The Burger Court Opinion Writing Database

United States v. Donovan

429 U.S. 413 (1977)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 10, 1976

PERSONAL

Re: 75-212 - United States v. Donovan

Dear Lewis:

As written, I can only concur in the judgment and in all but Part IIA of the Court's opinion. I cannot agree, however, with your ~~the Court's~~ construction of the identification provisions of § 2518(1)(b)(iv). In my view, the statute plainly requires a wiretap application to identify by name the principal target of the investigation. The application in the instant case complies with that requirement. Since Congress demanded no more, I would conclude that no statutory violation occurred with respect to the application.

In Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975), you stated the familiar proposition that the starting point in every case involving construction of a statute is the language itself. The statute before us requires no more than that a wiretap application specify the "identity of the person, if known, committing the offense and whose communications are to be intercepted." 18 U.S.C. § 2518(1)(b)(iv). While requiring only the identification of "the person" whose communications are to be intercepted, Congress manifestly contemplated that interceptions effected pursuant to a single application and order could well potentially affect a large number of persons, particularly on incoming calls. Under the statute, notice of the intercept can be provided by order of the federal district court to "parties" other than persons named in the application. Id., § 2518(8)(d). Similarly, standing to object to intercepted communications is conferred upon "[a]ny aggrieved person . . . ." Id., § 2518(10)(a). Finally, the statute confers a civil damages remedy upon "[a]ny person" whose communications are unlawfully intercepted or used in violation of the statute.

Congress' clear recognition that multiple parties would potentially be affected by a single wiretap does no more than recognize the reality that numerous persons may call in and that some of them will be fellow "hoods." This is manifest from the statute itself. This has significant bearing upon our interpretation of § 2518(1)(b)(iv). In fashioning highly specific

requirements with respect to wiretap applications, Congress carefully avoided the use of plural language found in other parts of the same statute; instead, Congress spoke in the singular, requiring identification of "the person" whose communications are to be intercepted. Unless Congress meant something other than what it said, Congress had not thought to require the naming of "any [other] person" who might be caught up by the intercept.

You emphasize, however, that the statute expressly recognizes that more than one person may be named in a wiretap application. Ante, at 10. That is indeed true. See § 2518(1)(e), (8)(d). But I would think this is all the more reason for focusing upon the precise language in the provision establishing specific requirements for an application. Since Congress expressly contemplated that applications might contain more than one name, its failure in §2518(1)(b)(iv) to require the naming of "any [other] person" or "the persons" whose communications are to be intercepted must mean that the suggested open-ended identification requirement was not intended. In other words, Congress reasonably foresaw that for a variety of reasons actual wiretap applications might contain the names of more than one person. But Congress did not translate its recognition of what an application might contain into a command as to what it must contain, as is now proposed.

The plain words of the statute, of course, might have to bow in the face of compelling legislative history to the contrary. But there is none. Indeed, you observe that Congress' intent is enwrapped in its interpretation of this Court's decisions in Berger and Katz. But I think it is neither necessary nor appropriate on this sparse record to decide how Congress decided to read the prior decisions of this Court. The point is that we do not know. What we do know is that these provisions "'[were] intended to reflect the constitutional command of particularization.'" Ante, at 12. The language of the four precise statutory requirements confirm that purpose. 1/ For me, the very precision of the

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1/ Thus, § 2518(1)(b) requires the application to contain a "full and complete statement of the facts and circumstances", including "a particular description of the nature and location of the facilities . . . ." Likewise, the provision requires "a particular description of the types of communications."

language employed by Congress in § 2518(1)(b) strongly points to the conclusion that Congress meant exactly what it said in establishing an identification requirement in the singular. Also important, that exact language comports with Fourth Amendment requirements under our subsequent holding in United States v. Kahn, 415 U.S., at 155, and thus fulfills the express legislative purpose.

I would therefore interpret this statute to mean what it says. Whether wisely or not, Congress decided, consistent with Fourth Amendment strictures, to require only the identification of "the person" whose conversations are to be intercepted. Since it is clear Congress shifted from plural language to singular, I would take Congress at its word.

I hope you have not "hardened"!

Regards,

WEB

Mr. Justice Powell

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: JAN 6 1977

Recirculated: _____

Re: 75-212 - United States v. Donovan

MR. CHIEF JUSTICE BURGER, concurring in part and concurring in the judgment in part.

I concur in the judgment and in all except Part II-A of the Court's opinion. I cannot agree, however, with the Court's construction of the identification provisions of § 2518(1)(b)(iv), since I believe the application for surveillance in this case complied with statutory requirements. However, the precise reach of the identification requirement is irrelevant, because respondents are foreclosed from seeking suppression in any event.

