

lfp/ss 02/14/86 PEMBM SALLY-POW

MEMORANDUM

TO: Mike Witten DATE: Feb. 12, 1986

FROM: Lewis F. Powell, Jr.

84-1160 Pembaur

This is a second memo on this case. I gave to you, before your departure, the first 12 pages that reflected my editing and comments, with a memorandum in which I made brief comments. This second memorandum addresses Part II of your draft (the Monell issue). Your organization of Part II, and your analysis and quite good - including the fallacy of the Court's reasoning and the standards or analysis that should have been applied under Monell. If you have been fair to the Court's opinion and I have not checked this, you are quite right that this case eviscerates Monell and exposes local governments to substantially increased litigation and liability. It makes a mockery of any normal conception of "official policy" making.

Apart from my editing, and a rider I suggest for page 17, I have only one major observation: Part II is a good deal too long and somewhat repetitive.

Particularly in a dissenting opinion, one loses an audience quickly unless it is concisely, clearly and attractively written as well as soundly reasoned. Your draft has these characteristics except for a good deal of "overarguing" our case. When you return, I think in a half a day, you can substantially reduce the draft and at the same time increase its effectiveness as a dissent.

I make the additional observations that may or may not merit inclusion or emphasis:

1. There have been a number of newspaper articles (possibly I put one or two in the file) that have emphasized the problems municipalities have faced as a result of Monell. Damage suits are now commonplace against both city and county governments, the officials thereof, and against the boards and commissions of local governments - particularly school boards. I am asking Sara Sonet if she will try to find some documentation of this problem, possibly in publications of municipal governments.

2. As you have said, and as my editing has emphasized, the draft makes rather clear that a new meaning is being given the term "policy". I am not sure that dictionary definitions will help a great deal, but

you might take a look. Also, are there not CA decisions that take a more rational view of what Monell meant by the use of "policy". You do repeat twice the Monell language that brackets "policy" with "ordinance, regulation or decision officially adopted and promulgated by [the city's officers]". Certainly the terms "ordinance", "regulation", and "decision officially adopted and promulgated", suggest the sort of formulation of policy that you correctly identify as relevant to whether an official policy has been adopted.

There may be some other opportunity to make this point somewhat more explicitly, perhaps in a note. I am quite familiar with how the corporate business world functions, as I served on the boards of a number of private corporations (including three listed on the New York Stock Exchange). No responsible officer would make a major policy decision without bringing it to the board, a committee of the board, or perhaps to a committee of officers. Ad hoc, off-the-cuff decisions sometimes may bind a corporation, but no one considers them to be policy.

Finally, what would you think of my stating perhaps in a footnote that given the Court's new and

expansive view of Monell I would not have joined its decision in that case.

L.F.P., Jr.

SS

File

lfp/ss 02/12/86 Rider A, p. 17 (Pembaur)

PEM17 SALLY-POW private or public corporate entity.

According deference to this finding, the only remaining question is whether the prosecutor in this case had made a single decision in a single case - facts that are undisputed. On its face, today's decision finds that policy - of constitutional dimensions - is established every time a county or city official makes a single decision on the telephone that is within the scope of his authority. The Court ignores that fact that no business organization, and certainly no governmental organization, makes binding policy decisions so cavalierly. The Court makes no distinction between a single "decision" - whatever the circumstances - and the normal processes of

establishing an "official policy" that would be followed  
 by a responsible private or public corporate entity.

David E. Howell, Jr.

Phillip Barrows

Thank you for getting me a draft prior to your departure, and I am trying to review it carefully with the hope that possibly you may get up to it again when you return. This was certainly our wish until your return.

In addition to my writing, I am dictating this as I read your draft.

After your editing and marginal comments, I find the draft excellent until I come on your discussion of the retroactivity of Hammond to civil suits. It is important to recognize a distinction between retroactivity in criminal and civil suits. I would keep in the text what you have up to the bottom of page 7. At that point, it seems to me that the draft depicts too long a discussion of the possibility of retroactivity as a justification for retroactivity. I appreciate that you do this because of what the Court held in Ex parte, at least in a dissent. However, I think some of the discussion here