

# The Burger Court Opinion Writing Database

*United States v. Johnson*  
404 U.S. 802 (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

May 26, 1971

CHAMBERS OF  
THE CHIEF JUSTICE

No. 577 - United States v. Johnson

MEMORANDUM TO THE CONFERENCE:

Enclosed is proposed opinion reversing the 9th Court of Appeals in the above case.

I have expressly reserved the true "strip search" or "body search" and deal only with clothing searches not involving body contact.

Regards,

WB

BR  
We are  
presenting  
CHAMBERS OF  
THE CHIEF JUSTICE

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

June 2, 1971

No. 577 - United States v. Johnson

MEMORANDUM TO THE CONFERENCE:

While you are pondering the difficult problems posed by this case, I add these observations.

The circumstances and setting in which a border search occurs present very different factors from those in routine internal police work. Every border entrant is, in a very real sense a potential "suspect" because of the ease of concealing small packages on the person. In the internal or domestic setting a "suspect" or person under observation by police does not necessarily know of the surveillance. Border entrants on the other hand are well aware of the stringency of border searches. The "guiltier" the entrant, the more he is on guard to conceal. With the "amateur" this in itself may betray him, but those carrying drugs are not likely to be "amateurs" but rather seasoned professionals.

We are dealing here with an extraordinarily difficult "balancing act" between privacy and the terrible urgency of the drug problem. It cannot be dealt with emotionally or rhetorically and I have tried to keep my references to the drug aspect in low key.

I may incorporate some of this concept -- sans any appeals to emotion -- in a final draft of whatever I write. Meanwhile I will insert "neither Congress nor the lower courts have imposed", etc. after "that" on Line 31, Page 7.

Regards,

WCB

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

June 4, 1971

CHAMBERS OF  
THE CHIEF JUSTICE

No. 577 - United States v. Johnson

MEMORANDUM TO THE CONFERENCE:

Attached are some insert pages containing minor changes to the above opinion. They replace pages 8, 9, 10, all but the last paragraph on page 11, and page 19 of the original circulation. Changes are indicated by marks in the margins.

Regards,



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

CHAMBERS OF  
THE CHIEF JUSTICE

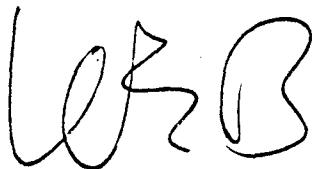
June 14, 1971

No. 577, United States v. Sandra Johnson

MEMORANDUM TO THE CONFERENCE:

Enclosed a revised draft with areas of changes marked. I believe you will find none of the changes of great significance.

Regards,

A handwritten signature in black ink, appearing to read "W.R.B." The signature is written in a cursive, flowing style with a prominent "W" and "B".

Changes throughout

To: Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan✓  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

2nd DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Recirculated: \_\_\_\_\_  
JUN 14 1971

No. 577.—OCTOBER TERM, 1970

United States, Petitioner, } On Writ of Certiorari to the  
v. } United States Court of Ap-  
Sandra Denise Johnson. } peals for the Ninth Circuit.

[June —, 1971]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This case presents a narrow question of the scope of governmental authority to search persons entering the United States at a border customs station. A search of respondent's clothing that revealed heroin is challenged as violative of the Fourth Amendment.

Electing to waive a jury trial, respondent was convicted on two counts of knowingly importing heroin into this country and concealing and facilitating its transportation, in violation of 21 U. S. C. § 174. She was sentenced to two concurrent five-year terms. At a hearing on her motion to suppress evidence of the heroin found by the search, respondent introduced no evidence. The case was tried entirely on the testimony of two Customs inspectors at the suppression hearing and respondent's stipulation that heroin was the substance they found concealed in her clothing. The dispositive issue was the validity of the search and seizure.

The Court of Appeals for the Ninth Circuit reversed the conviction by a divided vote, holding that respondent's motion to suppress the evidence of the heroin she

13, 14, 15

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

From: The Chief Justice  
 Circulated:

Recirculated: JUN 17 1971

## 4th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 577.—OCTOBER TERM, 1970

United States, Petitioner, } On Writ of Certiorari to the  
 v. } United States Court of Ap-  
 Sandra Denise Johnson. } peals for the Ninth Circuit.

[June —, 1971]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This case presents a narrow question of the scope of governmental authority to search persons entering the United States at a border customs station. A search of respondent's clothing that revealed heroin is challenged as violative of the Fourth Amendment.

