

U.S. Judge Refuses to Dismiss Ellsberg, Russo Spying Charges

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LOS ANGELES, July 7— U.S. District Court Judge W. Matt Byrne Jr. refused today to dismiss espionage charges from the 15-count indictment against Daniel Ellsberg and Anthony Russo in connection with their disclosure of the top secret Pentagon papers.

Denying the last major pretrial motion by the de-

fense, the judge rejected its argument that two sections of the federal espionage act, under which Ellsberg and Russo are charged, are unconstitutional on their face.

The defense also contended that even if the statute is constitutional, the espionage counts in the indictment are inadequate. But that argument was also rejected when the judge let the indictment stand.

Byrne left open the possibility, however, that he could still weed out three other espionage counts under a different section of the espionage act before jury selection in the case begins next Monday morning.

In addition to its unusual use of the espionage act, the Justice Department has charged Ellsberg and Russo with criminal conspiracy and with theft of government property.

If they go to trial next Monday on the full indictment and are convicted on all counts, Ellsberg could receive maximum sentencing totaling 115

years in prison and Russo 35 years.

At any point after presentation of the prosecution case, however, Byrne could direct a verdict of acquittal on any counts in the indictment on which he does not feel the government has carried its burden of proof.

The ruling today on the espionage charges came as a serious blow to the morale of the defense, which had held out hope that the judge would narrow the indictment.

Some defense lawyers, encouraged because Byrne had delayed a ruling on the espionage motion while denying almost all others brought on behalf of Ellsberg and Russo, felt they had made their strongest pretrial case in this area.

They had argued that the espionage act inherently violates the First Amendment guarantee of free speech, because it assumes the validity of the security classification markings on government documents without providing citizens any opportunity to challenge the markings in court.

The Pentagon papers, a historical study of American involvement in southeast Asia, were classified "top secret-sensitive." For the purposes of this trial, the prosecution says, they are "national defense documents" covered by the espionage act.

Byrne also denied several minor defense motions today, but delayed a decision until Monday on how the four still-classified "diplomatic" vol-

umes of the papers will be handled in court.

The prosecution has proposed that although they will be shown to the jury and openly discussed during the trial, the diplomatic volumes should not be seen by members of the public or the press.

During an angry debate over that issue which lasted two hours today, Charles E. Goodell, a former Republican senator from New York who is one of Ellsberg's lawyers, warned the judge against letting "a shroud descend over the proceedings" and "darkening the chamber" with any such special treatment for documents in evidence.

The defense also pointed out that columnist Jack Anderson, the Washington Post and The New York Times have already disclosed the contents of the four volumes.

Prosecution and defense lawyers announced to a disappointed judge today that they had been unable to agree on any significant stipulations of fact which could shorten the trial.

Byrne offered to mediate in his chambers in an attempt to reach other areas of agreement which would reduce the number of witnesses to be called. But on the instructions of Ellsberg, his attorneys refused to enter into any discussions in the case which are not held in public.

The judge said he will warn all prospective jurors on Monday morning that the trial could last as long as 10 to 12 weeks.