See also under FBI - Burglaries - (Felt, Miller) re Weathermen and FBI, Vermeersch, John & ITT, 2/25/75 on its domestic intelligence

In Burglaries/indictment file Klux Plot 9/24-25/80 include Vermeersch

FBI Ex-Aides' Trial: Fight Over Memos

10/14/80

By Laura A. Kiernan
Washington Post Staff Writer

In two smoke-filled rooms on the sixth floor of the U.S. District Court here, steel file cabinets with combination locks stand against the wall like tall safes, filled with classified government records. An automatic coffee pot runs nonstop. Ashtrays and trash cans overflow with the day's debris. On one table, in a swell of paper, sits a fishbowl full of candy.

Defense lawyers for W. Mark Felt and Edward S. Miller call this place the "war room." Field headquarters for the government prosecutors is located three floors below. Each day, both sides wheel grocery carts of documents into Chief Judge William B. Bryant's courtroom, where they have done battle for almost a month before a jury.

So far, it's been a murky fight.

The government charges that eight years ago, in a desperate search for clues to the whereabouts of members of the radical Weather Underground organization, then top FBI officials Felt and Miller authorized illegal searches into the homes of friends and relatives of the fugitives.

Felt, the No. 2 man at the bureau, and Miller, head of the powerful domestic intelligence division, contend that they had authority from the then acting FBI director, L. Patrick Gray III, to conduct the searches in national security cases. The Department of Justice knew the technique — known in the bureau as a "black bag job" — was being used and no one said it was illegal, Felt and Miller argue.

More than two years have passed since a federal grand jury charged Felt, Miller and Gray with conspiracy to vi-

See TRIAL, A6, Col. 1

TRIAL, From A1

olate the civil rights of the people who were the targets of those searches, a felony punishable by up to 10 years in jail, a $10,000 fine or both.

Much of the ensuing time has been spent in a painstaking effort to edit government documents so that they could be used at trial without disclosing national security information. It was this grueling process, carried out in a vault at the Justice Department, that led many observers to doubt that the case against Felt and Miller would ever be heard by a jury in a public courtroom.

Lawyers and the court concocted what defense lawyer Brian P. Gettings calls "double talk" — with code phrases like "Program C, Program D and Program Q" — to protect national security information.

The witnesses have been carefully briefed on what they can and cannot say in open court. "There's something that I don't want to discuss and I think you know what it is because it's classified," one witness, a retired FBI man, told one of the prosecutors in an awkward moment during his testimony.

Unlike most criminal trials, the essential facts in this case are not in dispute. Felt and Miller freely admit that they authorized the black bag jobs. So the trial has centered on the meaning of FBI memos, on discussions of counterintelligence techniques at various high-level meetings, and finally on the state of the law of search and seizure at the time of the break-ins.

The government's share of the legal debate focuses on a 1972 U.S Supreme Court ruling that electronic surveillance of a suspected domestic subversive is illegal without a court warrant. Memos, initialed by Felt and Gray, were introduced into evidence to show that on the date of that high court decision, the bureau immediately terminated a wiretap directed at the sister of one of the fugitive Weathermen. A former Justice Department lawyer who was a key government witness testified that while the language in the Supreme Court ruling was not precise, he interpreted it to mean that black bag jobs also were prohibited because if you can't plant a microphone "you can't turn around and break into her apartment."

Despite that warning, the government contends, the FBI, taunted by the violent Weathermen, went ahead with at least nine black bag jobs in search of leads to the fugitives and hid cryptic records of the break-ins outside regular FBI files.

Defense attorney Gettings, one of Felt's lawyers, and Miller's lawyers, Thomas A. Kennelly and Howard S. Epstein, who vowed to more than match the government for every piece of paper brought into the courtroom, have zeroed in on the built-in vagaries of legal analysis — particularly in the difficult area of search and seizure.

Under questioning by lawyers, witnesses have also repeated the defense theme that the bureau believed that surreptitious entries were legal but that the information collected as a result was "tainted" and thus could not be used in court.

