

Defense Sees Constitutional Test As Ellsberg-Russo Trial Starts

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Special to The New York Times

LOS ANGELES, Jan. 3 — In the modern, almost antiseptic Federal Building downtown here, thousands of miles from Vietnam, the final act of the Pentagon papers case began to unfold today with the start of jury selection in the trial of Daniel Ellsberg and Anthony J. Russo Jr. They are accused of espionage.

The incidents leading to the revelations of secret documents can sometimes be as intriguing as documents themselves, and the trial is expected to be filled with thriller-story tales of documents clandestinely copied and distributed, of people hiding away and of F.B.I. stake-outs in the dead of night.

But more important than these mystery story ingredients are the legal issues involved, and their implications. Many lawyers see the trial of Dr. Ellsberg and Mr. Russo as a major test of the First Amendment to the Constitution, of the Government's authority over information and of the public's access to that information.

Nonetheless, the Government has refused to concede that such broad constitutional issues are involved in this trial. For even though the decision to prosecute Dr. Ellsberg and Mr. Russo was made at the highest levels of the Justice Department,

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ment, the Government is contending that the issues are very narrow indeed—that, in fact, two men have committed precise crimes for which they are being tried and that no basic constitutional precedents are involved in the courtroom proceedings.

The Pentagon papers, a top-study of America's involvement in Indochina through four Presidential Administrations, were first made public on June 13, 1971, in The New York Times.

Since then, the papers have become embroiled in the public debate over the Vietnam war, and have precipitated other debate over the obligation of the Government to keep its constituency honestly informed.

Indeed, the publication of the papers has led to reviews within the Nixon Administration and Congress of the nation's security classification procedures.

And although it is not directly part of the Ellsberg-Russo trial, in the background is the fact that when the papers were made public, a newspaper of general circulation, The Times, for the first time in the country's history, was restrained by prior court order from publishing articles.

Ruling by High Court

This restraint was lifted by the Supreme Court, in a 6-to-3 finding, but that ruling left important questions unresolved, questions that could in part be cleared up as a result of this trial.

The Times case drew separate opinions from all nine justices, leaving freedom of the press rights under the First Amendment somewhat blurred.

The Court did say that the Government had not met the "heavy burden" of proving enough damage to the national defense as balanced against a crack in the First Amendment to allow prior restraints.

However, the Court gave the Government the right to prosecute The Times after the articles were published. And this right left the issue of "national defense" obscure.

The drama and constitutional questions that are part of the Pentagon papers case focus on two men, Dr. Ellsberg and Mr. Russo.

Dr. Ellsberg, 41 years old, a former research associate at the Massachusetts Institute of Technology, is charged with 12 counts of espionage, theft and conspiracy in the Pentagon papers case. If convicted on all counts he could receive 115 years in prison.

Mr. Russo, 36, an aeronautical engineer and economist, is charged with three counts of espionage, theft and conspiracy and could receive 35 years in prison.

There are also two alleged co-conspirators — Miss Lynda Sinay, a Los Angeles advertising woman, and Vu Van Thai, a former South Vietnamese Ambassador to the United States. Neither was indicted.

Focus of Indictments

The indictments focus mainly on how Dr. Ellsberg copied the Pentagon papers while he was employed at the Rand Corporation in nearby Santa Monica, but they do not go into the question of how the papers were finally made public. (The corporation does considerable work for the Defense Department and had two copies.)

The 15 counts in the indictments cover the period between March 1, 1969, and Sept. 30, 1970—nine months to more than two years before the papers were first made public by The Times.

They say that Dr. Ellsberg, during that period, first took many of the heavy Pentagon papers volumes out of the Rand Corporation offices in Washington and transported them to Los Angeles. The first cross-country trip, with 10 volumes of the 47-volume study, is said to have been made on March 4, 1969, and a second with eight more volumes on Aug. 29, 1969.

Details of Allegations

The allegations are that Dr. Ellsberg, who by the nature of his position was authorized to have access to the papers, took the volumes, and other related material he had obtained from the Rand Corporation in Santa Monica, to Miss Sinay's advertising office at 8101 Melrose Avenue here and, along with Miss Sinay and Mr. Russo, copied them on Oct. 4, 1969.

Neither Miss Sinay nor Mr. Russo nor later Mr. Thai was authorized to have or see the papers.

Mr. Thai, who came to oppose the war in Vietnam, was alleged to have entered into a conspiracy with Dr. Ellsberg in the spring of 1969 to reveal to the public the classified papers, and the Government contends that it has found his fingerprints on several of the pages of the Pentagon papers.

