Supreme Court Refuses to Act

Ellsberg Trial Delayed Indefinitely

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LOS ANGELES, Aug. 5—The Pentagon papers trial was put off indefinitely today, when the U.S. Supreme Court refused to set aside a stay granted a week ago by Justice William O. Douglas on the basis of wiretapping in the case.

In a major setback to the Justice Department, Chief Justice Warren E. Burger announced in Washington this morning that the high court would not call a special session to consider whether Douglas' stay was justified.

Burger issued a terse, one-paragraph order, saying that the decision was based on "consultation with all members of the court except Mr. Justice Douglas."

That order left undisturbed a timetable established by Douglas last week. Under its terms, the defense has until Aug. 28 to file a petition for full Supreme Court review of the wiretap issue, and the Justice Department has 20 days to reply.

Since the high court will not decide whether to take the case until its convenes for its new term in October, the trial of Daniel Ellsberg and Anthony Russo was thus put off at least until then.

If the court does take the case—which presents novel questions concerning government wiretapping and its effects on federal criminal trials—the delay could be much greater, perhaps until next year.

Attorneys for Ellsberg and Russo hope for delay beyond the presidential election in November, since they believe that if Sen. George McGovern, the Democratic candidate, were elected, the indictment on conspiracy, espionage and theft charges might be dropped altogether.

In the meantime, Burger's announcement focused attention on an extraordinary problem, believed to be unprecedented in the history of the American judicial system: What to do about the jury of eight women and four men already sworn to hear the case.

Solicitor General Erwin N. Griswold said last Monday, in his request for immediate high court review of Douglas' stay, that "jeopardy attached" to the defendants as soon as the jury was sworn.

The Fifth Amendment to the Constitution bars putting

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CHIEF JUSTICE BURGER
. . . issued the order

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ELLSBERG, From A1

any defendant in "double jeopardy," and Griswold interpreted that as meaning that the jury could not be discharged pending an eventual Supreme Court pronouncement on the wiretap.

If the jury were discharged, Griswold said at the time, "the United States will have forever lost its right to a trial of this indictment."

The jury problem must be resolved in the first instance by U.S. District Court Judge W. Matt Byrne Jr., who is presiding over the case and last week asked the jury to return to his courtroom on Wednesday, Aug. 9, for a status report on when the tiral might begin.

Despite public defense assertions that the jurors could be kept, there is skepticism on all sides here that they could be successfully insulated from publicity about the case for several months without being sequestered.

Although the defense camp is not united on the issue, some attorneys in the case favor asking the judge to declare a mistrial, discharging the jury on a defense request and thus waiving the double jeopardy problem.

If and when the case does come to trial, that would have a fringe benefit for the defense: a new jury would be selected from a new list of veniremen in federal court here, which would include 18-year-old voters for the first time.

The defense has openly expressed its displeasure with the makeup of the jury already selected—mostly middle-aged persons with almost no knowledge of the Pentagon papers and no professed strong feelings about the war in Vietnam.

But chief defense counsel Leonard B. Boudin said today of the jury, "That's the government's problem, not ours."

Government sources have frequently indicated that the Nixon administration is eager to press for a prompt trial of the Pentagon papers case, because it could bring a judicial endorsement of the federal government's power to control the disclosure of secret documents.

Since the case also concerns alleged abuses by the press in publishing leaked materials, the sources say, the administration hoped Ellsberg and Russo would be on trial during the presidential campaign.

That hope is offered as an explanation for the Solicitor General's unusual request that the Supreme Court shatter precedent by overturning Douglas's stay and by convening in special session for only the fifth time in itshistory.

There is only one way now that the prosecution could force the trial to proceed: by disclosing to the defense details of the "foreign intelligence" wiretap that picked up a conversation involving a defense attorney or consultant.

Byrne and a three-judge panel of the Ninth U.S. Circuit Court of Appeals, after inspecting a secret wiretap log, ruled that the intercepted conversation had nothing to do with the case or with the

Sixth Amendment confidential attorney-client privilege.

But the defense, in the appal ruled on by Douglas last week, insisted that judges are not entitled to make that private determination and that a full adversary hearing should be held before trial on the electronic surveillance.

Chief prosecutor David R. Nissen could not be reached today for comment on whether the Justice Department would disclose the wiretap rather than delay the trial,

It is generally believed, however, that the adminstration would be unwilling to compromise the confidentially of the surveillance just to bring Ellsberg and Russo to trial—especially if it believes that it may eventually prevail on the issue in the Supreme Court.

Burger's order came after a week of intensive consultation with other vacationing members of the high court on the Justice Department requests to overturn Douglas' stay.

Supreme Court sources said that some justices feared, without regard to the merits of the wiretap controversy, that if they were to convene in special session they might appear to be the srervants of the Justice Department.

The Chief Justice's announcement apparently indicated that he felt no action could be taken unless a quorum of six justices were present in Washington, rather than polling the court by telephone.

His statement that everyone but Douglas had been consulted also hinted that Justice William H. Rehnquist had refused to disqualify himself, despite he fact that he had participated in policy decisions with regared to the Pentagon Papers while he was an assistant attorney general. The defense had asked that Renquist not participate in the case.