

Ellsberg Calls Use of Subpoena Illegal

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By MARTIN ARNOLD

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LOS ANGELES, Dec. 20 — The Government was accused in the Pentagon papers case today of illegally using a grand jury subpoena issued in Boston to give the Federal Bureau of Investigation leads in investigating the case here.

A lawyer for Daniel Ellsberg also charged that the F.B.I. had examined the bank records of Dr. Ellsberg and his wife, Patricia, and then visited persons to whom they had sent checks, including Mrs. Ellsberg's dentist, who was asked for her dental records.

But the main charge involved the Federal grand jury in Boston. That grand jury, in a case totally separate from the one here, was inquiring into how The New York Times and other news media obtained and published the Pentagon papers, a Defense Department study of the United States involvement in the war in Vietnam.

Phone-Call Records

The Boston jury issued a subpoena for the records of the New York Telephone Company pertaining to telephone calls made and received by the Ellsbergs.

Today, one of Dr. Ellsberg's attorneys, Leonard B. Boudin, charged that instead of turning the records over to the grand jury, "the records were held at the telephone company office for an F.B.I. agent to look at them." He said that the F.B.I. had then collected the names of the persons the Ellsbergs had spoken to and had questioned them. Some of those questioned will probably be witnesses in this case here.

In the case out here, Dr. Ellsberg and Anthony J. Russo Jr., his co-defendant, are accused of 15 counts of espionage, theft and conspiracy. The indictment against them covers only the period between March, 1969, and September, 1970 — nine months to two and one-half years before the papers were first made public in The New York Times on June 13, 1971.

Judge William Matthew Byrne Jr. of United States District Court immediately ordered that the Government file an affidavit advising what telephone records had been subpoenaed by what grand jury and what had happened to them, and also whether or not the Government had in its possession the tele-

phone records of the various defense counsel.

"If an F.B.I. agent can follow up and talk to people [the names disclosed on the telephone records], talking to potential witnesses, we can't use the telephone to talk to our witnesses," Mr. Boudin said. "We don't want toll records to be looked at by the Government."

Surveillance Questions

Most of today's court session was devoted to clearing up various surveillance questions. Judge Byrne said that he had examined a second wiretap that the Government had admitted to having. It involved a defense attorney or consultant in this case. The judge said that it was not relevant to this particular case, so he would not make it available to the defense.

But in this and in the situation involving the telephone company records, he cautioned the Government again that he would not tolerate interference with the defendants' Sixth Amendment rights. These are the rights to counsel, and the rights of privileged communication between counsel and client.

He ordered that the Government again file an affidavit listing the offices and premises of defense counsel and consultants of record, with the assurance that they would not be wiretapped or otherwise bugged electronically.

The Government reiterated that its two wiretaps involving defense counsel had not been taps on the counsel but on the phones of persons the lawyers were calling and that the taps had no relevance to this case. The judge agreed. Mr. Boudin's law firm represents both the Chilean and Cuban Governments in this country.

Letter Held Up

The judge declined to disclose who had authorized the taps, which, he said, had nothing to do with the legal issues today. "If it's legal and it interferes with the Sixth Amendment rights—the right to counsel is sacred—then it still will not be allowed in this case," he said, in reference to wiretapping.

Mr. Boudin also introduced in court what he described as "a rather extraordinary thing." Holding up an airmail envelope, he said that in it was a letter

sent to his wife, Jean, from London, by Daniel Ellsberg's 15-year-old son, Robert, and that somewhere in transit it had been opened and resealed with tape.

He requested that Judge Byrne take the letter that was inside the envelope and have it examined by experts to determine whose fingerprints might be on it, the implication being that the prints of Government agents would be on it.

Judge Byrne declined to do so, but said that if Mr. Boudin would submit the letter with some affidavit tending to prove that the Government had tampered with his mail, he would look into the matter then.

Earlier in court, the judge had denied five motions challenging the jury selection system that were argued by Leonard Weinglass, attorney for Mr. Russo. He then set Jan. 3 for the start of a new jury selection, but ordered that at least one defense and one Government attorney be available on Dec. 27 in the event that any more problems developed in the case.