

Pentagon Papers trial

Has gov't proven espionage?

ANNA SKLAR

The prosecution in the Pentagon Papers Trial virtually rested its cast last Friday against defendants Daniel Ellsberg and Anthony Russo. On Monday, Feb. 26, Judge Matthew Byrne granted a defense motion for judgment of acquittal on two counts of the 15-count government indictment against the defendants.

In extensive argument at the conclusion of the prosecution, defense attorneys for Russo and Ellsberg asked for such acquittal on each of the 15 counts in the indictment.

The indictment against the defendants charges them with theft of government property, conveying and stealing government property, violation of three sections of the Espionage Act — Receiving, communicating and retaining national defense documents — and conspiracy to do all the above.

The two counts for which Byrne granted acquittal are Count Ten, a charge of espionage against Defendant Russo and Count Eight, a charge of espionage against Ellsberg. Count Eight had already, in effect, been dismissed when the government two weeks ago was precluded from giving evidence about the Gurtov Document because the prosecution had suppressed exculpatory.

The espionage count against Russo was dropped because of, according to Byrne, "The Government use of the term 'Disposal.'" This leaves one count of espionage against Russo; five counts of espionage against Ellsberg, five counts of theft against Ellsberg, one count of theft against Russo; and one count of conspiracy against both defendants. but — in summing up his denial of the defense motion for acquittal on all 15 counts, Byrne's said "The evidence presented in this case is viewed as being favorable to the government."

In summing up the total impact of the indictment, Leonard Weinglass, attorney for Tony Russo, said, "This is the first time that the Government has asserted that it has the right to control the dissemination of information — it is the first time that the government has asserted this right with respect to citizens of the United States and all of us not under the employment of the U.S. Government . . . The whole thrust of the government case is that the First Amendment does not exist."

Judge Byrne expressed reservations about the constitutionality of the statutes in this case, but stated that they could be resolved at the conclusion of the trial.

JOY RIDING

Earlier in the week, Judge Byrne seemed particularly dubious about prosecution's proof of theft of government property.

Charles Nesson, attorney for Ellsberg, used some classic examples in law about the meaning of theft, including a reference to "A horse, a pig and a cow." He also suggested that the defendants were, in effect, "joyriding with the documents." Since the documents were copied and returned to the government, there has been no proof of deprivation by the government of its property. Byrne seemed inclined to direct a verdict of acquittal on the theft charges relating to specific sections of the various counts. But since there is no precedent for breaking up any one count of the indictment, it seems likely he will save his reservations when making his charges to the jury.

Since there are still six counts of espionage, the real question is, has the prosecution proved espionage? Ten government witnesses testified for the prosecution. The only real proven fact, from this testimony, is that the defendants copied the Pentagon Papers.

Lynda Resnick (formerly Sinay), a named, but unindicted co-conspirator, testified, "Dan did not want me to read any of the documents." She added, "I had no top secret clearance and they weren't my business." Lynda Resnick said that her Xerox machine was used to copy the documents.

ESPIONAGE

The Espionage Act was first established in 1917 and was designed, in fact, to punish anti-war activity, mostly by Socialists during World War II. More than 1500 people were convicted during 1917 and 1918, including Eugene V. Debs, the Socialist Presidential candidate who received almost one million votes while in prison. By 1950, the Act had been modified and expanded to include penalties in peacetime against, in particular, communists.

Convictions on this Act have almost always been political, so it is not at all surprising that this Act would be used in this trial, the Pentagon Papers Trial. But, in order to prove espionage, the government must prove that the documents related to the national defense. All witnesses for the prosecution, including Generals DuPuy and Gorman have primarily stressed the fact that the documents were classified Top Secret in 1969 (the period of the indictment — Ellsberg and Russo are not being tried for giving the Pentagon Papers to the American people, as they did in 1971, but for "converting" them to their own-use in 1969).

Although Gorman testified that the documents could have been of use to a foreign analyst in 1969, exculpatory reports (evidence showing that the documents did not relate to the national defense) prepared by DOD analysts impeach his testimony.

