

# Ellsberg Trial Gets Secret Data

By Sanford J. Ungar  
Washington Post Staff Writer

LOS ANGELES, Jan. 26—A military jet flew across the country today with a new batch of top-secret Defense Department documents that could lead to dismissal of some of the charges in the Pentagon Papers trial of Daniel Ellsberg and Anthony J. Russo Jr.

U.S. District Court Judge W. Matt Byrne Jr., exploding in a rare show of temper, implied that the prosecution has been uncooperative in providing the documents, covered in a pre-trial order he issued last spring.

Byrne ordered that the cross-examination of a key prosecution witness, Brig. Gen. Paul F. Gorman, be postponed until the documents arrive here.

At issue are "damage reports" which were prepared in the office of Defense Department General Counsel J. Fred Buzhardt after the Pentagon Papers were publicized in newspapers in 1971. They were part of a government attempt to assess whether release of the study could be harmful to the "national defense" of the United States.

Ellsberg and Russo are charged with conspiracy, espionage and theft of government property in connection with the duplication, and eventual distribution, of the Pentagon Papers and other government documents stamped classified.

To prove the espionage charges, the prosecution must establish the connection of the disclosed material with the "national defense," a key phrase of the post-World War espionage act.

Under the terms of the 1963 decision of the Supreme Court in *Brady v. Maryland*, Byrne ordered the prosecution to produce the "damage reports" for his private inspection and possible turnover to defense attorneys.

(In that decision, the Supreme Court reversed the con-

vealed that there were still other "damage reports."

Byrne exploded at Bartimo on Tuesday, telling him:

"You know what I am talking about now, don't you? What I want is any study, analysis, survey or report prepared by the Department of Defense regarding these documents . . . as to whether they

in any way caused, their release could, would, did or possibly could, would or did cause injury to the United States."

Bartimo and Nissen have been on the phone to Buzhardt every day this week, on the judge's orders, and only today Nissen reported that more "damage reports" had been

located at the Pentagon on Thursday.

But the prosecutor said they were so sensitive that they could not be put on a commercial aircraft, even with an official courier, and that all available military aircraft had been tied up until today in connection with the funeral of former President Johnson.

viction of John Leo Brady, an accused rapist, because the prosecution failed to give the defense material it had which tended to exculpate, or prove the innocence of, the accused.)

If any of the reports say that disclosure of the Pentagon Papers would not affect the "national defense," this would be grounds for dismissal of the eight espionage counts in the 15-count indictment against Ellsberg and Russo.

Chief prosecutor David R. Nissen gave the judge one "damage report" last year, but after reviewing it Byrne declared the defense was not entitled to a copy because it was not "exculpatory" in nature.

But new doubt arose on Jan. 18 the second day of the Ellsberg Russo trial, when the first prosecution witness, Frank A. Bartimo, assistant Pentagon general counsel, acknowledged under cross-examination that another such analysis had been prepared.

Byrne sent Bartimo back to Washington last weekend to find that analysis, prepared by what Bartimo termed a "task force," and the assistant general counsel returned here with it Tuesday.

But when the judge examined it, he found it was something else entirely—apparently, an inquiry of where specific sections of the Pentagon Papers published in newspapers had come from.

On further questioning, this time by the judge, Bartimo re-