

# The Burger Court Opinion Writing Database

## *United States v. Giordano*

416 U.S. 505 (1974)

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

April 9, 1974

Re: No. 72-1057 - United States v. Giordano

Dear Byron:

I will await some dissenting views before I give you  
a comprehensive response in the above.

Regards,

LEB

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF  
THE CHIEF JUSTICE

May 7, 1974

Re: No. 72-1057 - U.S. v. Giordano, et al

Dear Byron:

Your opinion has persuaded me that the Court is correct on Parts I, II and III but that Lewis seems correct on Part IV so I will join on that basis.

Regards,

WJW

Mr. Justice White

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 72-1057 AND 72-1319

Circuit

3-15

United States, Petitioner, } On Writ of Certiorari to  
72-1057 v. } the United States Court  
Dominic Nicholas Giordano } of Appeals for the Fourth  
et al. } Circuit.

Receivable

United States, Petitioner, } On Writ of Certiorari to  
72-1319 v. } the United States Court  
Umberto Jose Chavez et al } of Appeals for the Ninth  
Circuit

[March --- 1974]

MR. JUSTICE DOUGLAS, concurring in 72-1057 *United States v. Giordano*, and concurring in part and dissenting in part in 72-1319, *United States v. Chavez*

The Court deals with two different Justice Department violations of Title III of the Omnibus Crime Control Act of 1968, which imposes express limitations on the use of electronic surveillance. It finds that suppression is mandated for violation which occurred in *United States v. Giordano*, 72-1057, in which decision I concur, but that suppression of evidence seized through the use of electronic surveillance is not warranted by the violation which occurred in *United States v. Chavez*, 72-1319. I dissent from the latter holding

I

Title III permits electronic surveillance to be employed only pursuant to a court order. It requires, *inter alia*, that a federal trial attorney desiring to apply to the District Court for such a wiretap order must first

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 72-1057 AND 72-1319

United States, Petitioner, } On Writ of Certiorari to  
72-1057 v. } the United States Court  
Dominic Nicholas Giordano } of Appeals for the Fourth  
et al. } Circuit.

United States, Petitioner, } On Writ of Certiorari to  
72-1319 v. } the United States Court  
Umberto Jose Chavez et al } of Appeals for the Ninth  
Circuit.

[March — 1974]

MR. JUSTICE DOUGLAS, joining in 72-1057, *United States v. Giordano*, and concurring in part and dissenting in part in 72-1319, *United States v. Chavez*.

The Court deals with two different Justice Department violations of Title III of the Omnibus Crime Control Act of 1968, which imposes express limitations on the use of electronic surveillance. In *United States v. Giordano*, 72-1057, the Court correctly finds that the violation of 18 U. S. C. 2516 (1) is a violation of a statutory requirement which "directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." The Court also properly finds that a violation of such a statutory requirement mandates suppression of the evidence seized by the unlawful interception. I join the opinion of the Court in *Giordano*. The same violation of § 2516 (1) is also involved in the Fernandez wiretap in *United States v. Chavez*, 72-1319, and I therefore concur in the Court's suppression of the evidence seized in that wiretap. In *Chavez*, however, the Court finds that suppression is not warranted for

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

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

Nos. 72-1057 AND 72-1319

United States, Petitioner, } On Writ of Certiorari to  
72-1057 v. } the United States Court  
Dominic Nicholas Giordano } of Appeals for the Fourth  
et al. } Circuit.

United States, Petitioner, } On Writ of Certiorari to  
72-1319 v. } the United States Court  
Umberto Jose Chavez et al. } of Appeals for the Ninth  
Circuit.

[March - 1974]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL concur, joining in 72-1057, *United States v. Giordano*, and concurring in part and dissenting in part in 72-1319, *United States v. Chavez*.

