Memorandum

File (Misc)

Subject	Date
Tennessee & Memphis Police Dept. v. Garner	May 24, 1984

To Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

From Brian K. Landsberg
Chief, Appellate Section
Civil Rights Division

You asked that I send you a package of materials relating to this case. Attached are my May 2, 1984 recommendation, Louise Lerner's April 27, 1984 preliminary assessment, her 1981 draft SG memo (helpful for background, but not providing the legal analysis which I recommend), and recommendations from Criminal Division, OLP, and Sam Alito.

Sam Alito's memorandum provides a thoughtful and complete review of the weaknesses of the Court of Appeals' Fourth Amendment analysis, although he does ignore the Chief Justice's Bivens opinion (my memo, p. 2) and gloss over the issue whether the use of deadly force to apprehend a fleeing felon is a "seizure." Moreover, the variety of "reasonable" rules (Alito memo. p. 10) does not mean that the courts should abstain from disapproving unreasonable seizures effected by deadly force. The Fourth Amendment requires courts to assess the validity of the lines governments draw to distinguish reasonable from unreasonable searches. Nonetheless there is much in Mr. Alito's memorandum that counsels caution in attempting to apply the Fourth Amendment here.

Mr. Alito, however, simply misunderstands the summary punishment argument. The argument is not that all use of deadly force against fleeing felons is punishment. Rather I argue that arbitrary use of deadly force, not reasonably related to a legitimate goal is punishment. The Alito memorandum brushes off the misunderstood analysis by citing to one criterion (history) of Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), while ignoring a host of other tests that case approved "to determine whether an Act of Congress is penal or regulatory in character . . . ." Id. at 168. The full litany of approved tests requires a more complete analysis:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment - retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Id. at 168-169 [footnotes omitted]. The logic of the Alito position would lead to the conclusion that since striking a prisoner with a billy club is sometimes historically and otherwise permissible, it can never constitute summary punishment. Such a pernicious doctrine would literally destroy one of our most effective civil rights enforcement programs, that conducted by the Criminal Section.

cc: Mr. Cooper
Mr. Turner
Mr. Rinzel
Ms. Davis
Mr. Carvin