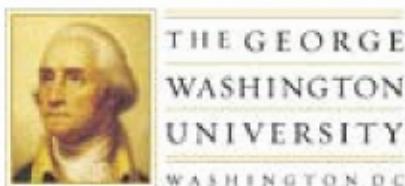


The Burger Court Opinion Writing Database

Walter v. United States

447 U.S. 649 (1980)

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

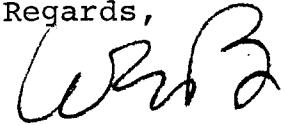
PERSONAL

March 3, 1980

Dear Harry:

If 79-67, Walter v. United States gets six votes to "DIG," I have "reserved" 79-192, N.Y. Gaslight Club to assign to you.

Regards,



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

CHAMBERS OF
THE CHIEF JUSTICE

March 3, 1980

Re: (79-67 - Walter v. United States
(79-148 - Sanders v. United States

MEMORANDUM TO THE CONFERENCE:

At Conference Potter suggested a "DIG" and as I review the "lineup", I have a feeling nothing very clear will emerge out of this to enlighten Fourth Amendment jurisprudence.

I am now prepared to join in a "DIG". If the requisite number do not join to DIG, I will then assign as per the five votes to affirm.

Regards,

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

CHAMBERS OF
THE CHIEF JUSTICE

March 6, 1980

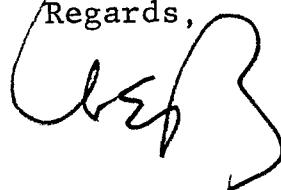
PERSONAL

Re: 79-67 - Walter v. United States
79-148 - Sanders v. United States

Dear Harry:

Would you be interested in trying your hand at
a dissent in this case?

Regards,



Mr. Justice Blackmun

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

CHAMBERS OF
THE CHIEF JUSTICE

March 6, 1980

RE: (79-67 - Walter v. United States
(79-148 - Sanders v. United States)

Dear Bill:

This will confirm that you will take care of the
above assignments.

Regards,



Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

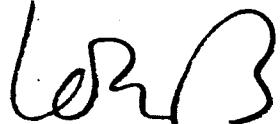
May 27, 1980

RE: 79-67 - Walter v. U.S.
79-148 - Saunders v. U.S.

Dear Harry:

I join your dissent.

Regards,



Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

March 3, 1980

RE: No. 79-67 Walter v. United States
No. 79-148 Sanders v. United States

Dear Chief:

In light of Thurgood's note that he has come down to reverse in the above, are there not now five votes to reverse and only four (you, Harry, Lewis and Bill) to D.I.G. or affirm? If so, am I to assign the opinion for the Court, which I note you have assigned to Harry?

Sincerely,

Bill

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

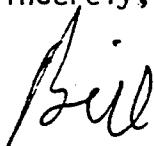
March 6, 1980

RE: No. 79-67 Walter v. United States
No. 79-148 Sanders v. United States

Dear Chief:

John has agreed to undertake the opinion for the
Court in the above.

Sincerely,



The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE W. J. BRENNAN, JR.

May 2, 1980

RE: No. 79-67 & 148 Walter and Sanders v. United States

Dear John:

I agree.

Sincerely,



Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE W. J. BRENNAN, JR.

June 13, 1980

RE: Walter v. United States and Sanders v. United States,
Nos. 79-67 and 79-148

Dear John:

I'm disappointed that Byron didn't withdraw. But since he's going to address the question, I'm afraid I'll have to leave you and join him. If you have any other suggestion, I'd welcome it.

Sincerely,



Mr. Justice Stevens

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

CHAMBERS OF
JUSTICE W.H. J. BRENNAN, JR.

June 17, 1980

MEMORANDUM TO THE CONFERENCE

RE: No. 79-67 & 79-148 Walter & Sanders v. United
States

This will confirm what I said at Conference that
I am joining Byron's concurrence and withdrawing my
join with John.

cc: [Signature]
W.J.B. Jr.

