

TRIAL WILL GO ON

Judge Calls for Inquiry on Defendants' Rights in Pentagon Case

4/28/73
By **MARTIN ARNOLD**
Special to The New York Times

LOS ANGELES, April 27—

The judge in the Pentagon papers trial released today a Justice Department memorandum saying that two convicted Watergate conspirators had broken into the office of Daniel Ellsberg's psychiatrist with the intention of stealing Dr. Ellsberg's medical records.

The two convicted conspirators named were G. Gordon Liddy, former Presidential assistant, and E. Howard Hunt Jr., a former White House consultant. The date of the alleged break-in was not disclosed.

The memorandum, from Earl J. Silbert, the Watergate prosecutor, to Henry E. Petersen, Assistant Attorney General, was disclosed today by Judge William Matthew Byrne Jr.

The information was forwarded to Judge Byrne after reportedly being kept by the Justice Department in Washington for 10 days.

Calls for Inquiry

The judge called for an investigation to determine whether "the legal or constitutional rights of any other individuals are possibly involved." He said the trial would continue.

The memorandum, dated April 16, was entitled: "Subject: Daniel Ellsberg Prosecution." It said:

"This is to inform you that on Sunday, April 15, 1973, I received information that at a date unspecified, Gordon Liddy and Howard Hunt burglarized the offices of a psychiatrist of Daniel Ellsberg to obtain the psychiatrist's files relating to Ellsberg. The source of the information did not know whether the files had any material information or whether any of the information or even the fact of the burglary had been

communicated to anyone associated with the prosecution."

Judge Byrne said that he wanted to know whether the information obtained, if any, had been used "by anyone involved in the preparation of the prosecution of the case, from the decision to prosecute, to presentment of indictments and through the trial of the case thus far."

If so, the judge has a wide range of options open to him,

Continued on Page 15, Column 4

Continued From Page 1, Col. 4

from dismissing some of the 13 counts against Dr. Ellsberg and his co-defendant, Anthony J. Russo Jr., to dismissing the entire case.

Today's disclosures were made out of hearing of the jury. Later the judge gave the jury particularly stern instructions not to read the newspapers this weekend. He also ordered all newspapers removed from stands at the court building's entrances and for the first time had a United States marshal escort the jurors out of the building to make sure they did not see any newspapers.

This is not the first time that the Watergate episode and the Pentagon papers case have been connected. Two Cuban exiles who were involved in Watergate have said that last May they and seven other exiles were recruited to attack Dr. Ellsberg on the steps of the Capitol, where the body of J. Edgar Hoover, the F.B.I. director, was lying in state.

Said Assault Was Ordered

The report was that Bernard Barker, the former agent of the Central Intelligence Agency, who led the Watergate raiding party, had recruited the Cubans in Miami, flown them to Washington and ordered them to assault Dr. Ellsberg.

"Our mission is to hit him—to call him a traitor and punch him in the nose, hit him and run," one of the exiles said. Dr. Ellsberg was addressing an anti-war rally at the time.

In January of this year, Ronald L. Ziegler, the White House press secretary, said that shortly after Liddy was hired as general counsel to the Committee for the Re-election of the President on Dec. 10, 1971, a telephone was installed at the committee to be used in investigating the Pentagon papers case.

The Silbert-Petersen memo-

randum arrived here yesterday. It was turned over to Judge Byrne as an in camera submission at 2 P.M. yesterday shortly after he had sent the jury home for the day to wait the arrival from Washington of other information that the Government has withheld in this trial.

Couldn't Accept Memo

Two hours later the judge summoned the defense counsel back to court to say that he had read the submission that he could not accept it and that he was giving the Government overnight to decide whether the prosecution would turn it over voluntarily to the defendants. Attached to the memorandum were several sheets of paper, the contents of which have, so far, not been made available.

In Washington, the Justice Department said that it had withheld Mr. Silbert's memo-



United Press International
Federal Judge William
Matthew Byrne Jr.

randum for 10 days "until it could be determined that its disclosure would not prejudice the rights of the defendants Ellsberg and Russo. This was an official statement from a department spokesman.

Unofficially, a high department official said that there was considerable anger in Washington over the fact that Judge Byrne decided to re-Judge Byrne decided to disclose the contents of the memorandum.

Today the judge said: "I am of the opinion that the defendants should be advised of the possible situation that could

give rise to taint of evidence. They should have a right to perform an investigation." He then turned the Silbert memorandum over to them.

Effect on Their Rights

Judge Byrne said he had order to be made" and "the results are going to be made in camera to me for a determination as to whether the information contained in those investigations could in any way affect the legal or constitutional rights of the defendants."

He said that he would then determine "what portions" of those investigative results "or whether all of them" will be given to Dr. Ellsberg and Mr. Russo.

"I am requesting the Government," he said, to supply me with all facts known to the Government, which can be made known to the Government by investigation of the occurrence of the alleged burglary—that is, who was burglarized.

"I want to know all the facts that were obtained by Mr. Silbert and by anyone else regarding the alleged burglary. I also want to know the source of the information to Mr. Silbert and all the facts surrounding the occurrence of the burg-

lary as to time, place and as I say, whose office it was and what material, if any is known to have been taken."

Asks Their Status

The judge also said he wanted to know "the status" of Liddy and Hunt and "under whose direction Mr. Liddy and Mr. Hunt or, of course, anyone else, that the Government may have information on, became involved in the alleged incident."

Both Liddy and Hunt have pleaded guilty to charges of burglary, conspiracy, attempted bugging and eavesdropping in the Watergate case.

Today's disclosure caught the defendants by surprise and made them jubilant. Mr. Russo, when he learned of it, was standing near the judge's bench and he immediately stuck his thumb up behind his back to alert the courtroom that something good had happened for the defense.

Dr. Ellsberg said later, "I wish I could say as a citizen that I am surprised." He said that his two dentist and his wife had been bothered by government investigations" and so has everybody who has been related to me in one way or another."

"How can I be surprised, just because the Administration breaks the law?" he asked. "The law stops at the White House fence."

Denies Any Link

Asked why he was undergoing psychiatric treatment, he replied, "it had nothing to do with the Pentagon papers."

Dr. Ellsberg began seeing the psychiatrist, who practices in Los Angeles, in the late nineteen-sixties while he was working for the Rand Corporation.

Now that the disclosure has been made, there are two steps to be taken. The first is the investigation to determine whether, in fact, an illegal act occurred, whether or not material was actually obtained from the doctor's office?

Legally, the second step is for the Government to prove that, if the allegation is correct, it did not use the material either to obtain leads in this case or to obtain evidence against Dr. Ellsberg. The Government must also contend now with another legal principle, that knowing that state of the mind of a defendant can be of a tactical legal advantage to the Government.

Meanwhile, the trial itself continued with Richard H. Best, the Rand security chief, and Jan Butler, formerly Rand's top secret control officer, on the witness stand. Dr. Ellsberg is accused of stealing the Pentagon papers from Rand's Santa Monica office. He and Mr. Russo are on trial for six counts of theft, six counts of espionage and one count of conspiracy.