The Burger Court Opinion Writing Database

United States v. White

401 U.S. 745 (April 5, 1971)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

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

CHAMBERS OF
THE CHIEF JUSTICE

December 2, 1970

Re: No. 13 - U. S. v. White

Dear Byron:

Please join me in your opinion.

Regards,

WEB

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE HUGO L. BLACK

November 9, 1970

Dear Byron:

Re: No. 13 - United States v. James A. White

Please note the following at the end of your opinion in this case:

> "MR. JUSTICE BLACK, while adhering to his views expressed in Linkletter v. Walker, 381 U. S. 614, 640 (1965), concurs in the judgment of the Court for the reasons set forth in his dissent in Katz v. United States, 389 U. S. 347, 364 (1967)."

Sincerely,

H. L. B.

Mr. Justice White

cc: Members of the Conference

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1970

From: Douglas, J.

Circulated: 11-9

Recirculated:

United States, Petitioner, v. James A. White. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[November —, 1970]

Mr. Justice Douglas, dissenting.

We held in *Berger* v. *New York,* 388 U. S. 41, that wiretapping is a search and seizure within the meaning of the Fourth Amendment and therefore must meet its requirements, *viz.:* there must be a prior showing of probable cause, the warrant authorizing the wiretap must particularly describe "the place to be searched and the persons or things to be seized," and that it may not have the breadth, generality, and long life of the general warrant against which the Fourth Amendment was aimed.

In *Katz* v. *United States,* 389 U. S. 347, we held that an electronic device, used without trespass onto any given enclosure (there a telephone booth), was a search for which a Fourth Amendment warrant was needed.[1] I said, concurring: "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches, and seizures." *Id.,* at 359.

As a result of *Berger* and of *Katz,* both wiretapping and electronic surveillance through a "bug" or other device are now covered by the Fourth Amendment.

There were prior decisions representing an opposed view. In *On Lee* v. *United States,* 343 U. S. 747, an

[1] See Greenawalt, The Current Problem in Wiretapping and Eavesdropping, 68 Col. L. Rev. 189; Kitch, *Katz* v. *United States;* The Limits of the Fourth Amendment, 1968 Sup. Ct. Rev., p. 133; Police Undercover Agents, 37 Geo. Wash. L. Rev. 634; Electronic Surveillance: The New Standards, 35 Brooklyn L. Rev. 49.

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1970

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[November —, 1970]

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Mr. Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

4/6

6

From: Douglas, J.

Circulated:

Recirculated: 12-4

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1970

United States, Petitioner, v. James A. White. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[December —, 1970]

Mr. Justice Douglas, dissenting.

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SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1970

From: Douglas, J.

United States, Petitioner, v. James A. White.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Circulated: 12/7/70

[December —, 1970]

Mr. Justice Douglas, dissenting.

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

8th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1970

United States, Petitioner, v. James A. White. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February —, 1971]

Mr. Justice Douglas, dissenting.

I

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To: The C... Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

9th DRAFT

From: Douglas, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 13.—OCTOBER TERM, 1970

Recirculated: 2/18/71

United States, Petitioner, v. James A. White. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February —, 1971]

MR. JUSTICE DOUGLAS, dissenting.

I

We held in *Berger* v. *New York*, 388 U. S. 41, that wiretapping is a search and seizure within the meaning of the Fourth Amendment and therefore must meet its requirements, *viz.:* there must be a prior showing of probable cause, the warrant authorizing the wiretap must particularly describe "the place to be searched and the persons or things to be seized," and that it may not have the breadth, generality, and long life of the general warrant against which the Fourth Amendment was aimed.

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

10th DRAFT

From: Douglas, J.

Circulated: 3/16/71

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1970

United States, Petitioner, v. James A. White. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[March —, 1971]

Mr. Justice Douglas, dissenting.