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 2, 1980

Re: 79-67 and 79-148 - Walter v. United States

Dear John:

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 30, 1980

Re: 79- 67 - Walter v. United States
79-148 - Sanders v. United States

Dear John,

Although I agree with nearly all of your circulating draft opinion in Walter v. United States, No. 79-67, and Sanders v. United States, No. 79-148, I suggest that two aspects of the opinion could use some clarification. First, there is your treatment of the question whether the FBI's acquisition of the films was a "seizure" subject to the warrant requirement of the Fourth Amendment. Both cert petitions raised this question, 1/ alleging that there was a conflict between the CA 5's decision in this case and the CA 8's decision in United States v. Kelly, 529 F.2d 1365 (CA 8 1976), with respect to this issue. Judge Wisdom based his dissent in part on the conclusion that the Government's acceptance of the films was a "seizure" that could not be justified under any exception to the warrant requirement. App. to Cert. Pet. in No. 79-67, at 27-31.

Although you never expressly address the "seizure" question, in several places you refer to the films as having been lawfully acquired by the FBI, suggesting at least an

1/ Question 2 in Sanders' cert petition was: "Was the Government's acquisition of the films a seizure?" Question 1 of Walter's cert petition was: "Whether the FBI's acceptance from a third party of films wrongfully within the party's possession was a 'seizure' subject to the warrant requirement of the Fourth Amendment, or alternatively, whether the rule fashioned in Burdeau v. McDowell, 256 U.S. 465, fifty years ago requires a two-step analysis of the 'seizure' -- that by the third party and that of the government -- where First Amendment concerns are involved as has been held by the Eighth Circuit but not by the Fifth or Ninth Circuits."

2/

implicit rejection of petitioners' "seizure" argument.^{2/} Footnote 4 of the opinion notes that "[e]xcept with respect to the issues discussed in the text, we have determined that certiorari was improvidently granted." It is unclear to me whether you intend for the "seizure" question to be encompassed within the questions DIG'd or whether you intend to decide the question. If your intention is the latter, the issue deserves more explicit treatment in the text of the opinion. If it is intended that the seizure issue not be reached, which would be quite reasonable since the disposition of the search issue makes it unnecessary to reach the seizure question, then the references in the text should be modified to indicate that the Court is assuming that the films were lawfully acquired by the government.

My second concern is the extent to which a private search may legitimate subsequent government searches. On page 6, the opinion states that there was "nothing wrongful" about the government's examination of the contents of the packages "to the extent that they had already been examined by third parties." I agree with this conclusion insofar as it is based upon the fact that the packages which had been opened by the private parties were open at the time the government acquired them and the government saw no more than what is in plain view. If a package is already open when the government acquires it, the opening of the package cannot be attributed to the government and considered a governmental search. In this sense there may be what the opinion refers to as "official use of a private party's invasion of another person's privacy" (page 7) without implicating any Fourth Amendment interest.

2/ For example, the opening sentence of your opinion states: "Having lawfully acquired possession of a dozen cartons of motion pictures, law enforcement officers viewed several reels of eight-millimeter film on a government projector." p. 1 (emphasis supplied). On page 4, the opinion states: "The fact that FBI agents were lawfully in possession of the boxes of film did not give them authority to search their contents." p. 4 (emphasis supplied). On page 6, the opinion states: "In this case there was nothing wrongful about the government's acquisition of the packages or its examination of their contents to the extent that they had already been examined by third parties." p. 6 (emphasis supplied).

I doubt, however, that the government may always conduct the same kind of search that private parties have conducted without implicating Fourth Amendment interests. Had the private parties projected the films before turning them over to the government, I suggest that the government would still have been required to obtain a warrant for their subsequent projection because this projection would be a separate search conducted by the government that offends a reasonable expectation of privacy that was infringed, but not destroyed, by the earlier private search (unlike the opening of the cartons that destroyed their privacy by exposing their contents to the plain view of subsequent observers).

On page 7 of the opinion, you state that "[w]hile the government may properly re-examine materials that have already been examined by a private party, see, e.g., United States v. Bulgier, F.2d , (CA7 1980), it may go no further unless it has the right to make an independent search." I agree that the government cannot exceed the scope of the private search, but I question the implication that a private search always legitimates a governmental search of the same scope. 3/ I believe that the government may properly examine materials that have been exposed to its plain view by the actions of private parties, but again I do not think that private projection of the film would legitimate a subsequent, warrantless projection by the government. Thus I would suggest that the opinion remove its emphasis on the fact that the private parties had not projected the film (p. 7 & n. 13). Perhaps something like the following could take the place of the full paragraph presently on page 7 of the opinion:

"If an official search that is properly authorized is limited by the particular terms of the authorization, the same kind of strict limitation must be applied to any official use of a private party's invasion of another person's privacy.

