

Military Snooping Wins Test

But Court Bans Illegal Bugging In Jury Probes

By John P. MacKenzie
Washington Post Staff Writer

The Supreme Court ruled yesterday that civilians who are targets of surveillance by military agents cannot take the government to court to test the legality of the practice.

By a 5-to-4 vote the justices held that courts lack power to hear the complaints of protesters and antiwar leaders who do not content that their own activities have been directly suppressed because of snooping techniques.

In a separate 5-to-4 decision the court upheld the right of grand jury witnesses to refuse to answer questions which are based on illegal government wiretapping and bugging.

In both cases, the four nominees of President Nixon voted to sustain the Justice Department's position that, even if the government's conduct was illegal, the individuals had made unjustified demands for judicial redress.

The fifth vote was provided in each case by Justice Byron R. White, who agreed with the Justice Department in the military snooping case and concurred in the grand jury case with four other holdover members.

Critical to the result in the military case was the participation of Justice William H. Rehnquist, who as assistant attorney general was the administration's principal witness in hearings before the Senate Constitutional Rights Subcommittee.

In his testimony, Rehnquist differed specifically with Chairman Sam J. Ervin Jr. (D-N.C.) over whether Arlo Tatum, executive director of the Central Committee for Conscientious Objection, and other plaintiffs had a right to

maintain their lawsuit—the one thrown out by the high court yesterday—against Pentagon officials.

Without Rehnquist's vote, the Supreme Court vote would have been a 4-to-4 tie, affirming the United States Court of Appeals in its decision that the suit should be tried in federal court here.

The American Civil Liberties Union said yesterday that it will promptly file a petition for a rehearing based on Rehnquist's dual role in the controversy. Ervin, who filed a brief as friend of the court in the case, said his rule against "personal attacks" on public officials prevented him from

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commenting on Rehnquist's action.

Tatum, the ACLU and a dozen other individuals and groups sued in 1970 after the scope of Pentagon intelligence gathering had come to light. They charged that the surveillance, inter-agency reporting and computer storage of data on lawful civilian activities was unauthorized by Congress and unconstitutional.

Although they conceded that their own protest activities were not curtailed, the individuals and groups charged infringements of their First and Fourth amendment rights of free speech, association and privacy from the "chilling effect" of the widespread snooping system.

Chief Justice Burger, delivering the majority opinion, said the plaintiffs had failed to meet the test of charging "direct injury" to their personal rights.

Noting that the plaintiffs "have cast considerable doubt on whether they themselves are in fact suffering from any such chill," Burger said they could not complain about the intimidation of others.

The majority opinion ignored the plaintiffs' argument that their personal rights of association were violated when others were discouraged



LESLIE BACON
... ruling upholds her

from associating with them in antiwar dissent. Also ignored was the contention that only a lower court hearing would uncover the extent of the "chilling effect."

Burger said the plaintiffs would have the courts, rather than Congress, function "as virtually continuing monitors of the wisdom and soundness of executive action." He said the courts stood ready to correct concrete abuses.

Joining Burger were White, Rehnquist and Justices Harry A. Blackmun and Lewis F. Powell. Dissenting vigorously were Justices William J. Brennan Jr., Potter Stewart,

Thurgood Marshall and William O. Douglas.

In the grand jury case, Brennan delivered the majority opinion holding that the 1968 and 1970 federal wiretapping laws, which were controversial because of their expansion of court-authorized eavesdropping, contained a safeguard for grand jury witnesses.

Brennan said the law permits witnesses, when taken before a court on contempt charges for refusal to talk to the jury, to justify their silence on the basis of illegal wiretapping.

The witnesses were two gambling figures from Nevada, two women who refused to testify before the grand jury which indicted the "Harrisburg 8" for conspiring to kidnap White House aide Henry Kissinger.

Also affected by the ruling are Leslie Bacon, who refused to cooperate with a grand jury investigating the bombing of the U.S. Capitol, and numerous others questioned in investigations of alleged domestic violence and subversion.

The court left open whether the government may press for a contempt ruling—which would lead to imprisonment until the witness cooperates—after producing a court order approving the wiretap or after simply denying the wiretap charge, as it did belatedly in the Harrisburg case.