Ellsberg Defense Seeks to Bar Evidence on 2 of 20 Documents

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LOS ANGELES, Feb. 5— The defense in the Pentagon Papers trial today asked U.S. District Court Judge W. Matt Byrne Jr. to prohibit the prosecution from offering evidence on two of the 20 documents that figure in the indictment against Daniel Ellsberg and Anthony J. Russo Jr.

Frustrated in their move last week to have the entire indictment dismissed or a mistrial declared, Ellsberg's and Russo's attorneys made the new request as an alternative means of punishing the prosecution for its apparent violation of a court order over the past nine months.

If the request is granted by Byrne—who took it under advisement—it would have the effect of throwing out three of the 15 counts charged in the indictment.

The two documents covered by the defense motion are a Rand Corp. study of the 1954 Geneva Accords on Indochina and one of the four "diplomatic volumes" of the Pentagon Papers, which trace early American efforts to reach an agreement with North Vietnam through third-party contacts.

They were among the 18 documents that internal government studies said had no relation to the "national defense."

The defense obtained those internal studies only last week, when the prosecution belatedly complied with an order issued by Byrne last April to make available any material that would tend to exculpate, or establish the innocence of, the defendant.

In order to prove the espionage charges against Ellsberg and Russo—who are also accused of conspiracy and theft of government property—the prosecution must show that disclosure of the documents

count in which Ellsberg is charged with showing it to Vu Van Thai, a former South Vietnamese ambassador to the United States.

Thai, a close friend of Ellsberg, is named as a coconspirator in the indictment, but is not formally charged in the case. The prosecution has said, however, that the FBI found his fingerprints on the diplomatic volume in question.

Since a major part of the defense case is to show that Ellsberg and Russo were motivated by a desire to bring the information in the Pentagon Papers before the American public, their attorneys have long worried about how the jury might react to evidence that this volume was shown to a "foreigner" long before publication in the United States.

The Rand Corp. study, writ-

ten by political scientist Melvin Gurtov, is the subject of an espionage count and is also mentioned in a comprehensive theft count.

But it is the one document in the indictment to which Ellsberg apparently cannot claim to have had exclusive access while working for Rand. It is believed by some of his defense staff that he took it "by mistake" when he allegedly removed the other documents and duplicated them.

Byrne refused to permit Leonard B. Boudin, Ellsberg's chief counsel, to "reopen my opening statement" before the jury in order to explain the one-week delay of the trial caused by the hearing in which the government studies were discovered.

Boudin had said he wanted

to tell the jurors of "government suppression of evidence for a year" and to explain that the government had itself "drawn exculpatory conclusions" from the Pentagon Papers.

The jury returned to court this afternoon, and the trial resumed as if nothing had happened during its absence. No explanation was given for the delay.

Boudin began what is expected to be a lengthy cross-examination of Brig. Gen Paul F. Gorman, who was assistant director of the Defense Department task force that compiled the Pentagon Papers.

Before the break in the trial, Gorman had testified that the documents did relate to the "national defense" and that their disclosure would be "useful" to foreign nations.

had an adverse effect on the "national defense."

Although it was moderate on its face, the defense motion today was aimed at eliminating from the indictment three of the charges that are the hardest for Ellsberg and Russo to fight.

The "diplomatic" volume, for example, is the subject of a theft count and an espionage