3/ I also question the cite to Bulgier, where airline personnel had effectively turned over to the government cocaine found in a suitcase. The cocaine was then left in the suitcase and a controlled delivery made to nab the defendant. The CA 7 upheld the subsequent search of the suitcase on the grounds that the government already had constructively seized the contraband itself.

Mr. Justice Stevens

- 4 -

May 30, 1980

While the government may properly examine materials that have been exposed to its plain view by the actions of a private party, it may go no further unless it has the right to make an independent search. In this case, the government conducted an independent search when it screened the films with a projector. This separate search was not supported by any exigency, or by a warrant even though one could have easily been obtained."9/

Additionally, on page 6, in line 13, I would substitute the words "exposed to view by the actions of" for "examined by." I would strike the words "simply" and "the remaining unfrustrated portion of" from the second full sentence on page 9. I would strike the word "additional" from the sentence that follows on page 9. I would also eliminate footnote 13.

Sincerely yours,



Copies to the Conference

cmc

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 3, 1980

Re: 79-67 - Walter v. United States;
79-148 - Sanders v. United States

Dear John,

As I attempted to make clear in my previous letter in this case, my view of the extent to which a government may rely upon a private search to justify its own is somewhat narrower than stated in your circulating opinion. I shall write briefly in concurrence.

Sincerely yours,



Mr. Justice Stevens

Copies to the Conference

cmc

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: 4 JUN 1980

1st DRAFT

Recirculated:

SUPREME COURT OF THE UNITED STATES

Nos. 79-67 AND 79-148

[June —, 1980]

MR. JUSTICE WHITE, concurring in the judgment.

I agree with MR. JUSTICE STEVENS that the Government's projection of the films constituted a search that infringed petitioners' Fourth Amendment interests despite the fact that the Government had acquired the films from a private party.¹ His opinion, however, declares "the Government may properly re-examine materials that have already been examined by a private party," *ante*, at —. This would imply that this search would not have infringed any Fourth Amendment interest if private parties had projected the films before turning them over to the Government. I disagree. The notion that private searches insulate from Fourth Amendment scrutiny subsequent governmental searches of the same or lesser scope is inconsistent with traditional Fourth Amendment principles. Nor does it follow from our recognition in *Burdeau v. Mc-*

¹ Although MR. JUSTICE STEVENS' opinion refers to the films as having been "lawfully acquired" by the Government, *ante*, at __, __, __, I note that he does not reach the question whether the Government's acquisition of the films was a "seizure" subject to the warrant requirement of the Fourth Amendment, *ante*, at __, n. 4, a question on which the Court of Appeals was divided. 592 F. 2d 788, 792-793, 800-802 (CA5 1979). Likewise, I do not address this question.

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: _____

Recirculated: 9 JUN 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 79-67 AND 79-148

William Walter, Petitioner,
79-67 *v.*

United States.

Arthur Randall Sanders, Jr.,
et al., Petitioners,

79-148 *v.*

United States.

On Writs of Certiorari to the
United States Court of Ap-
peals for the Fifth Circuit.

[June —, 1980]

MR. JUSTICE WHITE, concurring in the judgment.

I agree with MR. JUSTICE STEVENS that the Government's projection of the films constituted a search that infringed petitioners' Fourth Amendment interests despite the fact that the Government had acquired the films from a private party.¹ His opinion, however, declares that "[i]f the Government knows that the materials have already been examined by a private party, . . . it may re-examine them to that extent," *ante*, at —. This would imply that this search would not have infringed any Fourth Amendment interest if private parties had projected the films before turning them over to the Government. I disagree. The notion that private searches insulate from Fourth Amendment scrutiny subsequent governmental searches of the same or lesser scope is inconsistent with traditional Fourth Amendment principles.

¹ Although MR. JUSTICE STEVENS' opinion refers to the films as having been "lawfully acquired" by the Government, *ante*, at —, —, —, I note that he does not reach the question whether the Government's acquisition of the films was a "seizure" subject to the warrant requirement of the Fourth Amendment, *ante*, at —, n. 4, a question on which the Court of Appeals was divided. 592 F. 2d 788, 792-793, 800-802 (CA5 1979). Likewise, I do not address this question.

