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OPINION MEMORANDUM

No. 78-1202

CHIARELLA

v.

UNITED STATES

I have read the Chief Justice's dissent in this case. At present, I am not prepared to recommend that you join. Although I have read the dissent a couple of times, it is difficult for me to put my finger on what troubles me about it. The argument seems disjointed, and at points it seems to be directed more to hypothetical situations than to the facts of this case. It places heavy reliance on one or two sources

rather than constructing what I believe could be a fairly elegant argument from the purposes of the Exchange Act and case law construing Section 10(b). It implicitly accepts the Court's view that a "market insider" category of some sort is unworkable and beyond the scope of Rule 10b-5. And it obliquely charges the Court with creating a double standard for "white collar" and "blue collar" fraud without pointing out where such a distinction arises in the majority view. Finally, I am not sure that it does a satisfactory job of countering the majority's reading of the jury instructions.

I should note that one of Mr. Justice Brennan's clerks ✓ called to indicate that there is some dissatisfaction with the dissent in that camp. Apparently, Justice Brennan is particularly concerned about the jury charge and might lean toward dissenting on theory but agreeing that because of the charge the present conviction cannot be affirmed. It is possible Justice Brennan may decide to write something that you could join. In the alternative, you may wish to write separately. In any event, I will continue to ponder the Chief Justice's circulation and will follow up with any further thoughts.

2/1/80      Rahdert