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Spy-Catchers' Dilemma. When to Pounce?

By STEPHEN ENGELBERG

WASHINGTON — One of the trickier questions in a criminal investigation is the timing of an arrest. Move too soon or without proper attention to Constitutional safeguards, and a case may collapse in the courtroom. Wait too long, and the suspect may commit another crime or flee.

When it comes to espionage, such questions are heightened. Spying by its nature leaves few traces, and prosecution requires proof of several specific elements. There is the additional risk that spies will learn of investigations, gather up their most damaging documents and ask their "handlers" for safe passage out of the country.

These issues, raised in almost every one of the dozen espionage arrests this year, were thrown into sharp relief last week in the crowded courtroom of United States Magistrate Jean F. Dwyer.

The sworn statement of the Federal Bureau of Investigation supporting espionage charges against Randy Miles Jeffries, a messenger for the Acme Reporting Company, which transcribes closed sessions of the House of Representatives, was "as thin an affidavit as it has been my misfortune to see in many years," Magistrate Dwyer said. In a second hearing, she ruled that prosecutors had brought forth evidence on charges that classified material had been passed to the Soviet Union "just barely" sufficient to stave off a motion for dismissal.

G. Allen Dale, Mr. Jeffries's defense lawyer, argued that Federal prosecutors had misjudged his client's dealings with an undercover agent and arrested him Dec. 20 before he had had a chance to break the law. There was no evidence other than the defendant's own words, Mr. Dale said, that the documents in question were classified or had been passed to the Soviet Union. Moreover, Mr. Dale said, an unnamed witness had told him that they had been burned.

In the second hearing, the testimony of an F.B.I. agent, Michael Giglia, provided new details. The case against Mr. Jeffries arose, he said, when an unidentified man calling himself "Dano" was overheard talking to the Soviet Union's military office here. Mr. Giglia said that after Mr. Jeffries was identified as "Dano" and as an employee of Acme Reporting, the bureau mounted an undercover operation. An agent who speaks English with a Russian accent phoned Mr. Jeffries, said he was "Vladimir" and set up a meeting at a Holiday Inn.

With the F.B.I.'s video cameras rolling, Mr. Jeffries told the undercover man that he had delivered portions of three classified documents to Soviet agents and offered to sell "Vladimir" a complete set of the papers for $5,000, Mr. Giglia said. He added that Mr. Jeffries had told the undercover agent the material was in a briefcase being stored by a friend who did not know what it was. Mr. Jeffries then offered to retrieve the documents, Mr. Giglia said, and deliver them to the undercover agent.

If Mr. Jeffries had eventually done so, the prosecutors would have had a dream case — proof that he had classified documents and had attempted to deliver them to what he thought was a Soviet agent.

Earlier this year, John A. Walker Jr., a retired Navy Chief Warrant Officer, was arrested shortly after he had been observed leaving documents for a Soviet diplomat. When recovered, the papers were found to have been classified "secret" and "top secret," and when arrested, Mr. Walker had in hand more documents and a letter to the Russians describing his activities. Mr. Walker recently pleaded guilty to espionage charges. But Mr. Jeffries was arrested shortly after the time at which the F.B.I. said he made his admissions to "Vladimir." He was holding no documents, and the F.B.I. did not find any classified material in his house.

A Cautionary Precedent

Law enforcement officials said there were several considerations in the timing of that arrest. The F.B.I. did not want to run the risk that Mr. Jeffries would elude surveillance and pass further documents to the Russians. They were also concerned about the sensitivity of the documents. According to Congressional sources, one paper was a transcript of a closed hearing of a House Armed Services subcommittee, including a progress report on Pentagon efforts to make communications with nuclear forces more resistant to pre-emptive attack.

Another cause for haste may have been a case earlier this year in which the F.B.I. was subject to intense Congressional criticism for having failed to catch Edward Lee Howard, a former Central Intelligence Agency analyst identified as a Soviet agent by Vitaly Yurchenko, a Soviet defector. Mr. Howard got wind of the investigation and fled the country. Bureau officials said they had been unable to develop much of a case against Mr. Howard beyond Mr. Yurchenko's assertions.

Under the espionage statute, a crime is committed when an individual passes or attempts to pass to a foreign government information related to the national defense. The individual must have "reason to believe" that his action would harm the United States. And as in any criminal case, incriminating statements by a defendant must be corroborated by independent evidence.

Mr. Dale argued that the prosecutors lacked any independent corroboration of his client's admissions to the undercover agent. But Mr. Giglia testified that a witness at Acme Reporting had been working with Mr. Jeffries and had seen him leave the building with documents they had been assigned to destroy.

A Federal District Court judge refused to release Mr. Jeffries, saying that the case against him appeared to be strong. But Justice Department officials acknowledged that they had come a good deal closer than they would like to losing the case against Mr. Jeffries.

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