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:

Recirculated: 11 JUN 198

SUPREME COURT OF THE UNITED STATES

Nos. 79-67 AND 79-148

William Walter, Petitioner,
79-67 v.

United States.

Arthur Randall Sanders, Jr.,
et al. Petitioners

79-148

United States

On Writs of Certiorari to the
United States Court of Ap-
peals for the Fifth Circuit.

[June — 1980]

MR. JUSTICE WHITE, concurring in the judgment.

I agree with MR. JUSTICE STEVENS that the Government's projection of the films constituted a search that infringed petitioners' Fourth Amendment interests despite the fact that the Government had acquired the films from a private party.¹ His opinion, however, declares that "[i]f the Government knows that the materials have already been examined by a private party, . . . it may re-examine them to that extent," *ante*, at ___. This would imply that this search would not have infringed any Fourth Amendment interest if private parties had projected the films before turning them over to the Government. I disagree. The notion that private searches insulate from Fourth Amendment scrutiny subsequent governmental searches of the same or lesser scope is inconsistent with traditional Fourth Amendment principles.

¹ Although MR. JUSTICE STEVENS' opinion refers to the films as having been "lawfully acquired" by the Government, *ante*, at __, __, __, I note that he does not reach the question whether the Government's acquisition of the films was a "seizure" subject to the warrant requirement of the Fourth Amendment, *ante*, at __, n. 4, a question on which the Court of Appeals was divided. 592 F. 2d 788, 792-793, 800-802 (CA5 1979). Likewise, I do not address this question.

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: _____

Recirculated: 13 JUN 1981

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 79-67 AND 79-148

William Walter, Petitioner,
79-67 v.

United States.

Arthur Randall Sanders, Jr.,
et al. Petitioners

79-148

United States

On Writs of Certiorari to the
United States Court of Appeals for the Fifth Circuit,

[June —, 1980]

MR. JUSTICE WHITE, concurring in part and in the judgment.

I agree with MR. JUSTICE STEVENS that the Government's warrantless projection of the films constituted a search that infringed petitioners' Fourth Amendment interests despite the fact that the Government had acquired the films from a private party.¹ I write separately, however, because I disagree with JUSTICE STEVENS' suggestion that it is an open question whether the Government's projection of the films would have infringed any Fourth Amendment interest if private parties had projected the films before turning them over to the Government. *ante*, at 7, n. 9. The notion that private searches insulate from Fourth Amendment scrutiny subsequent governmental searches of the same or lesser scope is inconsistent with traditional Fourth Amendment principles.

¹ Although MR. JUSTICE STEVENS' opinion refers to the films as having been "lawfully acquired" by the Government, *ante*, at 1, 4, 6, I note that he does not reach the question whether the Government's acquisition of the films was a "seizure" subject to the warrant requirement of the Fourth Amendment, *ante*, at 3, n. 4, a question on which the Court of Appeals was divided. 592 F. 2d 788, 792-793, 800-802 (CA5 1979). Likewise, I do not address this question.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 16, 1980

Re: 79-67 - Walter v. United States;
79-148 - Sanders v. United States.

Dear John,

Since the only material change in your latest circulation is in footnote 14 on page 9, I shall simply revise my quotation of that footnote to conform to your present circulation. Otherwise, I shall have no changes of substance.

Sincerely yours,



Mr. Justice Stevens

Copies to the Conference

cmc

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

2-3

From: Mr. Justice White

Circulated: _____

Recirculated: 17 JUN 1980

SUPREME COURT OF THE UNITED STATES

Nos. 79-67 AND 79-148

William Walter, Petitioner, 79-67 v. United States.	On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.
Arthur Randall Sanders, Jr., et al., Petitioners, 79-148 v. United States.	

[June —, 1980]

MR. JUSTICE WHITE, concurring in part and in the judgment.

