

Judge Drops One Charge In Ellsberg-Russo Case

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LOS ANGELES, Feb. 26—The judge in the Pentagon Papers trial today acquitted Daniel Ellsberg and Anthony J. Russo Jr. on one of several espionage charges against them.

Ruling on a defense motion presented at the end of the prosecution case, U.S. District Court Judge W. Matt W. Byrne Jr. said the government had presented insufficient evidence on the two charges.

That left 13 counts in the indictment in the case — including one conspiracy charge against both defendants, 11 other charges against Ellsberg and two against Russo.

The government claims that their alleged conspiracy took place in 1969 and 1970, while Ellsberg was still working as a researcher at the Rand Corporation in Santa Monica, Calif.

One of the counts thrown out today by Byrne accused Ellsberg of espionage in connection with a Rand study of the 1954 Geneva Convention on Indochina.

Because of an earlier ruling that grew out of the prosecution's withholding of evidence in defiance of a court order, the judge had banned the presentation of any evidence on that count.

But the judge's decision on the other count, concerning Russo, came as a surprise.

That count alleged that Russo obtained nine volumes of the Pentagon Papers from Ellsberg "knowing and having reason to believe at the time he received and obtained them that said documents would be disposed of contrary to" the espionage act.

Byrne said there had been no evidence that Russo actually knew how the papers would be "disposed of."

While he denied other parts of the defense motion for a direct verdict of acquittal, the judge said he might throw two more counts out of the indictment on Tuesday before the defense begins presenting its case.

Those two counts charge Ellsberg with sowing one volume of the Pentagon papers to Vu Van Tai, a former South Vietnamese ambassador to the United States.

The prosecution has been prevented from offering evidence on those counts until it obtains a properly authenticated copy of Tai's fingerprints from Saigon. An earlier copy of Tai's fingerprints was excluded from evidence, because the judge said it was not clear that the South Vietnamese police official who signed them had the authority to do so.

In a brief court session this afternoon, Byrne denied several other defense motions, including a request by Leonard B. Boudin, Ellsberg's chief defense lawyer, to give another opening statement to the jury.

Boudin had argued that he was entitled to do so because of the government's withholding of key evidence in the case.

The judge stressed that his ruling today eliminating counts from the indictment was based on a reading of the evidence in the case "in a light favorable to the government."

"There still remains questions of constitutionality" of the laws under which Ellsberg and Russo are charged, the judge said, but he explained that they would be "best considered, analyzed and decided at the end of the case" before the jury begins deliberations.

After the defense concludes presenting its own evidence, the judge added, he could throw other counts out of the

indictment.

The charges left in the indictment after today's ruling include: One conspiracy count against both defendants, six espionage charges (five against Ellsberg and one against Russo), and six charges of theft of government property (five against Ellsberg and one against Russo).