

Dismiss Charge, Ellsberg Asks

By Sanford J. Ungar
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LOS ANGELES, June 6 —

Attorneys for Daniel Ellsberg and Anthony Russo, pleading for dismissal of a criminal conspiracy charge against them, argued in federal court here today that there is no "lawful government function" of controlling the dissemination of classified information.

Leonard Boudin, of New York, chief defense counsel for Ellsberg, warned U.S. District Court Judge W. Matt Byrne Jr. that if the Justice Department is permitted to proceed as it wishes in the case against Ellsberg and Russo, it will lead to a "system of information control" in the United States.

In a 15-count indictment, Ellsberg and Russo are charged with conspiring to "defraud the United States" by interfering with the control of classified information, violating the Espionage Act and stealing government property — all in connection with disclosure of the top secret Pentagon Papers a year ago.

Although he has taken credit publicly for making the history of American involvement in Southeast Asia available to the press, Ellsberg insists that he committed no crime in doing so.

In a key argument that is expected to be elaborated during the trial if all charges stand against the defendants, Boudin insisted that Congress has never made it a crime to disclose classified information, except in carefully defined circumstances.

The only prohibition on disclosure of material like the Pentagon Papers, Boudin said, is contained in Executive Order 10501, which was issued by President Eisenhower in 1954 and established classification categories.

That executive order, Boudin argued, fulfilled only a "general housekeeping function" and has never been interpreted by the courts as giving the President "extraordi-

sified material, on the basis of their own belief that no such law yet exists.

Even if there is a "governmental function" of controlling disclosure, Boudin added, it is a "lawless" one which is regularly violated by the Executive Branch itself when it makes selective leaks of classified material.

He and other defense law-

yers again offered to present witnesses who could describe such leaks in court.

Byrne withheld a ruling on the defense motion and its offer of witnesses, pending further argument.

On another matter, however, the judge said that government prosecutors would have to narrow down three counts in the indictment in

which it is charged that Ellsberg violated the Espionage Act while he had both "lawful" and "unauthorized" possession of the Pentagon Papers.

Byrne agreed with the defense that there was an "inconsistency" in use of both those terms, which come from different sections of the Espionage Act.

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