I agree with MR. JUSTICE STEVENS that the Government's warrantless projection of the films constituted a search that infringed petitioners' Fourth Amendment interests despite the fact that the Government had acquired the films from a private party.¹ I write separately, however, because I disagree with MR. JUSTICE STEVENS' suggestion that it is an open question whether the Government's projection of the films would have infringed any Fourth Amendment interest if private parties had projected the films before turning them over to the Government, *ante*, at 7, n. 9. The notion that private searches insulate from Fourth Amendment scrutiny subsequent governmental searches of the same or lesser scope is inconsistent with traditional Fourth Amendment principles.

¹ Although MR. JUSTICE STEVENS' opinion refers to the films as having been "lawfully acquired" by the Government, *ante*, at 1, 4, 6, I note that he does not reach the question whether the Government's acquisition of the films was a "seizure" subject to the warrant requirement of the Fourth Amendment, *ante*, at 3, n. 4, a question on which the Court of Appeals was divided. 592 F. 2d 788, 792-793, 800-802 (CA5 1979). Likewise, I do not address this question.

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

6th DRAFT

Circulated: _____

Received dated: 6-17-80

SUPREME COURT OF THE UNITED STATES

Nos. 79-67 AND 79-148

William Walter, Petitioner,
79-67 *v.*
United States.
Arthur Randall Sanders, Jr.,
et al., Petitioners,
79-148 *v.*
United States.

On Writs of Certiorari to the
United States Court of Appeals for the Fifth Circuit,

[June —, 1980]

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN
joins, concurring in part and in the judgment.

I agree with MR. JUSTICE STEVENS that the Government's warrantless projection of the films constituted a search that infringed petitioners' Fourth Amendment interests despite the fact that the Government had acquired the films from a private party.¹ I write separately, however, because I disagree with MR. JUSTICE STEVENS' suggestion that it is an open question whether the Government's projection of the films would have infringed any Fourth Amendment interest if private parties had projected the films before turning them over to the Government, *ante*, at 7, n. 9. The notion that private searches insulate from Fourth Amendment scrutiny subsequent governmental searches of the same or lesser scope is inconsistent with traditional Fourth Amendment principles.

¹ Although MR. JUSTICE STEVENS' opinion refers to the films as having been "lawfully acquired" by the Government, *ante*, at 1, 4, 6, I note that he does not reach the question whether the Government's acquisition of the films was a "seizure" subject to the warrant requirement of the Fourth Amendment, *ante*, at 3, n. 4, a question on which the Court of Appeals was divided. 592 F. 2d 788, 792-793, 800-802 (CA5 1979). Likewise, I do not address this question.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 3, 1980

Re: No. 79-67 - Walter v. United States
No. 79-148 - Sanders v. United States

MEMORANDUM TO THE CONFERENCE

I have come down in the reverse column on
this one.

Sincerely,

T.M.

T.M.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 2, 1980

Re: No. 79-67 & 79-148 - Walter and Sanders v. United States

Dear John:

Please add at the bottom of your opinion: "Mr. Justice Marshall concurs in the judgment."

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

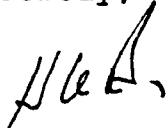
March 3, 1980

Re: No. 79-67 - Walter v. United States
 No. 79-148 - Sanders v. United States

Dear Chief:

I see that these cases have been assigned to me. As I count the votes, however, with Thurgood switching, there are only four to affirm and five to reverse (unless, of course, there are sufficient votes to DIG). I therefore suspect that these cases should not be assigned to me.

Sincerely,



The Chief Justice

cc: The Conference

March 7, 1980

Re: No. 79-67 - Walter v. United States
No. 79-148 - Sanders v. United States

Dear Chief:

I shall be glad to try my hand at a dissent for these cases.

Sincerely,

HAB

The Chief Justice

Supreme Court of the United States
Washington, D. C. 20530

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 3, 1980

Re: No. 79-67 - Walter v. United States
No. 79-148 - Sanders v. United States

Dear Chief:

I could join a DIG in these cases.

Sincerely,

H. A. B.
1

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 19, 1980

Re: No. 79-67 - Walter v. United States
No. 79-148 - Sanders v. United States

Dear John:

I shall have a dissent in this case out in a very few days.

Sincerely,



Mr. Justice Stevens

cc: The Conference

"Court" changed to "plurality"
and pp. 1, 3, and 5

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

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: _____ JUN 09 1980

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 79-67 AND 79-148

William Walter, Petitioner,
79-67 *v.*

United States.

Arthur Randall Sanders, Jr.,
et al., Petitioners,
79-148 *v.*

United States.

