

UNITED STATES GOVERNMENT

Memorandum

Note: On 4/6/79 The AG signed 2 affidavits modelled after package "A" instead of a "certification" which index ed the 20 documents over which privilege was asserted the index in Daly's affidavit was cross-referenced by The AG's affidavit

RECEIVED
OFFICE OF THE
ATTORNEY GENERAL

APR 4 1979

DATE: April 4, 1979

TO : Frederick Baron
Special Assistant to the Attorney General

FROM : Francis J. Martin
Criminal Division

SUBJECT: Affidavits to the Attorney General - United States v. Felt

FDB 4/6/79

DECLASSIFIED

Authority N.W. 32130

By AL NARA Date 11/13/09

Enclosed is the single affidavit for the Attorney General concerning the redesignation of a domestic security investigation as a foreign counter-intelligence investigation. This affidavit has been substantially redrafted. In its present form the Attorney General will be attesting only to information as to which he has personal knowledge. This information concerns the specific redesignation as to which the Attorney General is directly aware of the specific facts involved. As to whether or not any other redesignations have occurred, Allan Kornblum of the IRU will prepare a separate affidavit stating that the only redesignation is the one addressed in the Attorney General's affidavit.

In line with our discussions last week concerning a claim of privilege on foreign agency information, I have prepared two separate packages for the Attorney General. The first package contains an affidavit and certification by the Attorney General and is substantially identical to



5010-110

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

the package we presented to you last week. The second package is based on the theory of a "Kinoy" type affidavit. The views of those involved in the drafting process as to the benefits of each alternative procedure (package) are as follows:

(A) It is the view of Bob Keuch, Mary Lawton, Dave White, Lou Jacknycky, Paul Daly and myself that the Attorney General should proceed with the original package as presented last week (the "A" package). There are several reasons for this. First, the certification and claim of privilege by the Attorney General contained in the "A" package is the standard format that has been used to claim State Secrets privilege in all criminal cases. It is the format that is familiar to the Court of Appeals in this Circuit, and on appeal the Court could be expected to take note of any deviation from past practice. Second, the affidavit and certification procedure is the only procedure that fully comports with the requirements of Reynolds, which requires personal review and consideration by the Attorney General of each document. Third, in a case of this importance, particularly with the sensitivity to any withholding of information that could be attributed to the FBI, it is important that standard procedures be followed and that there be no question but that the Attorney General had personally reviewed the

DECLASSIFIED

Authority NW 30/30

By AL NARA Date 11/15/09

situation and made the appropriate determination that a claim of privilege was necessary. Fourth, Chief Judge Bryant will be required to examine closely not only each of the twenty documents as to which privilege is claimed but also a substantial additional number of documents which are being submitted as those documents which contain the "substitute information". In such a situation Judge Bryant might take some exception to the fact that it is necessary for him to personally review all these documents yet the Attorney General himself has not taken the time to personally review them. Fifth, the number of documents involved here (twenty) is of such a small volume that there would be little excuse for the Attorney General not to personally review each document. The case might be different if we were here dealing with somewhere in the nature of five to six hundred documents, as is often the case in civil litigation. Sixth, David White, who has used the "Kinoy affidavit" in civil cases, is of the view that its propriety would be in serious doubt if it were used in a criminal case where the claim of privilege may impinge on the due process rights of a defendant.

(B) The second package contains an affidavit by the Attorney General claiming privilege as well as a supplemental affidavit by Paul Daly which essentially substitutes for the certification that is made by the Attorney General in the "A" package. Under this procedure Daly will attest

DECLASSIFIED

Authority NJW 30/30

By AL NARA Date 11/15/09

to the fact that the twenty documents contain information from foreign government intelligence agencies and he will name the foreign governments that are involved. The Attorney General's affidavit will then rely on the Daly affidavit to the extent that it names the foreign countries and states that the information was obtained from their agencies. In reliance upon this the Attorney General will then claim privilege as to the information, solely on the basis that disclosure of the information without the consent of the originating agency would unilaterally breach our understandings with those agencies and cause irreparable harm to the national security and diplomatic interests of the United States. My objection to the general use of a "Kinoy affidavit" in criminal cases is not as strong on the facts of this particular case as it is on the facts of several other cases. In other cases the appropriate official is usually attesting to the judgment that disclosure of particular information would disclose the source or method by which that information is obtained, e.g., a wiretap on an embassy. That is not the case here. Daly's affidavit would simply be stating a fact, i.e., that information contained in the documents was received from cooperative foreign government agencies. On the unique facts of this situation, Daly would not be attesting to any judgment whatsoever but will merely be making a statement of

