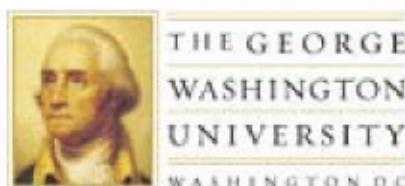


The Burger Court Opinion Writing Database

United States v. New York Telephone Co.
434 U.S. 159 (1977)

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



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

CHAMBERS OF
THE CHIEF JUSTICE

December 1, 1977

Dear Byron:

Re: 76-835 United States v. New York Telephone Co.

I join.

Regards,

WJW

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE WM.J. BRENNAN, JR.

November 14, 1977

RE: No. 76-835 United States v. New York Telephone Co.

Dear John:

Please join me in the dissenting opinion you have
prepared in the above.

Sincerely,



Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

November 3, 1977

Re: No. 76-835, U.S. v. N.Y. Telephone Co.

Dear Byron,

I shall await John Stevens' dissenting opinion.

Sincerely yours,

PS;

Mr. Justice White

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: NOV 16 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-835

United States, Petitioner,
v.
New York Telephone Company. } On Writ of Certiorari to the
United States Court of
Appeals for the Second
Circuit.

[November —, 1977]

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

I agree that the use of pen registers is not governed by the requirements of Title III and that the District Court had authority to issue the order authorizing installation of the pen register, and so join Parts I, II, and III of the Court's opinion. However, I agree with MR. JUSTICE STEVENS that the District Court lacked power to order the telephone company to assist the Government in installing the pen register, and thus join Part II of his dissenting opinion.

To: The Chief Justice
Mr. Justice Lamer
Mr. Justice Boudreault
Mr. Justice Gonthier
Mr. Justice Major
Mr. Justice Gagnon
Mr. Justice Bouchard
Mr. Justice Gauthier
Mr. Justice Gagnon

From: Mrs. Judahs White

Circulated. 10-28-77

1st DRAFT

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 76-835

United States, Petitioner,
v.
New York Telephone Company. } On Writ of Certiorari to the
United States Court of
Appeals for the Second
Circuit.

[October —, 1977]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case presents the question of whether a United States District Court may properly direct a telephone company to provide federal law enforcement officials the facilities and technical assistance necessary for the implementation of its order authorizing the use of pen registers¹ to investigate offenses which there was probable cause to believe were being committed by means of the telephone.

1

On March 19, 1976, the United States District Court for the Southern District of New York issued an order authorizing agents of the Federal Bureau of Investigation (FBI) to install and use pen registers with respect to two telephones and directing the New York Telephone Company (the Company) to furnish the FBI "all information, facilities and technical assistance" necessary to employ the pen registers unobtrusively. The FBI was ordered to compensate the Company at prevailing rates for any assistance which it furnished. App. 6-7. The order was issued on the basis of an

¹ A pen register is a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. It does not overhear oral communications and does not indicate whether calls are actually completed.

To: The Chief Justice
 Mr. Justice Blackmun
 Mr. Justice Stewart
 Mr. Justice Marshall
 Mr. Justice Brennan
 Mr. Justice White
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice O'Connor

STYLISTIC CHANGES THROUGHOUT.

SEE PAGE 2

From: Mr. Justice White

Circulated: _____

Recirculated: 10-31-77

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-835

United States, Petitioner, <i>v.</i> New York Telephone Company.	} On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
--	--

[October —, 1977]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case presents the question of whether a United States District Court may properly direct a telephone company to provide federal law enforcement officials the facilities and technical assistance necessary for the implementation of its order authorizing the use of pen registers¹ to investigate offenses which there was probable cause to believe were being committed by means of the telephone.

I

On March 19, 1976, the United States District Court for the Southern District of New York issued an order authorizing agents of the Federal Bureau of Investigation (FBI) to install and use pen registers with respect to two telephones and directing the New York Telephone Company (the Company) to furnish the FBI "all information, facilities and technical assistance" necessary to employ the pen registers unobtrusively. The FBI was ordered to compensate the Company at prevailing rates for any assistance which it furnished. App. 6-7. The order was issued on the basis of an

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STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 2, 6, 7, 8, 15

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Marshall
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

3rd DRAFT

Recirculated: 11-7-77

SUPREME COURT OF THE UNITED STATES

No. 76-835

United States, Petitioner, <i>v.</i> New York Telephone Company.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
--	--

[October —, 1977]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case presents the question of whether a United States District Court may properly direct a telephone company to provide federal law enforcement officials the facilities and technical assistance necessary for the implementation of its order authorizing the use of pen registers¹ to investigate offenses which there was probable cause to believe were being committed by means of the telephone.