The issue in this case is clouded and concealed by the very discussion of it in legalistic terms. What the ancients knew as "eavesdropping," we now call "electronic surveillance"; but to equate the two is to treat man's first gunpowder on the same level as the nuclear bomb. Electronic surveillance is the greatest leveler of human privacy ever known. How any form of it can be held "reasonable" within the meaning of the Fourth Amendment is a mystery. Certainly the Constitution and Bill of Rights are not to be read as covering only the technology known in the 18th century. Otherwise its concept of "commerce" would be hopeless when it comes to the management of modern affairs. At the same time the concepts of privacy which the Founders enshrined in the Fourth Amendment vanish completely when we slavishly allow an all-powerful government, proclaiming law and order, efficiency, and other benign purposes, to penetrate all the walls and doors which men need to shield them from the pressures of a turbulent life around them and give them the health and strength to carry on. Today no one perhaps notices because only a small, obscure criminal is the victim. But the technology we exalt today is man's master. Any doubters should read Arthur R. Miller's The Assault On Privacy (1971). After describing the monitoring of conversations and their storage in data banks, Professor Miller goes on to describe "human monitoring" which he calls

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1, 2

11th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 13.—October Term, 1970 Circulated: _____

Recirculated: 3-29

United States, Petitioner, v. James A. White. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April —, 1971]

Mr. Justice Douglas, dissenting.

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When Franklin D. Roosevelt on May 21, 1940, authorized wiretapping in cases of "fifth column" activities and sabotage and limited "so far as possible to aliens," he said that "under ordinary and normal circumstances wire-tapping by Government agents should not be car-

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1, 3, 12-15

12th DRAFT

From: Douglas, J.

Circulated: _____

Recirculated: 4-1

SUPREME COURT OF THE UNITED STATES

No. 13.—OCTOBER TERM, 1970

United States, Petitioner, v. James A. White. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April —, 1971]

MR. JUSTICE DOUGLAS, dissenting.

I

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That is why a "strict construction" of the Fourth Amendment is necessary if every man's liberty and privacy are to be constitutionally honored.

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1970

United States, Petitioner, v. James A. White. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[December —, 1970]

Mr. Justice Harlan, dissenting.

The Court correctly notes that the uncontested facts of this case squarely challenge the continuing viability of *On Lee* v. *United States,* 343 U. S. 747 (1952). As the opinion of the Court itself makes clear, important constitutional developments since *On Lee* mandate that we reassess that case, which has continued to govern official behavior of this sort in spite of the subsequent erosion of its doctrinal foundations. With all respect, my agreement with the majority ends at that point.

I think that a perception of the scope and role of the Fourth Amendment, as elucidated by this Court since *On Lee* was decided, and full comprehension of the precise issue at stake leads to the conclusion that *On Lee* can no longer be regarded as sound law. Nor do I think the date we decided *Katz* v. *United States,* 389 U. S. 347 (1967), can be deemed controlling both for the reasons discussed in my dissent in *Desist* v. *United States,* 394 U. S. 244, 256 (1969) (the case before us being here on *direct* review), and because, in my view, it requires no discussion of the holding in *Katz,* as distinguished from its underlying rationale as to the ~~result~~ reach of the Fourth Amendment, to comprehend the constitutional infirmity of *On Lee.*

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1970

United States, Petitioner, v. James A. White. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January —, 1971]

Mr. Justice Harlan, dissenting.

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

stylistic changes throughout
3. changes throughout necessitated by switching references from "the Court" to "the plurality opinion"
. See also pp. 1, 5, 8, 9, 13, 17, 18, 19, 20, 21, 2, 25, 26.

4th DRAFT

Mr. Justice Harlan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 13.—October Term, 1970

Recirculated: APR 1 1971

United States, Petitioner, v. James A. White. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April —, 1971]

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Circulated
12-2-70

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1970

United States, Petitioner, *v.* James A. White.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[December —, 1970]

Mr. Justice Brennan, concurring in result.

I agree that *Desist* v. *United States,* 394 U. S. 294 (1969), requires reversal of the judgment of the Court of Appeals. Therefore, a majority of the Court supports disposition of this case on that ground. However, my Brothers Douglas, Harlan, and White also debate the question whether *On Lee* v. *United States,* 343 U. S. 747 (1952), may any longer be regarded as sound law. My Brother White argues that *On Lee* is still sound law. My Brothers Douglas and Harlan argue that it is not. Neither position commands the support of a majority of the Court. For myself, I agree with my Brothers Douglas and Harlan. But I go further. It is my view that the reasoning of both my Brothers Douglas and Harlan compels the conclusion that *Lopez* v. *United States,* 373 U. S. 427 (1963), is also no longer sound law. In other words, it is my view that current Fourth Amendment jurisprudence interposes a warrant requirement not only in cases of third-party electronic monitoring (the situation in *On Lee* and in this case) but also in cases of electronic recording by a government agent of a face-to-face conversation with a criminal suspect, which was the situation in *Lopez.* For I adhere to the dissent in *Lopez,* 373 U. S., at 446–471, in which, to quote my Brother Harlan, *ante,* n. 12, "the doctrinal basis of our

