

ELLSBERG JUDGE BARS A DEFENSE

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Rules Out 'Justification' on
Intent to Aid Congress

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LOS ANGELES, March 5—
The judge in the Pentagon papers trial ruled out today the "justification defense," under which the defendants would have argued that the motivation for disclosing the secret study of United States involvement in Vietnam was to get information to Congress.

However, Federal District Judge William Matthew Byrne Jr. told Charles R. Nesson, a defense lawyer, to prepare a memorandum of law on the matter, indicating that he might allow the defense at a later time.

The "justification defense," which is widely accepted in some cases but rare in this type of trial, holds that any evil committed by the defendants was not as great as the evil that was avoided because of their acts.

Cannibalism in a Lifeboat

Mr. Nesson gave two examples. One was a case in which survivors in a lifeboat were acquitted of cannibalism after they ate their fellow passengers to avoid starvation.

The other involved the hypothetical situation of a man who was walking down the street and saw a woman being raped. Nearby was a blind person with a cane. The man grabbed the cane from the blind person, thus committing a crime, and beat up the rapist.

Would not the grabbing of the cane fall under the justification defense? Mr. Nesson asked the judge.

In this case, Mr. Nesson wanted to introduce the justification defense through the testimony of Representative Paul N. McCloskey Jr., Republican of California.

In a memorandum supporting the use of that defense, Mr. Nesson said that "the war in Vietnam was unquestionably an evil of the greatest magnitude" and that the 18 volumes of the Pentagon papers involved in this case "contained much information about the war of which Congress had been deprived and which Congress needed to properly perform its constitutional functions."

"The executive branch wrongfully withheld the Vietnam study from Congress," Mr. Nesson's memorandum went on and "the defendants undertook to deliver to Congress the information contained in the Vietnam study" because they "believed, rightly, that Congress could get the information in no other way."

'Two Great Evils'

"The defendants acted with awareness of two great evils, the prosecution by the executive branch of the war in Vietnam and the executive branch's subversion, through information control, of the powers and responsibilities of Congress," Mr. Nesson wrote.

Mr. McCloskey, in another memorandum to the judge, supported the defense's position and gave details of how Congress had been deprived of the information. He was prepared to testify, Mr. Nesson said, that the acts of the defendants were "precisely tailored to the evils they saw."

The defendants, Daniel Ellsberg and Anthony J. Russo Jr., are accused, in part, of "conspiring to defraud the United States" of the information contained in the Pentagon papers.

Leonard Weinglass, another defense attorney, argued that there was no law, only an Executive order, against leaking classified documents and that the "justification defense" was contemplated against the order.

Mr. McCloskey did get to testify on his second day of direct examination that "members of Congress, committees of Congress, the Congress itself is entitled to receive top secret material, and we do almost on a daily basis when Congress is in session."

Information Flow

Mr. McCloskey, the second defense witness, had been called to testify as a Congressional expert on the flow of Government information and, as a former marine colonel, as an expert on one volume of the papers. That volume tells about the marine landing in Vietnam in 1965.

Mr. McCloskey testified on Friday that disclosure of that volume in 1969 could in no way have affected the national defense, and so today, on cross-examination, David R. Nissen, the chief prosecutor, started out to impeach him as a witness.

Mr. Nissen asked him a series of questions about his military career and focused on maneuvers Mr. McCloskey took part in in the summer of 1965 just south of here at Camp Pendleton.

Mr. McCloskey was pressed into service during the operation, called Silverlance, more or less as an actor. He played the part of an ambassador to a mythical country, Camelot, for the purpose of training marines on how to act in a friendly nation such as South Vietnam. Mr. Nissen elicited this to present the implication that with such military training, Mr. McCloskey could hardly be taken seriously when he testified about the national defense.

Dr. Ellsberg and Mr. Russo are accused of six counts of espionage, six counts of theft and one count of conspiracy.