provisions that identify State law enforcement
13 officers. In those provisions the sheriff is never
14 referenced, never included, which I think again gives good
15 evidence as to why the sheriff is not a State policymaker.

16 And then finally, if we're not going to accept
17 election and funding and status as a county official as
18 the governing rationale, then the county commission's not
19 a county official either, because their relationship to
20 the county is also dependent on three factors. They're
21 elected, they're paid, and they're identified as county
22 officials.

23 Nothing else in Alabama law makes them any more
24 of a county representative than the sheriff, and in those
25 respects we think it's not only appropriate but necessary

1 to hold that county liable when its resources empower
2 somebody like the sheriff here to engage in the kind of
3 unconstitutional conduct against the petitioner that could
4 not have happened but for those resources.

5 Mr. McMillian would not have spent 6 years on
6 death row unless the county gave the sheriff the power to
7 arrest, to stop, to withhold evidence, and to do the other
8 things that violated his rights, and under those
9 circumstances it's certainly our position that the Federal
10 remedy ought not turn on the personal sovereignty of the
11 wrongdoer. It ought not turn on that, because that
12 wrongdoer's conduct was not made possible solely by that
13 wrongdoer's initiative or conduct.

14 Unless there are further questions, I'll rest.

15 CHIEF JUSTICE REHNQUIST: Thank you,
16 Mr. Stevenson.

17 The case is submitted.

18 (Whereupon, at 11:08 a.m., the case in the
19 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

WALTER McMILLIAN, Petitioner v. MONROE COUNTY, ALABAMA
CASE NO: 96-542

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)