

A Big Break for Ellsberg Defense

Los Angeles

The jury in the Pentagon Papers case learned for the first time yesterday that long before Daniel Ellsberg and Anthony J. Russo Jr. went on trial, an intelligence expert from the National Security Agency advised the Justice Department that disclosure of the top-secret documents had not damaged the national defense.

In a major breakthrough for the Ellsberg-Russo defense, U.S. District Judge W. Matt Byrne Jr. permitted the NSA official, William D. Gerhard, to read to the jury from studies of the Pentagon Papers that he prepared in late 1971 and early 1972.

A typical evaluation said that "disclosure of the information presented in this volume (part of the Pentagon Papers) would not have affected national defense interests as of 1969 nor today."

That is a fundamental issue in this case. The government must prove such injury to the national defense in order to convict Ellsberg and Russo of espionage in connection with their duplication of the documents while these were still classified in 1969.

The defendants also are charged with conspiracy and theft of government property.

Since February 27, defense attorneys have presented a parade of witnesses to assert that disclosure of the documents could not possibly have hurt the U.S. or given advantage to a foreign power.

But that testimony, often repetitive and tedious, has come largely from former government officials or others with avowedly anti-war views — while the prosecution case was based on the statements of two military officers still on active duty.

The existence of Gerhard's studies of the Pentagon Papers has been known publicly since early February, when Byrne ruled that chief prosecutor David R. Nissen had improperly withheld them from the defense despite a pretrial order to turn over all materials tending to exculpate, or establish the innocence of, the defendants.

The judge has banned the defense attorneys from making any reference to the alleged suppression of the Gerhard studies.

Yesterday afternoon Gerhard was called as the 17th defense witness.

Charles R. Nesson, a Harvard Law School professor who represents Ellsberg, moved immediately to introduce Gerhard's studies, written while the NSA official was temporarily assigned to the office of the Pentagon's general counsel to help prepare the government's case against Ellsberg and Russo.

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