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WB

3P  
✓ 11/15  
To: Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

From: The Chief Justice

5th DRAFT

Circulated:

SUPREME COURT OF THE UNITED STATES

Recirculated:

JUN 18 1971

No. 577.—OCTOBER TERM, 1970

United States, Petitioner, } On Writ of Certiorari to the  
v. } United States Court of Ap-  
Sandra Denise Johnson. } peals for the Ninth Circuit.

[June —, 1971]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

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Supreme Court of the United States  
Washington, D. C. 20543CHAMBERS OF  
THE CHIEF JUSTICE

June 28, 1971

No. 577 - United States v. Johnson

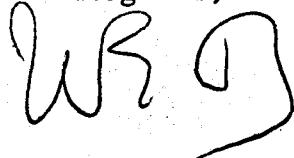
## MEMORANDUM TO THE CONFERENCE:

I have previously expressed concern over the above case which presents problems we ought not have, chiefly due to an incompetent prosecutor. There would be no case if he had asked just one more simple question: "On what did you base your suspicions?"

We can now be sure that if we set this case over for re-argument it will be the only Department of Justice case so treated. This will bring it up for close scrutiny and one of two things will happen: The Solicitor General will ask that it be dismissed or it will be more adequately briefed and argued.

I therefore move that the case be set for reargument.

Regards,



Can we meet in The Conference  
Room at 9:50 to act on  
This & any other current  
matters that need attention  
before we set?

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

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 577.—OCTOBER TERM, 1970 From: Douglas, J.

Circulated 6-1

United States, Petitioner, | On Writ of Certiorari to the  
v. | United States Court of Appeals for the Ninth Circuit.  
Sandra Denise Johnson. |

[June —, 1971]

MR. JUSTICE DOUGLAS, dissenting.

The Court today makes a break with precedent that to many will be a shocking invasion of privacy. The border inspector without a shred of evidence pointing to probable cause that a crime had been committed or was being committed caused two ladies to be stripped naked so that a search of their undergarments could be made. One was Sandra Denise Johnson, the respondent in this case, and the other was Jerelene Harris, who travelled with Miss Johnson.

The hunch that the border inspector had turned out to be correct so far as Miss Johnson was concerned and groundless in the case of Miss Harris. Heroin was found in respondent's underwear; nothing was found in any of Miss Harris' clothing. So the suspicion, the inarticulate hunch of the inspector, which the Court opinion extols, turns out to be a mere excuse for stripping every person naked at the border, no matter how far removed from illegal activity they may be. Once a hunch is substituted for probable cause there is no control possible, for a hunch at best is pure suspicion. Today's decision gives *carte blanche* to any border inspector to make any person strip to nakedness. I can think of only a few greater indignities or more pervasive invasions of privacy than that. Of course one who enters the country can be required to open his or her baggage and unlock all doors to his or her car for inspection. Of course he or she can be required

WB

*thought*  
*check*

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

2nd DRAFT

SUPREME COURT OF THE UNITED STATES *as. J.*

No. 577.—OCTOBER TERM, 1970

United States, Petitioner, | On Writ of Certiorari to the  
v. | United States Court of Ap-  
Sandra Denise Johnson. | peals for the Ninth Circuit.

[June —, 1971]

MR. JUSTICE DOUGLAS, dissenting.

The Court today makes a break with precedent that for many will mean a shocking invasion of privacy. The border inspector without a shred of evidence pointing to probable cause that a crime had been committed or was being committed caused two ladies to be stripped naked so that a search of their undergarments could be made. One was Sandra Denise Johnson, the respondent in this case, and the other was Jerelene Harris, who travelled with Miss Johnson.

The hunch of the border inspector turned out to be correct so far as Miss Johnson was concerned and groundless in the case of Miss Harris. Heroin was found in respondent's underwear; nothing was found in any of Miss Harris' clothing. So the suspicion, the inarticulate hunch of the inspector, which the Court opinion extols, turns out to be a mere excuse for stripping every person naked at the border, no matter how far removed from illegal activity they may be. Once a hunch is substituted for probable cause there is no control possible, for a hunch at best is pure suspicion. Today's decision gives *carte blanche* to any border inspector to make any person strip to nakedness. I can think of only a few greater indignities or more pervasive invasions of privacy than that. Of course one who enters the country can be required to open his or her baggage and unlock all doors to his or her car for inspection. Of course he or she can be required

13

3rd DRAFT

Mr. Chief Justice  
Mr. Justice Black  
Mr. Justice Harlan ✓  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Black

## SUPREME COURT OF THE UNITED STATES

No. 577.—OCTOBER TERM, 1970

United States, Petitioner, | On Writ of Certiorari to the  
v. | United States Court of Ap-  
Sandra Denise Johnson. | peals for the Ninth Circuit.

