

DECLASSIFIED

Authority N.W. 30130

By AL NARA Date 11/15/09

ROUTING AND TRANSMITTAL SLIP

ACTION

1 TO (Name, office symbol or location)

J. Michael Kelly
Counselor to the
Attorney General

INITIALS

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DATE

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FILE

REMARKS

In addition to the attached information we have discovered an additional item you should know about.

For two months NSA and DOD have led us to believe they discovered the four overhearings at issue three days after the affidavit was signed, specifically on August 16. It now seems that that may not be correct for we have been recently advised by CIA that they told NSA of the overhearings on June 2, two months before the Secretary signed his affidavit. Needless to say, this is most distressing to us to find we have operated on a faulty premise for the better part of two months.

Do NOT use this form as a RECORD of approvals, concurrences, disapprovals, clearances, and similar actions.

FROM (Name, office symbol or location)

George W. Calhoun, Chief
Special Litigation Section
Criminal Division

DATE

10-13-77

PHONE

3885

OPTIONAL FORM 41

AUGUST 1967

GSA FPMR (41CFR) 100-11.206

GPO 648-10-81418-1 410-015 5041-101

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Authority N.W. 30130

By AL NARA Date 11/13/09

REMARKS

Re: Ellsberg, et al. v. Mitchell, et al.
(D.D.C.) Civil Action No. 1879-72

Here is another problem involving Department of Defense and the Ellsberg case. We need a new, complete and accurate Affidavit from Secretary Brown to replace the one he previously signed, one which we subsequently determined to be incomplete and therefore misleading.

For your background, I have attached three letters to alert you and the Attorney General in the event Deanne Siemer or Secretary Brown brings the matter up. If they do, you can contact Mr. Calhoun on Extension 3885 in my absence.

Do NOT use this form as a RECORD of approvals, concurrences, disapprovals, clearances, and similar actions.

FROM (Name, office symbol or location)

Benjamin R. Civiletti *BRC*
Assistant Attorney General
Criminal Division

DATE

OCT 18 1977

PHONE

OPTIONAL FORM 41

AUGUST 1967

GSA FPMR (41CFR) 100-11.206

GPO 643-16-81418-1 419-015

5041-101

Department of Justice
Washington 20530

OCT 13 1977

Deanne C. Siemer
General Counsel
Department of Defense
Washington, D.C. 20301

Re: Ellsberg, et al. v. Mitchell, et al.
(D.D.C.) Civil Action No. 1879-72

Dear Ms. Siemer:

This is in reference to your letter dated October 8, 1977, requesting that Secretary Brown's Affidavit dated August 13, 1977, be filed promptly. I regret we cannot do so, for as Mr. Calhoun outlined to you in his letter of October 6, 1977, the Affidavit is now incomplete and therefore misleading. Under those circumstances, I am sure you will understand why we cannot file it as you request.

The only course of action we can follow now is to prepare a new, complete Affidavit addressing the four points outlined in Mr. Calhoun's letter. And to minimize the risk of any additional problems, the new Affidavit should be reviewed by the Special Litigation Section before it is submitted to the Secretary for his signature.

While I share your interest in seeking a prompt resolution of the problem, it is fortunate that the August 13 Affidavit was not filed, especially where it is being submitted to correct a previously filed Defense Department Affidavit and where a supplemental Affidavit would then be necessary to clear up the matter. The most effective presentation of a claim of privilege requires, it seems to me, an accurate and complete Affidavit be filed at the outset.

Authority N.W. 30130
By AL NARA Date 11/15/09



SUBJECT: Ellsberg, et al. v. Mitchell, et al.
(D.D.C.) Civil Action No. 1879-72

For all these reasons, a new Affidavit should
be prepared and filed promptly.

Very truly yours,

Benjamin R. Civiletti
Assistant Attorney General
Criminal Division

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Authority NND 30130

By AL NARA Date 11/15/09



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

WASHINGTON, D. C. 20301

October 8, 1977

RECEIVED

OCT 11 1977

George Calhoun
Chief, Special Litigation Section
Criminal Division
Department of Justice
Washington, D. C. 20530

Special Litigation Section

Re: Ellsberg v. Mitchell
(D.D.C.) Civ. No. 1879-73

Dear Mr. Calhoun:

The Secretary's affidavit dated August 13, 1977 should be filed promptly. Should supplemental information be needed, we will consider a supplemental affidavit.

As you know, the four additional documents discovered by CIA in its files are not in the custody or control of the Department of Defense. The Director of Central Intelligence has extensive responsibility for protecting sources and methods of intelligence. If he determines that it is not necessary to protect these documents, then a claim of privilege would not be proper. I have asked for a final determination in that regard from Admiral Turner and should be able to advise you shortly. If it is necessary to protect the documents, we will provide a supplementary affidavit, but the Secretary's affidavit will not be amended.

