

Court Declares Mistrial in Ellsberg Case

By Leroy F. Aarons

Washington Post Staff Writer

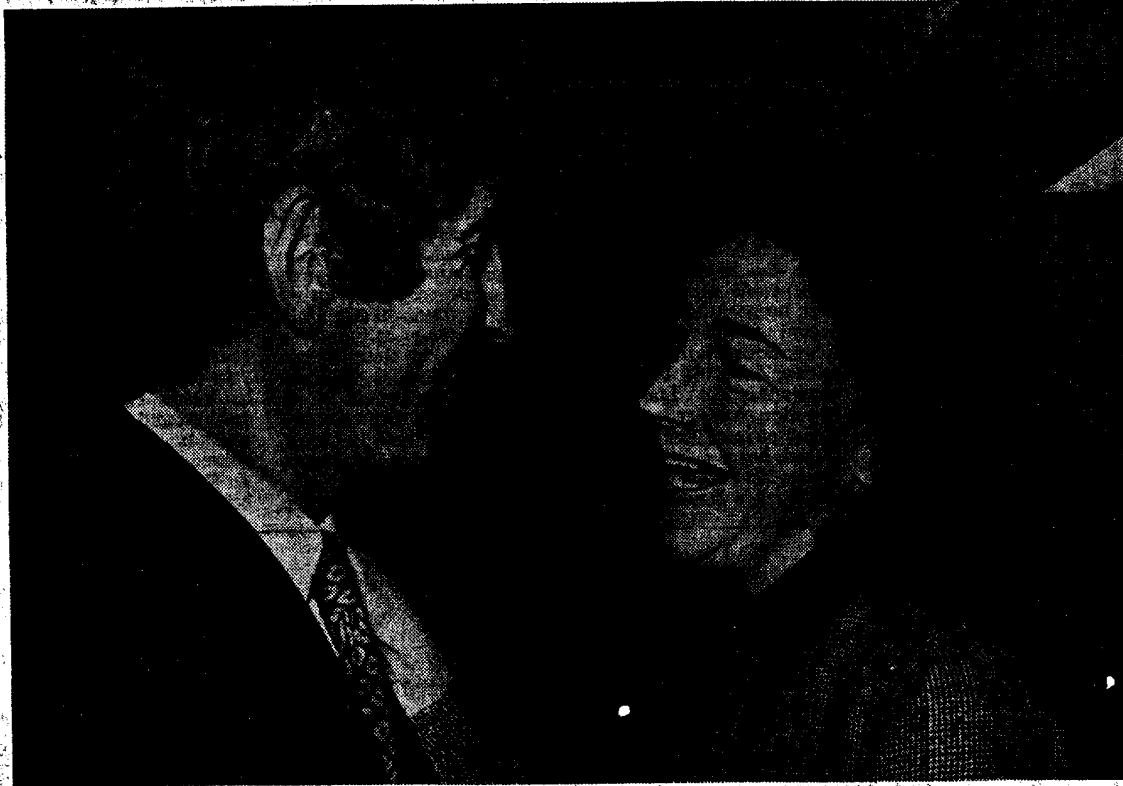
LOS ANGELES, Dec. 11— U.S. District Judge W. Matt Byrne Jr., acting at the pointed suggestion of a panel of the Ninth U.S. Circuit Court of Appeals, today declared a mistrial in the Pentagon papers trial and directed that a new jury be impaneled.

But even as he acted, attorneys for defendants Daniel Ellsberg and Anthony J. Russo indicated they would challenge the right of members of a new master jury panel, activated on Sept. 1, to hear the Pentagon papers case.

Leonard Weinglass, one of the attorneys, claimed that chief District Judge Albert Lee Stephens Jr. had made "disparaging" remarks about the Ellsberg case in the presence of some 240 potential jurors from which the master jury panel was being selected in late July and early August. It is this panel, which contains young voters for the first time, from which the new jury would be selected.

After Ellsberg and Russo waived their right against double jeopardy, Byrne said he would dismiss the present jury of eight women and four men on Tuesday. Byrne's action came after the appellate court said Friday it would be "foolish" to proceed with jurors chosen four months ago.

Byrne had opposed a mistrial, but interpreted the appellate court language, issued in response to a defense appeal, as indicating a risk of reversible error should the case



Associated Press

Daniel Ellsberg and his wife, Pat, are all smiles after the Los Angeles judge in the Pentagon papers case declared

a mistrial and ordered that a new jury be chosen. Action followed defense claim that publicity prejudiced jury.

go forward with the present jury.

The trial was scheduled to begin last July, but litigation over a defense challenge involving government wiretapping delayed proceedings for four months.

Byrne said today he hoped to start drawing a new jury as early as Wednesday. He ordered the defense to present affidavits on the challenge to the new jury and any other motions by Tuesday.

Defense attorney Weinglass elaborated on his charges against Judge Stephens at a press conference after the brief hearing. He said the chief judge had made disparaging remarks about the Ellsberg case on several occasions, but specified only one instance.

In that instance, which occurred Aug. 1, Judge Stephens was questioning a named Aumont Hernandez in the presence of some 240 other potential jurors, Weinglass said.

This is the partial exchange, as read to reporters from a transcript by members of the defense team. Hernandez has just asked to be permanently excused for work and personal reasons):

Stephens: We get all kinds of complaints for excusing somebody, and you are in a minority group, so people claim—

Hernandez: I am American.

Stephens: I know it, but a lot of the Americans claim they are a minority group discriminated against and

say they don't get enough members of their group in the jury and so forth. You probably have been reading about the Ellsberg case. This is what they brought up there, and so forth. I think it's a lot of nonsense myself, but I urge you to serve.

Judge Stephens, reached by telephone in his offices here, said he did not recall the exchange, but added that if it did occur, it would have been out of earshot of the remainder of the prospective jurors.