

Ellsberg Judge Halts Trial, Demands Data

By Sanford J. Ungar
Washington Post Staff Writer

LOS ANGELES, April, 26—

The judge in the Pentagon Papers trial angrily suspended proceedings and sent the jury home today after discovering that federal prosecutors had again apparently withheld evidence from the court.

"I'm only willing to go so far," U.S. District Court Judge W. Matt Byrne Jr. warned, as he demanded that the evidence be flown here from Washington for evaluation of its bearing on charges of conspiracy, espionage and theft of government property against Daniel Ellsberg and Anthony J. Russo Jr.

The latest crisis in this lengthy trial arose during the final stages of the prosecution's rebuttal case.

Assistant prosecutor Warren P. Reese told the judge as court convened this morning that four investigative reports, some of them almost two years old, had just been "found" in the offices of the general counsel of the Defense Department and the U.S. attorney here.

The reports are all based on government interviews with officers and employees of the Rand Corp. in Santa Monica, Calif., where Ellsberg was working as a researcher at the time that he and Russo photocopied the Pentagon Papers in the fall of 1969.

They are important because of a difference between the prosecution and defense over whether the copy of the Pentagon Papers to which Ellsberg had access was supposed to be kept in Rand's "top-secret control system."

The defense says it was not, and after an initial peek at a few pages produced on Wednesday, claimed that prosecution witnesses from Rand may have changed details of their stories between talking to investigators and testifying in court.

How the question is resolved could have a crucial effect on the theft counts in the indictment against Ellsberg

and Russo. Those counts are generally considered the defense's most vulnerable area.

As defense attorneys protested the lateness of their discovery and the judge fumed, Reese insisted that "there was certainly no deliberate or conscious effort on our part to avoid" providing material which the defense may be legally entitled to see.

The prosecutor said problems arose because of the government's burden of going through "a mountain of documents" connected with the Pentagon Papers trial.

Byrne, unsympathetic, lectured Reese that "the burden of the government cannot be weighed with the rights of the defendants. The rights of the defendants must prevail."

The judge seemed to share the defense attorneys' skepticism about the prosecutor's explanation, and he reacted angrily when Reese told him that the reports would not leave Washington on a plane until about 6 p.m.

"That will make an enjoyable evening for me (reading the reports)," Byrne remarked. "There's no reason they couldn't be here earlier. See if there is a military flight coming this way."

Later, Reese advised the judge that "special mission aircraft" had been assigned by the Pentagon to make the trip.

The reports being flown in from Washington were compiled by the Defense Supply Agency, the inspector general of the Air Force and the Los Angeles regional office of the Pentagon's Defense Contract Administrative Services, in the wake of disclosure of the Pentagon Papers in newspapers in June, 1971.

A fourth one, located in the U.S. attorney's office here and turned over to the judge this morning, was based on FBI agent interviews with Henry S. Rowen, who was president of the Rand Corp. at the time and was scheduled to be a prosecution rebuttal witness this week.

Today's incident was the second time that this trial, which began in January, has

been formally interrupted because of the possible suppression of evidence by the prosecution.

Hardly had the case begun when it was discovered that Defense Department analyses of the Pentagon Papers' relationship to the "national defense" had been withheld in violation of a pre-trial order.

Then, as today, the material came to light only after defense attorneys had learned of it through their own sources and pressed the judge to require disclosure.

On that occasion, the judge punished the prosecution by precluding certain evidence, which led to dismissal of one of the espionage counts against Ellsberg.

Last summer, the trial was stopped after a jury had already been sworn because of an eleventh-hour revelation of a government wiretap that overheard a defense attorney, and earlier this year the defense accused the Justice Department of trying to "silence" a Central Intelligence Agency official who wanted to testify.

Byrne ruled today that the newly discovered reports must be turned over to him, so that he can determine whether the defense is entitled to portions of them under two Supreme Court decisions.

In one of them, the high court reversed the conviction of Communist labor leader Clinton E. Jencks in 1957 and established a rule requiring that the prosecution turn over to criminal defendants all written reports on government witnesses.

Congress modified the decision with the "Jencks Act" later the same year, but in this trial among others it has meant that prosecutors must make available before cross-examination all prior statements of witnesses which bear on their testimony.

The other Supreme Court rule came in the 1963 decision in the case of Brady v. Maryland, requiring that the prosecution produce all evidence tending to exculpate, or establish the innocence of, defendants.