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# Judge Questions FBI Agent Who Planted Courthouse Bugs

Ross Todd, The Recorder

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SAN FRANCISCO — Revelations last year that federal agents had planted recording devices outside the San Mateo County Courthouse as part of an investigation clearly made some Bay Area lawyers and judges uneasy.

On Thursday at a hearing before U.S. District Judge Charles Breyer, prosecutors and defense lawyers clashed over whether the tactic crossed a constitutional line.

Government lawyers, who used the microphones to investigate a federal bid-rigging case, [contend](#) that individuals picked up on the recordings were speaking in a public place and thus had no reasonable expectation of privacy. Defense lawyers [insist](#) that the surveillance, conducted without judicial approval, amounted to unlawful government eavesdropping and want Breyer to suppress all evidence derived from the devices.

Although Breyer held off on ruling, he expressed at least gut-level discomfort with the notion of government agents listening at the courthouse door.

"Let's say I was out of that courthouse that day, I used the staff entrance and I turned my law clerk," the judge said. "I wouldn't know [about that recording], would I, unless the government turned it over?"

Breyer said that the targets of the investigation—real estate investors who allegedly colluded to hold down prices at auctions for distressed properties in the wake the foreclosure crisis—likely believed that their side conversations at the public auctions were private. Whether or not that expectation of privacy was reasonable, he added, would determine whether 200-plus hours of recordings and all evidence arising from them would be suppressed.

The courthouse bugs were used in 2009 and 2010, and their existence was first [made public](#) in November by defense lawyers. In response to the defense motion to suppress, prosecutors disclosed the location of three microphones hidden near an employee entrance of the San Mateo courthouse: one in a sprinkler control box attached to the building, another in a concrete planter near the bench where the auctions were held, and the third in his vehicle parked at curb nearby reserved for law enforcement vehicles.

David Ward, an attorney with the San Francisco office of U.S. Department of Justice Antitrust Division, said that as prosecutors were preparing a witness last Friday they learned that an additional microphone was placed in a backpack near the location of the auctions. Ward said that the backpack microphone had only been used on one occasion and that recording had been mislabeled.

But Ward said all the devices were located in the middle of "a raucous public foreclosure auction, often attended by dozens of people."

"If you are standing amid a crowd of people you don't have an expectation of privacy," Ward said. "This was a public, open space. And if you think about where you would go to have a private conversation—to have a truly private conversation—it wouldn't be a public auction."

At the outset of Thursday's hearing, Breyer denied the government's request to declare the matter moot since prosecutors have vowed not to use any of the disputed recordings at trial.

"I have to be satisfied that there's no taint" from the recordings on the rest of the evidence in the case, Breyer said. "The answer is, I'm not satisfied."

The judge also said that he hoped to learn at the hearing what steps the defendants took to shield their privacy at the time the recordings were made, who in particular was targeted for surveillance, and what steps, if any, the government took to amplify the recordings beyond the level that could be heard by ear under normal circumstances.

FBI agent Roahn Wynar, who placed the microphones, testified for close to five hours. Wynar said that most times he manually turned the devices on about a half-hour prior to the auctions and turned them off afterward. He said that he didn't remember any instances of the devices recording attorney-client conversations or the discussions of employees entering and exiting the building.

But Vinson & Elkin partner Matthew Jacobs who questioned the agent on behalf of the defense team asked Wynar about one instance when one of the microphones picked up a 14-minute conversation between two female courthouse employees. After Jacobs described the conversation, where one woman described her boyfriend placing a dollar bill in her bra and one discussed her brother's lack of intelligence, Wynar said "I don't remember listening to any of it."

When pressed by Jacobs as to whether the women had an expectation of privacy in the conversation, Wynar said, "My view was that there was no expectation of privacy in that area" while the auctions were occurring.

"They were public conversations," Breyer interjected. "That is they took place in a public area, right?"

"Yes sir," said Wynar, a 13-year veteran of the FBI with dark, shoulder-length hair and a graying beard.

Breyer then asked if "there were some [conversations] that were conducted in a private way" out of the earshot of a cooperating witness and an undercover agent who were wearing body microphones.

"Yes sir." Wynar again replied.

"Even though the source was in a public space, that would be an example of a private conversation in a public place," the judge suggested.

Wynar responded that he considered it an example of moving from one part of public place to another.

Later under questioning from Jacobs, Wynar conceded he hadn't written up reports for some recordings and that none of his reports noted that the recordings were "nonconsensual," or made by some means other than planting a microphone on the cooperating witness or undercover agent.

Agents also placed microphones outside the Alameda County courthouse as part of a related investigation, he said.

The hearing is set to resume on Feb. 29.

Contact the reporter at [rtodd@alm.com](mailto:rtodd@alm.com).

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