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Ellsberg in the Dock

By Tom Wicker

LOS ANGELES—There is no Perry Mason atmosphere in the trial of Daniel Ellsberg and Anthony Russo for releasing the Pentagon Papers. Federal Judge Matthew Byrne runs a strict court room, and neither the defense nor the prosecution attorneys are much given to dramatics. A technique of the prosecutor, David R. Nissen, seems to be to extract from witnesses one minute detail after another in a dogged search for inconsistencies or inaccuracies. The basic facts of the case, however, are largely agreed upon, which removes the major opportunities for suspense and surprise.

Dan Ellsberg, who was on the stand most of this week, proved a soft-spoken and self-possessed witness. It was what he said, when the restrictive court room rules gave him a chance, rather than how he said it, that occasionally charged the proceedings with some of his own intensity.

"I believe," he said at one point, "I would say I knew that not a page of those exhibits could injure the national defense if disclosed to anyone." The information he had disclosed, he conceded, was "painful" since it showed that the intentions of American officials in waging the war in Vietnam were "not all that easy to describe as good"; but he insisted steadfastly that it could not hurt the nation to know the truth of its own affairs.

It is true that a vital issue in this case is whether the information in the Pentagon Papers could have damaged the national defense; in that respect, Mr. Ellsberg's statement may have been self-serving. But it was his quality as a witness that his quiet voice and demeanor conveyed unmistakably the sincerity of his belief that—as he put it later in a paraphrase of "security" jargon—any "citizen and taxpayer" had in 1969 "an urgent need to know" what was in the Pentagon Papers.

Unfortunately, what Dan Ellsberg believed when he and Mr. Russo began copying the Pentagon Papers in a Los Angeles advertising agency is not likely to be the decisive factor in this all but unprecedented trial. However persuasively he may have described his "state of mind" in 1969, under this week's direct and cross-examination, his fate may well hang instead on Judge Byrne's final instruction to the jury on the meaning of the phrase "relating to the national defense."

Under the extraordinary indictment the Government has drawn up, Mr. Ellsberg is not charged with violating the espionage act in such a way that the prosecution must show he had "intent" to damage the interests of the United States. That makes this unique among all the espionage cases

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since the act was amended to its present form in 1950. Mr. Ellsberg is charged with violating a section prohibiting the disclosure of information "relating to the national defense" to persons not entitled to have such information; Judge Byrne has stated the preliminary opinion that no showing of intent is required by that particular section.

The prosecution still must prove, however, that the Pentagon Papers were, in fact, documents "relating to the national defense." On that issue, Judge Byrne seems to be holding to two propositions. The first is that whatever classification markings might have been on the documents ("Top Secret") is irrelevant, and that the jury will have to decide for itself, without reference to Government classification, whether the Pentagon Papers related to the national defense.

The second proposition so far suggested by Judge Byrne's preliminary rulings and his conduct of the trial is that a document so relates if it is what he has called "classifiable"—that is, "at a minimum, did they contain information or material, the unauthorized disclosure of which could be prejudicial to the defense interests of the United States?" The "could be" is obviously the operative phrase, since it apparently would require no showing that release of the Pentagon Papers did damage the national defense.

Some expert opinion here holds that Judge Byrne may yet throw out the espionage charge, since the Government at one point withheld evidence tending to show that the Pentagon Papers were harmless. But if the judge lets the charge stand as he appears to interpret it, Mr. Ellsberg might be found guilty if the jury concluded that any part of the eighteen volumes and two related documents could have injured American defense interests.

The prosecution has produced two generals, and apparently has several other high officials ready, to testify that the documents could have had that effect; the defense has called McGeorge Bundy and other heavyweights to testify that they could not have. Mr. Ellsberg's own impressive testimony may or may not have persuaded the jury that the documents were, in fact, helpful to true American interests. This is, of course, only one part of the over-all issue in a trial that, for all its lack of drama and color, is nevertheless historic—perhaps more important than the Pentagon Papers themselves. That broader issue, to be further discussed in another article, is the extent to which the Government can, and ought to, control information, including the withholding of it from the people.