

# Ellsberg Defense Fights for Delay

By Sanford J. Ungar  
Washington Post Staff Writer

LOS ANGELES, Aug. 2—The defense in the Pentagon Papers case today asked the Supreme Court not to overturn a delay of the trial of Daniel Ellsberg and Anthony Russo, granted last weekend by Justice William O. Douglas.

In a memorandum filed in Washington this morning, attorneys for Ellsberg and Russo contended that "nothing in this case warrants the extremely unusual step of convening a special session of the Court."

To do so, they argued, would "erode" the "integrity of the Court's summer recess and the posture of the Court as a measured deliberative body."

The defense response to a petition filed Monday by Solicitor General Erwin N. Griswold was flown to Washington overnight by former New York Republican Sen. Charles E. Goodell, one of the lawyers defending Ellsberg against charges of conspiracy, espionage and theft of government property.

Supreme Court sources indicated that several justices agree with the defense that it would be improper to convene a special session solely to force resumption of the Ellsberg-Russo trial, in which a jury has already been sworn.

But they added that Chief Justice Warren E. Burger—who is believed to favor Griswold's contention that Douglas went too far in stopping the trial over a wiretap dispute—would probably be able to get a quorum of six justices to vote on the matter by telephone.

With the defense response already in the hands of each justice's law clerk in Washington, such a vote could come as early as Thursday or Friday.

The defense brief said that "the action of Mr. Justice Douglas in granting the stay . . . was proper, duly considered, supported by reason and precedent, and by no stretch can be considered so extraordinary and unwarranted as to justify and order by the Court setting aside the action of an Associate Justice."

It urged that the trial be put

off until the Supreme Court has had an opportunity for full review, in its new term that begins in October, of whether the defense should be provided the log of a government wiretap that overheard a conversation involving a defense attorney or consultant.

The Justice Department, the defense claimed, is seeking "to truncate the deliberative reflection which the complicated and important questions at issue here require."

Griswold has urged the high court to let the trial go ahead and to review the wiretap controversy, if ever, only on appeal should Russo and Ellsberg be convicted.

In his own brief to the court on Monday, the solicitor general contended that "this is the first time that a criminal trial has ever been stayed by a Justice of this court after a jury had been empanelled to try the defendants and jeopardy had attached."

A new jury could never be sworn, he added, because of the Fifth Amendment bar on "double jeopardy."

The defense derided that complaint today, saying that the jurors could be kept in service until the fall and that to suggest they might pay attention to publicity about the case, as did Griswold, "is tantamount to impugning the entire jury system."

Ellsberg's and Russo's lawyers also renewed their request that Justice William H. Rehnquist excuse himself from the case, because of his involvement with policy concerning the Pentagon Papers when he was an assistant attorney general.

They were clearly hoping that individual members of the court would be concerned enough about their own prerogatives to grant stays that they would not want to set a precedent by overturning Douglas.

But one Supreme Court source said that Douglas is generally regarded as a "special case," because he often angers his fellow justices with unilateral actions.