The first count charges that in violation of Title 18, section 371, of the United States Code Annotated, Dr. Ellsberg and Mr. Russo conspired against the Federal Government to: "Obtain and caused to be obtained classified Government documents relating to the national defense . . . The documents would be communicated, delivered and transmitted to defendants and others, none of whom would be authorized to receive them."

That is the conspiracy charge.

The next six counts involve specific acts of stealing, concealing and receiving stolen Government property—including nine volumes of the Pentagon papers, a 1968 memorandum from the Joint Chiefs of Staff about Vietnam and a case study of the 1954 Geneva Conference on Indochina.

The nine volumes mentioned in these counts were among the 18 that Dr. Ellsberg allegedly transported across the country, and why only these nine are mentioned in these counts will presumably be made clear by the Government during the trial.

The six counts allege violation of Title 18, section 641, of the Code, which involves the embezzlement and theft of Government property.

The final eight counts involve unauthorized possession and reception of the Pentagon papers in violation of three subdivisions of Title 18, section 793, of the Code, which pertains to espionage and censorship, most particularly the gathering, transmitting or losing of defense information.

The subdivisions have to do with receiving and obtaining information about the national defense, whether they are documents or blueprints, photographs or sketches, and copying and distributing them to unauthorized persons.

Maze of Issues

If the charges in the indictments sound cut and dried, the maze of legal and constitutional issues underneath is not, and because of that the Ellsberg-Russo case could become one of the most extraordinary trials in an era of spectacular courtroom encounters.

The Government alleges, for instance, the Dr. Ellsberg had illegal possession of documents "relating to the national defense." This means that the Government must prove that the documents are, in fact, related to the "national defense," not merely classified top secret.

In the case of the Government against *The Times*, the issue of "national defense" was resolved only insofar as it was related to the freedom of the press issue. The Court said *The Times* could print the papers because they did not imperil the national defense enough to justify the unprecedented step of prior restraint.

But the Court did not define "national defense," and it did say that perhaps, in a different action, the Government could prove that making the material public did imperil the national defense enough to make possible criminal convictions at a

later date, after the papers were published.

So the Ellsberg-Russo trial could involve expert testimony from high officials of this and previous Administrations on just that point—what imperils the national defense.

Furthermore, the espionage statute requires that the defendants must have knowingly acted "against the best interests of the United States" and any argument over the nation's "best interests" would afford the defense an opportunity to discuss foreign policy, lawyers point out.

Dr. Ellsberg, for example, is prepared to argue that releasing the Pentagon papers was the best thing he could have done for the nation.

His argument here is that he performed a public service by providing the nation with information that it should have about the conduct of the war in Vietnam and of American foreign policy.

All of this, of course, tends to obscure the very real constitutional issues, particularly the crucial First Amendment implications of the case.

Many constitutional lawyers believe, for instance, that conviction of Dr. Ellsberg and Mr. Russo would set legal precedents that could give the Government a greater degree of control over information than has ever before existed.

There are several reasons for

this conclusion. The first is that the Ellsberg-Russo trial is, in essence, the Government's first attempt at imprisoning a person who "leaked" information to the public. That is, Dr. Ellsberg has admitted being the source of the Pentagon papers that appeared in the news media.

And while it is not the stated purpose of prosecuting Dr. Ellsberg, many constitutional authorities believe that successful use of the espionage laws against persons who have made information available to the public could have a deadly effect on others who might have information they believe should be made public. Such a development could give the Government unprecedented authority to conceal embarrassing facts.

In a separate case involving the Pentagon papers, a Federal grand jury in Boston investigated how *The New York Times* and other media obtained the papers. That grand jury was discharged shortly after Thanksgiving, without having handed down any indictments.

A spokesman for the United States Attorney's office in Boston said no final decision would be made on whether a new grand jury should be impaneled until after the Ellsberg-Russo trial. The office had said that the Boston jury was dismissed to avoid any conflict with the prosecution of crimi-

nal charges against Dr. Ellsberg.

How to keep Government secrets has always been a profound dilemma for the nation, since the First Amendment says: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Consequently, Congress has made several unsuccessful attempts to pass official secrets acts that would make it a crime to disclose or publish any information classified as secret.

However, with very few exceptions, these attempts have never succeeded for two reasons: many Congressmen believed finally that such laws would have questionable validity under the First Amendment, and they feared that such laws would allow Presidential Administrations to hide their mistakes simply by stamping them "classified."

The exception to this has been the Espionage Act, which outlaws the release of secret codes, disclosure by a Government employe of information to a foreign agent and the release of atomic information. None of this is alleged against Dr. Ellsberg and Mr. Russo.

But the Espionage Act also contains a broad, catch-all prohibition against disclosure of "any information relating to national defense" by a person who "has reason to believe [it] could be used to the injury of the United States or the advantage of any foreign nation."

