

lfp/ss 01/23/86 PEM SALLY-POW
MEMORANDUM

TO: Mike DATE: January 23, 1986

FROM: Lewis F. Powell, Jr.
84-1160 Pembaur v. Cincinnati

As I will be away for a week commencing next Wednesday afternoon, it would be helpful if you could give me a draft of a dissent in this case prior to my departure.

I do not have in mind an elaborate dissent. This is not the case in which to undertake a major effort to construe Monell in a sensible way.

Justice Marshall who voted with us initially, changed his mind and has joined Justice Brennan's opinion. Even Justice O'Connor voted the "wrong way".

I suggest our dissent make two arguments: (i) the Seagald issue that should resolve this case without reaching Monell; and (ii) the Monell issue.

Despite the "offhand" opinion given by the county prosecutor, his opinion was in accord with the law of the Sixth Circuit at that time. The county did not rely on Seagald, but this does not prevent us from arguing that this issue is dispositive.

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

January 25, 1983

I would then go on and make the argument that the Court misconstrues Monell. It is irrational to hold that a single "off the cuff" verbal approval of an arrest constitutes a "policy" for which the county may be held legally responsible under §1983. A judgment against the county in effect is a judgment against the people who pay the taxes. See article in U.S. News & World Report of January 27. Insurance is now so costly many public entities can't afford it. This view completely distorts both the literal meaning and the commonly accepted understanding of "policy". No private enterprise (e.g., a corporation) would tolerate a single statement by a senior officer in a telephone conversation as creating "corporate policy". Even less so, does it make sense to hold a governmental entity responsible for such a statement.

Of course, the temptation will be to write a great deal. Resist this, and simply lay the foundation for what I hope will be a an overruling of this unfortunate decision.

L.F.P., Jr.