High Court Expands Government's Use Of Wiretap Evidence

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The Supreme Court ruled 6 to 3 yesterday that the government can try criminal defendants with wiretap evidence gathered in violation of a 1968 law.

The court held that the evidence did not have to be suppressed at trial even though the government had neither identified all of the suspects it wanted to tap nor listed afterward all the persons whose conversations it had intercepted.

But this victory for the government was diluted by the court's rejection of Justice Department interpretations of two key deterrents to unjustified phone taps.

The Omnibus Crime Control and Safe Streets Act of 1968 requires prosecutors seeking a wiretap order from a judge to identify "the person, if known, committing the offense, and whose conversations are to be intercepted."

The Justice Department contended that "the person" is only the "principal target" of an investigation —the suspect whose phone is being tapped—and not any secondary target whose tapped phone is not listed in the application to a judge.

Eight justices rejected this contention, while Chief Justice Warren E. Burger disagreed.

The court said that when the government has "probably cause" to believe that persons are engaging in a criminal activity, its wiretap application must name "all" whose phone conversations it expects to intercept.

Congress drew "no distinction based on the telephone uses," Justice Lewis F. Powell Jr. said. "Indeed," the legislative history does not use "the term 'principal target' or any discussion of a different treatment based on the telephone from which one speaks," Powell said.

The law's second deterrent to excessive surveillance says that within 90 days after applying for a wiretap order, a prosecutor must provide the judge with a list of persons whose conversations were overheard. The purpose is to enable the judge to decide whether to notify those persons of the interception.

In the case at issue, the government claimed it had complied with the law but admitted that its purportedly complete list of wiretapped persons inadvertently omitted two names.

The justices unanimously agreed that such compliance is inadequate because it didn't assure the judge "the necessary range of information" to decide who ought to be notified of an interception.

Because prosecutors did not list all of the persons who were to be or were overheard, a U. S. District Court in Ohio suppressed all evidence against five defendants among 37 from Akron, Youngstown and Niles who had been indicted four years ago for illegal gambling. The Sixth U. S. Circuit Court of Appeals affirmed that ruling.

Reversing the appeals court, the high court said that the government's failure to comply fully with the deterrents in the law does not render unlawful "an intercept order that in all other respects satisfies the statutory requirements."

Powell wrote that the failure of the government to list three of the five suspects among those who would be overheard did not play a "substantive role" in the judge's approval of the wiretap order and did not warrant suppression of the evidence against them.

And, Powell said, the prosecution's failure to include the other two suspects among the persons it had overheard was inadvertent and also not sufficient to warrant suppression of the evidence against them.

Powell said he hoped the government will heed a suggestion the court made in a 1974 case: "Strict adherence by the government to the provisions of (the 1968 law) would nonetheless be more in keeping with the responsibilities Congress has imposed on it when authority to engage in wiretapping or electronic surveilliance is sought."

Dissenting Justice Thurgood Marshall said that Powell's "hope is a poor substitute for certainty that the government will make every effort to fulfill its responsibilities . . ."

Justice William J. Brennan Jr. endorsed Marshall's dissent, which also said that the majority was dismantling a "carefully designed congressional structure" that bars prosecutors who disobey "Statutory commands" from using intercepted communications as evidence in a criminal proceeding. Justice John Paul Stevens dissented separately.

In other action, Marshall denied a request by Michael and Robert Meeropol, the sons of Julius and Ethel Rosenberg, to name judges outside the "Second U.S. Circuit Court of Appeals to hear an appeal of a decision that, they say, allows a book by Louis Nizer to libel them and invade their privacy.

The Meeropols wanted the judges disqualified on the ground that they are friends of Irving R. Kaufman, the judge who in 1953 sentenced the Rosenbergs to death for conspiracy to commit espionage.