

Ellsberg Prosecution Prepares

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LOS ANGELES, Feb. 24—It has been almost six weeks since a tough federal prosecutor strode into court here and promised that his case against Daniel Ellsberg and Anthony J. Russo Jr. would be simple, efficient and brief.

There would be no problem, asserted David R. Nissen to the jury, establishing that Ellsberg and Russo committed conspiracy, espionage and theft of government property when they disclosed the top secret Pentagon papers.

In the world outside the courtroom of U.S. District Judge W. Matt Byrne Jr., many things have happened since Nissen launched the prosecution on Jan. 17 that affects major figures and issues in the case.

President Nixon was sworn in for a second term, former President Johnson died, a cease-fire went into effect in Vietnam, and American prisoners of war began coming home. New accords were reached with China.

But the judicial process is slower than political, physical or diplomatic processes, and Nissen will formally begin his case Tuesday morning, the earliest.

Some of the delays have been unavoidable—caused by disputes over the admissibility of controversial evidence, lengthy defense cross-examination of government witnesses, and even jurors getting stuck on the freeway in a rainstorm.

On several occasions, however, the trial has been interrupted for special inquiries into the prosecution's tactics.

Indeed, at times Nissen himself has seemed to be on trial, albeit out of the presence of the jury, and Byrne has, in effect, convicted the prosecutor of violating a pretrial order by withholding material from the defense.

No one can know how the ten women and two men in the jury box have reacted to the case so far.

They seem to be having a good time, laughing and joking with each other even while court is in session. They dozed or stared off into space during long readings from the Pentagon papers but took copious notes this week when an FBI expert was detailing how many of whose fingerprints he found on each page of the documents.

Despite the obvious need to watch-and-see, legal experts, waiting the case for its potential effects on both constitutional law and the political-journalistic world, are now assessing the prosecution case.

Justice Department officials, for example, have told The Washington Post that they feel Nissen is doing well.

Although the case is "quite a battle" and Byrne seems to be giving the defense "a great deal of breadth," said one source at Justice this week, the government side remains confident.

Nissen never talks to the press, but he has told his superiors in Washington that he expects to win a conviction against Ellsberg and Russo.

But observers here insist that it is too early to tell that the prosecution has presented a relatively weak case. One lawyer who has watched the case closely suggested that Nissen offered just enough evidence to get by the defense motion for acquittal. His strongest material may come on rebuttal, after the defense has presented its side.

This is what the prosecution claims to have established so far with ten witnesses:

• Conspiracy

Ellsberg, as an officially authorized government courier, on two separate trips from Washington in March and August of 1969, brought 18 volumes of an early draft of the Pentagon papers to the Rand Corporation headquarters in Santa Monica, Calif.

Rather than checking them in the Rand security system,

he kept them in his own office at Rand.

In October 1969, without prior authorization to do so, he took the papers and two other top-secret documents—a 1968 report of the joint chiefs of staff and a Rand study of the 1954 Geneva conference on Indochina—to the Hollywood office of an advertising woman, then known as Lynda Sinay.

There, with the help of Russo, Sinay and Ellsberg's teen-age son Robert, the documents were photocopied in the evenings over a two-week period. The security classifications were cut off the duplicate copies.

On one of the evenings, Vu Van Thai, a former South Vietnamese ambassador to the United States who was a Rand consultant and a close friend of Ellsberg, came by the Sinay office to join the group for dinner. According to the FBI fingerprint expert, he touched one of the volumes.

Another part of the conspiracy charge alleges that Ellsberg and Russo, along with Sinay and Thai (named as "co-conspirators" but not formally charged), agreed to "defraud the United States by impairing, obstructing and defeating" the security classification system.

Nissen insists that the evidence has established that the system is a "lawful governmental function," but the judge has indicated that he has serious doubts on that score.

There has only been indirect evidence on who classified each document, but Nissen says this is adequate and that he is not required to show that they were classified for good reasons.

• Theft of government property.

Ellsberg, by not entering the documents into the Rand security system and by duplicating them, "embezzled, stole and knowingly converted them to his own use" between

March 4, 1969, and May 20, 1970, when he turned them over to another Rand researcher, Richard H. Moors-teen.

The prosecution claims that Ellsberg committed further violations of the same law when he "concealed and retained" the material and "conveyed" it to Russo, Sinay, and Thai.

Russo violated the law merely by "receiving" the documents, when he knew them "to have been embezzled, stolen and converted."

One obvious gap in the government's proof on the theft charges is the inability to establish that the documents "had a value in excess of \$100." (If that is not established, the documents are not covered by Section 641 in title 18 of the U.S. criminal code.)

Byrne has thus far prevented the prosecution from establishing the value of the documents through the payroll records of the persons who compiled them.

The defense claims that the Pentagon papers were not "government property" at all, but were the "private papers" of three retiring Defense De-

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partment officials, who stored them at Rand with the express provision that Ellsberg could have unrestricted access.

Government witnesses have described the compilation of the Pentagon papers by a special Defense Department task force in the closing months of the Johnson administration.

Because of their unique character, reflecting the information on Southeast Asia as the "highest levels" of the U.S. government, it is claimed, they related to "the national defense" and required special protection.

Two Army generals, William G. DePuy and Paul F. Gorman, have testified about the alleged "use" which might have been made of the documents by a foreign nation or its intelligence analysts in 1969.

Eight of the 13 charges in the indictment are under the Espionage Act, and the prosecution says Ellsberg violated it by, for example, obtaining the documents stored at Rand and "communicating" them and the Pentagon papers vol-

umes to Russo, Sinay and Thai, who did not have security clearances.

Russo is charged with espionage for "receiving and obtaining" some of the documents from Ellsberg, "Having reason to believe at the time" that they would be "disposed of" illegally.

The prosecution also says it has proved two of the most significant espionage charges by showing that neither Ellsberg nor Russo "delivered" the documents to "the officer or employee of the United States entitled to receive them."

But the person to whom they would ordinarily have been turned over, Jan Butler, top secret control officer at Rand at the time, testified that she did not fall into that category.

It is now up to the defense, beginning Tuesday or Wednesday, to rebut all of that prosecution evidence, or in the case of facts that are not in dispute—such as the actual photocopying of the documents—to quarrel with its significance in this case.