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More government secrecy issue in Ellsberg case

NEW YORK — The Supreme Court ruled this week that despite the government's wiretapping of a member of the Daniel Ellsberg defense team, the trial of Ellsberg and his friend, Anthony Russo, could continue. But it does not seem to be widely recognized that the charges against these two men, if sustained, will provide the government with far more sweeping powers of secrecy and censorship than it has ever had.

Tom Wicker

In the case, John Kincaid has written in the magazine of the War Resisters League, "The executive branch will have succeeded in using the judicial branch to produce a new, repressive information control law which the legislative branch has always refused to enact." The little-known truth is that there is now no statute — none — which gives the president the explicit right to establish a system of classifying information. The classification system ("Top Secret," etc.) rests instead on executive orders, and those who have violated it in the past have suffered only administrative reprimands or the loss of their jobs — not criminal prosecution.

Conspiring to 'defraud'

It is a crime, declared so by statute, to make public certain information dealing with codes and atomic energy; neither Ellsberg nor Russo did that, nor are they so charged. It is also a crime, under the Internal Security Act, to hand classified information to a Communist country; neither defendant did that, either, nor are they charged with it. Among other things, Ellsberg and Russo are charged with conspiring to "defraud" the federal government of its "lawful function" of withholding classified information from the public. But Congress has never by statute declared that to be a "lawful function" nor made releasing classified information a crime. In this case, the government is contending that setting up a classification system is an inherent or implied power of the executive function — which it may be; but to prosecute Ellsberg and Russo for a crime in violating an executive order rather than a statute, the government also has to claim that it has inherent or implied power to declare certain behavior criminal, when Congress has never done so.

Ironically, government attorneys cite the so-called "Freedom of Information Act" for justification; because that act recognizes executive authority to keep national defense secrets, they contend Congress has "implicitly" given statutory authority to the classification system. This stretches the doctrine of "implication" a long way, but if sustained by the courts, it would give statutory status to the classification system by judicial rather than legislative act.

A very different thing

The Ellsberg-Russo indictments also charge them with violations of the Espionage Act. In every other case brought under that act, the government has had to show that the defendants acted, as the statute requires, "with intent or reason to believe that the information to be obtained is to be used to the injury of the United States or to the advantage of any foreign nation." But the government, despite this plain requirement, does not so charge Ellsberg and Russo; instead, the indictment charges them with communicating the Pentagon Papers "to persons not entitled to receive them," a very different thing.

The "theft" part of the indictment, moreover, charges Ellsberg with stealing, converting and communicating information and ideas — not documents (The actual documents were Xeroxed, and the government retains possession of the originals). The Ellsberg defense maintains that the government has never been construed by the courts or Congress to have proprietary rights over information; it has, for instance, no right to obtain a copyright, on the theory that no government should have the power to own or control information, and that a government's information is a collective possession of its people.

The remarkable issues

These are the remarkable issues that now must go to trial. If the government gets a conviction on these issues, and the conviction is sustained all the way through the Supreme Court, it will mean that making public classified information will have been declared a crime, although no statute makes it a crime. It will mean, further, that the government will not even have been required to show that such an act was intended to injure the country or to aid a foreign power — only that information was passed to persons "not entitled" to have it. And finally, the government's proprietary right to control information — not just physical documents, plans, films, etc. — will have been established.

The implications

Honest men may debate the wisdom and motives of Daniel Ellsberg and Anthony Russo in releasing the Pentagon Papers; but the implications of the case the government seeks to make against them transcend such questions. For if that case is sustained, the government will be enabled to make it a crime to make public anything on which it chooses to place a classification stamp. Then, anyone who discloses such information — say, an Air Force colonel "leaking" information about a faulty weapon or a wasteful program — and anyone who receives it — for instance, Joseph Alsop or Rowland Evans being clued in by the CIA — will be commiting a crime for which he can be prosecuted.

If that happens, there will be almost no limit on the government's capacity to act in secret — which is to say its capacity to do anything it chooses.