HIGH COURT CURBS U.S. WIRETAPPING AIMED AT RADICALS

Rules Warrant Is Necessary for Federal Surveillance in Domestic Matters

DECISION IS UNANIMOUS

Powell, Appointee of Nixon, Writes Opinion Upsetting Government Practice

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WASHINGTON, June 19 — The Supreme Court declared unconstitutional today the Federal Government's practice of wiretapping, without first obtaining court approval, domestic radicals considered dangerous to the national security.

The Court, 8 to 0, rejected the Nixon Administration's assertion that the Prsident's authority to protect the nation from internal subversion gives the Government the constitutional power to wiretap "dangerous" radical groups without obtaining court warrants.

"Fourth Amendment freedoms [against "unreasonable searches and seizures"] cannot properly by guaranteed if domestic surveillances may be conducted solely within the discretion of the executive branch," the Court declared.

Justice Agency Setback

Without ruling on the constitutionality of warrantless wiretapping against agents of foreign powers, the Court held that "national security" wiretapping of domestic radicals who have no foreign ties can be done only with the type of court warrants currently used in police wiretapping of organized crime.

The ruling was a stunning legal setback for the Justice Department, which failed to muster a single vote from a Court with four justices appointed by President Nixon.

Attorney General Richard G. Kleindienst announced after learning of the decision that he had "directed the termination of all electronic surveillance in cases involving security that conflict with the Court's opinion." He said that subsequent surveillance would be done "only under procedures that comply" with the decision.

The opinion was written by Justice Lewis F. Powell Jr., who was appointed to the Court shortly after he wrote a newspaper article strongly supporting the President's "national security" wiretap power.

Fear Opposed as Price

Justice Powell had termed the complaints against the Government's wiretapping "a tempest in a teapot" and had suggested that the distinctions between warrantless wiretapping of foreign agents and domestic subversives was "largely meaningless." but he assured the Senators at his confirmation hearing that his mind was still open.

His opinion today leaned heavily upon the threat to free speech that he saw in unbridled governmental wiretapping of dissenters.

"History abundantly documents the tendency of government—however benevolent and benign in its motives — to view

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with suspicion those who most fervently dispute its policies," he wrote.

"The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power," he continued. "Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation."

Justice William H. Rehnquist, another Nixon appointee who had made statements supporting the President's wiretap authority before joining the Court, did not participate in the decision. He had suggested that he would participate by remaining behind the bench when the case was argued. He gave no reason for stepping aside today.

By coincidence, the historic decision was announced only seconds after Attorney General Kleindienst, an aggressive proponent of warrantless wiretapping, formally presented the Supreme Court his credentials as the Government's chief legal officer.

Mr. Kleindienst, clad in the cutaway coat and striped trousers customarily worn by Government attorneys in the Supreme Court, was welcomed by Chief Justice Warren E. Burger in a brief statement as the Court session began.

Then as the Justices settled back for the announcement of the first decision, Mr. Kleindienst strode from the courtroom, not waiting long enough to hear that the long-awaited wiretapping ruling was about to be handed down.

An important result of the decision is that any defendant in a Federal prosecution has a right to see complete transcripts of any conversations overheard on a warrantless "domestic security" listening device so that his lawyer can make certain that no illegally obtained information is being used by the prosecution.

Court records indicate that victims of such wiretapping could include defendants in the "Chicago Seven" riot-conspiracy case, the kidnapping conspiracy case involving the Rev. Philip F. Berrigan and other prosecutions of antiwar activists and black radicals.

Mr. Kleindienst said that his case involving the Rev. Philip staff would screen all such cases to decide whther to disclose the wiretap transcripts or drop the prosecutions.

Today's ruling had its roots in a decision by President Roosevelt in 1940 that he had the power to wiretap suspected German spies. In 1946, President Truman broadened the practice to include American citizens suspected of espionage.

It was not until 1967, when the Supreme Court ruled that electronic surveillance was subject to the Fourth Amendment's warrant requirements, that the Government was confronted with the issue of what to do about this type of "national security" surveillance.

In 1968 Congress passed a law authorizing law enforcement officers to get court warrants to investigate a wide variety of crimes. The law stated that it would not affect any constitutional authority the President might have to wiretap in national security cases without warrants.

This confronted the Nixon Administration with the choice of trying to obtain court warrants for its national security surveillance or to take the chance that the Supreme Court would uphold warrantless eavesdropping.

Attorney General John N. Mitchell took the latter course —one so controversial among career attorneys that when the case reached the Supreme Court no member of the Solicitor General's office argued the Government's case.

Robert C. Mardian, then Assistant Attorney General in charge of the Internal Security Division, made the argument. He was opposed by Arthur Kinoy of the Center for Constitutional Rights in New York, and William T. Gossett of Detroit.

Mr. Kinoy represented three members of the radical White Panther party who were accused of plotting to bomb a Central Intelligence Agency office in Detroit. Mr. Gossett argued for United States District Judge Damon Keith, who ordered the Justice Department to disclose the transcripts of the defendants' conversations obtained by wiretaps installed without court permission.

The United States Court of Appeals for the Seventh Circuit upheld Judge Keith.

Justice Powell's opinion held that the 1968 statute did not give the Government the power to wiretap without court authority, but merely left untouched any constitutional power it might have had anyway.

He stressed that the Court was leaving for another day a decision on whether warrants will be required to wiretap foreign spies and that the decision today covered only those with "no significant connection with a foreign power, its agents or agencies."

Justice Department officials are expected to argue that many of the radicals who have been wiretapped have had contacts with Communist countries, and the ruling could make left-wing groups more circumspect about their future dealings with foreign governments.

Legal experts disagree as to whether the Government can 1968 act for surveillance of radicals, because the Government must show probable cause that a specific law is about to be violated. National security surveillance is usually based upon more nebulous suspicions.

Justice Powell's opinion virtually invited Congress to pass a new law to allow for this special type of wiretapping, but any proposal so loaded with overtones of political surveillance would be expected to face difficulty on Capitol Hill.

Chief Justice Burger noted that he concurred only in the result. Justice Byron R. White, in a separate concurring opinion, said that the warrantless surveillance might have been legal under the "national security" exception of the 1963 law, but that the Justice Department's court papers did not satisfy the statute.

The court, which is attempting to avoid extending its regular term into July, announced that it would hold a special session on Thursday to announce more decisions. It now has 36 opinions yet to hand down, so that if it holds two decisions sessions next week, it could adjourn before July.

In New York today, the American Civil Liberties Union hailed the wiretapping decision.

A statement by the organization's executive director, Aryeh Neier, said:

"The Supreme Court has rejected the Government's boldest claim of powers to intrude upon individual liberties. The Government had claimed that in the undefined interests of 'national security it could engage in a vast, lengthy, unsupervised and unchecked invasion of the privacy of people having only the remotest link with anything in any way criminal or even wrong.

"If this claim had been upheld, there would have been virtually no limits to the range of governmental intrusion on liberty that would have been implicitly authorized once the Government invoked the talisman of 'national security.'

"In rejecting the Government's claims, the Court has vindicated the constitutional liberties of all Americans."

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