NYTimes FEB 3 1973

E NEW YORK TIMES, SATURDAY, FEBRUARY 3, 1973

Ellsberg Judge Denies a Mistrial Motion

By MARTIN ARNOLD
Special to The New York Times

LOS ANGELES, Feb. 2—The judge in the Pentagon papers trial denied late this afternoon defense motions for dismissal of the case or for a mistrial.

Both Daniel Ellsberg and Anthony J. Russo Jr. had moved for a dismissal on the ground that the Government had suppressed evidence that would tend to prove their innocence. Mr. Ruso alone, as a backup motion, had asked for a mistrial on the same ground.

In making the motions before United States District Court Judge William Matthew Byrne Jr., the defense also contended that the chief prosecutor, David R. Nissen, had been guilty of misconduct in this case.

The motions will be argued before the judge out of hearing of the jury, which was sent home earlier this week until Monday pending resolution of the issue of whether exculpatory evidence existed in this case—that is, evidence in the possession of the Government that would tend to prove the innocence of the defendants.

Analyses at Issue

On Tuesday, Judge Byrne ruled that such evidence did exist and he ordered it turned over to the defense as required by a Supreme Court ruling in 1963.

The exculpatory evidence involved is the Government's analyses of the effect that disclosure of the Pentagon papers had on this country's national defense. Government witnesses have been testifying that the alleged illegal actions of the defendants—and the result of those actions, the ultimate disclosure of the papers—had damaged the national defense by possibly helping Hanoi during the Vietnam war.

But much of the Government's own analyses concluded that disclosure of large portions of the papers did not damage the national defense.

The grounds for the dismissal and mistrial motions involved suppression of that evidence and the prosecutor's alleged misconduct in the suppression.

On April 11, and again on June 23, Judge Byrne, at the behest of the defense, ordered that the Government turn over to him in private all analyses of the papers and all other documents and correspondence it had relating to the Pentagon papers, particularly those materials that could be considered exculpatory.

Failures Charged

The defense asked for the dismissal on several grounds—that the defendants' right to a fair trial had been "substantially prejudiced" by the Governmetn's failure to make "timely disclosure" of exclupatory material; that the Government had not only failed to make it available before the trial commenced, but had also failed to present such evidence to the grand jury that investigated the case and returned the indictments.

The defense also argued that it "cannot redress" the fact that it did not have the exculpatory material available in time for its opening staements to the jury.

A dismissal would mean that the defendants could not be tried again. If a mistrial is granted to Mr. Russo as an alternative, he could be tried again by another jury.

In their dismissal motions, Dr. Ellsberg and Mr. Russo contended that "sanctions against Government officials, such as contempt, cannot redress the prejudice to the defendants" resulting from the Government suppressing the exculpatory material.

Dr. Ellsberg and Mr. Russo are accused of eight counts of espionage, six counts of theft and one count of conspiracy in the case. In order to prove espionage against them, the Government must first prove that their actions damaged the national defense. Because of the exculpatory material, the judge, if he doesn't grant these motions, could dismiss some of the charges against them. At the very least, they will be able to use the exculpatory material in court before the jury to argue their case.