The Court deals with two different Justice Department violations of Title III of the Omnibus Crime Control Act of 1968, which imposes express limitations on the use of electronic surveillance. In *United States v. Giordano*, 72-1057, the Court correctly finds that the violation of 18 U. S. C. 2516 (1) is a violation of a statutory requirement which "directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." The Court also properly finds that a violation of such a statutory requirement mandates suppression of the evidence seized by the unlawful interception. I join the opinion of the Court in *Giordano*. The same violation of § 2516 (1) is also involved in the Fernandez wiretap in *United States v. Chavez*, 72-1319, and I therefore concur in the Court's suppression of the

3-28

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

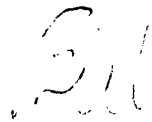
March 27, 1974

RE: No. 72-1057 - United States v. Giordano  
No. 72-1319 - United States v. Chavez

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR. March 27, 1974

RE: No. 72-1057 United States v. Giordano

Dear Byron:

I agree.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill".

Mr. Justice White

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

March 26, 1974

No. 72-1057, U. S. v. Giordano

Dear Byron,

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

Sincerely yours,

*P.S.*  


Mr. Justice White

Copies to the Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

March 26, 1974

No. 72-1057, U. S. v. Giordano  
No. 72-1319, U. S. v. Chavez

Dear Bill,

Please add my name to your separate opinion in these cases.

Sincerely yours,

*P.S.*

Mr. Justice Douglas

Copies to the Conference

To: The Chief Justice  
✓  
Solicitor General  
Clerk of the Court  
Judges  
Administrative  
Director  
Assistant Secretary  
Director of the Office of the  
Inspector General  
Director of the Office of the  
Inspector General  
Director of the Office of the  
Inspector General

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No 72-1057

United States, Petitioner,	} On Writ of Certiorari to	
v.		the United States Court
Domino Nicholas Giordano		of Appeals for the Fourth
et al.		Circuit.

[March -- 1974

MR. JUSTICE WHITE delivered the opinion of the Court.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, 211-225, 18 U. S. C. §§ 2510-2520, prescribes the procedure for securing judicial authority to intercept wire communications in the investigation of specified serious offenses. The Court must here determine whether the Government sufficiently complied with the required application procedures in this case and whether, if not, evidence obtained as a result of such surveillance, under a court order based on the applications, is admissible at the criminal trial of those whose conversations were overheard. In particular, we must decide whether the provision of 18 U. S. C. § 2516 (1) <sup>1</sup> conferring power on the "Attorney General, or any Assistant Attorney General specially designated by the Attorney General" to "authorize an application to a Federal judge . . . for . . . an order authorizing or approving the interception of wire or oral communications" by federal investigative agencies seeking evidence of certain designated offenses permits the Attorney General's Executive Assistant to validly authorize a wiretap

<sup>1</sup> This and other relevant provisions of the statute are contained in the Appendix to this opinion.

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*stylistic*

*OP 11. 12. 26. 27*

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice Marshall  
Mr. Justice Luc  
Mr. Justice F  
Mr. Justice Har

3rd DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: \_\_\_\_\_

No. 72-1057

Recirculated: 5-4

United States, Petitioner,	} On Writ of Certiorari to	
<i>v.</i>		the United States Court
Dominic Nicholas Giordano		of Appeals for the Fourth
et al.		Circuit.

[March —, 1974]

MR. JUSTICE WHITE delivered the opinion of the Court.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, 211-225, 18 U. S. C. §§ 2510-2520, prescribes the procedure for securing judicial authority to intercept wire communications in the investigation of specified serious offenses. The Court must here determine whether the Government sufficiently complied with the required application procedures in this case and whether, if not, evidence obtained as a result of such surveillance, under a court order based on the applications, is admissible at the criminal trial of those whose conversations were overheard. In particular, we must decide whether the provision of 18 U. S. C. § 2516 (1) <sup>1</sup> conferring power on the "Attorney General, or any Assistant Attorney General specially designated by the Attorney General" to "authorize an application to a Federal judge . . . for . . . an order authorizing or approving the interception of wire or oral communications" by federal investigative agencies seeking evidence of certain designated offenses permits the Attorney General's Executive Assistant to validly authorize a wiretap

<sup>1</sup> This and other relevant provisions of the statute are contained in the Appendix to this opinion.

