

# Ellsberg Judge to Review Secret Pentagon Analysis

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LOS ANGELES, Jan. 26—spiracy in the case.

The judge in the Pentagon papers trial—furious over the Government's failure to give him its secret reports on whether publication of the papers actually harmed the United States—this afternoon sent the jury home until Tuesday.

United States District Court Judge William Matthew Byrne Jr., who is presiding over the trial, expects by then to have finally read all the reports and to have decided what to do about them.

Depending on what they say, the judge could dismiss all espionage counts against Daniel Ellsberg and Anthony J. Russo Jr., who are now accused of eight counts of espionage and seven counts of theft and con-

The Government now contends that one of its secret "damage reports," as they are apparently called, is in an Air Force jet on way here.

The search for these reports has been going on since April, when the defense in the case first got an idea that they existed. At that time the judge ordered them produced, and during the intervening months many reports and communications between various Government agencies have been produced in camera for the judge.

But none of them got to the question of whether publication of the Pentagon papers did, in the eyes of the Government, harm this country's national

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defense.

In fact, David R. Nissen, the chief prosecutor, has insisted all along that he did not know of the existence of such reports, or of even one such report.

But on Tuesday, the first defense witness, Frank A. Bartimo, an assistant general counsel of the Defense Department, under cross-examination by one of Dr. Ellsberg's attorneys, Charles R. Nesson, said that soon after the papers were first made public by The New York Times in a series of articles starting on June 13, 1971. A department study group was set up to survey what damage, if any, had been done by the publication.

The court was stunned by this statements since Mr. Nissen had been saying that no such report existed, and the judge became angered. He finally said to Mr. Bartimo

"You know what I'm talking about now, don't you? What I want is any study, analysis, survey, report prepared by the Department of Defense regarding these documents, 'these documents,' being the so-called Pentagon papers, the Joint Chief of Staff report — as to whether they in any way caused — their release could, would, did, or possibly could, would or did cause injury to the United States or damage to a foreign country."

### 'I Want Those Cut Here'

"I want you to call Mr. Buzhardt and advise him of that, and I want those out here as soon as possible, and I will expect to hear from you in that regard in 'the morning,'" the judge told Mr. Bartimo. J. Fred Buzhardt is general counsel of the Department of Defense.

On the following day the Government said that the reports were on the way. Yesterday, because of the funeral of former President Lyndon B.

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Johnson, there was no court session, and so by this morning the judge was sure he would have the report, or reports.

But he did not. First, he was told, Air Force planes were busy yesterday transporting important people to and from

Mr. Johnson's funeral. Then he was told that when the report was finally put on a plane today, it was apparently put on a small one, one that had to make refueling stops.

"If you wanted something out here today, General Gorman, it would be here," the

judge said to the current prosecution witness, Army Brig. Gen. Paul F. Gorman, "I can tell by your grin."

The general, who was not yet on the witness stand for the day, said, "It wasn't the Army that was delivering them, your honor."