SUPREME COURT OF THE UNITED STATES

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United States, Petitioner, v. James A. White. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April 5, 1971]

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

CHAMBERS OF
JUSTICE POTTER STEWART

November 10, 1970

No. 13, United States v. White

Dear Byron,

I am glad to join the opinion you have written for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1970

United States, Petitioner, v. James A. White. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[November —, 1970]

Mr. Justice White delivered the opinion of the Court.

In 1966, respondent James A. White was tried and convicted under two consolidated indictments charging various illegal transactions in narcotics violative of 26 U. S. C. § 4705 (a) and 21 U. S. C. § 174. He was fined and sentenced as a second offender to 25-year concurrent sentences. The issue before us is whether the Fourth Amendment bars from evidence the testimony of government agents who related certain conversions which had occurred between defendant White and a government informant, Harvey Jackson, and which the agents overheard by monitoring the frequency of a radio transmitter carried by Jackson and concealed on his person.[1] On four occasions the conversations took place in the Jackson's home; each of these conversations was overheard by an agent concealed in a kitchen closet with Jackson's consent and by a second agent outside the house using a radio receiver. Four other conversations—one in defendant's home, one in a restaurant, and

[1] White argues that Jackson, though admittedly "cognizant" of the presence of transmitting devices on his person, did not voluntarily consent thereto. Because the court below did not reach the issue of Jackson's consent, we decline to do so. Similarly, we do not consider White's claim that the Government's actions violated state law.

Changes 8, 9

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun

From: White, J.

Circulated: _____

Recirculated: 11-11-70

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1970

United States, Petitioner, *v.* James A. White. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[November —, 1970]

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pp 1, 2, 8

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun

From: White, J.

6th DRAFT

Circulated: _____

Recirculated: 3-27-71

SUPREME COURT OF THE UNITED STATES

No. 13.—OCTOBER TERM, 1970

United States, Petitioner, v. James A. White. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[March —, 1971]

MR. JUSTICE WHITE announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN join.

In 1966, respondent James A. White was tried and convicted under two consolidated indictments charging various illegal transactions in narcotics violative of 26 U. S. C. § 4705 (a) and 21 U. S. C. § 174. He was fined and sentenced as a second offender to 25-year concurrent sentences. The issue before us is whether the Fourth Amendment bars from evidence the testimony of governmental agents who related certain conversations which had occurred between defendant White and a government informant, Harvey Jackson, and which the agents overheard by monitoring the frequency of a radio transmitter carried by Jackson and concealed on his person.[1] On four occasions the conversations took place in the Jackson's home; each of these conversations was overheard by an agent concealed in a kitchen closet with Jackson's consent and by a second agent outside the

[1] White argues that Jackson, though admittedly "cognizant" of the presence of transmitting devices on his person, did not voluntarily consent thereto. Because the court below did not reach the issue of Jackson's consent, we decline to do so. Similarly, we do not consider White's claim that the Government's actions violated state law.

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun

From: White, J.

7th DRAFT

Circulated: _____

Recirculated: 4-2-71

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1970

United States, Petitioner, v. James A. White. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April 5, 1971]

Mr. Justice White announced the judgment of the Court and an opinion in which The Chief Justice, Mr. Justice Stewart, and Mr. Justice Blackmun join.

