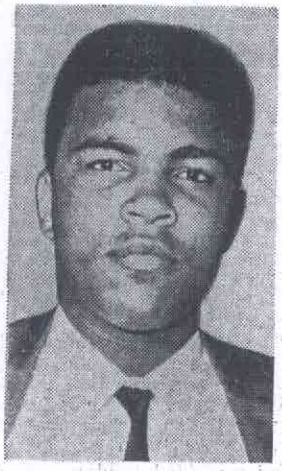

JAMES R. HOFFA MUHAMMAD ALI

. . . win new court hearings

# Security 'Bugging' Left Open by Court

By John P. MacKenzie 3/25/69
Washington Post Staff Writer

The Supreme Court made clear yesterday that the legality of electronic eavesdropping in "foreign intelligence" cases is a wide-open issue. One of its more conservative members criticized the Justice Department for suggesting last week that the Court had condemned the practice.

In a day filled with new action on wiretapping and electronic eavesdropping controversies, the Court:

- Rejected without comment the Government's petition for a rehearing of the Court's March 10 ruling that defendants, even in spy cases, are entitled to transcripts of their conversations, or conversations on their premises, that are overheard by illegal eavesdropping.
- Released a concurring opinion by Justice Potter Stewart declaring that it "should be entirely clear to any careful reader" of the March 10 opinions that the Court was not passing judgment on national security wiretaps.
- Announced that some issues, including in many cases the legality or illegality of the eavesdropping, may be handled by trial judges in chambers without requiring wholesale disclosure of information to the defense.

See BUG, A7, Col. 1

# Court Acts on Eavesdropping

BUG, From A1

• Sent back to lower courts the cases of James R. Hoffa, Muhammad Ali (Cassius Clay) and two dozen other convicted persons for hearings on whether the admitted eavesdropping in their cases was illegal and whether the Government must choose between disclosing the eavesdrop records and dropping the prosecutions.

• Ruled that its December, 1967, decision requiring court orders for microphones that do not physically trespass on a premises will not be applied retroactively, thereby letting stand convictions obtained by such methods before December, 1967.

The Court's March 10 rulings prompted Solicitor General Erwin N. Griswold last week to seek reconsideration. He hinted that court-ordered disclosures would require such embarrassing admissions as the wiretapping of foreign embassies, and that rather than admit this, the Government would have to drop criminal prosecutions of persons who merely "stumbled into" a listening device.

Griswold said he considered foreign intelligence eavesdropping reasonable and legal but that the Court's decision "apparently rests upon the assumption that the electronic surveillance involved in gathering foreign intelligence information was illegal."

Justice Stewart said the Court did indeed act on that assumption since Griswold himself had "mystifyingly" conceded illegality for the purpose of the argument "although he was repeatedly invited to argue that they were not" illegal.

**Transcript Cited**

Stewart cited three places in the transcript of oral argument last October in which Griswold had offered this concession. Thus the question whether such surveillance was legal or constitutional, Stewart said, is left for future cases.

Since this should have been clear to a careful reader, Stewart concluded sarcastically, perhaps "what I have said is unnecessary. But 10 years of experience here have taught me that the most carefully written opinions are not always carefully read—even by those most directly concerned."

Griswold had argued that logs and tape recordings of electronic eavesdropping should be turned over first to trial judges to screen out "irrelevant" material. But the Court held that only the defense is equipped to find traces of tainted evidence and that to give the trial judge the whole job might deprive the defendant of a chance to show that Federal agents used illegally obtained "leads" to build their case.

**Full Disclosure**

The decision has been described as demanding full disclosure of even "irrelevant" matter, but the Court said it was not for judges alone to determine what matter was relevant.

Despite the criticism it received yesterday, the Justice Department gained a major concession from the Court as well — the statement that the full-disclosure requirement might not apply to the threshhold decision judges must make about whether the eavesdropping was illegal.

It appeared that when the Ali and Hoffa cases are returned to lower courts, the Government will be free to argue directly to trial judges that the eavesdropping was legal—without letting the defense know the details of the tapping or bugging. Only if the judge finds illegality would the Government be faced with its disclose-or-dismiss choice.

Any one of a number of pending cases, including Ali's conviction and five-year prison sentence, could serve as a vehicle for testing the Government's claim about the legality of eavesdropping without warrants in foreign intelligence cases with the approval of the Attorney General.