

F.B.I. TAPS DATA MAYBE INCOMPLETE

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Lawyers Say Possible Gaps
Could Force New Trials
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WASHINGTON, June 5—The Federal Bureau of Investigation's massive index of individuals who have been overheard on F.B.I. wiretaps may be incomplete because of a quirk in the bureau's filing system, according to a former official of the F.B.I.

Ernest H. Belter, who for several years supervised the monitoring of national security wiretaps in the bureau's field office here, described the quirk as "an admitted weakness of the system" in a deposition taken last April in connection with a civil lawsuit.

The deposition, obtained by The New York Times, was taken by attorneys for Morton H. Haperin, a former official of the National Security Council, who is charging Secretary of State Kissinger and others with initiating an illegal tap on his home telephone.

Criminal and civil rights lawyers said today that the potential incompleteness of the files appeared to provide grounds for convicted criminals to win new trials if they could establish that they had been victimized by such a bureaucratic lapse.

"There's certainly a lot of room for movement by lawyers who want to move to vacate convictions," said John H. Shattuck, a lawyer in the New York office of the American Civil Liberties Union.

Testimony Concern Procedure

"I think," he added, "that this has really got to be tested in a criminal case."

Charles R. Nesson, a law professor at Harvard who helped in getting the deposition Mr. Belter, said in a telephone interview from Los Angeles that he expected to cite the former F.B.I. official's statements in moving next week to quash a Federal grand jury subpoena of Emile de Antonio, a New York filmmaker.

Mr. de Antonio, Haskell Wexler, the cinematographer, and Mary Lampson have been summoned to appear before the jury on June 12 to testify about a film they are producing on the Weather Underground, a terrorist group.

Mr. Belter's testimony concerned the procedures that are followed within the bureau after an individual is overheard on an existing wiretap.

As Mr. Belter explained it, if the target of an F.B.I. tap calls a second party, or is called by a second party, the F.B.I.

clerk monitoring the conversation is instructed to prepare an entry for the so-called Elsur file—for electronic surveillance—only if he can positively identify the second individual.

In many instances, Mr. Belter said, the monitor is uncertain of the individual's name and does not fill out such a card; he only enters a phonetic spelling of the name in his wiretap log, which is then passed to the F.B.I. agent who is investigating the case.

If the agent subsequently identified the individual in the course of the investigation, Mr. Belter said, the name and the subject of the overheard conversation would probably be noted in the investigative index in the field office where the surveillance took place.

Mr. Belter was asked in the deposition whether the agent was also required to notify the wiretap monitor of the correct name so that it could be inserted into the Elsur file.

"No," he replied, "and this is an admitted error."

A spokesman for the F.B.I., told of Mr. Belter's testimony, replied after checking, "He's right. We don't have any regulation on that."

But the spokesman added that he believed the probability of such a lapse to be unlikely because of the close relationship normally maintained between a monitor and an agent working on a case.

The potential incompleteness of the Elsur file is important, however, because it is this single index, maintained at F.B.I. headquarters here, that is examined when a Federal criminal defendant moves in court to discover whether he has been overheard through electronic surveillance.

"Most of these cases," Mr. Nesson said today, "come back with a blanket denial" of any electronic surveillance of the defendant, and he predicted that "I think we'll see two things."

In current criminal cases where wiretap disclosures are being requested, he said, defense lawyers were not likely to be satisfied with a Government response that no entry for the defendant exists in the Elsur file, but to request a check of the investigative indices and of the summaries of the overheard conversations themselves.

In past cases, Mr. Nesson said, the possibility of an error would "without question" be raised. If, he said, it were determined at a post-conviction hearing that an illegal surveillance had occurred, but had not been reflected in the Elsur file and reported to the defendant, a new trial could be obtained.