

Judge's Order

Ellsberg, Russo Win on 2 Counts

Los Angeles

The judge in the Pentagon Papers trial ordered Daniel Ellsberg and Anthony Russo acquitted of two of the espionage charges in their 15-count indictment yesterday and scheduled the defense portion of the trial to begin today.

U.S. District Judge Matt Byrne dropped one count of espionage against each defendant and did not immediately rule on two other counts which he took under submission. He refused defense requests to acquit on 11 counts of the espionage-conspiracy-theft indictment.

His rulings came in the wake of six hours of defense arguments last Friday in which acquittal on all counts was sought.

"There still remain questions of constitutionality on some of these statutes as applied," said Byrne of the laws invoked in the government's case.

But he added, "The question of constitutionality . . . is best considered, analyzed and resolved after all evidence is presented."

Ellsberg, 41, and Russo, 36, are on trial in connection with the release to news media of the Pentagon's top secret study of the Vietnam war.

The judge's ruling on the espionage count against Ellsberg made official a "sanction" imposed on the government earlier for withholding documents from the defense.

The government had already been forbidden from presenting evidence from the Pentagon Papers volume involved in that count.

The removal of one count of the indictment against Russo, the judge said, resulted from the government's interpretation of the word "disposed."

Judge Byrne had questioned attorneys at length as to what was meant by "disposed of" in relation to eventual use of the papers and whether Russo was aware of such planned disposal when he helped copy the papers. Apparently, Byrne felt he was not aware of any plans to dispose of the papers.

"It was a real victory," said Russo later. "By the time we get through with the defense, there will be nothing left for the jury to consider," Russo said.

The judge held in abeyance his ruling on the request to drop two more counts of the indictment, which mentioned transmittal of the papers to unindicted co-conspirator Vu Van Thai, a former South Vietnamese ambassador.

The government has failed so far in its efforts to introduce into evidence the fingerprints of Thai, but said it would present new foundation for such an admission when court opens today. The judge says he will rule then on those two counts.

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