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

CHAMBERS OF  
JUSTICE BYRON R WHITE

May 20, 1974

MEMORANDUM FOR THE CONFERENCE

Re: Cases held for No. 72-1057, United States v. Giordano  
and No. 72-1319, United States v. Chavez

I. Each of the following cases raises a claim based  
on the issue decided in Giordano:

- (1) No. 71-1410, Pisacano v. United States
- (2) No. 72-158, Becker v. United States
- (3) Nos. 72-1729, Simons v. United States )  
72-6992, Favano v. United States )  
73-13, Romanello v. United States )
- (4) No. 72-1320, United States v. King
- (5) No. 72-1475, United States v. Roberts
- (6) No. 72-1476, United States v. Mantello

(1) In Pisacano v. United States, No. 71-1410,  
petitioners pled guilty to conspiracy to violate 18 U.S.C.  
§§ 1952, 1084, and subsequently moved to withdraw their  
pleas, prior to the imposition of sentence, see F. R. Cr. P.  
32(d), after becoming aware of the CA 5 panel decision in  
United States v. Robinson, 468 F. 2d 189, indicating that  
about the time the wiretap evidence gathered against them had

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

March 27, 1974

Re: No. 72-1057 -- United States v. Giordano  
No. 72-1319 -- United States v. Chavez

Dear Bill:

Please join me.

Sincerely,



T. M.

Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

April 1, 1974

Re: No. 72-1057 - U. S. v. Giordano

Dear Byron:

I find myself about where Lewis Powell is. I am in accord with Parts I, II and III of your opinion, but am not in accord with Part IV. I, therefore, shall probably join Lewis in his forthcoming dissent.

Sincerely,



Mr. Justice White

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS



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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

April 10, 1974

Re: No. 72-1057 - U. S. v. Giordano

Dear Lewis:

If you will permit me, I would like to join your  
opinion circulated April 8.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a long horizontal flourish extending to the right.

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 14, 1974

No. 72-1057 United States v. Giordano

Dear Byron:

I will join in Parts I, II and III of your fine opinion in the above case but will dissent from Part IV.

Part IV, as you have written it, would exclude from evidence communications intercepted under the November 6 Extension Order as well as those intercepted under the original October 16 Order. The application for the Extension was approved personally by the Attorney General and is therefore not marred by the authorization defect found in the original Order. The application for the Extension incorporated by reference the allegation and affidavits of the original application, information not tainted by any constitutional or statutory violation and in my view clearly sufficient to show both probable cause and satisfaction of the statutory criteria for interception. I find no basis for concluding that the November 6 Extension Order was necessarily tainted because it also contained allegations derived from the illegal tap.

I had hoped that we could, on a principled basis, avoid extending the disastrous consequences of the blundering in the Attorney General's office beyond the October 16 wiretap. I still believe that this is the proper course and that we should remand for the trial court to determine whether the untainted allegations in the application for the extension did in fact suffice. I will circulate as soon as I have an opportunity to write my dissent.

Sincerely,

*Lewis*

Mr. Justice White

lfp/ss

cc: The Conference

To: The Chief Justice  
 Mr. [unclear]  
 ✓ Mr. [unclear]  
 Mr. [unclear]  
 Mr. [unclear]  
 Mr. [unclear]  
 Mr. [unclear]  
 Mr. [unclear]

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-1057

4/8/74

United States, Petitioner, } On Writ of Certiorari to  
 v. } the United States Court  
 Dominic Nicholas Giordano } of Appeals for the Fourth  
 et al. } Circuit.

rehearing: \_\_\_\_\_

[April —, 1974]

MR. JUSTICE POWELL, concurring in part and dissenting in part.