If necessary, the Deputy Director of NSA will provide an affidavit as to the reasons why the agency initially denied any interceptions of Ellsberg and later discovered two documents. I have asked Mr. Banner to prepare a draft for your review.

Please advise Mr. Andrews of this office prior to any contact with the court in this matter that affects the Department of Defense. I have asked Mr. Andrews to be present at any hearing or meeting with the Judge.

Sincerely,

Deanne C. Siemer

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Authority N.J. 30130

By AL NARA Date 11/15/09

typed 10-6-77
GWC:BCFlannagan:imc
145-12-1819

October 6, 1977

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Authority N.W. 50.130

By AL NARA Date 11/15/09

Ms. Deanne C. Siemer
General Counsel
Department of Defense
Washington, D. C. 20301

Re: Elsberg, et al. v. Mitchell, et al.,
(D.D.C.) Civil Action No. 1879-72

Dear Ms. Siemer:

For the past three or four months we have been having a number of conversations with Messrs. Andrews and Banner concerning the above captioned case and in particular an affidavit the Secretary of Defense must file.

On August 13, 1977, the Secretary executed an affidavit claiming privilege as to certain matters, but that affidavit was, as we have explained a number of times, incomplete. It does not include four additional Defense Department interceptions which were located very soon after the affidavit was executed. (CIA has advised it will not claim privilege as to these interceptions.)

In addition, three additional items of information must be included in the affidavit: (1) Paragraph 9C of the latest affidavit refers to some interceptions which were disseminated to the State Department, but that is not reflected in the affidavit. We now understand that copies of the other attachments were also disseminated to other agencies in addition to those reflected on the attachments. The affidavit should be changed to reflect these points; (2) A statement should be included

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in the affidavit explaining when Defense Department first discovered the overhearings listed to clear up any possible suggestion that the responses previously filed by the Defense Department and other agencies were not intentionally false. Our difficulty here, of course, is the fact that after Defense denied any interceptions as to Daniel Ellsberg, two were later discovered and they reflect they were disseminated to other agencies which had also denied having information concerning the interceptions (some agencies did not retain copies of the messages received from Defense), so the date the interceptions were discovered will be helpful to show the original responses were not intentionally false;

(3) The affidavit should also contain the bases for the requests to Defense from the various agencies asking Defense to engage in the interception activity. In short, the affidavit should contain the reasons why CIA, for example, wanted Defense to conduct the interception activity that resulted in these overhearings. We always include this kind of information in FBI and CIA affidavits so it will allow the Court an opportunity to determine that the activities were legitimate interception programs.

All of this information has been explained at length and in detail to Mr. Andrews and Mr. Banner. Unfortunately, we have literally run out of time to file this affidavit.

For the past couple of months we have explained that the Court had a protective order under consideration, and when it was signed we would be required to file within a day or two all of the information and claims of privilege then outstanding. Mr. Andrews, quite understandably concerned that the Secretary should not have to continually sign affidavits which lacked sufficient information, suggested we advise him of all of the necessary changes with the understanding that he would prepare a new affidavit and ask the Secretary to sign it the day the Court signed the protective order. We

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provided him the information and on September 20, 1977, the Court signed the order. We then waited as long as we could to file our answers and affidavits in order to give the Secretary an opportunity to discuss another problem with the Attorney General if he wished. He did not, so we filed our answers and affidavits on September 28, 29 and 30 (waiting until the very last to file the combined DOE-CIA answer and the CIA claim on the 30th).

The only outstanding pleading now remaining to be filed is the Secretary's affidavit, and we cannot file it in its present form - - it must either be corrected or supplemented. In any event, it simply has to be filed promptly before the Court discovers it is missing.

Should you have any questions, I will try to answer them, but in the meanwhile I must advise you that should the Court discover the affidavit is missing, we will have no choice but to advise it of this background in order to explain why we have not complied with its order and met our filing deadline. (An extension of time is not possible, for we previously advised the Court we were prepared to file our answers believing, at that time, the latest affidavit of the Secretary was complete and accurate.)

Finally, we enclose herewith for your files a copy of the

**FRESH RESPONSE BY DEFENDANT DIRECTOR OF
CENTRAL INTELLIGENCE IN HIS OFFICIAL
CAPACITY ON HIS OWN BEHALF AND ON BEHALF
OF THE SECRETARY OF DEFENSE IN HIS OFFICIAL
CAPACITY TO PLAINTIFFS' FIRST (SEPTEMBER 19,
1972) INTERROGATORIES, AS MODIFIED, AND TO
PLAINTIFFS' FURTHER (AUGUST 8, 1973) INTERROGA-
TORIES, AS MODIFIED**

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which was served and filed on September 30, 1977. You will note that this response is covered by the Court's protective order of September 20, 1977, by reason of the information relating to third parties contained in Tabs DOD-1 - - DOD-4 and CIA-1 - - CIA-4.

Sincerely,

GEORGE W. CALHOUN, Chief
Special Litigation Section
Criminal Division