

Pentagon Papers Case Against

Judge Drops Ellsberg, Russo

Federal Conduct Cited as Offending 'Sense of Justice'

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LOS ANGELES, May 11—U.S. District Court Judge W. Matt Byrne Jr., citing governmental misconduct so severe as to "offend the sense of justice," ended the Pentagon Papers trial of Daniel Ellsberg and Anthony Russo Jr. today and dismissed all criminal charges against them.

After two weeks of sensational disclosures, including news of a White House-directed burglary of Ellsberg's psychiatrist's office and of government wiretaps for which all records have disappeared, Byrne said, "There remain more questions than answers" about how seriously the defendants' constitutional rights were violated.

The judge blamed various government agencies, including the Central Intelligence Agency, for taking "an unprecedented series of actions" against Ellsberg after he was originally indicted almost two years ago for leaking the Pentagon Papers.

But Byrne said his ruling was also based on the fact

that government prosecutors had "time and again failed" to comply with his court orders to produce materials from government files that tended to exculpate, or establish the innocence of, Ellsberg and Russo.

He declared that they "should not have to run the risk of being tried again before another jury."

Byrne's ruling, which took 15 minutes for him to read from the bench this afternoon, brought pandemonium in his courtroom. As he strode back to his chambers, there was applause and whoops of joy from Ellsberg's and Russo's staff and supporters.

There was also discreet pleasure at the Justice Department in Washington, where high officials had come to believe that the Pentagon Papers trial, while important to President Nixon's effort to stem leaks of "national security information" from the federal bureaucracy, was hopelessly entangled with the Watergate affair.

Specifically, Byrne granted both a mistrial and a dismissal of the indictment which charged Ellsberg and Russo with conspiracy, espionage and theft of government property. He said he had determined that to grant a mistrial alone, leaving open the possibility for a new trial, "would not be fair."

The only way that the Justice Department could now move to retry Ellsberg and Russo on the charges here would be to appeal Byrne's decision on dismissal to the Ninth U.S. Circuit Court of Appeals in San Francisco, which it is entitled to do.

But legal observers pointed out that such an appeal is unlikely to be taken—and that it would probably not succeed—because Ellsberg and Russo had already been placed in "jeopardy" of conviction on the offenses

charged.

The Fifth Amendment to the Constitution dictates that no person "shall . . . be subject for the same offense to be twice put in jeopardy of life or limb. . . ."

Unlike an occasion last year when a mistrial was declared in the Pentagon Papers case, Ellsberg and Russo did not seek a mistrial this time, nor did they file a "waiver" of their rights against "double jeopardy."

Whatever the strict legal posture of the situation, Justice Department sources said that as long as Richard G. Kleindienst remains Attorney General—he has resigned from the Cabinet because people close to him are under investigation in the Watergate affair—Byrne's decision certainly will not be appealed.

But the sources stressed that the final decision will be up to Attorney General-designate Elliot L. Richardson, whose nomination is before the Senate Judiciary Committee, on the basis of advice from Solicitor General Erwin N. Griswold.

It was uncertain, however, whether the Justice Department would renew a separate grand jury investigation in Boston, suspended since last December, which focused on Ellsberg's distribution of the Pentagon Papers to The

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New York Times, The Washington Post and other newspapers.

(The charges here focused only on Ellsberg's and Russo's actions in late 1969, when they photocopied the top-secret Pentagon study at a Hollywood advertising agency, and their "conspiracy," which the government said continued into late 1970.)

A jury of 10 women and two men had been hearing the evidence against Ellsberg and Russo and in their defense since mid-January.

The jurors were sent home for a week last Tuesday, while Byrne weighed the tangle of disclosures concerning the government's investigations of Ellsberg. This afternoon, they were notified by telephone that they would not have to bother returning to court next week.

Attorneys on both sides of the case had already expressed their misgivings that the jury, which was not sequestered, had been insulated from information about the recent sensational developments.

