THE NATION

FIDDLING WITH THE LAW

MR. BELL AND INFORMERS

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Recent history has taught us to look skeptically upon claims of "privilege" asserted by government officials in order to keep their files closed to public scrutiny. We might expect by now to find nearly everyone watchful of executive officers asserting "security" or "confidentiality" as the excuse for denying access to documents or information. It is therefore dismaying to find that alert, sophisticated people can still be bamboozled by highly dubious claims of privilege on the part of government executives, as witness the measure of public support for the government's claim of "privilege" in the confrontation between the Federal District Court in New York and Atty. Gen. Griffin Bell over FBI documents the Attorney General wants to keep secret.

The case involves the Socialist Workers Party suit against the FBI, in which the Attorney General has asserted a privilege to keep FBI "informant" files closed despite a court order to produce them. In this suit, pending now for five years, the plaintiffs charge that their constitutional rights have been systematically violated by criminal conduct sponsored by the FBI. Indeed, it has become public knowledge through this case and Congressional inquiries that the FBI, using hired "informants," conducted a grotesquely abusive campaign for forty years without ever producing a shred of evidence of criminal activity by any of the investigated. Federal Judge Thomas Griesa has made the importance of the case plain, saying:

> . . . [T]he issues in this case are grave in the extreme, involving charges of abuse of political power of the most serious nature.
>
> Since the allegations relate to the highest levels of government, it is entirely appropriate for a court to enter an order against a cabinet officer, if necessary, for the production of the essential evidence, and to adjudge that cabinet officer in contempt if he refuses to obey the order.
>
> . . . [T]his Court concludes that the FBI informant files constitute a unique and essential body of evidence regarding the allegations of wrongdoing in this case.

Recently, Judge Griesa held Atty. Gen. Griffin Bell in contempt of court for refusing to comply with the court's order to produce a mere eighteen out of some 1,300 FBI informant files. As Judge Griesa said:

> Plaintiffs' request for eighteen informant files is unquestionably a good faith effort to arrive at a representative selection of the files. In view of the total number of such files in existence, it is a most modest request indeed.
>
> . . . [T]he questions about production of informant files in the present case cannot be resolved by looking solely at the interest in informant confidentiality, as the Government would have us do. There are countervailing considerations which deeply affect the public good. These considerations relate to the interest of the citizens of this country in being protected against the illegal and unconstitutional use of informants to interfere with the exercise of basic political rights and to invade the privacy of persons and organizations. One obvious way to protect against such abuses is to allow private plaintiffs fair opportunity to recover for such abuses to the extent legally allowed, with the attendant exposure of any misuse of Government power to public view. These considerations reinforce the conclusion that there is ample justification for the enforcement of an order against the Attorney General which is designed to provide essential evidence in this case to plaintiffs' attorneys.

The government has resisted producing any but the most cursory information about its informers' activities. Yet, having personally examined the files in question, Judge Griesa found that no major question in the case could be resolved without the plaintiffs' counsel having access to at least a representative cross section of the files.

The course chosen by Judge Griesa is a proper one. The position of the Attorney General and the government lawyers on the case is unfounded.

It is common enough for courts to hold offending parties in civil contempt without permitting any appeal whatsoever. This did not happen here. On the contrary, Judge Griesa ordered the FBI to produce the eighteen files more than a year ago, in May 1977, and the FBI immediately petitioned the Second Circuit Court of Appeals to review the judge's action. The Second Circuit refused and held that Judge Griesa's order lay within his lawful discretion. (Interestingly, among the three judges who upheld the order was William Webster, who has since been appointed FBI Director.) The government attorneys then petitioned the Second Circuit for a rehearing which the court denied. As a final effort, the government petitioned the Supreme Court to hear the appeal, and that Court also denied the government's petition.

The Attorney General's difficulty does not lie, as he asserts, in being refused appellate review. It lies in the

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fact that the appellate courts have ruled against him and he will not accept that.

The Attorney General has received all the appellate review to which the law entitles him. Yet, even now, he is engaged in a *third* effort to have the Second Circuit Court review Judge Griesa's exercise of discretion. His action represents a continuing effort to dictate to the courts what the government shall and shall not produce. It ill becomes the Attorney General, as a party defendant, to seek to elevate himself above the law. It is equally objectionable for the Attorney General to use the resources of the government for endless delaying tactics over an issue in which he should recognize both the law and the public interest by voluntary compliance. His asserted notion that disclosure of information about these government-hired thugs will disrupt the proper administration of our justice system is mind-boggling.

What the Attorney General says he wants and has *not* received is appellate court review, not simply of whether Judge Griesa was acting within the limits of a trial judge's lawful discretion but also of whether the Judge's particular directive was the "right" one. The reason the Attorney General has not received such a review is because the law prohibits it. The law has prohibited such appeals prior to final judgment after trial ever since Congress passed the Federal Judiciary Act in 1789.

The rationale for this long-standing ban against what are known as "interlocutory appeals" is simple and compelling: without it the federal courts would be hopelessly clogged. Litigants (such as the government here) with sufficient power and resources could eternally delay cases simply by appealing the scores of determinations judges make prior to finally deciding a case. Among other things, this could assure that parties with limited resources would be driven out of court without justice simply for lack of funds.

For more than a century the Justice Department has consistently supported this federal rule. Attorneys General have invoked it countless times against *private* defendants who sought interlocutory appeals for reasons far more compelling than the government's in this case.

Now the shoe is on the other foot, and the Attorney General is saying, in essence, that the law which applies to others does not apply to the government. But it is a fundamental premise of our law that the government stands before the courts like any other party.

Quite rightly, the Attorney General has expressed concern with the "unseemly" situation which exists. But the only unseemly thing here is the Attorney General's posture which ignores a basic precept of law in order to shield FBI "informants" who were not, in fact, volunteer informants but government-hired *agents-provocateurs.* Documents made public in this case and through Congressional inquiries reveal a wearying catalogue of incidents of burglaries, blackmail, harassment and violent intimidation. The FBI has admitted committing more than ninety burglaries of the SWP's headquarters in New York City alone.

The entire affair resembles an upside-down world in which citizens peacefully exercising political rights were treated as criminals, while criminals were enlisted on the government rolls to perpetrate their crimes while cloaked with government sanction. Whatever his intentions, Attorney General Bell's assertion of "informer privilege" against the court's quite prudent order only serves to perpetuate this situation. To repeat, it defies imagination to believe that disclosing the contents of these eighteen files to the plaintiffs' attorneys would imperil any present or future legitimate law-enforcement activities of the FBI. If disclosure would discourage repetition of illegal activities under government sponsorship, then all of us will benefit.

Important and fragile principles are implicated in this unseemly fray—the independence of the judiciary and the rule of law as well as the right of citizens to meet and speak freely. We hope the Attorney General will reconsider his position and turn over the files. If he does not, we hope the Second Circuit will promptly reaffirm its earlier view and lift the stay against contempt proceedings. ☐

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