Respondents Donovan, Robbins and Buzzaco contend that, since their names were not contained in the wiretap application, suppression is required under the express exclusionary provision of Title III, § 2518(10)(a). Their contention flies in the teeth of legislative history directly to the contrary. In the evolution of Title III, Congress considered and rejected a proposed amendment which would have expressly conferred the exclusionary benefit that respondents now seek. Specifically, Senators Long and Hart proposed the addition of a fourth subdivision to the suppression provision contained in § 2518(10)(a). 114 Cong. Rec. 14718 (1968). Had that proposal been adopted, it would

P.2

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

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1st/DRAFT

Recirculated: JAN 11 1977

SUPREME COURT OF THE UNITED STATES

No. 75-212

United States, Petitioner, v. Thomas W. Donovan et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[January —, 1977]

MR. CHIEF JUSTICE BURGER, concurring in part and concurring in the judgment in part.

I concur in the Court's judgment except as to its interpretation of § 2518 (1)(b)(iv), and in all except Part II-A of the Court's opinion. I cannot agree, however, with the Court's construction of the identification provisions of § 2518 (1)(b)(iv), since I believe the application for surveillance in this case complied with statutory requirements. However, the precise reach of the identification requirement is irrelevant, because respondents are foreclosed from seeking suppression in any event.

Respondents Donovan, Robbins, and Buzzaco contend that, since their names were not contained in the wiretap application, suppression is required under the express exclusionary provision of Title III, § 2518 (10)(a). Their contention flies in the teeth of legislative history directly to the contrary. In the evolution of Title III, Congress considered and rejected a proposed amendment which would have expressly conferred the exclusionary benefit that respondents now seek. Specifically, Senators Long and Hart proposed the addition of a fourth subdivision to the suppression provision contained in § 2518 (10)(a). 114 Cong. Rec. 14718 (1968). Had that proposal been adopted, it would have allowed suppression of intercepted conversations at the behest of any aggrieved person on the ground that he or she was not named in

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 20, 1976

MEMORANDUM TO: Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Stevens

RE: No. 75-212 United States v. Donovan

My records show that the four of us are in dissent.

Thurgood would you like to take this one?

W.J.B. Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 28, 1976

RE: No. 75-212 United States v. Donovan

Dear Thurgood:

Please join me in the dissenting opinion you have prepared in the above.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 14, 1976

75-212 - U. S. v. Donovan

Dear Lewis,

Although I was tentatively of the other view with respect to one of the issues involved in this case, I think you have written a most persuasive opinion. Accordingly, I do not plan to write in dissent. I shall look carefully at whatever is written by anyone else, but, subject to that condition subsequent, I acquiesce for now in your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 4, 1977

Re: No. 75-212, U. S. v. Donovan

Dear Lewis,

I have decided to join your opinion for the Court in this case.

Sincerely yours,

P.S.
1.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 10, 1976

Re: No. 75-212 - U. S. v. Donovan

Dear Lewis:

Please join me.

Sincerely,

Mr. Justice Powell

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

October 21, 1976

Re: No. 75-212, United States v. Donovan

Dear Bill:

Thanks. I will gladly do the dissent in this one.

Sincerely,

T. M.

Mr. Justice Brennan

cc: Mr. Justice Stewart
Mr. Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 7, 1976

Re: No. 75-212, United States v. Donovan

Dear Lewis:

In due course I will circulate a dissent in this case.

Sincerely,

T.M.

Mr. Justice Powell

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: DEC 27 1976

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-212

United States, Petitioner, v. Thomas W. Donovan et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[January —, 1977]

MR. JUSTICE MARSHALL, dissenting.

The Court today holds that an application for a warrant to authorize a wiretap under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510–2520, must name all individuals whom the Government has probable cause to believe are committing the offense being investigated and will be overheard. See 18 U. S. C. § 2518 (1)(b)(iv). It also holds that the Government must provide sufficient information to the issuing judge to allow him to exercise the discretion provided by 18 U. S. C. § 2518 (8)(d). I fully agree with both of these holdings. The Court concludes, however, that if the Government violates these statutory commands, it is nevertheless free to use the intercepted communications as evidence in a criminal proceeding. I cannot agree.

I continue to adhere to the position, expressed for four Members of the Court by Mr. Justice Douglas in his dissent in *United States* v. *Chavez,* 416 U. S. 562, 584 (1974), that Title III, does not authorize "the courts to pick and choose among various statutory provisions, suppressing evidence only when they determine that a provision is 'substantive,' 'central,' or 'directly and substantially' related to the congressional scheme." The Court has rejected that argument, however, see *United States* v. *Chavez, supra; United States* v. *Giordano,* 416 U. S. 505 (1974), and nothing is to be gained by renewing it here. But even under the standard set forth

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–212

United States, Petitioner, *v.* Thomas W. Donovan et al.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[January —, 1977]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Court today holds that an application for a warrant to authorize a wiretap under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510–2520, must name all individuals whom the Government has probable cause to believe are committing the offense being investigated and will be overheard. See 18 U. S. C. § 2518 (1)(b)(iv). It also holds that the Government must provide sufficient information to the issuing judge to allow him to exercise the discretion provided by 18 U. S. C. § 2518 (8)(d). I fully agree with both of these holdings. The Court concludes, however, that if the Government violates these statutory commands, it is nevertheless free to use the intercepted communications as evidence in a criminal proceeding. I cannot agree.