I agree with the majority that the authorization by the Executive Assistant to the Attorney General of the application for the October 16 interception order contravened 18 U. S. C. § 2516 (1) and that the statutory remedy is suppression of all evidence derived from interceptions made under that order. I therefore join Parts I, II, and III of the opinion of the Court. For the reasons stated below, however, I dissent from the Court's conclusion, stated in Part IV of its opinion, that evidence obtained under the two "pen register" extension orders and under the November 6 extension of the interception order must also be suppressed.

These are the pertinent facts. On October 8, 1970, the Chief Judge of the United States District Court for the District of Maryland authorized the use of a pen

<sup>1</sup>A pen register is a mechanical device attached to a given telephone line and usually installed at a central telephone facility. It records on a paper tape all numbers dialed from that line. It does not identify the telephone numbers from which incoming calls originated, nor does it reveal whether any call, either incoming or outgoing, was completed. Its use does not involve any monitoring of telephone conversations. The mechanical complexities of a pen register are explicated in the opinion of the District Court 340 F. Supp. 1033, 1038-1041 (Md. 1972).

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AP 9-12

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

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

From: Powell, J.

No 72-1057

Circulated: \_\_\_\_\_

United States, Petitioner, } On Writ of Certiorari to  
Dominic Nicholas Giordano } the United States Court  
et al. } of Appeals for the Fourth  
Circuit.

Recirculated APR 23 1974

[April -- 1974]

MR. JUSTICE POWELL, concurring in part and dissenting in part.

I agree with the majority that the authorization by the Executive Assistant to the Attorney General of the application for the October 16 interception order contravened 18 U.S.C. § 2516 (1) and that the statutory remedy is suppression of all evidence derived from interceptions made under that order. I therefore join Parts II and III of the opinion of the Court. For the reasons stated below, however, I dissent from the Court's conclusion stated in Part IV of its opinion that evidence obtained under the two "pen register" extension orders issued under the November 16 extension of the intercept order must also be suppressed.

These are the pertinent facts. On October 8, 1971, the Chief Judge of the United States District Court for the District of Maryland authorized the use of a pen

A pen register is a mechanical device attached to a given telephone line and usually installed at a central telephone facility. It records on a paper tape all numbers dialed from that line. It does not identify the telephone numbers from which incoming calls originated, nor does it reveal whether any call, either incoming or outgoing, was completed. Its use does not involve any monitoring of telephone conversations. The mechanical complexities of a pen register are explicated in the opinion of the District Court, 349 F. Supp. 1033, 1038-1041 (Md. 1972).

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

3rd DRAFT

# SUPREME COURT OF THE UNITED STATES

From: Powell, J.

No. 72-1057

Circulated: \_\_\_\_\_

United States, Petitioner, } On Writ of Certiorari to  
v. } the United States Court  
Dominic Nicholas Giordano } of Appeals for the Fourth  
et al. } Circuit.

Circulated: APR 26 1974

[April —, 1974]

MR JUSTICE POWELL with whom MR JUSTICE BLACK  
MUN and MR JUSTICE REHNQUIST join concurring in  
part and dissenting in part

I agree with the majority that the authorization by  
the Executive Assistant to the Attorney General of the  
application for the October 16 interception order contra-  
vened 18 U. S. C. § 2516 (1) and that the statutory  
remedy is suppression of all evidence derived from inter-  
ceptions made under that order. I therefore join Parts  
I, II, and III of the opinion of the Court. For the  
reasons stated below, however, I dissent from the Court's  
conclusion, stated in Part IV of its opinion, that evidence  
obtained under the two "pen register" extension orders  
and under the November 6 extension of the interception  
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F. Supp. 1033, 1038-1041 (Md. 1972).

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

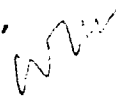
April 15, 1974

Re: No. 72-1057 - United States v. Giordano

Dear Lewis:

Please join me in your concurring and dissenting opinion  
in this case.

Sincerely,



Mr. Justice Powell

Copies to the Conference

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