

EVIDENCE SNARLS ELLSBERG TRIAL

—APR 27 1973

Angry Judge Sends the Jury
Home on the Prosecution's
Withholding of Material

NYTimes

By MARTIN ARNOLD

Special to The New York Times

LOS ANGELES, April 26—His face flushed with anger, the judge in the Pentagon papers trial sent the jury home today because the Government had again withheld evidence from the court and the defendants.

This is the second time during the 79 days of the trial that the jury has been sent home over essentially the same issue—the Government withholding material that it has a constitutional mandate to make available to the defense—and the latest incident could mean that the defense will be allowed to reopen part of its case.

"The burden on the Government" in sifting through its evidence, evaluating it and turning it over "cannot be weighed with the rights of the defendants," United States District Court Judge William Matthew Byrne Jr. said.

"Obviously, the rights of the defendants have to prevail," he added.

Warren B. Reese, an assistant prosecutor, told the judge out of hearing of the jury that there was "no conscious or deliberate effort on our part" to without the material, which consists of interviews by agents

Continued on Page 7, Column 1

ELLSBERG JUDGE SENDS JURY HOME

Continued From Page 1, Col. 1

of the Federal Bureau of Investigation and other Government investigators.

But the judge summoned the jury, excused them for the day and ordered them to return tomorrow. Previously, the jury was sent home for four and a half days late in January and early in February while the court held evidentiary hearings, which produced exculpatory material that the Government had withheld for many months.

Exculpatory material is evidence in the possession of the prosecution that tends to prove the innocence of the defendants and therefore, must be turned over to the defense. As a sanction against the Government for withholding that evidence, Judge Byrne dismissed one of the original espionage counts against Daniel Ellsberg.

Anthony J. Russo Jr, a co-defendant, was also dismissed but for another reason.

Today's excusal of the jury involved another type of evidence.

4 Reports Found

It is called "Jencks" material, and in this case consists of four reports, some of them nearly two years old. They were interviews gathered by agents of the Federal Bureau of Investigation and Defense Department investigators, who swooped down on the Rand Corporation shortly after the Pentagon papers were first disclosed in The New York Times on June 13, 1971.

Dr. Ellsberg is accused of stealing the papers from the Rand Corporation, and the reports are the Government interviews with Rand officials and employees, some of whom have already testified in this trial and others who are expected to testify.

Three of the reports were discovered in the Pentagon yesterday, and the fourth, an interview with Harry Rowen, former president of Rand, was discovered in the local office of the United States attorney and was turned over this morning. Mr. Reese told the judge that the other three "Jencks" reports would arrive here tonight — leading Judge Byrne to say sarcastically that "means I'll have an enjoyable later evening."

Dates to 1954

"Jencks" material gets its name from a case involving Clinton E. Jencks, a New Mexico labor leader, who was convicted in January, 1954, of falsely signing a non-Communist affidavit under the Taft-Hartley Act. The conviction was appealed to the Supreme Court, which ruled 7 to 1 on June 3, 1957, that F.B.I. reports that formed the basis of testimony by Government witnesses in criminal trials must be turned over to the defense or the case must be dismissed.

This ruling was to allow the defendants to discredit Government witnesses in part of their defense, and it immediately touched off a public controversy. J. Edgar Hoover, then director of the F.B.I., charged that the ruling undermined the agency's traditional position that its files were inviolate.

Subsequently, in 1957, Congress passed the so-called Jencks act, which modified the Court's ruling. It said that only authenticated or substantially verbatim pretrial interviews by prosecution witnesses had to be given to the defendants. On June 22, 1959, in a 5-to-4 decision, the Court upheld the constitutional validity of the act.

Judge Has Leeway

There are rules governing the turnover of Jencks material. In this circuit, for instance, it normally must be turned over to the defense 72 hours before a Government witness is scheduled to testify. The judge has the leeway, however, to change the time period, if the Government considers the material particularly sensitive.

As near as can be determined now, the Jencks material in this case goes to the six theft counts against the defendants — the very counts the defendants have had the hardest time combating.

It consists of pre-trial interviews with Richard Moorsteen, a Rand consultant; Richard H. Best, chief of Rand security; Jan Butler, formerly Rand's top secret control officer, all of whom have already testified in this trial without the defense being given the materials.

The judge said the material on Mr. Rowen may contain exculpatory material also. Mr. Rowen has yet to testify.

Judge Byrne was clearly infuriated by today's happenings, and he sharply ordered the Government "to turn over to this court everything you have." Mr. Best was scheduled to testify on cross-examination today, but the judge refused to permit this until the material was turned over.

'Mountain of Documents'

Mr. Reese said that there was "literally a mountain of documents," and Judge Byrne snapped back:

"The mountain of documents is a mountain of documents prepared by the Government, and you're going to have to make it available for scrutiny."

He said this included material on "any witnesses already called."

Leonard B. Boudin, a defense attorney, called the Government's action "inexplicable" in withholding the "Jencks" material, and Judge Byrne said "I'm only willing to go so far" in examining "the mountain" for Jencks material — "it is the Government's responsibility."