

Evidence Curtailed In Ellsberg Case

By Sanford J. Ungar
Washington Post Staff Writer

A federal judge in Los Angeles yesterday threw out a large chunk of the evidence the government had planned to use against Daniel Ellsberg and Anthony Russo during their trial in connection with disclosure of the top-secret Pentagon papers.

Ruling on a defense motion, U.S. District Court Judge W. Matt Byrne Jr. said the prosecution could not show the jury 102 of the 610 pages of the Pentagon papers which it intended as evidence that Ellsberg and Russo had endangered national defense.

But Byrne denied a defense request for more time to prepare its case on 288 other pages only recently designated as government evidence. He said the trial must proceed as scheduled next Tuesday.

Still pending, however, was Ellsberg's and Russo's appeal to the Ninth U.S. Circuit Court of Appeals in San Francisco, challenging Byrne's ruling that the same jury sworn in 4½ months ago must hear the case.

If the appellate court upholds the defense contention that the jurors were "infected" by publicity about the case, it would probably take until after the first of the year to select a new jury.

In the hope that a different panel would include new voters between 18 and 21 years of age, Ellsberg and Russo have waived their Fifth Amendment right against "double jeopardy" and asked to have a mistrial declared.

Byrne's ruling yesterday excluding some government evidence grew out of a recent switch of prosecution tactics in the case.

Last spring, the prosecutors filed a "bill of particulars" setting out which pages of the Defense Department study they would rely upon to prove the charges of conspiracy, espionage and theft of government property against Ellsberg and Russo.

But last week, they filed a list of 610 photographic transparencies of individual pages to be shown to the jury on a screen during the government case.

Byrne was furious when the defense pointed out that 390 of the 610 pages had been omitted from the earlier bill of particulars. The defense attorneys demanded exclusion of all 390 pages or more time to prepare.

After studying the lists and 18 volumes of the Pentagon papers over the weekend, Byrne came up with an apparent compromise, excluding 102 pages, but leaving 508 pages—288 of them new—in the case and granting no extra time.

On the surface, the ruling was a setback to the prosecution.

But a Justice Department official close to the case said yesterday that there would be no government appeal and that "we don't think this affects the case seriously."

There also appeared to be a loophole in Byrne's decision, which will permit introduction of the 102 disputed pages in evidence for other purposes—such as any fingerprints that may be on them.

Charles R. Nesson, one of Ellsberg's attorneys, contended yesterday that Byrne's ruling was a serious blow to the defense. He complained that the prosecution case is "a moving target" on which the defense is unable to focus properly.