Dr. Ellsberg and Mr. Russo are the first persons who did not pass on information to foreign agents who are charged under that provision of the act.

There are two more charges against the defendants that have never been made by the Government in any previous case, and both also raise profound constitutional issues.

The first is that Dr. Ellsberg and Mr. Russo conspired to "defraud the United States" by "impairing, obstructing, and defeating its governmental function of controlling dissemination of classified Government studies, reports, memorandums and communications."

If upheld, this could allow the Government to invoke general federal anticonspiracy statutes against, for example, Government officials and newsmen who work together to make public information marked "classified" — even though Congress has never made it a crime to make such material public.

Secondly, and perhaps even more far-reaching in the view of some constitutional authorities, the charging of Dr. Ellsberg and Mr. Russo under the general Federal statutes involving theft.

Dr. Ellsberg, for example, apparently never intended to keep a Government copy of the Pentagon papers. Rather, he made a copy and returned the original.

Thus, in this context, the Government's charge appears to imply that it owned the information contained in the papers, and that Dr. Ellsberg stole and criminally converted that information for his own use when he copied it. This raises the point that if the Government can own and control information rather than the paper it is printed on, the Government could suppress any embarrassing reports or studies without regard to the national defense.

In this, as in other points of the indictments, the Government has refused to speculate about broader constitutional issues and precedents that may be set by this trial. Instead, it has stuck to the much narrower view that two particular men have committed particular crimes and that whatever happens to them in the end will set no future precedents for Government prosecutions.

It is also the contention of the Government not only that Dr. Ellsberg stole the Pentagon papers to make copies of them, but also that while he had them he deprived the Government—defrauded it, in fact—of their use.

Furthermore, the Government contends that while there may

be no official secrets act, it is indeed the lawful function of Government to classify certain documents as "top secret."

The defense does not concede that Dr. Ellsberg stole the documents. It argues that he had Government clearance to see the papers, which he had helped to write, and that removing them from the Rand Corporation, copying them and then returning them did not constitute theft.

The defense argues further that since Congress did not pass an official secrets act, the Government is in effect asking the judge and jury to make law concerning classified documents, something that Congress has steadfastly refused to do.

Indeed, there is no statute that gives the Executive Branch of Government the right to establish its system of classifying information with such labels as "top secret."

The classification system rests, instead, on executive orders, not Congressional action. Violators of the system have not suffered criminal prosecution, only administrative jobs.

So if the two men are convicted, and the conviction is sustained through the Supreme Court, it could mean that making public classified information would have been declared a crime, even though no statute makes it a crime.

It could also mean that the Government would not be required to show that the act of passing information was intended to do injury or to help a foreign power, as the espionage laws now require.

Prof Melville B. Nimmer of the University of California at Los Angeles Law School, a leading authority on the First Amendment, has said: "The Government will have an official secrets act which covers not only official secrets but any and all information the Government has."

There is, of course, another side to this question. In 1789, for instance, Congress enacted a statute authorizing the heads of executive departments to prescribe "regulations" for the governing of the department, including "the custody, use and papers and property obtaining preservation of the records, to it."

Whether that will pertain to the Pentagon papers case will be determined finally by the judge's charge to the jury and the jury's decision.

The defense contends that the 1789 statute merely pertains to the internal operations of an executive branch department, not to broader issues such as security.

Under the statute the regulations, including executive orders, have the force of law, many legal authorities believe.

Furthermore, the Freedom of Information Act of 1966 provides exemptions for nine broad categories of information, including the exemption for "matters that are . . . specifically required by the executive to be kept secret in the interest of national defense or foreign policy." And it will be argued that in providing exemptions, the right of the executive to impose secrecy is explicit.

In the end, this question might

turn on what the jury perceives to be the meaning of the words "national defense."

One of the main defense contentions will be that the information contained in the Pentagon papers—as distinct from the physical papers themselves—was long in the public domain; that all the information in the papers had been the subject of newspaper and magazine articles, of books and of speeches by officials in various Administrations.

Dr. Ellsberg is not contending that the documents themselves, which include numerous secret Government memorandums, had been made public, but that the general sweep of the information they contain was already known and that the documents

merely served to support that knowledge.

And the defense will argue that if this is so, and since the Government does not have a copyright on information, how can Dr. Ellsberg and Mr. Russo be tried for releasing information that was already public?

It is, a practicing Los Angeles lawyer who is not connected with the trial said recently, "the most interesting case I've ever heard of—there are so many great constitutional issues, so many obscure points of law.

"The defense has two really tough jobs, to defend the case in court and build a good record for appeals, because so much is going to depend on the judge's charge to the jury at the end of the trial," he said.