DECLASSIFIED

Authority N.W. 50130

By AL NARA Date 11/15/09

fact and, in my opinion, such a procedure would ultimately not cause any reversal of a conviction. However, I would stress that the appearance problem with respect to the Attorney General's not reviewing these twenty documents in a case of this importance would likely not be lost on the Court of Appeals. I would anticipate that although almost any panel of this Circuit would uphold the claim of privilege and not reverse a conviction, I would assume that there would be at least some "tongue-lashing" of the Department by one or more of the judges.

Please let me know as soon as possible when the Attorney General will be able to consider these affidavits and I will assure that Paul Daly and myself are available to answer any questions that the Attorney General may have with respect to the affidavits.

DECLASSIFIED

Authority NND 30130

By AC NARA Date 11/15/09

UNITED STATES GOVERNMENT

Memorandum

Gray Case
File - ~~in~~ ~~Frank~~ ~~was~~

TO : Frederick D. Baron
Special Assistant
to the Attorney General

DATE: March 29, 1979

FROM : Francis J. Martin
Criminal Division

FJM

SUBJECT: Affidavits of the Attorney General - United States v. Felt, et al

No I don't!

As you know, Chief Judge Bryant has stated that the government must certify that all discovery has been completed in the Felt case by March 30, i.e., tomorrow. In order to make such certification the government will need to submit to the Court affidavits of the Attorney General with respect to two matters.

The first is the post-Keith redesignation of domestic intelligence investigations as foreign intelligence investigations. Bob Keuch has already provided you with the appropriate affidavit, which is self explanatory.

The other matter relates to defense discovery demands for documents and information obtained by the FBI from cooperative foreign intelligence agencies. As in other recent cases, the Department is producing the documents for in camera ex parte inspection by the Court and claiming a state secrets privilege to preclude production to the defense. Accordingly, there is enclosed an affidavit and claim of privilege for

DECLASSIFIED
Authority NW 30130
By AL NARA Date 11/15/09



5010-110

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

signature by the Attorney General. In order to avoid a Humphrey-Truong situation, the Attorney General's affidavit references an affidavit by FBI Special Agent Paul V. Daly (also enclosed) which sets forth the harm that would occur if disclosure were made to defendants. Should any litigation require testimony on this issue Daly would be the witness. Both of these affidavits will be filed under seal.

Were this a civil case these two affidavits would end the matter. In order to maintain the viability of a prosecution, however, it is necessary to demonstrate that the defendants' due process rights have not been violated by denying them access to the information subject to the state secrets privilege. Accordingly, Paul Daly has executed an affidavit (enclosed) which analyzes the twenty (20) privileged documents and demonstrates the substantial extent to which the data contained in those documents is already known to the defense through discovery of non-privileged documents. There is an appendix to the Daly affidavit which contains the foreign source documents together with substitute non-privileged documents already provided to the defense as discovery. Finally, there is enclosed for the Attorney General's signature a certification identifying these specific twenty (20) documents (attached to the affidavit) as privileged. The second Daly affidavit, the appendix to that affidavit and the Attorney

DECLASSIFIED

Authority E.O. 13526

By AL NARA Date 11/15/09

General's certification will all be filed for the Court's ex parte examination.

We are, of course, in the unfortunate, but not unusual, situation of needing to have this done yesterday. Realistically, however, it is only of absolute necessity that these documents be signed and returned to the FBI Task Force by early tomorrow morning. Please advise me, or Lou Jachnycky, later today or this evening as to when the package will be ready. I can be reached at 724-7011 or 387-2475 (home). Lou can be reached at 724-7144 or (703) 494-9774 (home).

Thanks

cc: Robert L. Keuch
Deputy Assistant Attorney General
Criminal Division

Paul Michel
Assistant Deputy Attorney General
Criminal Division

DECLASSIFIED
Authority NND 30130
By AL NARA Date 11/15/09