

U.S. Aides File Affidavits With Ellsberg Trial Judge

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LOS ANGELES, May 9—Four Justice Department officials, including Henry E. Petersen, an Assistant Attorney General, swore today that they did not know about the burglary of the office of Dr. Daniel Ellsberg's psychiatrist until April 16 this year.

The affidavits were part of an apparent move by the Government to block the trial judge from dismissing this case by contending that the evidence and testimony presented in 87 days of the Pentagon papers trial had not been tainted by any knowledge obtained in the break-in, which took place Sept. 3, 1971.

The affidavits were delivered to the judge here on the eve of a turning point in the trial tomorrow when attorneys for Dr. Ellsberg and Anthony J. Russo Jr. are scheduled to argue for a judgment of acquittal.

The affidavits do not go to that question, but only to the question of whether evidence and testimony had been tainted. Nor do the affidavits discuss why the Justice Department took 10 days between April 16, when it says that it first heard of the break-in, and April 26, to send that information to the trial judge.

Other Affidavits

The defense immediately said that the information in the affidavits was "highly insufficient" and that it would continue to press for a hearing on the link between the Watergate case and this trial.

Besides the affidavit filed by Mr. Petersen, there were affidavits from Kevin T. Maroney, a Deputy Assistant Attorney General; John L. Martin, an attorney at the Justice Department, and David R. Nissen, the chief prosecutor in this case.

Mr. Nissen, in his affidavit, said that none of the Government's "exhibits and other evidence" used in the trial had been "derived in any manner, directly or indirectly," from the break-in.

If the motion for a judgment of acquittal is granted, the probability is that the sweeping investigation ordered by the judge into Government misbehavior in the case, and White House involvement, will be ended.

Defense attorneys also asked for, as soon as they are received in Washington, the affidavits from Charles W. Colson, President Nixon's former special counsel; Gen. Robert E. Cushman Jr., commandant of the Marine Corps, member of the Joint Chiefs of Staff and former deputy director of the C.I.A. and David R. Young Jr., a former White House aide who was named with Mr. Krogh as a participant in the secret White House investigation into this case.

A motion for judgment of acquittal is based on the contention that the Government produced insufficient evidence to convict on the charges—in this case, six espionage counts, six theft counts and one conspiracy count.

Such a judgment would mean that the charges could never again be brought against Dr. Ellsberg and Mr. Russo. Yesterday, Judge Byrne said that he "hopes" to rule on the motion tomorrow, after the arguments by Leonard B. Boudin; Charles R. Nesson and Leonard I. Weinglass, the defense attorneys. The Government will be given the opportunity to reply.

The defense is also prepared to argue tomorrow another motion to dismiss parts of the

indictment, count by count. It will argue the constitutionality of the conspiracy law as applied to this case.

In the first part of the conspiracy charge, the Government contends that the defendants conspired to deprive the Government of its lawful rights by stealing information that is classified "top secret-sensitive."

The question here is, is it constitutional to contend that persons can steal information—not the paper it is printed on—and, further, can two people conspire to violate an Executive order, since there is no statute governing classified documents?

The defense will also argue that the theft counts are not constitutionally applied in this case, because the Federal theft statute has nothing to do with stealing information, only with stealing property.

The question is, did Dr. Ellsberg and Mr. Russo, when they copied the Pentagon papers and then returned the original set, steal information or property?

Mr. Nesson said that the Government had not proved "substantial deprivation" to the Government in the theft counts.

The defense has already argued two motions to dismiss the case. In one, it argued that the case should be dismissed because Judge Byrne twice met last month with Mr. Ehrlichman to discuss the possibility of the judge becoming director of the F.B.I.

The argument was that Mr. Ehrlichman, at the time President Nixon's top adviser for domestic affairs, was, in essence, attempting to bribe the judge. The judge denied the motion.

Inquiry Ordered

The judge had ordered an investigation into the connection between the Watergate case and the Pentagon papers trial, and today that investigation led to the resignation of Egil Krogh Jr., a former White House aide and more recently Under Secretary of Transportation.

It was disclosed here this week that Mr. Krogh had authorized the burglary as part of a secret White House investigation of the Pentagon papers leak and of Dr. Ellsberg's personality.

There was no court session today, but defense lawyers asked the trial judge, Federal District Court Judge William Matthew Byrne Jr., to obtain and turn over to them the testimony of present and former C.I.A. officials that was given to a Senate subcommittee today.

Yesterday, the defense argued again that the Government's misconduct in this case had been so bad that the entire case should be dismissed.

The argument here is that from the beginning the Government has withheld evidence and more recently has not moved very fast in complying with the court-ordered investigation.

The judge has not yet ruled on this motion.

In another development today, Los Angeles County District Attorney Joseph Busch announced that a grand jury investigation has been scheduled here for June 5-8 to inquire into the burglary of the office of Dr. Lewis J. Fielding, Dr. Ellsberg's psychiatrist.

Yesterday, for the first time, the defense said in court that psychiatric reports on Dr. Ellsberg were, in fact, stolen during the burglary.