

HEARING IS ASKED IN ELLSBERG CASE

His Lawyers Seek to Show
That Leaks Are Routine
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LOS ANGELES, June 5—
Lawyers for Dr. Daniel Ellsberg and Anthony J. Russo, who are accused of stealing the Pentagon papers, argued in a Federal court today that the court should permit a pretrial hearing of witnesses that would show that leaks of classified Government documents were a routine practice of Washington officials.

Charles Nesson, one of Dr. Ellsberg's five lawyers, argued that the evidence would show that the prosecution of Dr. Ellsberg and Mr. Russo was discriminatory.

Both Dr. Ellsberg and Mr. Russo had access to classified Government documents when they were employes of the Rand Corporation, which did research for the Department of Defense. Dr. Ellsberg has admitted giving copies of the Pentagon papers—a recapitulation of inter-governmental debate on the United States involvement in the Vietnam war—to the press.

David R. Nissen, the Department of Justice prosecutor, opposed the hearing on the ground that discriminatory prosecution had never been held a proper defense in Federal courts.

Federal District Judge William Matt Byrne Jr. took the arguments under submission, calling for affidavits from the defense attorneys by Thursday that would specify elements of proof that they thought would be provided by a pretrial hearing.

May Take Several Days

The arguments came on the first day of oral arguments on pretrial motions before Federal District Judge William Matthew Byrne Jr. The defense has entered seven motions for dismissal. Although both sides have submitted voluminous briefs, the pretrial arguments are expected to take several days and Judge Byrne is not expected to rule until Wednesday on whether a pretrial hearing is proper.

In the first argument today, Gerald Uelman, a lawyer for Dr. Ellsberg, attempted to convince the court that the charges should be dismissed because the indictment had not been properly signed.

The indictment was signed by Mr. Nissen, and the defense contended that, as a Special Assistant Attorney General, he was not authorized under law to do so. Mr. Uelman argued that Robert L. Meyer, former United States Attorney in Los Angeles, had refused to sign the Federal indictment and that Mr. Nissen had no authority to do so.

Mr. Nissen replied that his appointment as a Special Assistant Attorney General authorized him to carry out all functions that are properly delegated by the Attorney General, including the signing of an indictment.

Told to Work It Out

Judge Byrne asked that the prosecution and defense work out procedures under which an affidavit from Mr. Meyer might be submitted to the court.

In arguments for the pretrial hearing, Mr. Nesson said the defense would produce witnesses who would show that the use of classified Government documents for personal use and the leaking of them to the press was a common practice among Government officials.

Mr. Nesson said, "we will present a picture of a system which had extremely elaborate technical specifications which, if followed, would bring our government to a halt."

Judge Byrne said he was inclined to agree with the defense brief, but called on Mr. Nesson to be more specific on the points of proof a hearing might provide.

Mr. Nesson said he was prepared to offer an affidavit from Max Frankel, Washington Bureau chief of The New York Times, that would document routine leaks of classified information to the press.

Mr. Nesson countered that there were no cases in precedent permitting discriminatory prosecution as a defense in Federal cases.

"A person guilty of a crime cannot be excused simply because others who are guilty are not prosecuted," he said. "The answer is not to let everybody go, but to let the prosecutor go."