

Cellphone-Wiretap Ruling Is a Headache for Prosecutors

Opinion Says Authority to Listen In on Calls Doesn't Cross Federal-Court-District Boundaries

By
[JOE PALAZZOLO](#)

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The mobility of cellphones is the very thing that is complicating law enforcement's ability to wiretap them in criminal investigations.

A recent ruling by the Fifth U.S. Circuit Court of Appeals in New Orleans said that while cellphones may move easily between the country's 94 federal districts, the authority to tap them doesn't. The ruling affects the wiretaps typically used in criminal investigations, especially by the Drug Enforcement Administration, which is part of the Justice Department.

Former law-enforcement officials said the Aug. 26 opinion is among the most significant in recent memory governing the use of such wiretaps and could pose administrative headaches for law-enforcement agencies, unless Congress stepped in, which most regard as unlikely.

The appeals court said that for the federal government to intercept calls on a cellphone, either the phone itself or the hub where agents listen in on the calls must be in the district of the judge who authorized the wiretap. The Justice Department had previously interpreted the law to allow it to continue intercepting calls on a phone that wandered outside of the district in which the wiretap was authorized, former officials said. Now, federal investigators in Louisiana, Mississippi and Texas—the states covered by the Fifth Circuit—run the risk of having evidence suppressed if a cellphone they have tapped crosses federal boundaries.

"God help you if the [suspect] is driving down the highway, having a conversation on his cellphone and crosses into another district," said Mark Eckenwiler, a former Justice Department official who worked on the Fifth Circuit case. While the ruling is only legally binding on those states, defense lawyers across the nation are also likely to invoke it as they seek to get wiretap evidence against their clients thrown out, he added.

The Justice Department has asked the court for a month to consider its next step. A DEA spokeswoman referred questions to the Justice Department, which declined to comment.

In the Fifth Circuit case, DEA agents and federal prosecutors in southern Mississippi who were investigating a drug-trafficking organization received authorization from a local judge to tap the cellphone of Richard North, a Houston native whom they suspected of supplying local dealers with cocaine. Mr. North was stopped in May 2009 by Texas state troopers acting on information from federal investigators who believed he was on his way to make a delivery in Mississippi.

He was released after a search turned up no drugs, and he headed home to Houston. Unaware that his phone was tapped, he called a friend and was overheard telling her that the troopers had failed to uncover the cocaine hidden in his car, according to court documents. A DEA agent listening in from Louisiana forwarded the information to officers in Texas, who stopped him a second time and found the stash.

Mr. North pleaded guilty to conspiracy to distribute five kilograms of more of cocaine, but he reserved the right to challenge the wiretap on appeal to the Fifth Circuit.

The appeals court decided that the Mississippi judge erred in issuing the warrant, because the phone was in Texas, investigators were in Mississippi and the listening post was in Louisiana, putting them all in separate districts. "In short, the district court...lacked the authority to permit interception of cellphone calls from Texas at a listening post in Louisiana," the Fifth Circuit said, in an unsigned opinion.

Federal law exempts "mobile interception devices" from jurisdictional requirements, and at least one appeals court, the Seventh U.S. Circuit Court of Appeals in Chicago, has interpreted such devices to include cellphones.

Hanni Fakoury, a staff attorney at the Electronic Frontier Foundation, a civil-liberties group, said in an email that the Seventh Circuit ruling allowed the Justice Department to seek out "a more advantageous jurisdiction (and a more sympathetic judge) before applying for a wiretap." The Fifth Circuit, however, said "mobile interception device" refers to a device used to capture communications and not a mobile phone, restoring what Mr. Fakoury described as an important safeguard against prosecutors seeking judges believed to provide preferential treatment to the government.

Norman J. Silverman, a lawyer for Mr. North, said the decision was the first major "reining in" of the Wiretap Act since 1974, when the Supreme Court ruled that the power to authorize wiretap applications inside the Justice Department was restricted to a few top officials.

In the near term, law-enforcement officials may need to set up temporary listening posts in districts where wiretap warrants are issued, said Mr. Eckenwiler, now senior counsel at Perkins Coie LLP. That solution is unlikely to sit well with the DEA, which uses these kinds of wiretaps more than any other agency and relies heavily on regional listening posts outfitted with sophisticated eavesdropping technology and staffed full-time with federal employees and contractors, who transcribe and translate what they hear. Of the 1,354 federal wiretaps authorized in 2012, 94% were used in narcotics investigations, according to the administrative office of the U.S. Courts.

"If you want to run 15 intercepts, the best place to run them is in one place—not 15 places," said David Wilson, a retired 32-year veteran of the DEA.

The Justice Department could funnel wiretap applications to the districts with regional listening posts, but that could create delays for cases in which taps need to "get up" quickly to determine deliveries and shipment of drugs, said Stephen J. T'Kach, a former Justice Department official who worked in the surveillance unit.

Write to Joe Palazzolo at joe.palazzolo@wsj.com