

ELLSBERG JUDGE BARS ONE CHARGE

Evidence on a Memorandum
Will Not Be Accepted

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LOS ANGELES, Feb. 7—The judge in the Pentagon papers case took action today that will result in the dismissal of one of the espionage charges against Daniel Ellsberg.

Judge William Matthew Byrne Jr. precluded the Government in United States District Court from presenting evidence on one of the top secret volumes in this case because exculpatory evidence exists on it. The document in question is a memorandum on the 1954 Geneva Accords.

Judge Byrne also ordered that all Government witnesses appear before him before they give testimony. He wants to find out, he said whether they have been told not to allow defense attorneys to interview them in preparing to defend this case.

Dr. Ellsberg and Anthony J. Russo Jr. are accused of eight counts of espionage, six counts

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of theft and one count of conspiracy.

Count eight in the indictment accuses Dr. Ellsberg of taking the Geneva Accord memorandum illegally from the Rand Corporation office in Santa Monica, Calif., "for the purpose of obtaining information about the national defense."

To prove espionage, the Government must show that the defendants' alleged illegal acts were related and damaging to the national defense.

The 20 documents in the case are 18 volumes of the 47-volume Pentagon papers, the 1954 Geneva Accord memorandum and a memorandum from the Joint Chiefs of Staff in 1968. They were marked "top secret-sensitive." All were first made public by The New York Times in a series of articles that started June 13, 1971.

The judge said that his precluding the Government from presenting evidence about the Geneva Accords memorandum was a "sanction" against the Government. In the normal course of events, perhaps after the Government presents its case, or perhaps when he

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charges the jury, it is assured that that count at least will be dropped.

Judge Byrne said that the "sanction" was issued because the Government had not told him its own analysts had concluded that that document could have had no effect on the national security when released. He had indicated earlier there would be other similar sanctions for the same reason.

Exculpatory evidence is evidence that is in possession of the prosecution that would tend to prove the innocence of the defendant.

Thus far, the judge has ruled that there is exculpatory evidence touching on 13 of the 20 documents in the case, and this, in turn, touches on nearly every count in the indictment. That does not mean that these counts will also be dismissed. Other documents, for which no exculpatory material exists, are involved in portions of the other counts.

Count eight was one of the few counts involving a single document, and the judge ruled that there was exculpatory evidence on it. In granting the defense motion to preclude that one document, the judge denied a motion to preclude presenting another document in evi-

dence—one of the so-called "diplomatic" volumes of the Pentagon papers—because he said there was only a small amount of exculpatory evidence concerning that volume.

Had he ruled otherwise, another espionage count and one theft count would have, in effect, been dismissed.

The exculpatory material consists of those portions of the Government's own analyses that the disclosure of the Pentagon papers and the two other documents did not damage the national defense.

Judge Byrne ordered that the material be turned over to the defense, but so far the defense has not officially offered it in evidence, and the jury is not yet aware of its existence.

The defense apparently in-

tends to offer it into evidence slowly, after a buildup most likely aimed at whetting the jury's appetite.

That buildup started today during the continued cross-examination of Brig. Gen. Paul F. Gorman, a prosecution witness, by Leonard B. Boudin and Leonard I. Weinglass, attorneys for Dr. Ellsberg and Mr. Russo; respectively.

Mr. Boudin, for instance, simply handed General Gorman sheets of the exculpatory material and, without asking him to read them to the jury, asked if the general had known of their existence before giving testimony. The general said no to each inquiry.

One question went like this: "Prior to your testifying in this case, were you ever in-

formed by anyone in the Defense Department that officials of the Defense Department had studied done to determine their (The Pentagon papers) relation to the national defense?"

After the general had answered in the negative to a series of such questions, he said finally that he had learned of the Government's various analyses of the papers only on Sunday night.

That series of questions alerted the courtroom to the existence of Defense Department and State Department documents that the general had not read before preparing his testimony.

General Gorman, who helped put together The Pentagon papers, is the prosecution's major witness on the effect

their disclosure might have had on the national defense; so far, he has insisted that the disclosure of the papers could have been helpful to Hanoi in 1969 during the Vietnam war.

Much of the defense's cross-examination of him today was aimed at showing that a lot of the information contained in the Pentagon papers was in the public domain before the papers were made public.

For example, the general had previously testified that the details in the Pentagon papers of the coup that ousted Ngo Dinh Diem as President of South Vietnam had damaged the United States' national defense. President Diem was assassinated Nov. 1, 1963.

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