

A Count Against Ellsberg Thrown Out

Los Angeles

The judge in the Pentagon Papers trial, punishing the government for withholding evidence, issued a "sanction" yesterday that, in effect, threw out one espionage count of the indictment against Daniel Ellsberg.

U.S. District Judge Matt Byrne described this as only the "first" of sanctions against the government, indicating there may be more to come.

His order forbids the government prosecutor from presenting evidence that would show possible damage to national security from re-

lease of one volume of the Pentagon Papers in evidence.

The volume, a study of the 1954 Geneva conference, is the only item mentioned in one espionage count of the 15-count espionage, conspiracy and theft indictment against Ellsberg and Anthony Russo.

Byrne ruled earlier that the government had suppressed until now official studies by the government's own analysts that concluded some volumes of the top secret government history of the Vietnam war could have been released without any harm to national security or

defense.

Ellsberg, 41, and Russo, 36, are charged in connection with release of the history to news media in 1971. The government has been seeking to prove that the defendants endangered the nation by copying the papers.

The judge has indicated he believes such proofs necessary for convictions under espionage laws.

In another action unfavorable to the government, the judge sternly scolded Assistant U.S. Attorney David Nissen for "advising" a key government witness not to talk to defense attorneys. Byrne offered to stop the

trial for a period if the witness, Brigadier General Paul F. Gorman, would be willing to talk with defense attorneys now. But Gorman, who took the stand for his third day of cross-examination, refused repeatedly.

The judge, although refusing a defense motion to strike Gorman's testimony from the record, read to the witness laws governing the issue of talk with opposing counsel as well as a section of the canons of ethics of the American Bar Association.

"Witnesses in the case are not the special property of either party in that case,"

said the judge. "Either side can interview a witness. . . ." He added, "Any witness has the right not to be interviewed."

Gorman swore he had not

been influenced by Nissen's instructions and said, "My decision now is as it was then, that I prefer not to be interviewed."

Associated Press