

Judge Suspends Papers Trial, Orders Full Data on Wiretaps

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LOS ANGELES, May 10—The Justice Department revealed for the first time in U.S. District Court here today that the Federal Bureau of Investigation overheard Daniel Ellsberg in wiretapped telephone conversations in late 1969 and early 1970, but said that records of the electronic surveillance have disappeared.

According to a memorandum from FBI Director William D. Ruckelshaus, Ellsberg was "overheard talking from an electronic surveillance" at the Bethesda, Md., residence of Morton H. Halperin, then a consultant to the National Security Council. Ellsberg was a guest at Halperin's home at the time.

The surveillance of Halperin's telephone occurred between the spring of 1969 and June of 1971, it was disclosed, but records relating to it have been missing since "July-October, 1971."

The disclosure—the latest in a string of sensational developments in the Pentagon papers trial of Ellsberg and Anthony J. Russo Jr.—infuriated U.S. District Court Judge W. Matt Byrne Jr., who had ordered more than a year ago that all such wiretaps be revealed.

Byrne immediately suspended proceedings in the case and ordered chief prosecutor David R. Nissen to produce full details of the electronic surveillance and an explanation of why he was not told about it earlier.

With defense motions to dismiss the case on the basis of other "governmental misconduct" already under submission, the judge declared that "this information . . . puts a different posture on the issues."

He noted that Ellsberg apparently "was surveilled in the most crucial period of

the indictment"—just at the time when he and Russo were photocopying the top-secret Pentagon papers at a Hollywood advertising agency.

(Ellsberg and Russo are charged with conspiracy, espionage and theft of government property in connection

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with disclosure of the Pentagon's history of U.S. involvement in Southeast Asia.)

Byrne added that the wiretapping seems to have taken place shortly before FBI agents first went to the Rand Corp. in Santa Monica, Calif., to investigate Ellsberg's activities as a researcher there.

The implication was that the electronic surveillance may have been a part of, or led to, the government's investigation in the case. If it is shown to have been an illegal wiretap in violation of the Fourth Amendment to the Constitution or to have otherwise "tainted" the prosecution's evidence, this could lead to immediate dismissal of the case.

Byrne scheduled a court session for Friday morning for argument over whether the wiretaps—and the lack of government records on them—require such a dismissal.

The judge viewed the matter so serious that he delayed the argument between defense and prosecution attorneys, scheduled for this morning, on a defense motion to acquit Ellsberg and Russo on the grounds that the government's evidence against them is insufficient to sustain a conviction.

Initially, Byrne gave Nissen an hour to make the necessary inquiries by telephone with the Justice Department and FBI headquarters in Washington.

But the prosecutor came back to court after an hour and said that he had been unable to reach Ruckelshaus or Assistant Attorney Gen-

eral Henry E. Petersen, head of the Watergate investigation, because they were out to lunch. The judge then gave Nissen three more hours and warned, "Tell Mr. Petersen that I want the information now and not at the completion of some investigation."

Byrne said that he wanted full information on the wiretaps not only of Ellsberg and Halperin, but also of "newsmen or anyone else" in connection with all government investigations of the Pentagon papers leak and publication.

"It seems like there was more than one interception," the judge said after reading the Ruckelshaus memo. "I want to know how many, how long the electronic surveillance was on."

Questioned repeatedly by the judge, Nissen protested that he had no personal knowledge of the wiretapping or of the FBI's and Justice Department's procedures for keeping track on such interceptions. "I only know what's in the [Ruckelshaus] memorandum," the prosecutor said.

After the luncheon break, Nissen returned to court with a set of "questions and answers" transmitted to him by the Justice Department.

Among other things, they said that the wiretap on Halperin was not connected with the Pentagon papers case and that "key interviews" are under way to trace the missing records.

Chief defense counsel Leonard B. Boudin later read to the judge from a Time magazine article which contended that the late FBI director, J. Edgar Hoover, was aware that wiretap records had been removed from the bureau's files during 1971.

The Ruckelshaus memo, sent to Petersen on Wednesday with the recommendation that it "be immediately filed with the court," is entitled, "Preliminary Report Concerning Ongoing Investigation of Possible Wiretaps of Newsmen and Others."

"Shortly after assuming office as acting director of the FBI" two weeks ago, Ruckelshaus said, "my attention was called to the newspaper allegation that FBI personnel had been wiretapping unidentified newsmen."

Although FBI records did

not reveal such wiretaps, Ruckelshaus said, he "initiated an investigation" last Friday (May 4) "to interview present and retired FBI personnel for the purpose of determining, if possible, whether there had been any such taps."

Ruckelshaus added that on Tuesday night he received information "that an FBI employee recalls that in late 1969 and early 1970 Mr. Ellsberg had been overheard talking from an electronic surveillance of Dr. Morton Halperin's residence. It is this employee's recollection that the surveillance was of Dr. Halperin and that Mr. Ellsberg was then a guest of Dr. Halperin."

