

New Argument Is Granted In Pentagon Secrets Case

By Sanford J. Ungar,

Washington Post Staff Writer

LOS ANGELES, June 25—Federal Judge W. Matt Byrne Jr. has scheduled new courtroom argument here over the claim by Daniel Ellsberg and Anthony Russo that their prosecution for disclosing the Pentagon Papers is a "selective and discriminatory" one.

Ellsberg and Russo are scheduled to go on trial in U.S. District Court on July 5, but Byrne has yet to rule on their effort to have the indictment dismissed on the grounds that others duplicate their alleged crimes in Washington every day and are never prosecuted.

Nor has the judge decided yet whether he will give the defendants an opportunity for a fullscale hearing to present witnesses who would describe the traffic in secret documents in the nation's capital.

With other matters connected with the case scheduled for hearing almost all week, if Byrne does grant the "selective prosecution" hearing, that could again postpone the start of the Ellsberg-Russo trial.

Lawyers for the defense seem to have little confidence that the testimony would be so powerful as to bring dismissal of the indictment on charges of conspiracy, theft of government property and espionage.

But they see the hearing as a potential opportunity to "take the offensive" in the case, and to persuade Byrne that the same evidence should later be admitted before the jury.

The special Justice Department prosecutors argue that it is no defense to a criminal charge to say that others do the same thing without being punished.

Even if there is such a defense, they say, other cases serve as a precedent for the Ellsberg-Russo prosecution.

They cite, for example, the prosecution of Arthur Rogers Roddey, of Falls Church, Va., in 1961 for stealing more than 200 secret Defense Department documents and making contact with British and Portuguese agents because of his concern over the then controversial "missile gap."

Roddey eventually pleaded

guilty to one espionage count and was sentenced to eight years in prison.

The prosecutors also point to the case of Rea S. Van Fossen, an ex-Air Force captain who took a secret security report on a one-time Communist from the Air Force's Office of a special Investigations and gave it to the House Un-American Activities Committee in 1954.

Van Fossen, after pleading guilty to the misdemeanor of "converting" 113 sheets of paper, was put on probation for six months.

Defense lawyers insist, however that there are significant differences between those cases and the charges against Ellsberg and Russo, where they say the government is claiming for the first time that "information" is its "property."

It was also confirmed that Townsend Hoopes, former Under Secretary of the Air Force, and Arthur Goldberg, former U.S. Ambassador to the United Nations, have been asked to be witnesses for the defense but have not yet said whether they will.

In the meantime, the defense has submitted an affidavit from John Kenneth Galbraith, former American Ambassador to India.

He said that "the selective release of secret material is a prerogative of significant public position, has been so for a long while, and, indeed, serves a highly serviceable role in the public interest and as a limitation on excessive bureaucratic power."

While Ambassador to India, he added, "I found it easier to bring my views to bear on the President of the United States by way of The Washington Post and its New Delhi correspondent than by way of the State Department."