I continue to adhere to the position, expressed for four Members of the Court by Mr. Justice Douglas in his dissent in *United States* v. *Chavez*, 416 U. S. 562, 584 (1974), that Title III does not authorize "the courts to pick and choose among various statutory provisions, suppressing evidence only when they determine that a provision is 'substantive,' 'central,' or 'directly and substantially' related to the congressional scheme." The Court has rejected that argument, however, see *United States* v. *Chavez, supra; United States* v. *Giordano*, 416 U. S. 505 (1974), and nothing is to be gained by renewing it here. But even under the standard set forth

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 13, 1976

Re: No. 75-212 - United States v. Donovan

Dear Lewis:

By a separate letter I am joining your opinion. I have only the following minor comments:

I prefer not to do this. The Note would not be a brief one. Our holding makes clear that we adopt a different standard.

1. You will recall that at conference I was somewhat attracted to Judge Godbold's position in dissent in United States v. Doolittle, 518 F.2d 500, 501, 503 (1975), where he thought the standard might be "a person against whom the interception was directed." On further reflection, I have concluded that probable cause is perhaps the better standard. I wonder, however, whether a footnote reference to Judge Godbold's suggested standard and our rejection of it might be in order. Perhaps not. Do as you wish about this. I mention it only because it might shore up my joinder a little for me personally.

OK

2. I wonder whether the adoption of the Chun Test, p. 16 and n. 21, with which I agree, might not be more strongly stated if the footnote were worked into the text and if the conclusion as to Merlo and Lauer were spelled out there.

Sincerely,

Harry

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 13, 1976

Re: No. 75-212 - United States v. Donovan

Dear Lewis:

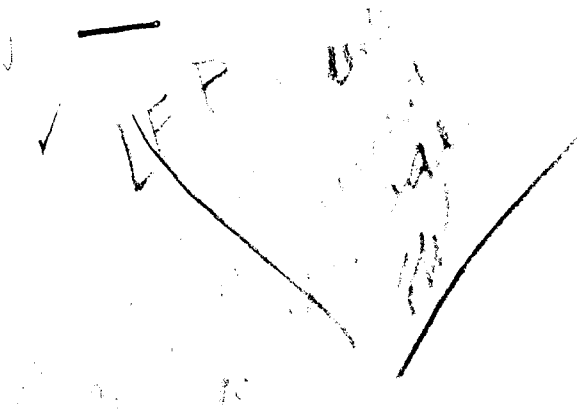
Please join me.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference



To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: DEC 7 1976

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-212

United States, Petitioner, v. Thomas W. Donovan et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[December —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents issues concerning the construction of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510–2520. Specifically, we must decide whether 18 U. S. C. § 2518 (1)(b)(iv), which requires the Government to include in its wiretap applications "the identity of the person, if known, committing the offense, and whose conversations are to be intercepted," is satisfied when the Government identifies only the "principal targets" of the intercept. Second, we must decide whether the Government has a statutory responsibility to inform the issuing judge of the identities of persons whose conversations were overheard in the course of the interception, thus enabling him to decide whether they should be served with notice of the interception pursuant to 18 U. S. C. § 2518 (8)(d). And finally, we must determine whether failure to comply fully with these statutory provisions requires suppression of evidence under 18 U. S. C. § 2518 (10)(a).

I

On November 28, 1972, a special agent of the Federal Bureau of Investigation applied to the United States District Court for the Northern District of Ohio for an order authorizing a wiretap interception in accordance with Title

December 13, 1976

No. 75-212 United States v. Donovan

Dear Chief:

Thank you for your thoughtful letter of December 10.

Although I would agree that the statutory construction question with respect to § 2518(1)(b)(iv) is not free from doubt, I reached a different conclusion after rather careful study. Moreover, my Conference notes indicate clearly that your view of the statute did not attract a "Court".

My opinion, as now written, will impose a hortatory obligation on the government to name persons whose communications it reasonably expects to intercept. But the important holding in the case is that a failure to name will not result in exclusion of the intercepted communications.

