

Dismissal of Ellsberg Trial Over Judge's Acts Sought

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LOS ANGELES, May 6—Defense attorneys in the Pentagon papers trial plan to ask a Federal appeals court to dismiss the case immediately on the ground that the White House tried to compromise the trial judge.

The attorneys said that the final decision on when to go to the higher court will be made by the defendants, Dr. Daniel Ellsberg and Anthony J. Russo Jr. The papers are already drawn up, but the defendants, who have already asked the trial judge for a dismissal, have to decide whether to ask formally also for a mistrial before going to the higher court.

There will be two other grounds for going to the higher court. One is that the case is one of selective political prosecution directed from the White House, rather than a normal criminal one directed by the Attorney General. The other is what the defense calls a "long history" of Government "misbehavior" in the case.

There is, for instance, the belief that the Government knew as far back as 1969 that Dr. Ellsberg had copied the papers but did not choose to arrest him until the eve of the day that the Government's prior restraint case against The New York Times was to be argued in the Supreme Court on June 26, 1971. This was 13 days

after The Times first disclosed the Pentagon Papers.

A writ of mandamus against Federal District Judge William Matthew Byrne Jr., who is presiding at the trial, will be filed, possibly with the United States Court of Appeals for the Ninth Circuit, in San Francisco, if it is approved by the defendants and their lawyers. The defense attorneys expect approval.

Vindication Is Sought

Dr. Ellsberg and Mr. Russo are opposed to a mistrial, although they might allow a motion for one to be filed with Judge Byrne as a legal tactic prior to going to the Court of Appeals.

The two defendants are also personally ambivalent about a dismissal at this stage of the trial because they believe they have answered the charges against them and they want the jury to acquit them as a vindication of their acts. Still, they

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Hoover Files Vanish

Official documents authorizing wiretaps on the telephones of reporters and White House aides reportedly disappeared from J. Edgar Hoover's files in 1971 after he threatened to disclose that taps existed. Page 46.

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have moved for a dismissal on a number of occasions, and one such motion is still under consideration by the trial judge.

The new writ of mandamus will be the third one brought in this trial against Judge Byrne. The first one, in July, 1972, led to a four-month hiatus of the case while the issue of wiretapping was threshed out between the Government and the defense.

At that time a jury had already been selected, and so, after the four-month wait, the defense moved for a mistrial to enable a new jury to be impanelled, and the second writ of mandamus was filed against him in San Francisco.

On Dec. 8, the Court of Appeals upheld the judge's ruling but said it would be "foolish" to continue the trial with the first jury. Four days later Judge Byrne did declare a mistrial and a new jury had to be selected. No testimony in the case had been heard by the first jury.

The writ of mandamus drawn up this weekend charges "impropriety" by

Judge Byrne in visiting twice in April with John D. Ehrlichman, then President Nixon's top adviser for domestic affairs, who discussed with him the possibility of the judge's becoming director of the Federal Bureau of Investigation.

In two statements issued from the bench, with the jury out of the room, the judge said that he visited Mr. Ehrlichman in San Clemente on April 5 and Santa Monica on April 7 and that on both occasions he told Mr. Ehrlichman he could not consider another Government position until the trial had ended.

But the writ will assert that the judge did not volunteer this information, that he disclosed it only after news of the meetings was published in the newspapers, and that even then the disclosure came about after the defense solicited a statement from him on the encounters. During the first meeting he also met briefly with President Nixon, the judge said.

What Was Said

In neither of his statements did the judge explain why a second meeting with Mr. Ehrlichman was necessary, nor did he disclose precisely what was said at the meetings. The writ says that at the time he saw the judge Mr. Ehrlichman knew his name was shortly thereafter to be involved in the Pentagon papers trial.

On May 1, the judge released an F.B.I. interview of April 27 with Mr. Ehrlichman in which the former White

House aide said that, acting on orders from President Nixon, he had had two of his assistants conduct a secret investigation of the Pentagon papers case. This inquiry led to the break-in at the office of Dr. Ellsberg's psychiatrist in Beverly Hills.

The defense has already moved to dismiss the case on the ground of the judge's involvement with Mr. Ehrlichman. But on Friday Judge Byrne denied that motion saying, "I am convinced beyond any doubt that nothing has compromised my ability to act as a fair and impartial judge in this case."

The "selective political prosecution" charge in the proposed writ stems also from the allegation that E. Howard Hunt Jr., a convicted Watergate conspirator, leaked "top secret" information to the now-defunct "Life" magazine and was not prosecuted for it.

Authority Denied

Hunt has admitted that he and G. Gordon Liddy Jr., another convicted conspirator, led the team that broke into the psychiatrist's office, and that the operation was approved by the White House and aided by the Central Intelligence Agency. The agency, the writ will point out, has no authority to carry out such operations within the continental United States.

One question in the selective prosecution argument is: Why has Hunt not prosecuted for leaking top secret information

to Life and why was Dr. Ellsberg prosecuted for disclosing the Pentagon Papers?

The other question is: Why did the Government wait so long to have Dr. Ellsberg arrested when the F.B.I. knew at Christmas, 1969, that he had copied papers taken from the Rand Corporation and by April, 1970, other Government officials also knew about the copying?

There is the further fact that the first prosecutor in this case, now deceased, refused to sign the indictment against Dr. Ellsberg. It was finally signed on the orders of John N. Mitchell, then Attorney General, by one of Mr. Mitchell's aides.

Two Counts Originally

When Dr. Ellsberg was first arrested he was charged with only two counts, but in December, 1971, he was reindicted and the case was broadened to include conspiracy. He and Mr. Russo are now on trial for six counts of espionage, six counts of theft and one count of conspiracy.

The defense is also contending in its writ that there has been a long history of Government misbehavior in this case, from the suppression of evidence to the White House involvement, to the slowness with which the Government has responded to Judge Byrne's order for an investigation into the link between this trial and the Watergate case. Judge Byrne has already dismissed an espionage count against Dr. Ellsberg because of the suppression of evidence.

Judge Byrne has taken under submission the motion to dismiss on the misbehavior group. This has led to a highly legalistic argument in the courtroom between the defense attorneys and the judge—an argument that many lawyers believe will be studied by constitutional scholars for years to come.

Briefly put, despite the break-in at the psychiatrist's office and despite the involvement of

the White House, Judge Byrne apparently believes that there is no precedent for dismissing the case simply on the ground of the Government's misbehavior, lawyers say. And he is a judge who insists on following, not setting, precedent.

As he apparently sees it, from his statements in court, there can be a dismissal only if it can be shown that the "fruits" of the misbehavior were used by the Government

either in arriving at the decision to prosecute Dr. Ellsberg or were directly used in either the evidence or the testimony presented by the Government in the courtroom during the 85 trial days so far.

This goes to the matter of "taint," and so far the court-ordered investigation of the Watergate-Pentagon Papers link is directed at discovering whether there was actual "taint."