I

On March 19, 1976, the United States District Court for the Southern District of New York issued an order authorizing agents of the Federal Bureau of Investigation (FBI) to install and use pen registers with respect to two telephones and directing the New York Telephone Company (the Company) to furnish the FBI "all information, facilities and technical assistance" necessary to employ the pen registers unobtrusively. The FBI was ordered to compensate the Company at prevailing rates for any assistance which it furnished. App. 6-7. The order was issued on the basis of an

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STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 7, 10, 11, 15

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
 Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

4th DRAFT

Recirculated: 11-15-77

SUPREME COURT OF THE UNITED STATES

No. 76-835

United States, Petitioner, <i>v.</i> New York Telephone Company.	} On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
--	--

[November —, 1977]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case presents the question of whether a United States District Court may properly direct a telephone company to provide federal law enforcement officials the facilities and technical assistance necessary for the implementation of its order authorizing the use of pen registers¹ to investigate offenses which there was probable cause to believe were being committed by means of the telephone.

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STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 5

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

5th DRAFT

Recirculated: 11-16-77

SUPREME COURT OF THE UNITED STATES

No. 76-835

United States, Petitioner, <i>v.</i> New York Telephone Company.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
--	--

[November —, 1977]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case presents the question of whether a United States District Court may properly direct a telephone company to provide federal law enforcement officials the facilities and technical assistance necessary for the implementation of its order authorizing the use of pen registers¹ to investigate offenses which there was probable cause to believe were being committed by means of the telephone.

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On March 19, 1976, the United States District Court for the Southern District of New York issued an order authorizing agents of the Federal Bureau of Investigation (FBI) to install and use pen registers with respect to two telephones and directing the New York Telephone Company (the Company) to furnish the FBI "all information, facilities and technical assistance" necessary to employ the pen registers unobtrusively. The FBI was ordered to compensate the Company at prevailing rates for any assistance which it furnished. App. 6-7. The order was issued on the basis of an

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To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

phi. 11

From: Mr. Justice White

Circulated: _____

Recirculated: 11-17-77

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-835

United States, Petitioner, <i>v.</i> New York Telephone Company.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
--	--

[November —, 1977]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case presents the question of whether a United States District Court may properly direct a telephone company to provide federal law enforcement officials the facilities and technical assistance necessary for the implementation of its order authorizing the use of pen registers¹ to investigate offenses which there was probable cause to believe were being committed by means of the telephone.

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On March 19, 1976, the United States District Court for the Southern District of New York issued an order authorizing agents of the Federal Bureau of Investigation (FBI) to install and use pen registers with respect to two telephones and directing the New York Telephone Company (the Company) to furnish the FBI "all information, facilities and technical assistance" necessary to employ the pen registers unobtrusively. The FBI was ordered to compensate the Company at prevailing rates for any assistance which it furnished. App. 6-7. The order was issued on the basis of an

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 16, 1977

Re: No. 76-835, United States v. New York Telephone Co.

Dear John:

Please join me.

Sincerely,



T. M.

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 31, 1977

Re: No. 76-835 - U. S. v. New York Telephone Co.

Dear Byron:

I think your opinion is a good one, and I am happy to join it.

Sincerely,



Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20542

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

Rochester, Minnesota

November 21, 1977

Re: No. 76-835 - U. S. v. New York Telephone Co.

Dear Byron:

I am still with you.

Sincerely,

H. A. B.

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

October 31, 1977

No. 76-835 U.S. v. New York Telephone

Dear Byron:

Please join me.

Sincerely,

Lewis

Mr. Justice White

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

October 31, 1977

Re: No. 76-835 - United States v. New York Telephone Co.

Dear Byron:

Please join me.