The acting FBI director's memo did not indicate whether the surveillance had been court-authorized or one of the "national security wiretaps" which the Nixon administration once claimed an inherent right to conduct without prior court authorization.

But the "questions and answers" submitted to the court later said "testimonial evidence indicates the surveillances were authorized by the Attorney General [at that time, John N. Mitchell] in accordance with national security procedures."

Such wiretaps were outlawed by the Supreme Court last summer, and it has since been revealed by The Washington Post that they had been used, among other purposes, to investigate leaks of "national security information" from the National Security Council and other government agencies.

Ruckelshaus stressed that "I have no information concerning the substance of the conversation (in which Ellsberg was overheard) nor has the investigation to date

been able to find any record of such a conversation."

He said that as the investigation continues, "further facts bearing upon the wiretaps may be uncovered."

Halperin, a deputy assistant secretary of defense for international security affairs during the Johnson administration, was one of the Pentagon officials in charge of the compilation of the Pentagon papers for then-Defense Secretary Robert S.

McNamara in 1967. Ellsberg, then an employee of the Rand Corp., was among those recruited to help write the study.

Remaining at the Defense Department in the early days of the Nixon administration, Halperin was recruited by Mr. Nixon's national security adviser, Henry A. Kissinger—an old colleague from Harvard University—to join the NSC staff.

He resigned in September, 1969, from that job, but stayed on as an NSC consultant until May, 1970, when he left in protest against the sending of American troops into Cambodia and became a senior fellow at the Brookings Institution in Washington.

Halperin has officially been a consultant in Ellsberg's legal defense effort since November, 1971. He testified as a defense witness during the trial.

As "chief of staff" for the Ellsberg-Russo defense, Halperin was the author of the controversial theory that the copy of the Pentagon papers stored at the Rand Corp.—and photocopied by Ellsberg and Russo—was not "government property" at all, but rather the "private papers" of himself and former Pentagon officials Paul C. Warnke and Leslie H. Gelb.

According to that theory, which both Warnke and Gelb dispute, Ellsberg was not bound by the usual Rand Corp. rules concerning the safeguarding of classified material, because special "ground rules" applied to that copy of the Pentagon papers.

During pretrial proceedings in the Pentagon papers case, Byrne issued orders on May 2 and July 7, 1972, requiring that the Justice Department disclose any and all wiretaps on Ellsberg after Sept. 30, 1970, and on Halperin after Nov. 28, 1971.

But Nissen agreed with the judge today that he had interpreted the pretrial order as meaning that any electronic surveillance on Ellsberg at any time was to be disclosed.

This seemed to indicate either that the Justice Department had defied Byrne's order or that it had been unable to produce some of the wiretap information because of the "disappearance" of the FBI's records.

Ellsberg, talking with reporters today, said it was "conceivable" that while staying at Halperin's home in Bethesda in 1969 or 1970, he made telephone calls during which he discussed the Pentagon papers.

Today was the second time that the Pentagon papers trial was disrupted by revelations of government wiretapping.

Last July, after a jury was already sworn to begin hearing evidence, the prosecutors disclosed that a defense attorney or consultant, who was not identified publicly, had been overheard in a non-court-authorized "foreign intelligence" electronic surveillance.

Byrne ruled that the wiretap log was irrelevant to the case, but the defense, in a desperate appeal, persuaded Supreme Court Justice William O. Douglas to stop the trial pending review of the matter.

The Supreme Court eventually refused to hear the defense's appeal on that point, but the long delay resulted in declaration of a mistrial because of the risk that the jury had been prejudiced by publicity surrounding the case.

Another jury was selected in January and has been hearing evidence ever since.

Defense attorneys, while delighted by today's developments, pleaded with Byrne this afternoon not to end the case with merely a dismissal that punishes "the extreme wrongdoing of the government."

Boudin asked that the judge first rule on the defense motion for a directed verdict of acquittal, in order to vindicate Ellsberg and Russo and settle legal disputes over whether the indictment was an effort at "information control" by the government.

Without a formal acquittal, Boudin argued, "a stain might still be left" on the two defendants because of the government's serious charges against them. "It would be a terrible waste of judicial knowledge," he said, if Byrne fails to decide the legal issues.

At Nissen's requests, the judge scheduled Friday morning's court session half an hour later than usual, to give the government extra time to come up with more

details on the wiretapping.

Boudin argued that any additional information submitted should include inquiries made of Mitchell, Attorney General Richard G. Kliendienst, former Assistant Attorney General Robert C. Mardian, and "regrettably, at the appropriate time, of the President."

Nissen said he could prove at a hearing that no government evidence in this case came from the wiretaps and that he could establish "an independent source" for all of it.