

EDNESDAY, SEPTEMBER 8, 1976

2 F. B. I. AGENTS TOLD THEY NEEDN'T TESTIFY

Agreement for 'Interviews' Follows a Ruling in Court of Appeals Upholding Their Subpoenas

By BARBARA CAMPBELL

The Justice Department yesterday won an attempt in court to compel two special agents for the Federal Bureau of Investigation to appear before a special grand jury investigating allegedly illegal burglaries and possible criminal violations of civil rights by them and other agents.

But hours later, attorneys for the Justice Department and the two agents said the agents would not have to appear.

The apparent victory for the Justice Department came when the United States Court of Appeals refused to stay the enforcement of a subpoena.

It was not immediately clear why attorneys for the Justice Department, after taking a consistently strong stance that the men must appear and after countering all legal attempts by the agents to avoid appearing, changed their minds.

Interviews of Agents Planned

"We have worked out an agreement to the extent that certain interviews would obviate the need for grand jury appearances by some of the agents," said Stephen Horn, a lawyer for the Department of Justice interviewed in a fourth-floor office at the Federal Courthouse in New York City yesterday hours after the Court of Appeals for the Second Circuit said the F.B.I. agents must appear before the grand jury.

However, Martin W. Schwartz, one of the attorneys representing the two agents, Philip J. Newpher and Claiborne J. Poche, and approximately 28 other agents who have been subpoenaed stated unequivocally:

"We do not anticipate at the present time that there will ever be a need for any of our clients to appear before the presently enpaneled special grand jury."

The acts being investigated by the grand jury allegedly occurred in New

York City in the last five years.

'Alternative' Being Worked Out

Mr. Schwartz, who was also present in Mr. Horn's office yesterday afternoon, added that "alternative means of complying with the subpoena are being worked out with the prosecutor."

Mr. Schwartz added that the United States Attorney General, Edward H. Levi, "has taken certain steps to safeguard national security" and that agents who give information "will be protected from criminal prosecution and criminal discipline."

On Friday, the agents lost an attempt in United States District Court at Foley Square to have the subpoenas against them quashed. They had maintained that they should not be compelled to go before a grand jury because they would have to divulge information that they are prohibited from disclosing by security regulations.

However, J. Stanley Pottinger, head of the Justice Department's Civil Rights Division, had argued that "it would border on fantasy to believe that the national interest is at stake."

Arguments in Circuit Court

Yesterday morning the agents petitioned a three-man panel in the Circuit Court of appeals to be granted a stay of the enforcement of the subpoena hours before the grand jury was to have convened.

Mr. Schwartz argued again that the men should not appear because if they refused to appear they would be cited for contempt and "their jobs would be put in jeopardy" because Clarence M. Kelley, the director of the F.B.I., had ordered his men to cooperate fully with the authorities. "It is our opinion," Mr. Schwartz said, "that the grand jury is probing into an area in which it has no right to probe."

Mr. Horn reiterated the Department of Justice's contention that national security would not be jeopardized by the appearance of the agents.

Agreement Worked Out

However, by yesterday afternoon an agreement had been worked whereby the agents would not appear before a grand jury, but would give information to the Department of Justice. Mr. Horn, however, still insisted that "this agreement has no bearing upon the issue as to whether national security is involved in this investigation." He went on to say "the investigation is proceeding and we are gathering information both within and without the grand jury."

Both Mr. Horn and Mr. Schwartz emphasized that their agreement had been made subsequent to the decision by the Court of Appeals.