On Writs of Certiorari to the
United States Court of Appeals
for the Fifth Circuit.

[May —, 1980]

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE,
MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST join,
dissenting.

The Court at least preserves the integrity of the rule specifically recognized long ago in *Burdeau v. McDowell*, 256 U. S. 465 (1921). That rule is to the effect that the Fourth Amendment proscribes only governmental action, and does not apply to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.

I disagree with the plurality's parsing of the case's "bizarre facts" see *ante*, at 1, to reach a result that the Government's screening of the films in question was an additional and unconstitutional search. The facts, indeed unusual, convince me that, by the time the FBI received the films, these petitioners had no remaining expectation of privacy in their contents.

The cartons in which the films were contained were shipped by petitioners via Greyhound, a private carrier, to a fictitious addressee, and with the shipper fictitiously identified. The private examination of the packages by employees of L'Eggs

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 6, 1980

No. 79-67 Walter v. United States
No. 79-148 Sanders v. United States

Dear John:

I will await a dissent in this case.

If none should be forthcoming, I may simply write a sentence or two saying - as I did at Conference - that petitioners no longer had any reasonable expectation of privacy in these films.

Sincerely,



Mr. Justice Stevens

Copies to the Conference

LFP/lab

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 21, 1980

79-67 Walter v. U.S.
79-148 Saunders v. U.S.

Dear Harry:

Please add my name to your dissent.

Sincerely,

L Lewis

Mr. Justice Blackmun

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 3, 1980

Re: No. 79-67 - Walter v. United States; and
No. 79-148 - Sanders v. United States

Dear Chief:

I could join a DIG in these cases.

Sincerely,



The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

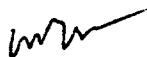
May 20, 1980

Re: Nos. 79-67 and 79-148 Walter v. United States and
Sanders v. United States

Dear Harry:

Please join me in your dissenting opinion in this case.

Sincerely,



Mr. Justice Blackmun

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: MAY 2 '80

1st DRAFT

Recirculated:

SUPREME COURT OF THE UNITED STATES

Nos. 79-67 AND 79-148

William Walter, Petitioner,
79-67 *v.*

United States.

Arthur Randall Sanders, Jr.,
et al., Petitioners.

79-148

United States.

On Writs of Certiorari to the
United States Court of Appeals for the Fifth Circuit,

[May —, 1980]

MR. JUSTICE STEVENS delivered the opinion of the Court.

Having lawfully acquired possession of a dozen cartons of motion pictures, law enforcement officers viewed several reels of eight-millimeter film on a government projector. Labels on the individual film boxes indicated that they contained obscene pictures. The question is whether the Fourth Amendment required the agents to obtain a warrant before they screened the films.

Only a few of the bizarre facts need be recounted. On September 25, 1975, 12 large, securely sealed packages containing 871 boxes of eight-millimeter film depicting homosexual activities were shipped by private carrier from St. Petersburg, Fla., to Atlanta, Ga. The shipment was addressed to "Leggs, Inc."¹ but was mistakenly delivered to a substation in the suburbs of Atlanta, where "L'Eggs Products, Inc." regularly received deliveries. Employees of the latter company opened

¹ There was no "Leggs, Inc." "Leggs" was the nickname of a woman employed by one of petitioners' companies. The packages indicated that the intended recipient would pick them up and pay for them at the carrier's terminal in Atlanta.

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

7.9

From: Mr. Justice Stevens

Circulated: _____

Recirculated: MAY 6 '80

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 79-67 AND 79-148

William Walter, Petitioner,
 79-67 *v.* United States. On Writs of Certiorari to the
 Arthur Randall Sanders, Jr., United States Court of Ap-
 et al., Petitioners, peals for the Fifth Circuit,
 79-148 *v.* United States.

[May —, 1980]

MR. JUSTICE STEVENS delivered the opinion of the Court.

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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

P. 7, 8

From: Mr. Justice Stevens

Circulated:

3rd DRAFT

Recirculated: MAY 21 '80

SUPREME COURT OF THE UNITED STATES

Nos. 79-67 AND 79-148

William Walter, Petitioner,
79-67 v.

United States.

Arthur Randall Sanders, Jr.,
et al., Petitioners,

79-148 v.

