

Stylistic change
see pp. 8, 10

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

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 27, 1986 Justice Powell

Circulated:

Recirculated: Feb 27, 1986

Re: 84-1160 - Pembaur v. City of Cincinnati

Dear Lewis:

Please join me in your dissent.

Sincerely,

BERTOLD J. PEMBAUR, PETITIONER
CITY OF CINCINNATI ET AL.

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

February 27, 1986

Justice Powell

cc: The Conference

The Court today holds Hamilton County liable for the forcible entry in May 1977 by deputy sheriffs into petitioner's office. The entry and subsequent search were pursuant to captares for third parties—petitioner's employees—who had failed to answer a summons to appear as witnesses before a grand jury investigating petitioner. When petitioner refused to allow the sheriffs to enter, one of them, at the request of his supervisor, called the office of the County Prosecutor for instructions. The Assistant County Prosecutor received the call, and apparently was in doubt as to what advice to give. He referred the question to the County Prosecutor, who advised the deputy sheriffs to "go in and get them" [the witnesses] pursuant to the captares.

This five word response to a single question over the phone is now found by this Court to have created an official county policy for which Hamilton County is liable under §1983. This holding is wrong for at least two reasons. First, the prosecutor's response and the deputies' subsequent actions did not violate any constitutional right that existed at the time of the forcible entry. Second, no official county policy could have been created by an off-hand telephone response from a

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