

Bizarre Dilemma Confronts Pentagon Papers Trial Judge

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LOS ANGELES, May 9—W. Matt Byrne Jr. is the kind of federal judge who moves cautiously and prefers to base his every action on prior legal precedent.

This week, however, as the judge in the Pentagon papers trial, he is confronted with an extraordinary and bizarre dilemma in the case of Daniel Ellsberg and Anthony J. Russo Jr.

Already faced with adjudicating one complex and delicate national controversy—the leak of the sensitive Pentagon papers—Byrne now has been thrust into the violent swirl of an even bigger issue; the Watergate affair and all its antecedents.

At the center of the dilemma are allegations that in the course of investigating one possible crime, White House aides and others in the federal government committed illegal acts themselves.

In a startling 10-day period, it has been disclosed that:

- A burglary squad reporting directly to the White House broke into the Beverly Hills office of Ellsberg's psychiatrist as part of a scheme to determine Ellsberg's "prosecutability."

- The Central Intelligence Agency, in possible violation of its legal authority, provided technical assistance to the burglars over a five-week period.

- The entire operation grew out of President Nixon's personal directive for an urgent investigation—outside the normal channels of the Federal Bureau of Investigation—to identify the sources of leaks of "national security information."

- Watergate conspirator

E. Howard Hunt Jr., a member of that operation, forged official State Department cables to implicate the late President John F. Kennedy in the assassination of South Vietnamese President Ngo Dinh Diem.

- Byrne was approached twice during the Pentagon papers trial by former chief White House domestic adviser John D. Ehrlichman about a possible offer of the permanent directorship of the FBI.

The situation is virtually unprecedented in American jurisprudence, and judicial caution has begun to seem like a meaningless concept in the attempt to unravel it all.

Byrne is expected to rule Thursday on whether the jury of ten women and two men—sitting since January—will ever get to decide if Ellsberg and Russo are guilty of conspiracy, espionage and theft of government property for photocopying the Pentagon papers.

Attorneys for the two defendants are asking, at the least, that Byrne throw the two-year-old case out of court, or better yet, that he launch an intensive probe here into how Hunt and others in the cast of Watergate characters began looking into Ellsberg's affairs.

Chief defense counsel Leonard B. Boudin appealed to Byrne this week to use his "inherent power to do justice."

Boudin told the judge: "Each time we talk about, 'Is there a precedent?' Surely I need not remind your honor that precedents are set by judges, and your honor is such a judge . . . And in the days to come,

other judges won't have to ask me whether there is a precedent, because I will be able to refer to your honor as having established one."

Even before the latest sensational developments, Byrne was seen as having an historic legal role, for the

Pentagon papers case poses major questions concerning the limits of government secrecy and freedom of the press.

Among them are:

- Is information itself, when embodied in classified documents, actually "government property" as implied in the indictment against Ellsberg and Russo, or does it belong to the public?

- Does the government security classification system have the force of law, even though it is embodied in presidential executive orders rather than acts of Congress?

- Is the government "defrauded" of its lawful functions whenever someone mishandles or leaks a document stamped secret?

- Can it legitimately be called "espionage" when a person with a security clearance shows classified material to others who do not have such a clearance?

Some legal observers argue that a conviction of Ellsberg and Russo would, in effect, give this country the sort of "Official Secrets Act" that Congress has repeatedly refused to pass and that it would throw a major stumbling block in the path of investigative reporting of the sort that unveiled the Watergate affair to the public.

But now there are new is-

sues, raised by the recent disclosures, which may be dealt with by Judge Byrne's actions this week.

It is important to determine, for example, whether one part of the government, such as the Justice Department, can be held liable for the possible misconduct of others, such as the CIA.

Some observers also feel that this case could become a test of the limits that should be put on the FBI and other investigative agencies in their probes of alleged illegal conduct.

(One view is that Ellsberg's constitutional rights were automatically violated when the burglary squad broke into the psychiatrist's office and when the CIA compiled a "psychiatric profile" of him, without regard to whether that information was used in the prosecution.)

When Byrne comes into court Thursday morning, he will have several defense motions before him. They are:

- A motion to dismiss the indictment completely on the grounds that the case was so serious that a connection with the actual evidence need not be shown.

- motion to throw the case out as a "sanction" against the prosecutors for withholding vital information from the court and the defense.

- A motion for a directed verdict of acquittal, based on the contention that the government has presented insufficient evidence to convict Ellsberg and Russo.

(Defense attorneys today backed down on their earlier stand and agreed to argue this motion before Byrne decides whether to dismiss the case.)

- A motion to dismiss parts of the indictment, including the conspiracy and theft charges, on the grounds that they involve an unconstitutional use of the relevant statutes.

- A motion for an exten-

sive hearing on whether the evidence in the case was "tainted" by the burglary of the psychiatrist's office and other aspects of the independent White House investigation which, according to some reports, included the wiretapping of reporters' telephones.

Also unresolved at this point is the defense's claim that the case against Ellsberg and Russo involves "discriminatory prosecution" for acts regularly committed by government officials.

Byrne has already declared, however, that he feels that issue would be best resolved in a post-trial hearing.

Defense attorneys said today that if Byrne refuses to dismiss the case or to order the hearing on taint, and instead says that some parts of the indictment must go to the jury, they will appeal to the Ninth U.S. Circuit Court of Appeals in San Francisco.

But that decision, they concede, is "subject to veto by our clients." Both Ellsberg and Russo have made it clear that as far as they are concerned, after being tied up in litigation over the Pentagon papers for two years, they will really be satisfied with a verdict, which they expect to be acquittal.

And it is Russo's view that

the only "legitimate authority" left is the jury.