United States.

On Writs of Certiorari to the
United States Court of Appeals for the Fifth Circuit.

[May —, 1980]

MR. JUSTICE STEVENS delivered the opinion of the Court.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 2, 1980

Re: 79-67 - Walter v. United States
79-148 - Sanders v. United States

Dear Byron:

Many thanks for your thoughtful and complete letter.

I agree with your first point, but would prefer not to expand the opinion to decide the seizure issue since, as you note, it is not necessary to do so in order to dispose of the case. I would therefore propose adding a new sentence in footnote 4 reading as follows:

"For purposes of decision, we accept the Government's argument that the delivery of the films to the FBI by a third party was not a 'seizure' subject to the warrant requirement of the Fourth Amendment."

With respect to your second point, I am afraid that I do not agree with your analysis. Unless one draws the line precisely where it was drawn by the search conducted by the private party, I think we will run into difficulty in defining the contours of the Burdeau private search exception. Perhaps I would be more inclined to try to revise the opinion to obtain your vote if it would result in a Court opinion, but since it appears that it will merely announce the judgment and speak for what is at most a plurality of four, I would prefer to adhere to my present draft.

Respectfully,



Mr. Justice White

Copies to the Conference

1,317

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

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4th DRAFT

Recirculated: JUN 5 '80

SUPREME COURT OF THE UNITED STATES

Nos. 79-67 AND 79-148

William Walter, Petitioner,
 79-67 v.

United States.

Arthur Randall Sanders, Jr.,
 et al., Petitioners,

79-148 v.

United States.

On Writs of Certiorari to the
 United States Court of Ap-
 peals for the Fifth Circuit.

[May —, 1980]

MR. JUSTICE STEVENS announced the judgment of the Court and delivered an opinion in which MR. JUSTICE BRENNAN and MR. JUSTICE STEWART joined.

Having lawfully acquired possession of a dozen cartons of motion pictures, law enforcement officers viewed several reels of eight-millimeter film on a government projector. Labels on the individual film boxes indicated that they contained obscene pictures. The question is whether the Fourth Amendment required the agents to obtain a warrant before they screened the films.

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2.7

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: _____

Recirculated: JUN 11 1980

5th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 79-67 AND 79-148

William Walter, Petitioner,
 79-67 v.

United States.

Arthur Randall Sanders, Jr.,
 et al., Petitioners,
 79-148 v.

United States.

On Writs of Certiorari to the
 United States Court of Ap-
 peals for the Fifth Circuit.

[May —, 1980]

MR. JUSTICE STEVENS announced the judgment of the Court and delivered an opinion in which MR. JUSTICE BREN-
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Having lawfully acquired possession of a dozen cartons of motion pictures, law enforcement officers viewed several reels of eight-millimeter film on a government projector. Labels on the individual film boxes indicated that they contained obscene pictures. The question is whether the Fourth Amendment required the agents to obtain a warrant before they screened the films.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 13, 1980

Re: 79-67 - Walter v. United States
79-148 - Sanders v. United States

Dear Bill:

Thanks for your note. I surely understand your desire to withdraw. Even though I originally erred in the other direction, I would rather not decide the question because it is not presented by the record. The only change I am presently considering is adding the following at the end of footnote 9 in my most recent circulation:

"If MR. JUSTICE WHITE were correct in his view that that question is not open, our proper course in this case would be to reverse the decision of the Court of Appeals summarily. Ironically, however, there are not even five votes in favor of reversal on the reasoning set forth in this opinion. MR. JUSTICE WHITE'S view would seem to be inconsistent with the actual disposition in Burdeau v. McDowell, 256 U.S. 465, since that case involved a large quantity of 'private books, papers, memoranda, etc.' Id., at 470, which had been thoroughly examined by a private party, and then were re-examined by Government agents. Presumably most of the contents of those papers were no more in plain view at the time of their delivery to the Government than were the films involved in this case."

Respectfully,



Mr. Justice Brennan

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 16, 1980

Re: 79-67 - Walter v. United States
79-148 - Sanders v. United States

Dear Byron:

The only additional change that I intend to make, subject of course to what further changes you make, is to revise footnote 14 on page 9 of my draft to read as follows:

"14/It is arguable that a third party's inspection of the contents of 'private books, papers, memoranda, etc.' could be so complete that there would be no additional search by the FBI when it re-examines the materials. Cf. Burdeau v. McDowell, 256 U.S. 465, 470. But this is not such a case, because it was clearly necessary for the FBI to screen the films, which the private party had not done, in order to obtain the evidence needed to accomplish its law enforcement objectives."

