

High Court Lets Stand Ruling on Bombing

By Jack C. Landau

The Supreme Court has refused to review a congresswoman's claim that the Department of Defense unconstitutionally bombed Cambodia in the spring of 1973.

The congresswoman, Rep. Elizabeth Holtzman (D-N.Y.), joined by four Air Force officers who had refused to obey bombing orders, won a U.S. District Court injunction against the Cambodia bombing in July, 1973 but then lost in the U.S. Court of Appeals.

The Supreme Court action let stand the appellate court opinion which, by a 2-to-1 vote, said that the bombing challenge was a "political question" which could not be decided by the courts because "judges are incapable of assessing the facts" of military operations.

In another major case Justice Department and Georgia officials urged the court to rule clearly that all 78,000 federal, state, county and municipal jurisdictions can establish separate standards for obscenity in prosecuting booksellers and theater owners.

"Since the First Amendment applies to both state and federal (obscenity) prosecutions," said Assistant Solicitor General Allan A. Tuttle, "it would be permissible for each federal court jury to work under local contemporary community standards" for what is obscene and what is not.

This argument was echoed by Attorney Tony H. Hight who insisted that a jury in the city of Albany, Ga., should be permitted to decide for itself whether the prize-winning film "Carnal Knowledge" is obscene. Hight represented Albany officials.

The jury was shown the film at the trial under the Georgia obscenity law. "They did not see reviews in The New York Times or anything else," he explained during several hours of oral arguments yesterday before the Justices in two major obscenity cases.

The movie industry produced New York City attorney

Louis Nizer who said that the obscenity conviction of the Albany theater owner for showing "Carnal Knowledge" was "pornographic imbecility."

He said that "Carnal Knowledge" was "not sex for its own sake."

"The camera . . . is always on the faces of the characters and not below," he explained.

He urged the Supreme Court to clarify its anti-obscenity ruling of last June by at least ruling that juries must establish at a minimum a single statewide standard for pornography.

In the June decision, the high court rejected a "national" standard but did not define how broad an area is encompassed by a "local" standard.

The Georgia Supreme Court, in upholding the conviction, said that an Albany jury could set its own standards and another jury, in a different city, could set a different standard.

Nizer argued that this would be a "constitutionally intolerable situation because there are more than 78,000 federal, state and local jurisdictions with the power to start obscenity prosecutions involving more than 14,000 movie theaters.

Chief Justice Warren Burger pointed out that the Court has permitted different cities to set different standards for "parade permits".

"Wouldn't your argument," he said to Nizer, "appear to run counter to the traditional idea that the jury is the conscience of the community?"

The bombing case has a complicated history. On July 25, 1973, a U.S. District Court judge ruled that the bombing was illegal and enjoined it. On July 27, the U.S. Court of Appeals vacated the order. On August 4, Justice William O. Douglas reinstated it.

The factors behind the necessity to bomb Cambodia, the appeals court said, are "questions of fact involving military and diplomatic exper-

tise not vested in the judiciary."

The Justice Department, which had opposed review, said that the case was "moot" — there was no need to decide it — because American combat activities in Cambodia had terminated on Aug. 14, 1973, so there was no issue left to decide.

A Court of Appeals dissent by Judge James L. Oakes said that the courts had enough facts to decide the suit brought by Rep. Holtzman and the officers.

He said the simple question was whether the President had the power to order bombing in Cambodia from April 1 to Aug. 14 when the Vietnam war had actually terminated on April 1, with the last troop withdrawal.

The dissent said that, without congressional authority, the President had power to bomb only if there was a "belligerent attack" or "grave emergency."

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