Ellsberg Trial: Now the Focus Is on Secrecy

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Special to The New York Times

LOS ANGELES, March 4—From the start, many constitutional authorities have seen the Pentagon papers trial as a major test of the Government's authority over information and the public's access to it. But until Friday, when defense testimony began on the Government's system of classifying secrets, the crucial First Amendment implications of the case had been somewhat obscured. They had been touched upon by lawyers for Daniel Ellsberg and Anthony J. Russo Jr. in their opening statements to the jury. Now, in the coming days, the defense will open as broad an attack against the classsification system as the trial judge will allow.

News Analysis

The First Amendment arises in this case in the Government's melding of the classification system, as defined by an Executive order, with the Federal espionage, theft and conspiracy statutes. The Government has never attempted this marriage before, and many lawyers believe that if the defendants are convicted, and that conviction is upheld, it will set legal precedents that could give the Government a degree of control over information that it never had before.

World War II and the cold war, the Korean war and the Vietnam war have so accustomed Americans to the concept of Government secrets and have so popularized the phrase "top secret," for instance, that many persons apparently believe there are laws governing what the Government labels top secret information. But there is no such law.

Congress has never passed an official secrets act making it a crime to disclose or publish any matter classified as top secret, largely because its validity under the First Amendment might be questionable, but also because of the possibility that such a law would permit the Government to hide embarrassing information merely by stamping it "top secret."

The Atomic Energy Act, controls dissemination of what is called "restricted" information on nuclear matters and a Federal statute controls the disclosure of communications intelligence, that is military codes, but Dr. Ellsberg and Mr. Russo are not accused of either, and the judge has ruled the communications code statute out of this case.

The defendants are accused of six counts of espionage, six of theft and one of conspiracy. The Espionage Act, as its name implies, is directed at espionage, not at leaking information, and the particular section invoked against the defendants has been used in the past only against persons alleged to have to a foreign country information that would damage the national defense.

In this case, however the Government is in essence trying to convince the judge and the jury that the disclosure of documents marked "top secret" is damaging to the national defense and helpful to a foreign country merely because they are marked "top secret."

This concept of top secret designations rests not on law, but on Executive Order 10501, which was issued by President Eisenhower on Nov. 5, 1953, and has since been superseded by an act issued by President Nixon, but was in effect at the time that Dr. Ellsberg and Mr. Russo allegedly committed the crimes.

The Government goes even further in its theft charges. It contends that because the information contained in the Pentagon papers was classified top secret under Executive Order 10501, it owns that information, and that the information itself, as distinct from the paper it was printed on, was therefore subject to theft.

In the conspiracy count, the Government contends that the defendants conspired to "defraud the United States" by "impairing, obstructing, and defeating its lawful governmental function of controling the dissemination of classified Government studies, reports, memorandum and communications."

Again, there is no statute that defines the classification of documents as a "lawful Government function" and again the Government has never made such a contention in any previous case. If it is upheld in this case, the Justice Department could then invoke the general conspiracy laws against Government officials and newsmen who act together to publicize classified matter.

Since the trial judge has refused thus far to allow the "right to know" issue to be raised before the jury, it must be done indirectly, and that will be through the defense attack on the classification system, which will take place this week if all goes as scheduled.

Thus, the defense will try to present testimony to show that the classification system is overbroad, and that once a document is classified it is seldom declassified, despite the passage of time and events.

The defense will also seek to introduce evidence to the effect that responsible Government officials, from the President down, regularly leak "top secret" information to the news media when it suits their purpose to do so, and they are not arrested when they do.

Many of the documents in this case were classified under the doctrine of derivative classification, and that is not even mentioned in Executive Order 10501, let alone in any statute. It is merely in the Defense Department regulations, and it works with a pyramid-like effect.

That is, derivative classification is a doctrine that provides that if you produce a study or a report that is based on just one sentence of research that has previously been classified, then that report must also eb classified.

The defense will not contend that the executive branch does not have the right to classify documents; it will argue only that the documents in this case were not properly classified and that such classification has nothing to do with the statutes under which Dr. Ellsberg and Mr. Russo were indicted.

The Government has acknowledged that it is trying to skirt the First Amendment issues in this case and so far the trial judge has not allowed much testimony that touches on those issues. But he has said that he will allow testimony on whether the particular documents in this case were, one, properly classified at the time that the offenses were allegedly committed and, two, whether they were indeed classifiable.

That is only the beginning of this phase of the trial.