I must confess that it is my fault that we have gotten into this debate on a question not presented by the record. You were entirely correct in pointing out that I had unnecessarily decided the issue in a way that you think is erroneous. I am still not sure in my own mind what the right answer is in cases in which a package is only partially opened, or a cover of a magazine indicates the probable contents. Can the Government dig further into the package or leaf through the magazine without getting a warrant? Your view, I gather, would impose a flat ban on any investigation beyond what is in plain view when the materials are turned over to the Government. I have a feeling that line may be a little hard to identify but, on the other hand, I suppose the line that I originally suggested might be subject to similar difficulties. In all events, the more I think about the problem, the more I am persuaded that we might be wise to postpone deciding it until it is squarely presented in a proper case.

- 2 -

If there is any possibility that further reflection would lead you to withdraw your opinion, I would of course eliminate footnote 14 entirely and consider any other suggestions that would make it perfectly clear that we are saving the issue that may separate us for another day.

The whole problem may be somewhat academic anyway because it appears that there are only four Members of the Court that are willing to go as far as my opinion goes and only two or perhaps three who are prepared to adopt your view.

Respectfully,



Mr. Justice White

cc: Mr. Justice Brennan
Mr. Justice Stewart

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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: _____

6th DRAFT

Recirculated: JUN 17 '80

SUPREME COURT OF THE UNITED STATES

Nos. 79-67 AND 79-148

William Walter, Petitioner,
 79-67 v.

United States.

Arthur Randall Sanders, Jr.,
 et al., Petitioners,

79-148 v.

United States.

On Writs of Certiorari to the
 United States Court of Appeals
 for the Fifth Circuit.

[June —, 1980]

MR. JUSTICE STEVENS announced the judgment of the Court and delivered an opinion in which ~~Mr. Justice BRENNAN and Mr. Justice STEWART~~ joined.

Having lawfully acquired possession of a dozen cartons of motion pictures, law enforcement officers viewed several reels of eight-millimeter film on a government projector. Labels on the individual film boxes indicated that they contained obscene pictures. The question is whether the Fourth Amendment required the agents to obtain a warrant before they screened the films.

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¹ There was no "Leggs, Inc." "Leggs" was the nickname of a woman employed by one of petitioners' companies. The packages indicated that the intended recipient would pick them up and pay for them at the carrier's terminal in Atlanta.

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 18, 1980

MEMORANDUM TO THE CONFERENCE

Re: Case heretofore held for Walter v. United States,
No. 79-67 and Sanders v. United States, No. 79-148

Grassi v. United States, No. 79-809, is the only case held for Walter and Sanders. Petitioner, though tried separately, was convicted for interstate transportation of the same films as were Walter and Sanders, and he raises some of the same claims as were raised by Walter and Sanders.

The District Court denied his suppression motion on the ground that he lacked any legitimate expectation of privacy in the contents of the shipment, or alternatively that there was only a private search. On appeal to CA 5, however, petitioner did not really press the Fourth Amendment issue, because he felt that a Fifth Circuit precedent rendered him without standing to raise it. He did conditionally reserve the issue in his brief, in the event that the Fifth Circuit decided to reconsider its precedent. See Petn., at p. 6. The Government's opposition claims that the precedent involved posed no barrier to petitioner's litigation of the suppression motion on appeal, and would therefore have us treat the issue as not having been raised at all in the Court of Appeals. Petitioner did technically reserve the issue, however, and for that reason I intend to vote to grant, vacate and remand this case in light of Walter and Sanders. Of course, it will be open to the Court of Appeals to hold, as it well might, that petitioner waived the Fourth Amendment issue on appeal. It should be noted that Judge Wisdom, who dissented in Walter and Sanders, did not dissent in this later case.

Of the remaining issues raised by petitioner, two were raised and "digged" in Walter and Sanders: (1) whether the Government imposed an illegal prior restraint by holding the films for over two years without having obtained a judicial determination of obscenity and (2) whether the