

Ellsberg, Russo Are Set Free

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Judge Dismisses Case-- 'Improper' U.S. Conduct

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Citing what he called "improper government conduct shielded so long from public view," the judge in the Pentagon Papers trial dismissed all charges yesterday against Daniel Ellsberg and Anthony J. Russo Jr.

And he made it clear in his ruling that the two men would not be tried again on charges of stealing and copying the Pentagon Papers by saying that he was

dismissing the charges "with prejudice."

"The conduct of the government has placed this case in such a posture it precludes the fair and dispassionate consideration of issues by the jury," he said.

But the decision by U.S. District Judge Matt Byrne Jr. did not vindicate the defendants; it chastised the government. Nor did it resolve the important constitutional issues that the case had raised.

The end of the trial, on its 89th day, was dramatic. The courtroom was jammed; the jury box was filled with news men; workers in the Ellsberg-Russo cause, mostly young people, sat in chairs lining the courtroom wall.

Ellsberg and Russo, surrounded by their lawyers, stared intently as Byrne quickly read his ruling.

The government's action in this case, he said, "offended a sense of justice," and so "I have decided to declare a mistrial and grant the motion for dismissal."

The courtroom erupted in loud cheering and clapping. The judge, barely hiding a smile, quickly strode out the door behind his bench.

David R. Nissen, the chief prosecutor, said, "It appears that the posture is such that no appeal will be possible."

RISK

The judge said that he had considered the possibility of a mistrial, but did not declare one because "under all conditions, the defendants should not have to risk the possibility that they might be tried again."

Tension had been building up for two days, since the sudden disclosure by the government Thursday that telephone conversations of Ellsberg were picked up by wiretapping in late 1969 and

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early 1970, and that all records and logs of those conversations had disappeared from the FBI.

When the government was still unable to produce either the records or a legal authorization for the taps yesterday morning, it was evident that the case had ended.

JURY

The jury was not present when the judge read his decision. It had been sent home until Monday morning.

The judge discharged the jury later yesterday and of nine who commented on the case several said they thought the trial would have ended in acquittal. None said he would have voted guilty had the jury received the case.

Before rendering his decision, the judge offered the defendants the opportunity to go to the jury for a verdict. He said that he would withhold his ruling on their motion to dismiss if they wanted. He indicated that if they did decide to go to the jury, he would probably dismiss some of the counts — six for espionage, six for theft and one for conspiracy.

He said that he believed enough of the case was left to litigate before the jury, if the defendants so desired. They did not, and then he read his ruling.

AGENTS

Byrne said that his ruling was based not only on the wiretap disclosures, "or based solely on the break-in" of the office of Ellsberg's psychiatrist on Sept. 3, 1971, by agents in the employ of the White House.

But Byrne said that "on April 26 the government made an extraordinary disclosure" — that of the break-in — and that was followed by disclosures that the break-in was done by a "special unit reporting to the White House."

He said that the special unit "apparently operated with the approval of the FBI" and that the CIA also became involved in the prosecution of this case at the "request of the White House."

Ellsberg and Russo were jubilant, and members of their families were in tears as the long ordeal, which started with Ellsberg's arrest on June 25, 1971, ended.

ACTION

Ellsberg said that he would file a civil action against former and present high ranking officials of the government, even perhaps against President Nixon.

"I am convinced by the record of the last couple of weeks, particularly the last couple of days, that the trial should not go on," the judge said.

"Governmental agencies have taken an unprecedented series of actions against these defendants," he said. He cited the special White House "plumbers" unit, which "apparently operated with the approval of the FBI."

"We may have been given only a glimpse of what this special unit did," the judge said. "The latest series of actions compounded a record already pervaded by instances which threatened the defendants' right to a fair trial."

"It was of greatest significance," he said, that the

wiretap occurred during the period of Ellsberg's alleged conspiracy.

"Continued government investigation is no solution," he added, "because delays tend to compromise the defendants' rights."

JUDGMENT

Ellsberg was asked if he was disappointed that the case had not gone to the jury, and he replied: "I think that American jury would have come to a judgment that is good for this country."

"Tony and I think we know we did something right," he said.

He was asked if he would disclose the Pentagon Papers again, and he answered: "I would do it tomorrow, if I could do it."

Leonard R. Boudin, a defense attorney, said:

"I think that the court's ruling was appropriate, necessary, eloquent, justified

and dispositive. The judgment was made not on the narrow issue of wiretapping, but on the totality of government misconduct."

TRIAL

This trial began on January 3, with the start of selection of a second jury. The first was dismissed because of a four months hiatus over a previous wire tap argument.

The government had charged the defendants with espionage, theft and conspiracy covering a period between March 1, 1969, and Sept. 30, 1970 — nine months to more than two years before the papers were first made public in the New York Times.

The broad constitutional issues involved were those of the First Amendment, for the government was, in essence, charging Ellsberg with the theft of information, and of conspiring to deprive the government not of materials — for the copied documents were returned — but of the information in those documents.

SECRETS

In a country where there was no Official Secrets Act, the government was contending, for the first time, that the disclosure of information classified as "top secret" violated the espionage laws even though that information was not given to a foreign power, but was

made public.

Indeed, there is no law, only executive orders, pertaining to the disclosure of classified information. So, legal authorities said, the government was trying to make a jury create law

where no congressional statutes existed.

These legal authorities say that the way the trial ended — not by a jury verdict but because of legal technicalities — has left those constitutional issues unresolved.