

# Ellsberg Loses Challenge To Jury Selection System

By Sanford J. Ungar

Washington Post Staff Writer

LOS ANGELES, June 30 — U.S. District Court Judge W. Matt Byrne Jr. today rejected the challenge of Daniel Ellsberg and Anthony Russo to the jury selection system in federal court here.

Ruling after a hearing that took three and a half days — instead of one day, as scheduled — Judge Byrne said he was convinced, as the prosecutors in the case had argued, that the jury plan complies with the federal Jury Selection and Service Act of 1968.

Byrne's decision, which denied a defense motion to dismiss the indictment against Ellsberg and Russo or to delay their trial because of alleged jury selection deficiencies, cleared away the next-to-last procedural roadblock to the start of the trial.

The judge has yet to rule on another defense motion to dismiss the indictment that is based on Ellsberg's and Russo's contention that they are the victims of "selective" and "discriminatory" prosecution for disclosing the top-secret Pentagon Papers.

Despite weeks of consideration of the issue, Byrne has still not said whether he will hold a special hearing during which defense witnesses could describe what they called the everyday leaking of secret documents in Washington without prosecution.

He has scheduled new legal argument Monday on that issue, as well as on the prosecution's contention that Ellsberg and Russo are responsible, directly or indirectly, for the recent disclosure by columnist Jack Anderson of the last four still-secret volumes of the Pentagon Papers.

Some defense lawyers in the case are said to believe that Byrne was soured on the idea of an evidentiary hearing on the selective prosecution issue

by the protracted dispute over the jury selection system.

The jury challenge was pressed exclusively by young anti-establishment attorneys — members of the "Bar Sinister" here—who represent Russo.

During most of the week, neither Ellsberg nor his lawyers were present in the courtroom. When they were, they openly professed being "bored" by the jury hearing.

Argued by attorney Barrett Litt, the jury challenge contended that the jury clerk for U.S. District Court wrongfully excused some 14,000 persons originally summoned for jury duty in the pool that lasted from 1970 until this year.

Contrary to the provisions of the 1968 law, which places jury selection and excusal responsibility on the chief judge of U.S. District Court, the defense contended, the clerk, Jodie Modie, exercised discretion herself.

Defense witnesses, relying on a statistical study, said that in some instances jurors were

excused for "health" reasons when they claimed to be "prejudiced." The witnesses also testified that most college students were systematically excluded from jury duty.

Under cross-examination by Litt, Mrs. Modie conceded that "we're going to do it differently next time," when some of the drawbacks of the selection system were pointed out.

But it was the prosecution's view, as expressed by special Assistant U.S. Attorney Richard Barry, that the defense sought to make the chief judge "a full-time jury clerk" by requiring him to review each individual excusal.

The jury challenge presented a ticklish problem for Byrne, a relatively junior judge in federal court here. Legal observers said that upholding the defense arguments could have been interpreted as a slap at his superior, Chief Judge Albert Lee Stephens.

Although he appeared to hesitate on some of the basic issues, Byrne told the defense lawyers frankly during the hearing that he was "not impressed" by their statistical study which he apparently considered amateurish.

Had the defense prevailed, both the grand jury that indicted Ellsberg and Russo and the pool from which their trial jury will be drawn would have been invalidated.