

Judge Bars Most McCloskey Testimony

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LOS ANGELES, March 5—The judge in the Pentagon papers trial today prohibited attorneys for Daniel Ellsberg and Anthony J. Russo Jr. from offering evidence on the frustration of Congress over its inability to obtain information about the Vietnam war.

The ruling by U.S. District Court Judge W. Matt Byrne Jr. eliminated much of the defense testimony that was to be offered by Rep. Paul N. (Pete) McCloskey Jr. (R-Calif.).

Although he did not explain his decision, the judge's ruling apparently was based on his

frequently expressed opinion that Congress' entitlement to information is not directly at issue in the indictment against Ellsberg and Russo on charges of conspiracy, espionage and theft of government property.

Ellsberg and Russo, however, insist that they duplicated the top-secret papers in late 1969 largely because they were trying to get the information contained in them to Congress and the American public.

McCloskey, one of the congressmen Ellsberg approached in his effort to disclose the documents publicly, was to be a major witness on that point.

According to a written preview of his testimony presented to the court this morning, McCloskey was planning to say that "under the circumstances that existed in 1969 and 1970, a person coming into possession of the Pentagon papers . . . was entitled to take reasonable steps to accomplish the delivery of such information to the Congress of the United States."

Contrary to the charges in the indictment, McCloskey was prepared to say, it was not the defendants but the Executive Branch of government that violated the law when it withheld the Pentagon papers

despite congressional requests for access to them.

The refusal of the defense department to make the documents available to Sen. J. W. Fulbright (D-Ark.), chairman of the Senate Foreign Relations Committee, "subverted" the security classification system and "endangered the security of the United States by preventing Congress from knowing the truth" the draft of McCloskey's testimony said. Having failed to make the point through other approaches, Ellsberg's and Russo's attorneys sought to offer the testimony today as part of a defense of justification.

As outlined by the attorneys, that defense would seek to establish that Ellsberg and Russo took justifiable action against "two great evils"—the war in Vietnam and the withholding of information from Congress by the Executive Branch.

Leonard I. Weinglass, who represents Russo, argued anew that the only reasonable way to punish the defendants would have been through administrative sanctions for violating the rules of their employer, the Rand Corp.

But Byrne rejected the defense maneuver, pointing out that the defense of justification had not been used in this way "since well before the turn of the century."

As a result, McCloskey's defense testimony today was brief. He told the jury that even, without security clearances, members of Congress obtain access to classified information like the Pentagon papers "every day."

Chief prosecutor David R. Nissen, however, launched a lengthy cross-examination of the maverick Republican congressman.

He sought to persuade the jury that although McCloskey had testified in part on the basis of his experience in the Marines, he has little knowledge of military intelligence and is not qualified to comment on whether the Pentagon papers were related to the national defense—as required for a conviction under the espionage act.