The prosecution is asserting that the mere existence of the classification Top Secret proves the documents related to the national defense. There has been and probably will be much more evidence



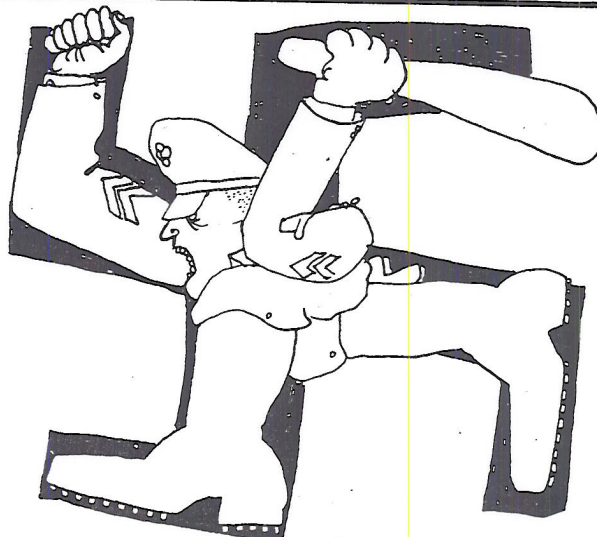
on the improper classification of documents.

Jerry Rubin and Jimmy Hoffa have both been charged with causing grave damage to the nation and both made surprise visits to the Pentagon Papers Trial last week. Jerry Rubin, a co-defendant in the Chicago 8 Conspiracy Trial, was convicted, but the Appeals Court overturned the decision. Rubin came by Friday morning last week, minus his beard, sporting one gold earring and a few friends. He was in great spirits and broadly embraced Dan and Patricia Ellsberg at the lunch break. He stayed less than half an hour.

Jimmy Hoffa stopped by on Friday afternoon. He sat in the crowded courtroom flanked by one very heavy bodyguard. Hoffa sported a clipped short haircut, tailored suit and a stone face that never changed expression. For two solid hours, Jimmy Hoffa watched the Justice Department protecting the American people. In one of the few funny moments of the proceedings, a reporter sat next to him and they both left the courtroom. And the heavy media people from the *New York Times*, the *Washington Post*, Associated Press, and UPI scurried out after them. Jimmy Hoffa was not talking. The only reason I didn't join the crowd was dedication to the job at hand — which is, of course, a lot of bullshit. I just figured Hoffa wouldn't talk.

Leonard Boudin, counsel for Daniel Ellsberg, met Hoffa at the close of Friday's session and arm-in-arm, they strolled out together. Hoffa will need a lawyer to get "his union" back.

According to the classification system in effect during the indictment period, "Top Secret classification shall be limited to defense information which requires the highest degree of protection or information that defense aspect of which is paramount and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation." It has become clear from the extensive cross-examination of government witnesses that the Pentagon Papers were, in part, disclosed before 1969, publicly, and that its relationship to "unauthorized disclosure" causing "grave damage to the nation," doesn't exist.



Despite the fact that the prosecution has put on a weak case, there is no way of stating that the jury agrees with my assessment. Moreover, Judge Byrne, who will direct the jury on the evidence given, has shown no signs of agreeing either. He has expressed doubts about Constitutional issues, but in summing up his denial of the defense motion for acquittal on all 15 counts, Byrne's said, "The evidence presented in this case is viewed as being favorable to the government." General Gorman was wrong in his belief that the documents could have been of use to a foreign analyst, but he believed it. The defendants anticipate six weeks to prove that the defendants committed none of the crimes they are charged with.

Some observers have expressed a concern that the defense counsel may

engage in "overkill," too many big names. And one observer said, "The jury may be put off by Tony's radicalism and Dan's evangelism."

In any event, the defense counsel for Daniel Ellsberg and Anthony Russo must demonstrate to the 12 jurors that the Pentagon Papers contained no information damaging to the national defense. Since this is a political trial, they will also have to deal with intangibles, jurors frequently vote their feelings, and the climate of this country is still an unknown. There is no pervasive fear of Communism — a fear that undoubtedly led to the convictions of so many past defendants in American history. But, there is a belief by many that there has to be some limitation on release of government information — that, in fact, there must be protection for vital secrets.