

# ELLSBERG JUDGE OFFERS HIS VIEW

'Tentative Thoughts' Seen  
as Pentagon Trial Key

By MARTIN ARNOLD  
Special to The New York Times

LOS ANGELES, Jan. 21 — There were the opening statements to the jury in the Pentagon papers case, and there was, for two days, a general in the witness chair. There were even slides projected on two screens in the courtroom.

But perhaps the most important happening in the trial of Daniel Ellsberg and Anthony J. Russo Jr. last week, the first week in which testimony was heard, occurred on Thursday afternoon.

It was then that Judge William Matthew Byrne Jr., who was presiding over the trial in United States District Court, gave attorneys for both sides what he said were his "tentative thoughts" on the espionage laws as they apply to this case. Dr. Ellsberg and Mr. Russo are charged with 15 counts of espionage, theft and conspiracy.

"I give you some of these tentative thoughts, contingent, of course, on what the evidence ultimately demonstrates the issues in the case are," Judge Byrne said. "I want to make it clear that this tentative statement is not to be taken as a limitation by the government or any limitation by the defendants of what you may attempt to prove or disprove at this trial."

He then proceeded to give his thoughts on Title 18, section 793, subdivision d and e, of the United States Code Annotated, which pertains to es-

pionage and censorship, most particularly the gathering, transmitting or losing of defense information.

Eight of the 15 counts against the defendants stem from this section of the code, and the Government has, for this case, sought to define the espionage issues as narrowly as possible. As the Government explains it, Dr. Ellsberg gathered together the "top secret" Pentagon papers and other documents, which were related to the national defense, and transmitted them to Mr. Russo, who helped copy them.

But Judge Byrne broadened considerably the legal arena in which Dr. Ellsberg and Mr.

Russo will be allowed to defend themselves. He asked, for instance, if one or both of the defendants had been authorized to have possession of the documents. The defense contends that Dr. Ellsberg was authorized to have possession of the Pentagon papers.

The judge also suggested that the two sides attempt to define the phrase "related to the national defense." He also asked the two sides to consider whether the papers did in fact relate to the national defense and further, whether that relationship, if any, was "direct and reasonable; rather than strained and arbitrary?"

Judge Byrne also suggested

that this question be litigated: "Are the documents the type that require protection in the interest of national defense, in that their disclosure could adversely affect or injure this nation or be to the advantage of any foreign nation?"

The prosecutor's chief witness last week, Lieut. Gen. William G. De Puy, assistant to the vice chief of Army staff, testified that the publication of one of the documents involved, a 1968 Joint Chiefs of Staff memorandum, prepared to evaluate the Communist Tet offense in Vietnam in 1968, could have helped Hanoi plan last year's Tet offensive against South Vietnam.