Sincerely,



Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

October 31, 1977

Re: 76-835 - United States v. New York Telephone

Dear Byron:

In a few days I shall circulate a dissent. Although I agree with Part II of your opinion, I am persuaded that Rule 41 does not authorize a federal court to issue a warrant to conduct electronic surveillance, and also that federal courts have no inherent authority to issue warrants not authorized by statute.

I also strongly disagree with the construction of the All Writs Act which authorizes the entry of an order to aid the executive in the performance of his duties as contrasted with an order in aid of the courts' own jurisdiction.

Respectfully,



Mr. Justice White

Copies to the Conference

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

From: Mr. Justice Stevens

Circulated: NOV 8 1971

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-835

United States, Petitioner,
v.
New York Telephone Company. } On Writ of Certiorari to the
United States Court of
Appeals for the Second
Circuit.

[November —, 1977]

MR. JUSTICE STEVENS, dissenting.

Today's decision appears to present no radical departure from this Court's prior holdings. It builds upon previous intimations that a federal district court's power to issue a search warrant under Fed. Rule Crim. Proc. 41 is a flexible one, not strictly restrained by statutory authorization, and it applies the same flexible analysis to the All Writs Act, 28 U. S. C. § 1651 (a). But for one who thinks of federal courts as courts of limited jurisdiction, the Court's decision is difficult to accept. The principle of limited federal jurisdiction is fundamental; never ~~it is~~ more important than when a federal court purports to authorize and implement the secret invasion of an individual's privacy. Yet that principle was entirely ignored on March 19 and April 2, 1976, when the District Court granted the Government's application for permission to engage in surveillance by means of a pen register, and ordered the respondent to cooperate in the covert operation.

Congress has not given the federal district courts the power either to authorize the use of a pen register, or to require private parties to assist in carrying out such surveillance. Those defects cannot be remedied by a patchwork interpretation of Rule 41 which regards the Rule as applicable as a grant of authority, but inapplicable insofar as it limits the exercise of such authority. Nor can they be corrected by reading the All Writs Act as though it gave federal judges the wide-ranging

✓
 P. 1, 4-8, 11-12

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

From: Mr. Justice Stevens

Circulated:

2nd DRAFT

Recirculated: 11/16/77

SUPREME COURT OF THE UNITED STATES

No. 76-835

United States, Petitioner. v. New York Telephone Company.	} On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
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[November —, 1977]

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

*Mr. Justice
 Marshall*

Today's decision appears to present no radical departure from this Court's prior holdings. It builds upon previous intimations that a federal district court's power to issue a search warrant under Fed. Rule Crim. Proc. 41 is a flexible one, not strictly restrained by statutory authorization, and it applies the same flexible analysis to the All Writs Act, 28 U. S. C. § 1651 (a). But for one who thinks of federal courts as courts of limited jurisdiction, the Court's decision is difficult to accept. The principle of limited federal jurisdiction is fundamental; never is it more important than when a federal court purports to authorize and implement the secret invasion of an individual's privacy. Yet that principle was entirely ignored on March 19 and April 2, 1976, when the District Court granted the Government's application for permission to engage in surveillance by means of a pen register, and ordered the respondent to cooperate in the covert operation.

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pp 1/16/13

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

From: Mr. Justice Stevens

Circulated: Nov 23 1977

Recirculated:

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-835

United States, Petitioner, <i>v.</i> New York Telephone Company.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
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[November —, 1977]

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

Today's decision appears to present no radical departure from this Court's prior holdings. It builds upon previous intimations that a federal district court's power to issue a search warrant under Fed. Rule Crim. Proc. 41 is a flexible one, not strictly restrained by statutory authorization, and it applies the same flexible analysis to the All Writs Act, 28 U. S. C. § 1651 (a). But for one who thinks of federal courts as courts of limited jurisdiction, the Court's decision is difficult to accept. The principle of limited federal jurisdiction is fundamental; never is it more important than when a federal court purports to authorize and implement the secret invasion of an individual's privacy. Yet that principle was entirely ignored on March 19 and April 2, 1976, when the District Court granted the Government's application for permission to engage in surveillance by means of a pen register, and ordered the respondent to cooperate in the covert operation.

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