

Ellsberg Defense Is Upheld by Judge On Pretrial Point

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LOS ANGELES, June 6—
The defense won a partial victory in Federal District Court here today in pretrial arguments over the Pentagon papers.

Judge William Matt Byrne Jr. ruled that the prosecution must choose between conflicting counts in the indictment charging Dr. Daniel Ellsberg and Anthony Russo with theft of Government documents from the secret Pentagon study of the Vietnam war.

Dr. Ellsberg and Mr. Russo, both former employes of the Rand Corporation, which did research for the Defense Department, are charged with unlawfully appropriating the Pentagon papers and making them public.

The defense asked dismissal of two counts of the indictment on the ground that they were mutually exclusive because one charges that Dr. Ellsberg had unauthorized possession of the papers while the other charges that he had lawful possession but put the papers to unauthorized use.

Must Make Choice

Judge Byrne declined to dismiss both counts but said that the prosecution must choose one or the other.

The ruling came in the second day of pretrial oral arguments on seven motions for dismissal made by the defense.

On another motion, Leonard B. Boudin, chief counsel for Dr. Ellsberg, argued for dismissal of the first count, which charges the defendants with conspiring to "defraud the United States and agency thereof by impairing, obstructing and defeating its lawful governmental function of controlling the dissemination of classified Government studies." Mr. Boudin declared that there was no such lawful government function because there was no statute governing this practice.