

Mistrial Is Declared in the Ellsberg Case

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LOS ANGELES, Dec. 11—The trial of Daniel Ellsberg and Anthony J. Russo Jr. was officially declared a mistrial today and the Pentagon papers case was back to arguing over jury selection.

Four months ago a jury was selected in the case. It never heard a word of testimony.

After the declaration of mistrial, the defendants both waived their double jeopardy protection and Federal District Court Judge William Matthew Byrne Jr. said that he would dismiss the jury tomorrow and try to select another on Wednesday.

But the defense said it would challenge the new jury selection on several grounds — the main one being that the chief Federal judge of this district had, as had, as far as the defense was concerned, already prejudiced the next array of prospective jurors with asides he made about the Ellsberg case.

From Big Panels

Juries are chosen for each case from large panels of persons (about 2,000 here) who are periodically brought together to become potential jurors. The Pentagon papers jury was chosen from a group of citizens who were registered to vote as of December, 1971.

The judge would have the new jury selected from an array of about 2,000 persons who were brought together in July, 1972, but were still on the list of registered voters as of December, 1971.

The defense wants the new jury to come from among persons who were registered to vote as of October, 1972 — mostly because that group presumably would have a good percentage of 18- and 19- and 20-year-old members. The defense feels that the younger

prospective juror, the better able he or she will be to associate with the type of defense Dr. Ellsberg and Mr. Russo are putting together. The first jury in this case only had one member under 40 years of age.

To get a jury with teen-age members on it the defense will have to mount a successful challenge to the current array of prospective jurors.

Complain of 'Taint'

Its chief argument is that this list was "tainted" against the defendants because of remarks made to it in another case by Chief Judge Albert Lee Stephens Jr. of the Federal Court here.

Judge Byrne gave the defense until 9:30 A.M. tomorrow to file an affidavit indicating on what grounds it intended to challenge the new jury selection and gave it until Friday to file a formal motion. However, in

the interests of speeding the trial, he can make his rulings based on tomorrow's affidavit without waiting for the formal motion.

Judge Byrne also ordered the prosecution to complete its survey of electronic surveillance in the case and report the results to him by Friday. Under the rules the survey results are given to the judge in private. If he finds any of the defendants are under electronic surveillance or their counsel are being wiretapped on matters concerning his case, he makes that information public and then holds a court hearing of the material gathered.

Dr. Ellsberg is charged with 12 counts of espionage, conspiracy and theft in the Pentagon papers case and Mr. Russo is charged with three counts.

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