SUPREME COURT OF THE UNITED STATES

No. 94–270

UNITED STATES, PETITIONER *v.* ROBERT P. AGUILAR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 21, 1995]

JUSTICE STEVENS, concurring in part and dissenting in part.

Although I agree with the Court's disposition of the §1503 issue, and also with its rejection of the First Amendment challenge to respondent's conviction for disclosing a wiretap application under §2232(c), I believe the Court of Appeals correctly construed §2232(c) to invalidate respondent's conviction under that statute.

When respondent was convicted of disclosing a 30-day wiretap authorization that had expired months before the disclosure, he was convicted of an attempt to do the impossible: interfere with a nonexistent wiretap. Traditionally, the law does not proscribe an attempt unless the defendant's intent is accompanied by "a dangerous probability that [the unlawful result] will happen." *Swift & Co.* v. *United States*, 196 U. S. 375, 396 (1905) (Holmes, J.). Whether such a dangerous probability exists, of course, depends ultimately on what result we interpret the statute as having declared unlawful. See 2 W. LaFave & A. Scott, Substantive Criminal Law §6.3, pp. 44–45 (1986). In this case, there was no dangerous probability that respondent actually would reveal the existence of a wiretap or wiretap application because none existed to reveal. We should abjure a construction of a criminal statute that leads to criminalizing nothing more than an evil intent accompanied by a harmless act, particularly when, as here, the statutory language does not clearly extend liability so far. Cf. *Simpson* v. *United States*, 435 U. S.

6, 14–15 (1978).

Indeed, the text of §2232(c) favors a reading that requires, as an essential element of the offense, the possibility of interference with an authorized interception. Both the second and third clauses of the statute support this straightforward interpretation. The second clause requires that the defendant intend to impede "such interception." That phrase refers to an interception that the defendant knows a federal officer "has been authorized or has applied for authorization" to make. After the authorization expires, no "such interception" can occur. Moreover, to infer that "such interception" includes any interception that might be made pursuant to any subsequent reauthorization severely undermines the statute's knowledge requirement by making actual knowledge of an initial, limited authorization the linchpin of liability for disclosing later, entirely conjectural or nonexistent authorizations. That inference contradicts our usual practice of giving strict effect to scienter provisions. See, *e.g.*, *United States* v. *X-Citement Video, Inc.*, 513 U. S. ___, ___-___ (1994) (slip op., at 5–9).

The third clause of §2232(c) describes the notice that a defendant must attempt to give a third person in order to violate the statute as notice of "*the* possible interception." The definite article necessarily refers to an interception that is "authorized" (or for which federal officers have applied for authorization) per the second clause, thereby imposing authorization as a requirement to satisfy the next word, "possible." I agree with the Court that interceptions prevented by mechanical failures or the departure of the suspect are "possible" within the meaning of the statute, see *ante*, at 9, as long as those interceptions, however unlikely, are legally "authorized." The wholly theoretical interception that respondent was convicted of attempting to impede was not authorized, nor had federal officers even sought authorization for it;

therefore, it was not "possible" within the meaning of the statute.

The Court's attempt to explain the word "possible" as an assurance that the statute will cover interceptions that may or may not result from a pending application, see *ante*, at 10–11, is unpersuasive. Because the statute plainly criminalizes disclosures of pending applications, "possible" does not need to do the work the Court assigns it. The phrase "such interception," already used in the second clause, would do just as well. The function of "possible" must be to place some temporal limitation on potential liability under the statute. Under the Court's reasoning, respondent could be found guilty if he had disclosed a 10-year-old application or authorization. The word "possible," properly understood, would prevent such an absurd result by limiting liability to interceptions that could actually be made pursuant to present or pending authorization.

As the Court notes in response to this dissent, see *ante*, at 10, under its reading the third clause serves to define the *actus reus* element of the crime, just as Congress could have done by replacing the phrase "notice of the possible interception" with the unambiguous phrase "notice of such authorization or application." That unambiguous language, however, would not achieve the temporal limitation on liability that I believe Congress intended to achieve with the words "possible interception." The Court appears to acknowledge the need for such a limitation. See *ante*, at 10, n. 3. Rather than recognizing the limitation the statute contains, however, the Court hints that it might in some future case invent one. Limiting liability to the time before the authorizing judge announces the wiretap may well be "plausible," *ibid.*, but no plausible basis exists for finding that limitation in the words of the statute. A wiser course than judicial legislation, I submit, is simply to adopt a

literal, reasonable construction of the text that Congress drafted.

I would affirm the decision of the Court of Appeals in its entirety.