

# Crucial Prosecution Evidence Banned From Ellsberg Trial

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LOS ANGELES, Feb. 7.—The judge in the Pentagon Papers trial today imposed the first punishment on the prosecution for disobeying a major pretrial order in the case.

Partially granting a motion by attorneys for defendants Daniel Ellsberg and Anthony J. Russo Jr., U. S. District Court Judge W. Matt. Byrne Jr. banned the prosecution from offering any evidence on whether one of the 20 documents in the indictment relates to the "national defense."

The document involved, a Rand Corp. study of the 1954 Geneva accords on Indochina, is one of the most significant in the case.

It contains pages marked "restricted data," which is an Atomic Energy Commission security classification system that includes the designation "top secret-sensitive." The latter classification is stamped on every page of the Pentagon Papers.

Byrne indicated that he would later grant a defense motion to strike from the 15-count indictment a count

charging Ellsberg with espionage for his alleged disclosure of the Rand study, written by political scientist Melvin Gurtov.

The judge said, however, that the prosecution would still be able to offer evidence on a count charging that Ellsberg stole government property when he removed the document, as well as the Pentagon Papers, from the Rand offices in nearby Santa Monica in 1969.

His ruling grew out of the recent discovery that chief prosecutor David R. Nissen had failed to turn over to him or the defense internal government studies rejecting a link between the documents and the "national defense," despite an order issued by Byrne last April and reiterated in June.

In order to obtain a conviction on the espionage charges against Ellsberg and Russo, the government must establish that the documents they allegedly disclosed bore such a relationship to the "national defense."

The defense now has available for use in the case the government studies asserting that 18 of the 20 volumes did not meet that qualification.

They will be used to challenge the contrary "expert" opinions of prosecution witnesses.

After failing in a move to have the entire indictment dismissed or a mistrial declared because of "prosecutorial misconduct," Ellsberg's and Russo's attorneys asked the judge Monday to prohibit the prosecution from offering any evidence at all on the Rand document and one of the "diplomatic volumes" of the Pentagon Papers.

But Byrne, ruling today, said that the "national defense" aspects of the diplo-

matic volume had not been as thoroughly discredited by the newly available studies as had the Rand document.

The indictment charges that Ellsberg showed the diplomatic volume to Vu Van Thai, a former South Vietnamese ambassador to Washington.

In another rebuke to Nissen, Byrne ordered today that all prosecution witnesses be brought into court this week for a special inquiry on whether Nissen instructed them not to grant interviews with defense attorneys.

It was revealed Tuesday that a key prosecution witness, Army Brig. Gen. Paul F. Gorman, while he originally consented to an interview with defense attorney Charles Nesson before the trial, changed his mind on the basis of "advice" from Nissen and Defense Department lawyers.

The defense tried unsuccessfully today to have all of Gorman's testimony stricken from the trial record, because of that "advice."

Instead, Byrne offered to make facilities available for such an interview now. But Gorman insisted that he had "no desire" to talk with the defense and that this decision was his own choice.

The judge, reading from cases previously decided by appellate courts, pointed out that no witness in the case "is the special property of either side." He said he wanted to question the other prosecution witnesses to make sure they are aware of this rule and to determine whether they want to meet with the defense.

Leonard B. Boudin, Ellsberg's chief counsel, completed his cross-examination of Gorman this morning, and Leonard T. Weinglass, who represented Russo, began questioning the general this afternoon.