

Ellsberg Wins a Big Ruling

Washington Post Service

Los Angeles

Daniel Ellsberg and Anthony J. Russo Jr., defendants in the Pentagon Papers trial, won a major victory here last night, obtaining copies of internal government studies stating that disclosure of more than half of the secret documents involved in the case did not affect the "national defense."

U.S. District Judge W. Matt Byrne Jr. ordered the prosecution to give defense attorneys copies of the studies, which were prepared by officials of the National Security Agency and the State Department in connection with the case.

The judge left open the possibility that he would order still other, similar studies turned over to the defense today.

Because the government must convince the jury that the so-called Pentagon Papers related to the "national defense," in order to convict Ellsberg and Russo of espionage charges in the indictment, Byrne's decision is expected to have a profound impact on the trial.

CHARGES

It could lead to dismissal of the espionage counts in the indictment, leaving Ellsberg and Russo to be tried only on a watered down conspiracy charge and six counts charging theft of government property.

Leonard B. Boudin, Ellsberg's chief counsel, said yesterday, however, that he would move for dismissal of the entire indictment.

Leonard I. Weinglass, who

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represents Russo, urged the judge to "impose sanctions" on chief prosecutor David R. Nissen for a nine-month delay in making the studies available to Byrne for the judge's private inspection.

Such "sanctions" could range from a contempt-of-court finding against the prosecutor to an order striking all references to ten of the once-top-secret documents mentioned in the indictment.

DEFENSE

In the meantime, the jury will not be returned to court until the defense has had an opportunity to review the studies rejecting the relationship of the documents to the "national defense."

At the very least, the defense attorneys are expected to use the studies before the jury in an effort to discredit the earlier testimony of two of the three prosecution witnesses who have thus far appeared.

Later last night Byrne issued another order that could create still more trouble for the prosecution.

He said that Charles Hinkle, chief of the Pentagon's

Office of Security Review, must appear at a special hearing here today to testify on a claim by defense attorneys that the Defense Department suppressed a different set of studies of the Pentagon Papers which is even more favorable to Ellsberg and Russo.

WITNESS

Also to appear is a "mystery witness" available to the defense — now identified as retired Lieutenant Colonel Edward A. Miller — who wrote the studies at Hinkle's direction and apparently provided information about them to defense attorneys.

Defense attorney Charles Nesson contends that these studies were removed from the files of the Office of Security Review at the direction of J. Fred Buzhardt, general counsel of the Defense Department.

Buzhardt denied under oath yesterday, however, that he ever heard of the studies written by Miller before Monday of this week.

Byrne's order requiring the prosecution to turn the other studies over to the defense attorneys came under the rubric of the Supreme

Court's 1963 decision in the case of Brady v. Maryland.

In that case the High Court reversed the conviction of Brady, an accused rapist, because the prosecution failed to give the defense information it had which tended to exculpate, or establish the innocence of, the accused.

Turning aside Nissen's legal arguments and angry protests, Byrne declared yesterday that the studies saying that some documents in the indictment do not relate to the "national defense" are "exculpatory material" under the Brady case.

The studies which Byrne ordered the prosecution to give the defense include analyses of nine volumes of the Pentagon Papers, prepared in late 1971 and early 1972 by an official of the national security agency temporarily assigned to Buzhardt's office.

Also covered was a state department analysis of a Rand Corp. study of the 1954 Geneva Conference — another document mentioned in the Ellsberg-Russo indictment — and part of a State

Department analysis of a tenth volume of the Pentagon Papers.

The judge said that the authors of the studies must be made available by the prosecution as witnesses.