That analysis, actually the reversal of traditional search and seizure law,

has led to some unusual law school-like exchanges between government prosecutor John W. Nields Jr. and some of the witnesses. Such a back and forth occurred last Friday between Nields and New York lawyer Roy Cohn, a top aide in the Justice Department in the early 1950s.

A black bag job "was not to be done for evidentiary purposes. It was done for informational purposes," testified Cohn, who is best known these days for his unsuccessful defense on a tax evasion charge of the coowners of the New York disco Studio 54.

"Was there any reason in 1952 why this evidence could not have been used if the searches were legal?" asked Nields, who is prosecuting the case along with Justice Department lawyers Francis J. Martin and Daniel S. Friedman.

"I suppose there is no reason why it could not," Cohn responded.

Cohn said his view was that "surreptitious entries were legal and proper" as long as they were related to national security cases — and there was no court case, he said, between 1952 and 1973 (the close of the conspiracy period for Felt and Miller) that directly addressed the legality of such searches.

"The courts never got a chance to hear about it, did they?" Judge Bryant asked Cohn. The government contends that the bureau concealed information about the searches.

"Every time the opportunity came up, the courts seemed to stop a little bit short of it," Cohn testified.

The plain language of some of the memos introduced into evidence has been a point of debate in the trial. Last week, prosecutors introduced a 1963 memo from an assistant attorney general to then FBI director J. Edgar Hoover which said that a warrantless search of the home of a man sought in connection with an espionage investigation was illegal even though the man's landlord was present during the entry.

Defense lawyers pointed out, however, that the memo specifically said that such searches would be unlawful as a "general rule."

Key to the defense argument is Felt's and Miller's contention that they believed that the black bag jobs in search of the Weathermen were justified for national security reasons, and they have introduced extensive evidence which they claim shows the radical group's connections to hostile foreign powers, particularly Cuba and North Vietnam. And they have made a point of resurrecting the shrill rhetoric, the memories of bombings and other violence that the Weathermen claimed responsibility for in the early 1970s.

The government countered with testimony that the actual targets of the searches — the friends and relatives of the Weathermen — had no significant links to foreign powers. Even if there were foreign ties in the case, the government contends, such secret searches would have to be approved on a case-by-case basis by the president or the attorney general.

Last week, the defense shot back with testimony from a former high-ranking bureau official that in the fall of 1972 he was present at a meeting between then acting director Gray, who has been granted a separate trial, and Miller in which Gray "indicated a receptiveness" to reinstituting black bag jobs in connection with a national security investigation known at the trial only as "Program C."

In October 1972, the official, William Branigan, former head of the bureau's espionage section, said Miller received approval from Gray to reinstate Program C on a strict "need to know" basis, but that no activity was to commence until after November 1972, the month President Nixon was elected to a second term in office.

Frank W. Dunham Jr., who is representing Felt along with Gettings and Mark Cummings, last week also introduced into evidence a stipulation — facts agreed to in advance by the prosecution and defense — that described a document, on White House stationery, in the FBI files until at least June 1973. It said that President Nixon directed the FBI to remove restraints on surreptitious entries in Program C and other internal security matters.

The last witness called Friday, before the court recessed for the long weekend, was Larry D. Grathwohl, also known as the "Cincinnati Source," once a paid FBI informant and, according to the FBI, the only man to successfully penetrate the Weather Undergound in the early 1970s.

Grathwohl recalled his year-long odyssey with the radicals, traveling from city to city planning "strategic sabotage" directed at symbols of authority, from police officers to multinational corporations and government buildings.

Grathwohl explained that the Weathermen, a militant splinter group of the Students for a Democratic Society, took their name from some lines in a Bob Dylan song: "You don't need a weatherman to know which way the wind blows."

And they believed, Grathwohl testified, "the time for violent revolution was now."

The trial is expected to resume today.

Trial of FBI Ex-Aides: A Fight Over Memos

Lawyers and the court concocted what defense lawyer Brian P. Gettings calls "double talk" — with code phrases like "Program C, Program D and Program Q" — to protect national security information.

Memos, initialed by Felt and Gray, were introduced into evidence to show that on the date of the high court decision, the bureau immediately terminated a wiretap directed at the sister of one of the fugitive Weathermen.