[June —, 1971] (18/71)

MR. JUSTICE DOUGLAS, dissenting.

The Court today makes a break with precedent that for many will mean a shocking invasion of privacy. The border inspector without a shred of evidence pointing to probable cause that a crime had been committed or was being committed caused two ladies to be stripped naked so that a search of their undergarments could be made. One was Sandra Denise Johnson, the respondent in this case, and the other was Jerelene Harris, who travelled with Miss Johnson.

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5 copies

JP

37

4th DRAFT

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

From: Douglas, J.

No. 577.—OCTOBER TERM, 1970

Circulated:

United States, Petitioner, | On Writ of Certiorari to the  
v. | ~~Recirculated~~ United States Court of Appeals for the Ninth Circuit.  
Sandra Denise Johnson. | 6/14/71

[June —, 1971]

MR. JUSTICE DOUGLAS, dissenting.

The Court today makes a break with precedent that for many will mean a shocking invasion of privacy. The border inspector without a shred of evidence pointing to probable cause that a crime had been committed or was being committed caused two ladies to be stripped naked so that a search of their undergarments could be made. One was Sandra Denise Johnson, the respondent in this case, and the other was Jerelene Harris, who travelled with Miss Johnson.

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*RB*  
*MB. 4*

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

5th DRAFT

## SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 577.—OCTOBER TERM, 1970

Argued:

United States, Petitioner, | On Writ of Certiorari to the  
v. | United States Court of Ap-  
Sandra Denise Johnson. | peals for the Ninth Circuit.

6/16/71

[June —, 1971]

MR. JUSTICE DOUGLAS, dissenting.

The Court today makes a break with precedent that for many will mean a shocking invasion of privacy. The border inspector without a shred of evidence pointing to probable cause that a crime had been committed or was being committed caused two ladies to be stripped naked so that a search of their undergarments could be made. One was Sandra Denise Johnson, the respondent in this case, and the other was Jerelene Harris, who travelled with Miss Johnson.

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June 7, 1971

Re: No. 577 - United States v. Johnson

Dear Chief:

Pursuant to your suggestion at the end of our conversation the other day, I have indicated the portions of your proposed opinion in this case which give me trouble.

My principal difficulty with the present draft is the inclusion of the seriousness of the criminal offense as one of the factors properly to be taken into account in assessing the reasonableness of a particular official intrusion on privacy under the Fourth Amendment. I am troubled by this for the following reasons: (1) I think it is a substantial departure from Fourth Amendment law, (2) I think it is subject to considerable misinterpretation, and (3) I think the other reasons given in your opinion are more than adequate to support the result, so that this aspect of the argument is, as I see it, unnecessary.

My problem could be met by omitting the passages marked in the text and also the last paragraph of footnote 7, and also footnotes 8, 16 and 18 in their entirety.

I have also marked two additional omissions which I would prefer to see made in the opinion. First, the last sentence on p. 17 seems to me to go too far in appearing to trivialize the extent of the intrusion on privacy involved in this case. Second, the material marked on pp. 14-15 could be read as expressing a preference for the officer's unarticulated hunch based on

experience, over a traditional basis for showing probable cause as a matter of Fourth Amendment law generally. That, I am sure, you do not intend.

With the above omissions, I think you would have a tightly reasoned and excellent justification of the result which I would be pleased to join.

Sincerely,

JMH

The Chief Justice

June 18, 1971

Re: No. 577 - U.S. v. Johnson

Dear Chief:

I had been awaiting Bill Bremmer's dissent before making my final return on your opinion. As I filed myself unopposed by Bill's dissent, I now write to say that I am ready to join you.

Sincerely,

J. M. H.

The Chief Justice

CC: The Conference

*Circulated*

6-15 71

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 577.—OCTOBER TERM, 1970

United States, Petitioner, } On Writ of Certiorari to the  
v. } United States Court of Ap-  
Sandra Denise Johnson. } peals for the Ninth Circuit.

[June —, 1971]

MR. JUSTICE BRENNAN, dissenting.

My principal disagreement with the Court in this case is a narrow but important one. The question here presented is whether, assuming the existence of information indicating that a not insubstantial number of travellers entering the United States may be concealing heroin upon their persons, customs officials may conduct strip searches at their pleasure without any articulable reason for searching one person and not another. The Court holds that searches of this kind may be conducted upon an official's hunch. I believe that strip searches based upon no objective, identifiable reasons are not authorized by the customs regulations; that if authorized by customs regulations, they are nevertheless contrary to the governing statute; and that if they are not contrary to the statute, they are nevertheless invalid under the Fourth Amendment. For these reasons, set forth in greater detail below, I dissent.

