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ELLSBERG TRIAL TO START TUESDAY

Judge Will Let Prosecution
Use Some Contested Data

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LOS ANGELES, Dec. 7 —

Most of the pretrial legal maneuvering in the Pentagon papers case ended today, and, as of now, the trial of Daniel Ellsberg and Anthony J. Russo Jr. is scheduled to start Tuesday.

Today's hearing concluded "the battle of the bill of particulars." United States District Judge William Matthew Byrne Jr. awarded both sides something, but the defense was decidedly unhappy with its share of the compromise.

"They [the Government] get to go 10 steps forward and two steps backward," said Charles R. Nesson, a defense attorney.

Nonetheless, the judge ruled that nearly 100 pages of documents that the prosecution wanted to use in its case were not admissible. He did, however, give the Government the right to use several hundred other pages that the defense contended were not in the original bill of particulars, and he refused to postpone the trial beyond Tuesday to allow the defense to study them.

One More Possibility

There is one more possibility for a delay in the trial. On Dec. 1, Judge Byrne refused to grant a mistrial on the defense's argument that the jury had become "tainted" with bias during the four months between the time it was picked and now. This decision is being appealed to the United States Court of Appeals for the Ninth Circuit. No one on either side expects that court to overrule Judge Byrne's ruling.

One of the rules of a criminal case is that the prosecution make available to the defense, in advance, a detailed list of the documents it intends to present to the jury. This is called the bill of particulars.

The Government's bill of particulars in the case includes a listing of the materials it says will show that Mr. Ellsberg and Mr. Russo endangered national security and violated the Espionage Act when they made the Pentagon papers available to the public.

663 Documents Listed

Such a bill of particulars was given to the defense. It listed 663 documents. Subsequently, the Government gave the defense a set of 610 photo transparencies—many of the documents will be shown to the jury on slides. The defense contended that only 220 of the 610 slides were in the original bill.

Judge Byrne, however, ruled that only about 100 documents and their slides did not match the original bill, and the prosecution appeared content with the ruling.

The battle over the bill of particulars was more than a fight over legal niceties, for a large part of Mr. Ellsberg's and Mr. Russo's defense will be based on the fact that though the Pentagon papers were classified top secret, the reality was that the information in the papers was already in the public domain. That is, books, magazines and newspapers had for many years been printing the same information that was contained in the Pentagon papers.

To support this defense, researchers for Mr. Ellsberg and Mr. Russo have taken the bill of particulars and have tried to match it with books and newspaper and magazine articles and statements made by high Government officials before the Pentagon papers were made public in The New York Times on June 13, 1971.

Thus, it was the defense's contention that it would not have the time between now and Tuesday to do this matching research on what it called the new documents and new transparencies. Perhaps because of this, the judge also ruled today that the prosecution could not enter some of the disputed documents—a small number of them—into the case until the end of the trial or until 30 days from now, which ever comes first.

Heine Defense'

The contention of Mr. Ellsberg and Mr. Russo, that much of the information in the Pentagon papers was already in the public domain, is based on the so-called "Heine defense" in the nineteen-forties.

In that case, a man named Heine was charged with espionage for supplying Germany with American military secrets. His defense was that he had only provided information culled out of American newspapers and magazines and, therefore, had not committed acts of espionage. In a decision written by Judge Learned Hand of the United States Court of Appeals for the First Circuit, Heine was acquitted.

In this case, the Government will contend that the Heine defense does not apply because the Pentagon papers were top secret when they were made public and that they were not culled from data in the public domain.