

Memo on Case Against Ellsberg

Special to The New York Times

WASHINGTON, July 18—Following is the text of a White House memorandum from Egil Krogh Jr. and David R. Young to John D. Ehrlichman indicating the Department of Defense's view of the Government's case against Dr. Daniel Ellsberg.

MEMORANDUM FOR: JOHN D.
EHRlichMAN
FROM: EGIL KROGH
JR. & DAVID R.
YOUNG
SUBJECT: ELLSBERG
ET AL.—DOD
DAMAGE AS-
SESSMENT

As you are aware from prior discussions, information on damage is a sine qua non of a successful prosecution of Daniel Ellsberg. This is particularly true in this case as:

- (a) Ellsberg gave classified information to the Press, not to a foreign power;
- (b) Just a few months after Ellsberg went public, DoD published virtually the same material;
- (c) There has been no apparent damage as a result of Ellsberg's disclosures.

Generally, successful prosecution under 18 U.S.C. 793 (Espionage) requires only that the documents involved relate to the national defense and that their disclosure could affect adversely the defense interests of the nation. For the reasons set forth in (a), (b) and (c) above, however, Justice believes it will have to prove at least that the Ellsberg disclosures would damage our defense

interests and, probably, that in fact they did. (See Justice analysis, Tab A).

What is needed are specifics; e.g. examples of actual interruption of, or damage to, U.S.-Hanoi negotiations on POW release and/or interruption or compromise of U.S. communications intelligence. It will not suffice for a ranking military officer to do what was done (with unsuccessful results) in the civil suit against The New York Times: state that Ellsberg's disclosures caused damage to the defense interests of the U.S. That is a conclusion which must be arrived at by the jury. What is necessary are the concrete examples from which such a conclusion can logically be drawn.

On September 30th, at a meeting between Buzhardt and his staff and Mardian and his staff, Mardian stressed the urgency of Justice's need for specific information on damage. Buzhardt promised to speak separately to Mardian about it.

By October 19th, when the promised meeting had not yet taken place Justice inquired into the matter. DoD advised that no one is working on the problem, and that there is no information to give to Justice. DoD suggested, in the alternative, that Justice review the 47-volume McNamara Study and refer in writing to those portions thereof which "troubled" them. This is an unacceptable situation.

Justice has thought out the damage problem well and knows exactly what it needs from DoD. It is necessary that Defense be instructed immediately to accept Justice's detailed request and respond thereto fully within 10 days.

RECOMMENDATION: That you sign the attached letter to Secretary Laird.

7-19-78 NY