A Controversial Trial Ends With Questions Unanswered

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LOS ANGELES—"There remain more questions than answers," said U.S. District Court Judge W. Matt Byrne Jr. Friday, as he dismissed all charges against Pentagon Papers defendants Daniel Ellsberg and Anthony J. Russo Jr.

The judge was talking about the incomplete investigation into how a burlgary squad reporting to the White House and government wiretappers had violated Ellsberg's constitutional rights.

But his expression of frustration could have been pronounced with equal force about the entire Pentagon Papers affair and the fundamental legal issues it raised. Although that affair has now come to a tentative conclusion after two years of complex litigation, many problems are unresolved.

The system of government secrecy that produced the Pentagon Papers and kept them from the public has been attacked and mocked in the courtroom, but remains intact.

Freedom of the press has not been advanced one iota by the dismissal of charges against Ellsberg and Russo, and it may still be bruised from the Justice Department's temporary success in stopping newspaper publication of the documents two years ago.

No balance has been struck, or happy medium found, to guide future relationships between government and the press on the issue of what "national security" information can legitimately be published and what can legitimately be kept classified.

No Victory

The federal government's powers to investigate citizens for alleged criminal conduct have been shown to be virtually without legal safeguards—with the Central Intelligence Agency prepared to ignore statutory restrictions and engage in domestic operations, and the Federal Bureau of Investigation unable or unwilling to produce records of its own electronic surveillances.

There has been no pronouncement on whether "information" can be "stolen" from the government, nor has the legal definition of "espionage" been moved in one direction or the other.

In retrospect, it all appears to be a peculiar piece of recent American history —more political than legal —a rather embarrassing defeat for the Noxon administration, but not a clear-cut victory for anyone.

It began exactly 23 months ago today, when The New York Times published articles based on the then-secret history of U.S. involvement in Southeast Asia

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and infuriated the administration, which was just then working on President Nixon's overtures to China.

The Justice Department, at that time under the stewardship of Attorney General John N. Mitchell (himself under criminal indictment now), moved for injunctions against The Times and, in their turn, The Washington Post, The Boston Globe and the St. Louis Post-Dispatch.

Although the Supreme Court ruled on June 30, 1971, that the federal government had not met its charges.

In the midst of the fight with the newspapers, Daniel Ellsberg, a former government policy researcher and a convert on the Vietnam war, was revealed to be the source of the leaked documents.

He was indicted for the first time even before the high court ruled on the civil suits.

In the course of trying to build its case before a federal grand jury here, the government sought the testimony of Russo, a long-time friend of Ellsberg while they both worked at the Rand Corp. in Santa Monica, who had helped him Xerox the Pentagon Papers in 1969.

Russo resisted, was held in contempt-of-court and served more than six weeks in jail for his refusal to testify—the only time, it would turn out, that either defendant ever served in jail in connection with the Pentagon Papers affair.

When he continued to refuse to appear at a secret grand jury proceeding after being released from jail, Russo was added to a superceding indictment against Ellsberg in December, 1971.

That indictment included 14 counts charging espionage and theft of government property, as well as a unique conspiracy charge that accused Ellsberg and Russo of "defrauding" the United States out of its "lawful governmental function of controlling the dissetion of controlling the dissemination of classified govmemoranda and communications."

Government Tap

The case almost went to trial last July but on the eve of opening statements and after a jury had been sworn into service, it was revealed that a defense lawyer or consultant had been overheard in a "foreign intelligence" wiretap by the government on someone else.

Byrne declared the wiretap irrelevant, but the defense persuaded Supreme Court Justice William O. Douglas to suspend the trial while the issue was litigated.

The Supreme Court ultimately refused to hear the wiretap appeal, but several months had passed before that decision, and the Ninth U.S. Circuit Court of Appeals told Byrne that it would be "foolish" to proceed before a jury that might have been prejudiced by publicity during four months outside the courtroom.

A mistrial was declared in December, after the defendants waived their Fifth Amendment rights against "double jeopardy," and a new jury selected the next month.

When the trial finally began in mid-January, the prosecution and defense made it clear that they agreed only about a few "mechanical facts."

For the government, it was a simple, narrow case of theft and misuse of "guarded" documents. But the defense told the jurors they had a unique opportunity to learn about and pass judgment on deception of the American people by the executive branch of government.

Several of the figures originally scheduled to testify for the prosecution had drifted away to other tasks during the long delay, and so the government had to rely largely on two Army generals to link the documents at issue with the "national defense," as required for conviction under the Espionage Act.

The idea was that if the Pentagon Papers had fallen into the hands of a hypothetical "foreign analyst" working in intelligence, they would have caused "injury" to the United States and "advantage" to the foreign power.

To contradict that view, the defense presented one witness after another—former government officials—to satisfy Ellsberg's inclination toward the powerful, and more "radical" types who fit into Russo's view of the case as a "political trial."

Thus, the jurors heard not only from those who had helped Presidents Kennedy and Johnson plan the American effort in Vietnam, but also from antiwar activists who had traveled to Hanoi in the midst of it.

On the conspiracy charge, the prosecution merely demonstrated that Ellsberg and Russo had been seen together in the period of time before they photocopied the documents.

Ellsberg insisted in his own defense, however, that he made the decision on the spur of the moment and called Russo only to see whether a Hollywood advertising person, then Russo's girlfriend, could make her Xerox machine available.

To the last, the defense sought to persuade judge Byrne to knock out the "conspiracy to defraud" part of the indictment, claiming it was an unconstitutional effort at "information control."

The theft charges were the toughest ones for the defense to deal with.

Although the prosecution never established that the copy of the Pentagon Papers removed from Rand by Ellsberg was worth over $100 —as required for a felony conviction—there was simply no question that the documents had been taken out and duplicated.

Accepting the facts, the defense came up with a complicated theory that the Papers were not "government property" at all, but rather the "private papers" of three former Defense Department officials.

What is more, Ellsberg and Russo insisted that Rand's security regulations did not have the force of law.