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May 21, 1985

Mr. Justice:

Re: No. 83-1919, City of Oklahoma v. Tuttle

X I recommend that you join Justice Brennan's concurrence. He does a good job of explaining why the single incident jury instruction was erroneous in this case without getting into the dangerous attempt to define "policy" that Justice Rehnquist thought was necessary. I am troubled by the first sentence of footnote 4, because it adopts Justice Rehnquist's dictionary definition of "policy," which could be interpreted to rule out the possibility that inaction can constitute a policy. I am informed by the Brennan clerk that Justice Brennan will be happy to delete that sentence if you share my concern.

Vicki

*Stanton v. Holt down?*