Sincerely,

The Chief Justice

lfp/ss

p. 8
p. 16 fn. 21 deleted + substance moved to text at page 17; fns. 22-27 renumbered 21-26.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: DEC 17 1976

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-212

United States, Petitioner, *v.* Thomas W. Donovan et al.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[December —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents issues concerning the construction of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510–2520. Specifically, we must decide whether 18 U. S. C. § 2518 (1)(b)(iv), which requires the Government to include in its wiretap applications "the identity of the person, if known, committing the offense, and whose conversations are to be intercepted," is satisfied when the Government identifies only the "principal targets" of the intercept. Second, we must decide whether the Government has a statutory responsibility to inform the issuing judge of the identities of persons whose conversations were overheard in the course of the interception, thus enabling him to decide whether they should be served with notice of the interception pursuant to 18 U. S. C. § 2518 (8)(d). And finally, we must determine whether failure to comply fully with these statutory provisions requires suppression of evidence under 18 U. S. C. § 2518 (10)(a).

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p. 18

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

3rd DRAFT

From: Mr. Justice Powell

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 75-212

Recirculated: JAN 11 1977

United States, Petitioner, v. Thomas W. Donovan et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[December —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents issues concerning the construction of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510–2520. Specifically, we must decide whether 18 U. S. C. § 2518 (1)(b)(iv), which requires the Government to include in its wiretap applications "the identity of the person, if known, committing the offense, and whose conversations are to be intercepted," is satisfied when the Government identifies only the "principal targets" of the intercept. Second, we must decide whether the Government has a statutory responsibility to inform the issuing judge of the identities of persons whose conversations were overheard in the course of the interception, thus enabling him to decide whether they should be served with notice of the interception pursuant to 18 U. S. C. § 2518 (8)(d). And finally, we must determine whether failure to comply fully with these statutory provisions requires suppression of evidence under 18 U. S. C. § 2518 (10)(a).

I

On November 28, 1972, a special agent of the Federal Bureau of Investigation applied to the United States District Court for the Northern District of Ohio for an order authorizing a wiretap interception in accordance with Title

February 16, 1977

Holds for No. 75-212 - U. S. v. Donovan

Dear Chief:

I would appreciate all of the holds for Donovan being taken off the list and carried over to the February 25th Conference.

These holds appear on pages 33 and 34, List 9, Sheets 2 and 3, of the February 18, 1977 Conference List. There are some 16 cases being held and I simply underestimated the complexity of some of them.

There is also a case on List 1, Sheet 2 of the February 18 Conference List, No. 76-597, U. S. v. Cabral, that I would like to take off the list. In my view, it is a hold for Donovan, and I will include it in my memorandum.

Sincerely,

The Chief Justice

LFP/lab

Copies to the Conference

cc: Mr. Michael Rodak, Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

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TO FILE

February 23, 1977

75-212

MEMORANDUM TO THE CONFERENCE

No. 74-1486 United States v. Bernstein. CA 4 rejected the Government's "principal target" interpretation of § 2518 (1)(b)(iv) and held instead that a wiretap application must identify an individual if the Government has probable cause to believe that the person will be overheard engaging in the criminal activity under investigation. CA 4 also held that failure to comply fully with the identification requirement triggers the statutory suppression remedy. Since Donovan reaches a contrary result with respect to suppression, I will vote to grant, vacate, and remand in light of Donovan.

No. 75-500 Anderson v. United States; No. 75-509 Malloway v. United States; No. 75-513 Doolittle v. United States. There are six petitioners in these three curve lined petitions. In addition to petitioners in 75-500 and 75-509, those in 75-513 are Doolittle, Sanders, Union, and Whited. CA 5, sitting en banc, held that suppression would be appropriate if the Government had procured the wiretap in bad faith or if the defendants could show that they were prejudiced by the omission of their names from the wiretap application.

Petitioners first contend that evidence derived from the wiretap should have been suppressed since the intercept

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 9, 1976

Re: No. 75-212 United States v. Donovan

Dear Lewis:

Please join me.

Sincerely,

WHR

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 9, 1976

Re: 75-212 - United States v. Donovan

Dear Lewis:

Although I agree with Parts I and II, I will await the dissent before deciding on Parts III and IV.

Respectfully,

JPS

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

Personal

January 3, 1977

Re: 75-212 - United States v. Donovan

Dear Thurgood:

You have written a fine dissent. The only reason I did not join it completely is that I am not sure I agree with the dissent in Chavez and, with respect to Part III, I am somewhat doubtful about having the motive of the government agent determine the admissibility of evidence.

Respectfully,

John

Mr. Justice Marshall

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: JAN 3 '77

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-212

United States, Petitioner, v. Thomas W. Donovan et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[January —, 1977]

MR. JUSTICE STEVENS, concurring in part and dissenting in part.

For the reasons stated in Parts I and II of MR. JUSTICE MARSHALL's opinion, I respectfully dissent from Parts III and IV of the Court's opinion. I join Parts I and II of the Court's opinion.