Conflict Troubles Ellsberg Defense

2/26/73

By Sanford J. Ungar
Washington Post Staff Writer

LOS ANGELES—Ask Daniel Ellsberg and Anthony J. Russo Jr. why they disclosed the Pentagon Papers, and they will tell you it was because they felt that Congress and the public needed to have the information in them.

Ask Ellsberg's and Russo's defense attorneys why their clients are not guilty of espionage, and they will tell you that most of that information was already public.

The apparent contradiction between those two points—one an assertion of motive and the other a legal defense—hovers over Ellsberg's and Russo's case like a stubborn insect.

But in order to win acquittal on the espionage charges, and on other charges of conspiracy and theft of government property in the Pentagon Papers trial, they must try to convince the jury of both.

The legal defense has been well established in the United States since the 1940s, when the Second U.S. Circuit Court of Appeals in New York reversed the espionage conviction of Edmund Carl Heine, an American citizen who sent reports on the U.S. aircraft industry to Nazi Germany in the months before this country entered World War II.

Judge Learned Hand, issuing the appellate court's opinion on Nov. 8, 1945, wrote that Heine's conviction could not stand, because all of the information he sent to Germany "came from sources that were lawfully accessible to anyone who was willing to take the pains to find, sift and collate it."

Affirmative Defense

Hand's opinion pointed out that Heine, in writing his reports, had relied upon magazines, books and newspapers, correspondence with aviation industry officials and even a visit to the 1940 New York World's Fair—in short, nothing very confidential or classified.

The judge said that if Heine could be convicted, under a strict interpretation of the Espionage Act's ban on disclosure of information relating to "the national defense," then:

"It would be criminal to send to a subject of Britain or to a citizen of France a railway map, a list of merchant ships, a description of automobile assembly technique . . . or even a work upon modern physics, provided only the sender had reason to believe that the information might reach the government, and be helpful to it in any of its activities."

On the basis of Heine and other related cases, it has become an affirmative defense against espionage charges to assert that the information disclosed was already "in the public domain."

Thus, for almost every citation from the Pentagon Papers, the disclosure of which prosecution witnesses say could have injured the "national defense," Ellsberg's and Russo's staff has come up with something identical or similar that was on the public record before the Papers were disclosed.

The defense references come from, among other things, newspapers, reports published by the Government Printing Office, and the memoirs of former officials as prominent as the late President Lyndon B. Johnson.

Wanted To Help

But the prosecution's standard response is that even if some of the information in the Papers was already public, it is the "totality" of the documents and their "authenticity" that really made the difference

Ironically, although they cannot directly say so for reasons of legal strategy, Ellsberg and Russo agree.

They believed that the Pentagon Papers as a whole, tracing the often-concealed history of U.S. policy-making in Southeast Asia, would have a devasting impact if comprehensively read—not by any foreign power, but by American lawmakers and citizens.

That is what each defendant is expected to say when he takes the witness stand here in his own defense.

Ellsberg and Russo will explain that they wanted to help, not hurt, the United States, by using the information in the Papers to hasten an end to the Vietnam war.

As for the contradiction, Ellsberg has his own explanation: the real impact of the Pentagon Papers, he believes, was to embarrass the government, rather than to affect the "national defense."

Because some details in the Papers would still be very embarrassing to the government if widely known, he contends, the prosecution has carefully selected the sections it wants to highlight to the jury and the public.

And most of what the prosecution chooses was already public knowledge, albeit with a small part of the public.

That is a complicated chain of reasoning, but one on which the defense in this case may stand or fall.