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Continued

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W. Mark Felt (left), Edward S. Miller and L. Patrick Gray 3d.

Who Knew What, and When, at the F.B.I.?

By ANTHONY MARRO

WASHINGTON — From the start, the investigation into the break-ins by agents of the Federal Bureau of Investigation has involved a good deal of finger-pointing and blame-shifting. All the way up the line, agents and their supervisors have been saying that their superiors, with proper authority, had told them that "bag jobs" must be performed. The pattern held last week when the three men indicted on charges of authorizing those break-ins suggested in pretrial motions that the persons actually responsible included people outside the reach of law: two former high-level bureau officials who are dead and a former President who has been granted a pardon.

But there was more than an exercise in finger-pointing to the statements filed on behalf of L. Patrick Gray 3d, the former acting director, and W. Mark Felt and Edward S. Miller, top aides during his brief tenure. Together, they outlined the defenses that will be raised, and underscored the difficulties the prosecutors will have in building their case. They also made clear that before matters run their course there will be still more controversy, including a good chance of fighting between Mr. Gray and his co-defendants.

Because the issues deal with what constitutes legitimate use of police power, there could be consequences for the future performance of all law-enforcement agencies. For the bureau, there is an extra, and more immediate, worry. Not only were three former officials indicted but the new director, William H. Webster, must decide soon whether to take disciplinary action against more than 60 agents. Agents, in turn, worry that disciplinary proceedings could undercut their defense in a half-dozen civil suits filed by targets of break-ins, mail openings and warrantless wiretaps.

Mr. Miller's motion to dismiss the charges against him sketched the outlines of controversies yet to come. His lawyers said he had told a Federal grand jury, and would say again in court, that he informed two superiors in 1973 about the break-ins — William D. Ruckelshaus, who was acting director briefly in 1973, and Clarence M. Kelley who became director later that year. Mr. Ruckelshaus in effect denied the allegation; Mr. Kelley was not reached for comment.

No matter what they may say, it would only draw more people into the dispute. Since Mr. Ruckelshaus later became Deputy Attorney General, it raises the possibility that the Justice Department knew about break-ins as early as 1973, but did not start an investigation until 1976. And it conflicts with Mr. Kelley's past assertions that he learned nothing until 1976.

Justice Department officials will not discuss the potential liabilities for either man. But the very possibility that both knew about illegal activities and did nothing may create difficulties for the prosecutors. Proof that the department waited two years before beginning an investigation could bolster arguments for dismissal of the charges because so many key witnesses have died and important documents disappeared that the defendants could not receive a fair trial. Besides, evidence that two and perhaps three recent Attorneys General knew about break-ins and ignored them makes it easier to claim that the prosecution of these three defendants is as selective and discriminatory as to be unconstitutional.

All three are also ready to argue that high Government officials wanted the break-ins, as part of a hunt for Weather Underground fugitives, and they had no reason to doubt the officials' authority. Mr. Miller's lawyers cited grand jury testimony by the late William C. Sullivan, formerly the No. 3 man in the bureau, that he personally had relayed verbal orders from the late J. Edgar Hoover to "use any practical means" to locate the fugitives. All three asked the Government to produce a copy of a 1971 memo written by bureau officials in charge of White House liaison. The essence of this, according to Mr. Gray's lawyers, was that an aide had passed the word that "President Nixon wanted the F.B.I. to use all means possible to

stop terrorist activities." According to a source familiar with its contents, the document doesn't contain a specific order from the President to conduct break-ins, but "does show there was a great deal of pressure on the bureau to find the fugitives."

After that, however, Mr. Gray and his co-defendants go their separate ways. Mr. Miller and Mr. Felt say Mr. Gray himself was among the higher-ups who authorized break-ins; Mr. Gray says he did no such thing. Although popular with agents on the street, Mr. Gray had running feuds with many senior bureau officials, who generally considered him an outsider. It strikes many agents as ironic that he should now be lumped into a conspiracy with men who were part of the group he had feuded with during his one year in office. Some agents are prepared to believe that many things happened about which Mr, Gray knew little or nothing. One consequence is that unless Mr. Gray is granted his motion for a separate trial he will spend much of his time at odds with his co-defendants, they charging that he was among those who authorized break-ins, he arguing that operation were carried out without his knowledge, let alone his approval.

It is not likely that the defendants will benefit from the Justice Department nervousness about national security that enabled Richard Helms, the former Director of Central Intelligence, to arrange a plea bargain last year on his felony indictment. Their lawyers are asking for piles of Government documents, which might include embarrassing material about break-ins and wiretaps at foreign embassies and consulates. But unlike the Helms case, this one doesn't seem to give the department pause about going ahead with a trial. Much of the information, sources say, probably could be reviewed in private, in the judge's chambers, say. There is no sign that the Government would abandon its case rather than turn over files.

Quite the contrary. Some neutral observers believe the department has constructed a skillful indictment, one that can be used to advantage in a Federal judicial district, Washington, which has been unsympathetic to defenses based on claims of "national security" or inherent Presidential powers. But they also agree that, as with many cases of the Watergate period, this one will be sensitive and not easily pursued because it involves fundamental issues going well beyond the specifics of the indictment and people, some of them dead, who are not in the dock.

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