In 1966, respondent James A. White was tried and convicted under two consolidated indictments charging various illegal transactions in narcotics violative of 26 U. S. C. § 4705 (a) and 21 U. S. C. § 174. He was fined and sentenced as a second offender to 25-year concurrent sentences. The issue before us is whether the Fourth Amendment bars from evidence the testimony of governmental agents who related certain conversations which had occurred between defendant White and a government informant, Harvey Jackson, and which the agents overheard by monitoring the frequency of a radio transmitter carried by Jackson and concealed on his person.[1] On four occasions the conversations took place in Jackson's home; each of these conversations was overheard by an agent concealed in a kitchen closet with Jackson's consent and by a second agent outside the

[1] White argues that Jackson, though admittedly "cognizant" of the presence of transmitting devices on his person, did not voluntarily consent thereto. Because the court below did not reach the issue of Jackson's consent, we decline to do so. Similarly, we do not consider White's claim that the Government's actions violated state law.

Cases Held for White

I would deny the White issues in the following cases:

No. 21	Koran v. United States
22	Koran v. Florida
23	Franke and Lindsey v. United States
(32	Sullivan v. United States
(33	Teller v. United States
34	Marchese v. United States
(37	Wallace & Bowie v. United States
(38	Donohue v. United States
50	Koran v. Florida
64	Provenzano and Briguglio v. Follette
70	Weiser v. United States
100	Iozzi v. United States
103	Roviaro v. United States
126	DeVore v. United States
496	DiLorenzo v. United States
630	Birns v. Perini
823	Riley v. United States
917	Jacobs v. United States
920	Jones v. United States
943	Wright v. United States
1234	Delutro v. United States
5045	Gibson, et al. v. New York
5053	Lopez v. United States
5070	Mallory v. Ohio
5071	Daniels v. United States
5102	Chatfield v. California
5217	Groze v. California
5555	Martinez v. United States
5820	Singleton v. United States
5795	Hudson v. United States
5986	Hickman v. United States
6075	Escobedo v. United States
6199	Spieler v. United States

There are other issues in many of these cases but none of them seems certworthy except query on the following:

In No. 23 trial followed reindictment after defective first indictment dismissed on motion of defendant filed before jury was sworn but granted afterwards without prejudice. Thus a Jorn issue.

No. 1234 has the constitutionality of the federal loan sharking act at issue. It should be held for No. 5175, Perez v. Campbell.

No. 6075, Danny Escobedo, presents what may be a serious Jencks Act issue.

B.R.W.

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Mr. Justice Marshall, J.

Circulated: MAR 16 1971

No. 13.—October Term, 1970

Recirculated: _____

United States, Petitioner, v. James A. White. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[March —, 1971]

Mr. Justice Marshall, dissenting.

I am convinced that the correct view of the Fourth Amendment in the area of electronic surveillance is one that brings the safeguards of the warrant requirement to bear on the investigatory activity involved in this case. In this regard I agree with the dissents of Mr. Justice Douglas and Mr. Justice Harlan. In short, I believe that *On Lee* v. *United States,* 343 U. S. 747 (1952), cannot be considered viable in light of the constitutional principles articulated in *Katz* v. *United States,* 389 U. S. 347 (1967), and other cases. And for reasons expressed by Mr. Justice Fortas in dissent in *Desist* v. *United States,* 394 U. S. 244 (1969), I do not think we should feel constrained to employ a discarded theory of the Fourth Amendment in evaluating the governmental intrusions challenged here.

November 16, 1970

Re: No. 13 - United States v. White

Dear Byron:

I am presumptuous, but not knowing exactly what to do, I mention the following:

1. I am intrigued by that word "conversions" in the 8th line of your opinion. I doubt if this namesake of yours had much religion in him, but I may be wrong.

2. Is there any Court policy about citing the opinion below? I believe the Seventh Circuit's en banc opinion is reported at 408 F. 2d 838, but I do not seem to find the formal citation here.

Sincerely,

HAB

Mr. Justice White

November 16, 1970

Re: No. 13 - United States v. White

Dear Byron:

I concur in the opinion you have proposed for this case. Please regard this concurrence, however, as tentative so far as Part II is concerned. I would like to defer final decision until I have read any other dissenting material which comes along, and until I have seen the forthcoming opinions in Eikenich and Williams, which you cite on page 9 of the proof.

Sincerely,

H. A. B.

Mr. Justice White

cc: The Conference

February 11, 1971

Re: No. 13 - United States v. White

Dear Byron:

This will supplement my letter to you of November 16. I would be pleased to have you join me in your opinion.

Sincerely,

H.A.B.

Mr. Justice White

cc: The Conference