

Ellsberg Judge Says U.S. Must Give Data to Defense

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By MARTIN ARNOLD JAN 31 1973

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LOS ANGELES, Jan. 30—The judge in the Pentagon Papers trial ruled late this afternoon that the Federal Government possessed some evidence tending to prove the innocence of Dr. Daniel Ellsberg and Anthony J. Russo Jr. and ordered that it be turned over to them.

As Dr. Ellsberg sat beaming in the courtroom, his arm around his wife, Federal District Court Judge William Matthew Byrne Jr. said that the Government's own analyses of 11 of the 20 "top secret" documents in the case had such exculpatory evidence in them.

The analyses were done by the Government to determine whether or not the national defense was damaged by the disclosure of the Pentagon papers.

The defense immediately told the judge that it would move for a mistrial tomorrow and that it would ask for sanctions against the Government for withholding this evidence for many months.

No one expected that a mistrial would be granted, but the defense will now be able to use some of the Government's own analyses when arguing before the jury. The defense has been seeking since last spring to learn if this material existed.

Earlier today, the Government gave Judge Byrne what

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it said was its final analysis of the effect of the publication of the papers.

It consisted of a stack of papers about as thick as the Manhattan telephone book. And among the papers were some analyses that the defense has been contending would help prove the innocence of Dr. Daniel Ellsberg and Anthony J. Russo Jr. of at least some of the espionage counts against them.

The two are also standing trial on charges of theft and conspiracy.

The analyses that the defense was particularly interested in covered nine volumes of the 47-volume Pentagon papers and were prepared by the Defense Department's Office of Security Review, which is headed by Charles Hinkle.

These analyses were written largely by Lieut. Col. William Miller, who is now retired, and they were, the defense contends, suppressed by the Government.

J. Fred Buzhardt, general counsel of the Defense Department, testified today that they had apparently been written by a man in the Security Review Office who was seeking an interesting way to use his spare time. They are not official, he said.

Mr. Buzhardt said that he himself had never heard of these analyses or seen them until they were delivered from Washington last night by special Government courier.

The defense has asked the

judge to hear testimony tomorrow from Mr. Hinkle and from someone it called a secret witness, presumably Colonel Miller. From them, the defense hopes to elicit testimony that the Security Review Office analyses were official, and not someone's pastime, and that were indeed suppressed.

All this took place without the jury, which was sent home last Friday until the matter of just what Government analyses existed on the effect that the disclosure of the Pentagon papers had on the national defense.

The defense is contending that these analyses were prepared on order on or about Dec. 13, 1971, and that they contained exculpatory material and therefore were suppressed by the Government, which ordered that other analyses without exculpatory material be prepared.

Exculpatory material is evidence that would tend to prove the innocence of the defendants, and under a Supreme Court ruling in the case of Brady v. Maryland in 1963 such evidence must be turned over to the defense upon request.