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EDITORIALS. *X.P.C*

Above the Law

First, the good news. A United States Court of Appeals has just "unequivocally affirm[ed] the principle" that the Attorney General of the United States is not above the law. Now, the bad news. The court doesn't mean it.

The court made plain its disregard for its own rhetoric by overturning a contempt order against Attorney General Griffin Bell that had been issued last June 30 by Federal Judge Thomas P. Griesa. The judge cited the Attorney General for contempt because he had engaged in a "totally unjustified attempt to obstruct" justice by disobeying a court order to turn over to lawyers for the Socialist Workers Party files on eighteen of more than 1,300 "informants" the F.B.I. had employed between 1960 and 1976 to spy on and disrupt the party.

The Socialist Workers Party is a small organization, and it is, as the Government now concedes, law-abiding. By contrast, the Government has been

anything but law-abiding in its treatment of the Socialist Workers Party. For forty years, the F.B.I. has attempted to destroy it by tapping its telephones illegally, intercepting its mail, burglarizing its offices, not protecting it against bombings the Bureau knew about in advance and playing "dirty tricks" on it. A good deal of this was exposed during the court proceedings that started in 1973 when the party filed suit against the Government seeking an end to spying and disruption and asking for compensation for the damages it had suffered.

The F.B.I.'s dirtiest work was done by the 1,300 "informants," a euphemism, as we now know, that often masks a much uglier behavior. Exactly what these informants did to the party is not publicly known but Judge Griesa, who has reviewed the eighteen representative files he wants turned over to the party's lawyers, says that they contain "the most important body of evidence in this case, recording in immense detail the activities of the informants, the instructions by the F.B.I. to the informants, and the F.B.I.'s evaluation of informant activities." It is evidence the S.W.P.'s lawyers need to devise an order that will pro-

tect the party against any continuation of these activities and to demonstrate how much the Government should pay to compensate it for the injuries it suffered. Even if they got the eighteen files, the party's lawyers would operate under a handicap because the great majority of files would still be withheld and because Judge Griesa deferred to the Government's fear that informants would face retaliation, and prohibited the lawyers from discussing the files with their clients.

To overturn Judge Griesa's citation of Attorney General Bell for contempt, the United States Court of Appeals for the Second Circuit—Judges Lumbard, Friendly and Oakes—had to do some pretty fancy footwork. In October 1977, the same court had ruled that Judge Griesa's order to turn over the files was within his powers and, in March 1978, had denied the Government's request for a rehearing. On June 12, 1978, the Supreme Court turned down the Government's effort to get it to review Judge Griesa's order. Then, on June 13, Attorney General Bell threw down the gauntlet and announced that he was assuming personal responsibility for defying Judge Griesa's order and that he wanted a review of the order by the courts.

It was an astonishing assertion, and it should have made not the slightest difference legally because Bell, as the boss of the F.B.I., was already a defendant in the suit. The previous appeals had been brought in his behalf, and he was responsible in any case for complying with the court order. Even so, it worked. Stuck with its own earlier decisions, the United States Court of Appeals ruled on March 19 that Judge Griesa had the power to order Bell to turn over the files but—and here is the fancy stuff—that Griesa had abused his discretion when he cited Bell for contempt for defying that order. "Alternative sanctions" should have been considered, it said.

The effect of all this is that those informant files will probably never be revealed to the Socialist Workers Party's lawyers. As the Court of Appeals had to acknowledge, fashioning alternative sanctions "will not be easy." Leonard Boudin, the party's principal counsel, is pursuing the matter in the courts, and Judge Griesa is now considering the appointment of a magistrate or a special master to review the files and come up with findings on which a decision in the case might be based. Boudin also has made a formal proposal to the Government to settle the case in exchange for an order prohibiting future harassment and is asking for \$5 million to compensate the party for the damages it suffered. A Government attorney, riding high now that it appears the files will never be disclosed, scoffed at the \$5 million figure. It might have been worth a lot of money to the Government to prevent their disclosure, but that pressure is now off.

It is just a few years, of course, since a President was forced from office for withholding information about illegal wiretapping against another political party. An Attorney General and several other high officials went to prison for their parts in that affair

even though the intrusions on the rights of Democrats and other enemies of Richard Nixon were bush league compared to what the F.B.I. did to the Socialist Workers Party. Why then should Griffin Bell be able to get away with defying a Federal court when Nixon et al. could not do so?

Of several possible answers, the most plausible one is the identity of the victims. A *New York Times* editorial on March 24 encapsulated the low level of outrage that is aroused by depredations against the rights of people such as those in the Socialist Workers Party: "We never thought he [the Attorney General] would or should be remanded to the custody of his own Bureau of Prisons for contempt of court, even though we agreed with Federal Judge Thomas Griesa that the files should be turned over." That's just how the Court of Appeals saw it: Even if Judge Griesa is right, the Attorney General shouldn't be held in contempt for defying him. The legal principle that emerges is less than resounding. It goes something like this: An Attorney General is not above the law, except in cases involving groups like the Socialist Workers Party.

ARYEH NEIER

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When Is a Secret a Secret?

It has become clear that the issue in *The Progressive* H-bomb article case is not a breach of secrecy but secrecy itself. Two weeks ago, we warned of the danger of the Government imposing prior restraint on the basis of testimony by its own "experts." Their testimony was apparently swallowed whole by Judge Robert Warren, who has granted a preliminary injunction against the article's publication. Most independent expert opinion, however, supports the general principle enunciated by Gerald Piel, publisher of *Scientific American*, that "there never was a secret that could keep another country from making a bomb." Or as Albert Einstein put it in 1947: "There is no secret, there is no defense and there is no possibility of control except through the aroused understanding of the peoples of the world." Conceivably, Howard Morland's article could contribute to that "aroused understanding."

No one contests that Morland's article was drawn from nonclassified data but now the Government puts forth the bizarre-seeming doctrine that certain information, even if legally obtained, is "born classified." The Government now apparently claims the power to classify men's thoughts. How prophetic Herman Kahn was when he spoke of "thinking the unthinkable."