The Attorney General Defies a Judge

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AT FIRST GLANCE, the position of Attorney General Griffin Bell in the Socialist Workers Party case seems outrageous. He says he will not obey a court order to turn over the names of those who secretly informed the FBI about the party's activities. That's bad enough—an attorney general openly defying an order of a federal judge—but it gets worse. If Mr. Bell doesn't obey, the judge can, among other things, find him in contempt and send him to jail or order the United States to pay the SWP $40 million.

Once you examine this case closely, however, Mr. Bell's action is neither outrageous nor even illogical. He believes the government has a legal right to protect the confidentiality of its sources. Since the judge's order requires him to break that confidence, he believes he must challenge it. And the only way he can challenge it, the only way he can get a higher court to review that order, is to refuse to obey it.

Recognizing the unseemliness of this situation, the Department of Justice has tried to get the second circuit Court of Appeals and the Supreme Court to review the disclosure order. Each has refused, primarily because the judicial system is geared to reviews of *final* orders, like contempt citations and money judgments, but not of orders entered during litigation. While these preliminary orders sometimes determine the outcome of a case, the appellate courts don't normally consider them until that outcome has been reached.

Our guess is that Mr. Bell's position on the order itself will be sustained once he gets a hearing in a higher court. In refusing to consider the question now, the Court of Appeals expressed its "concern" that the federal judge (Thomas P. Griesa of New York) was requiring "disclosure for which there is no substantial need." It added that the case might well be decided on other issues and that it was "far from convinced" that the party's lawyers needed to know the identities of the informers. That, plus the reluctance of the Supreme Court recently to require the government to reveal the identity of its confidential informers even in criminal cases, suggests that Mr. Bell has a strong legal position.

Despite the SWP's not knowing who spied on it for the government, the SWP already has much evidence about the extent of the FBI's surveillance between 1938 and 1973. The government has provided much of that evidence during pre-trial discovery proceedings, including the disclosure that about 1,300 persons (including 300 party members) supplied it with confidential information on at least two occasions. It has provided summaries of the raw files of a small cross-section of those informers but has balked at giving the party's lawyers access to either the raw files or the names. The Department of Justice has argued, much as newspapers have argued in cases involving their confidential informants, that sources of information will dry up if promises of confidentiality are broken.

Enough of what the government has already disclosed has been made public to convince us that the FBI went far beyond the bounds of reason in its surveillance. But whether anything it did entitles the SWP to collect $40 million in damages—which is what it is seeking—is another matter depending in large part on interpretations of complex laws. There may well be a way, as the Court of Appeals suggested, that this lawsuit can be disposed of without a direct confrontation between the Attorney General and a federal district judge. The judge ought to find it.