

Prosecutors Oppose Move for Dismissal

Case Against Ex-FBI Chief Is 'Weakened'

By Charles R. Babcock
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Justice Department lawyers said yesterday that their conspiracy case against former acting FBI director L. Patrick Gray III has been "weakened" since he was indicted 2½ years ago. They said a key witness has changed his story, but they opposed a motion by Gray's attorney to dismiss the charges.

John N. Niels Jr., the chief government lawyer in the case, said in papers filed late yesterday in U.S. District Court here that the indictment's allegation that Gray gave top FBI officials approval in 1972 to conduct break-ins in search of Weather Under-

ground radicals "is now unconvincing." But he said that Gray's attorney, Alan I. Baron "greatly exaggerates" the extent to which the case is undermined.

Any decision on whether to dismiss the case, the department said, should await the pending trial of W. Mark Felt and Edward S. Miller, two other former high FBI officials who were indicted with Gray in early 1978 on charges of approving the illegal break-ins in the 1970s.

Felt and Miller are scheduled to stand trial Aug. 18, and are expected to raise, as a defense that Gray approved the break-ins they ordered. Gray was severed from their case in

March 1979 because of national security complications.

Baron charged in his motion Thursday that a federal prosecutor on the case has acknowledged the indictment was based on erroneous information, but still refused to dismiss the charges.

Niels said in his reply brief yesterday that the indictment was based on Felt's and Miller's testimony as well as the now-discredited information about what Gray allegedly told his top commanders in September 1972.

Their testimony—if found credible at their trial—could be used against

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Gray, now that he is being tried separately, Niels reasoned.

Baron said that he turned his research over to the prosecutors in April 1979 and that after their own review one government attorney acknowledged that "if the prosecutors had known at the time the indictment was sought all of the facts brought to their attention by the defense and the government's own reevaluation, Mr. Gray would not have been charged in the first place."

Baron said he also wrote Attorney General Benjamin R. Civiletti in July questioning the integrity of the investigation because of the errors given the grand jury.

It is a gross injustice to leave Gray "dangling at the end of an indictment" under the circumstances, he wrote, in a clear echo of the Watergate-era decision by the Nixon White House to let Gray "twist slowly, slowly in the wind."

Baron's motion claims that the case against his client is faulty in several respects. The conspiracy charge includes only a few references to acts by Gray. It said that he gave "generic authorizations" for the use of "black-bag jobs" at two meetings of FBI field office chiefs in September 1972 and that he approved a training class in break-in techniques.

In late 1978, Barnet D. Skolnik, the government's trial prosecutor, told Baron the case against Gray would come mainly from nine FBI officials who attended the September meetings. Others who attended didn't recall what Gray said about break-ins, Skolnik said.

Baron claims his research found that some of the government witnesses recanted, and many of those

who "didn't recall" in fact recalled that Gray made no statement approving break-ins.

His research also uncovered notes by other agents which contained no mention of Gray's giving general approvals of break-ins. Gray did tell the grand jury that indicted him that he personally had approved a 1972 break-in at the Dallas office of a suspected Arab terrorist. This was just after the massacre at the Munich Olympics.

The alleged class on bag jobs never took place, Baron said in his papers, because Gray had suspended the lecturer on an unrelated matter. Gray had approved the agenda, but had no idea of the subject matter of the "special investigative techniques" speech, he said.

Baron also accused the grand jury prosecutors of making "utterly false" statements that the Weatherman break-ins started after Gray's alleged September 1972 statements. The record shows, instead, Baron said, that the break-ins started in June 1970, nearly two years before Gray took office.

There have been at least 29 break-ins in connection with the Weather Underground investigation, Baron said. Thirteen occurred while Gray was director, but the government concedes he knew nothing of the specific entries.

In his plea to U.S. District Court Chief Judge William B. Bryant, Baron said the case should be dismissed now because it "from its inception was so riddled with distortions, misrepresentations and sheer incompetence that its continuation is an infamous blot on the administration of justice."

Baron said he hadn't moved for a formal dismissal before because he felt the government should have asked for the dismissal itself.