## I

I have no doubt that the Fourth Amendment's command that the right to be secure against unreasonable searches and seizures "shall not be violated" means exactly what it says, and that the Amendment is a direct limitation upon the power of the Federal Government to carry out searches and seizures at the borders or anywhere else. I find nothing in the Court's opinion to

WR

6-16-71

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 577.—OCTOBER TERM, 1970

United States, Petitioner, } On Writ of Certiorari to the  
v. } United States Court of Ap-  
Sandra Denise Johnson. } peals for the Ninth Circuit.

[June —, 1971]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

My principal disagreement with the Court in this case is a narrow but important one. The question here presented is whether, assuming the existence of information indicating that a not insubstantial number of travellers entering the United States may be concealing heroin upon their persons, customs officials may conduct strip searches at their pleasure without any articulable reason for searching one person and not another. The Court holds that searches of this kind may be conducted upon an official's hunch. I believe that strip searches based upon no objective, identifiable reasons are not authorized by the customs regulations; that if authorized by customs regulations, they are nevertheless contrary to the governing statute; and that if they are not contrary to the statute, they are nevertheless invalid under the Fourth Amendment. For these reasons, set forth in greater detail below, I dissent.

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WB

Circulated  
6-17-71

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 577.—OCTOBER TERM, 1970

United States, Petitioner, } On Writ of Certiorari to the  
v. } United States Court of Ap-  
Sandra Denise Johnson. } peals for the Ninth Circuit.

[June —, 1971]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

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WS

DR ✓  
Rearrangement  
See Pages 1, 2, 4, 15, 16 & 18

To: THE CHIEF JUSTICE  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Stewart  
Mr. Justice White  
✓Mr. Justice Marshall  
Mr. Justice Blackmun

## 5th DRAFT

From: Mr. Justice Marshall, J.

## SUPREME COURT OF THE UNITED STATES

No. 577.—OCTOBER TERM, 1970

6-22-71

United States, Petitioner, On Writ of Certiorari to the  
v. United States Court of Appeals for the Ninth Circuit.  
Sandra Denise Johnson.

[June —, 1971]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

My principal disagreement with the Court in this case is a narrow but important one. The question here presented is whether, assuming the existence of information indicating that a not insubstantial number of travellers entering the United States may be concealing heroin upon their persons, customs officials may conduct strip searches at their pleasure without any articulable reason for searching one person and not another. The Court holds that searches of this kind may be conducted upon an official's hunch. I believe that strip searches based upon no objective, identifiable reasons are contrary to both the customs regulations and the governing statute. But even if the Court's construction of the statute and regulations could fairly be supported in light of their language and history, elementary principles of constitutional adjudication would compel us to reject such a construction in the candid service of avoiding the constitutional question that the Court reaches out to decide. It is fair, I think, to say that the Court has not given the slightest explanation for its decision to ignore a readily available construction of the customs statutes and regulations and instead to venture a wholly unnecessary decision with regard to a complex and important constitutional question never previously before this Court. Since the Court has undertaken to decide that question, however, I am constrained to state my own view, which is that strip searches based

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

CHAMBERS OF  
JUSTICE POTTER STEWART

May 26, 1971

No. 577 - U. S. v. Johnson

Dear Chief,

I am glad to join your opinion for  
the Court in this case.

Sincerely yours,

*P. S.*

The Chief Justice

Copies to the Conference

✓  
L.R.  
✓

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 16, 1971

Re: No. 577 - United States v. Johnson

Dear Bill:

Please add at the foot of your opinion:

Mr. Justice White concurs in  
Part II of Mr. Justice Brennan's dis-  
senting opinion and would affirm the  
judgment.

Sincerely,

*Byron*

Mr. Justice Brennan

Copies to Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 30, 1971

MEMORANDUM TO THE CONFERENCE

Re: No. 577 - U.S. v. Sandra Denise  
Johnson

Bill Brennan has suggested the  
attached question for reargument in  
the above case.

  
B.R.W.

No. 577, United States v. Sandra Denise Johnson

The case is restored to the docket for reargument at the 1971 Term. In their briefs and oral arguments, counsel are requested to discuss, in addition to the questions specified in the original writ, the following:

What relevance has the doctrine of Vitarelli v. Seaton, 359 U.S. 535, to the legality of the search in the present case?

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 16, 1971

Re: No. 577 - United States v. Johnson

Dear Bill:

Please join me in your dissent.

Sincerely,



T.M.

Mr. Justice Brennan

cc: The Conference

