**[Blackmun Conference Notes 12-04-85 HAB439F70051-52][[1]](#footnote-1)**

**[1st Page – Image HAB439F70051 – Part 1][[2]](#footnote-2)**

No. 84-1160, Pembaur v. Cincinnati

12-4-85

**The Chief Justice** Affirm

Consistent pattern of *mistaken* advice = a policy

Facts here suggest ad hoc approval

Steagald decided latter [sic]

Should not be applied retroactively

I see no policy here

No preexisting policy

Fact-bound and a simple decision

**Brennan, J.** Reverse

Monell – Respondeat superior not sufficient

Question is one of specific sanction *conduct* by a) written rule, b) consistent application, or c) *making* a decision.

Distinction between act of the county or of the *employee*.[[3]](#footnote-3)

Could be by a single act

Consider *hijacking[[4]](#footnote-4)*

Under that test, this county can be held liable

*Considering[[5]](#footnote-5)* Steagald – no one argues not to be retroactively applied

Do not have to address *Steagald’s* retroactivity

No objection below.

[See next page for

HAB’s notes on the comments of

Justice White and Justice Marshall.]

**[1st Page – Image HAB439F70051 – Part 2]**

**White J.** Reverse

Passing Steagald

Not raised below or here

At the trial no constitutional violation[[6]](#footnote-6)

Cincinnati knuckled under

County [illegible] to do what sheriff said

But not every act establishes a policy. Could not stick county just because sheriff made a mistake.

§ county attorney *recomended[[7]](#footnote-7)* the violation, *so[[8]](#footnote-8)* policy?

But no trouble in this case

Steagald not retroactive under our cases for purposes of the Ex Rule

Unless we get to Steagald, I reverse

**Marshall, J.** Affirm

This capias equals a bench warrant

OK

?

**[2nd Page – Image HAB439F70052]**

**Powell, J.** Affirm

No apply Steagald retroactively

That would be unfair

Therefore, not necessary to reach policy question

If I do, I affirm

This a spur of the moment decision

Surely not a policy

On that basis, would not have joined Monell

**Rehnquist, J.** Affirm

Wrong to apply Steagald retroactively

On policy issue, affirm

No policy to break down a door

That he went to county attorney shows not a policy

**Stevens, J.** Reverse

I no share BRW’s concern

This not dramatic

Often policy is made by a single person

Responsible public official makes decision in appropriate area

**O’Connor, J.** Reverse?[[9]](#footnote-9)

County attorney has no authority to order sheriff to *seize.*

But county attorney said this ok under Ohio law

Therefore reverse?

Could join opinion reaching Steagald and saying not retroactive.

With BRW *approximate*[[10]](#footnote-10) concerns.

1. Words added by the editor for clarity are enclosed in brackets as are editor comments. Interpretations of which the editor is particularly uncertain are indicated in italics and alternative interpretations may be indicated in footnotes. Items in small caps were printed or typed in the original rather than handwritten. [↑](#footnote-ref-1)
2. The first page included comments by Chief Justice Burger and Justices Brennan, White and Marshall. They are so extensive that I have had to put them on two pages. [↑](#footnote-ref-2)
3. This appears to be “Eee” or “Ee,” an abbreviation for employee. This reading is consistent with Brennan’s typewritten notes prepared for the conference. [↑](#footnote-ref-3)
4. Brennan’s pre-conference notes indicate that he would give, as an example of a single act that would be policy, the President’s decision to intercept the Achille Lauro hijackers. Justice Blackmun frequently used the “@” to mean “consider” or a variant such as “consideration.” [↑](#footnote-ref-4)
5. See note 4. [↑](#footnote-ref-5)
6. Probably meant that, at the trial, the argument was that there was no constitutional violation. [↑](#footnote-ref-6)
7. This word is extremely unclear. I’ve read it as “rcmed” – an abbreviation for recommended. It could also be “named” – possibly in the sense of “called.” See the next footnote. [↑](#footnote-ref-7)
8. This could either be the abbreviation “co” for county or the word “so.” Depending on the meaning of the section mark and the illegible word, this sentence could be something like, “The County attorney named the violation county policy” or something like, “The county attorney recommended the violation, so [it was] county policy.” I think the latter is the more likely reading, but the manuscript is very unclear. [↑](#footnote-ref-8)
9. The manuscript indicates that a “+” sing (HAB’s shorthand for affirm) was crossed out and a “-” sign (HAB’s shorthand for reverse) written over it. [↑](#footnote-ref-9)
10. The abbreviation is “ca” as in “circa.” [↑](#footnote-ref-10)