The Ellsberg-Russo defense fought to the last moment for a ruling from Byrne on its motion for a directed verdict of acquittal based on the assertion that the government's evidence was insufficient to sustain a conviction.

Russo, for his own part, repeatedly instructed his attorney Leonard I. Weinglass, that he wanted the case to go to the jury in order to vindicate his and Ellsberg's conduct in releasing to the public the secret history of American involvement in Southeast Asia.

Before Judge Byrne dismissed the case this afternoon, he indicated that if he were to rule on the motion for a directed verdict of acquittal, he would acquit the defendants on some counts, but send other counts to the jury for a verdict.

He gave the defendants time to consult with their attorneys on whether they wanted to have him follow that course or rule on the dismissal motion.

After a moment, chief defense counsel Leonard B. Boudin said, "The defendants do press their motion, based on the totality of government misconduct." It was then that Byrne delivered his ruling.

While scolding the prosecution generally, the judge seemed to indicate that he viewed most seriously the

revelation on Thursday that Ellsberg had been overheard in late 1969 and early 1970 in a wiretap on the Bethesda, Md., residence of Morton H. Halperin, then a consultant to the National Security Council and more recently "chief of staff" for the Ellsberg-Russo defense.

"Of greatest significance," Byrne said, was the discovery that the Justice Department and Federal Bureau of Investigation had lost or destroyed records of the wiretap on Halperin.

Although pressed repeatedly by Byrne over the past two days, chief prosecutor David R. Nissen had been unable to come up with more details on the wiretap or the missing records. This afternoon, the judge said he was willing to wait no longer.

At other times during the past two weeks, it had been disclosed that:

- A burglary squad reporting directly to the White House broke into the Beverly Hills office of Ellsberg's psychiatrist, Dr. Lewis Fielding, as part of a scheme to determine Ellsberg's "prosecutability."

- The Central Intelligence Agency, in possible violation of its legal authority, provided technical assistance to the burglars over a five-week period.

- The entire operation grew out of President Nixon's personal directive for an urgent investigation—outside the normal channels of the FBI—to identify the sources of leaks of "national security information."

- Convicted Watergate conspirator E. Howard Hunt Jr., a member of that operation, forged two official State Department cables to implicate the late President Kennedy in the 1963 assassination of South Vietnam President Ngo Dinh Diem.

- Byrne was approached in the midst of the Pentagon Papers trial by former chief White House adviser John D. Ehrlichman about accepting the permanent directorship of the FBI.

During a court session this morning, defense attorneys for Ellsberg and Russo made a concededly half-hearted argument for dismissal of the case.

Boudin and Weinglass asserted that legal precedent supports a dismissal when the government has failed to produce the logs and other records of a wiretap.

"The government has engaged in an act whose legality it cannot even seek to establish," Boudin told the judge. "The government has destroyed the records or made them disappear."

Referring to allegations that records of "national security" electronic surveillances were removed from the FBI's files in 1971, Boudin said, "It makes no difference whether it was the White House, the Justice Department or the FBI" which conducted the wiretap that overheard Ellsberg—"although, apparently, one was subject to robbery by the other."

Weinglass contended that once any records of the wiretap were produced, the defense is legally entitled to inspect them and help in the court's determination of whether the surveillance was related to the case and had "tainted" the prosecution evidence.

On the contrary, argued chief prosecutor Nissen, the government should have the opportunity to demonstrate that it had an "independent origin" for all of its evidence.

But the thrust of defense arguments today was an appeal that Byrne not conclude the controversial case without first mounting a full investigation of the wiretap and other "governmental misconduct" and settling the complex legal issues involved by acquitting Ellsberg and Russo of all charges.

Weinglass suggested that Ruckelshaus's last-minute discovery of an FBI employee who remembered that Ellsberg had been overheard in a wiretap was "a White House attempt to divert the court" from more embarrassing disclosures.

"It is very possible," he argued, that "this (FBI) agent is a person assisting the government to get out from a very uncomfortable situation."