

File

(I've sent acc to Mike)

lfp/ss 02/12/86 MIKEP SALLY-POW

MEMORANDUM

TO: Mike Wilson DATE: Feb. 12, 1986

FROM: Lewis F. Powell, Jr.

84-1160 Pembaur

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 to it again today. If this presses you, this case certainly can wait until your return.

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

1. Apart from editing and marginal comments, I find the draft excellent until I come to your discussion of the retroactivity of Steagald 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 devotes too long a discussion of the possibility of deterrence as a justification for retroactivity. I appreciate that you do this because of what the Court held in Owen. At least in a dissent, however, I think most of the discussion from

the bottom of page 8 through page 12 can be omitted - at least in the first draft of our dissent.

In addition to the one specific footnote that I suggest (see p. 7, 8), it may be well in a separate footnote to devote a paragraph to Owen v. City of Independence, keeping that brief.

I do like your final paragraph that begins on p. 11 with respect to the inequity of retroactive application. I would keep that paragraph, as well as the final two sentences that begin at the bottom of page 12.

2. My recollection is that when Steagald was discussed at Conference, at least a majority of the Justices thought we need not reach the retroactivity issue since it had not been relied on or argued. We can be sure this point will be made in response to our dissent. Try drafting a footnote that anticipates this and states that whether argued or not the issue - a constitutional one - is clearly implicit and the Court has a responsibility to decide it before moving on to the Monell question as to what constitutes policy.

(Mike: I will give you the foregoing before I commence work on the Monell issue).

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Rider A, p. 1 (Pembaur)

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When petitioner refused to allow the sheriffs to enter, one of them called the office of the County Prosecutor to obtain advice as to whether to make an entry by force. The Assistant County Prosecutor received the call, and apparently being in doubt referred the question to the County Prosecutor. He advised the deputy sheriffs to "go in and get [the witnesses]" pursuant to the arrest warrants.