

LOS ANGELES—It is somehow appropriate that the Pentagon Papers trial, a test of the limits of government secrecy, should have been halted, at least temporarily, by a crisis over government secrecy:

Supreme Court Justice William O. Douglas granted a stay of all proceedings in the case because the Justice Department prosecutors refused to provide the defendants, Daniel Ellsberg and Anthony Russo, full details of a "foreign intelligence" wiretap that picked up the voice of one of their lawyers or consultants.

It may be, as the trial judge and an appellate court have already ruled, that the intercepted conversation has no relationship to the case or to the confidential lawyer-client privilege.

BUT WHAT the defense attorneys challenge is the right of judges to make such decisions privately, with only the advice of the prosecution—the same people who did the tapping.

The entire crisis could have been averted, and the appeal would likely never have reached the Supreme Court, if the Justice Department had made its electronic surveillance log available to the defense, as it has in many other cases.

If the overheard conversation is as "innocuous" as the prosecution contends, the adversary pretrial hearing on its contents would be brief and conclusive; and the trial could go on.

It is precisely because of its alleged irrelevance to the Pentagon Papers case, however, that the government insists upon keeping the wiretap log secret.

To reveal it, Chief prosecutor David R. Nissen has argued, could jeopardize the eavesdropping "installation," which is still in operation somewhere collecting "foreign intelligence" information at the direction of the Attorney General (rather than under a court order.)

There is a principle involved, Nissen says—that the government is entitled to protect the confidentiality of such surveillance in the national interest—which is closely related to the one that brought this case to trial in the first place, the federal government's asser-

tion that it is entitled to control disclosure of documents stamped "secret."

Secrecy has, in fact, bedeviled the entire Pentagon Papers trial from the start.

Only when badgered by reporters covering the case did Ellsberg and Russo realize that their attorneys were indulging in a time-honored practice of court secrecy by retreating into his chambers to discuss minor matters privately with U.S. District Court Judge W. Matt Byrne Jr.

That custom finally came to a halt when, one morning, Russo walked out of the judge's chambers and back into the courtroom in anger over what he considered the prosecution's attempt to extend the scope of the conference. Since the defendants must be present at all times, Russo's departure forced the group back into open court.

But the parties in the case later found a new way to transact the public's business in private, switching to bench conferences even when the jury was not in court.

On one occasion, the judge talked about his health at the bench. On another, when the discussion turned to purely procedural matters that could be dealt with publicly, Nissen suddenly asked the judge and defense attorneys, "What are we doing up here?"

(Part of his concern, apparently, was that several newsmen had devised a means of listening in from the press table, and the scene of them leaning forward and straining to hear was an unseemly one from the public gallery.)

LAST WEEK, when one of the already sworn jurors reported privately to the judge that she was troubled by some phone calls she had received about the case, the defense—the same people who talk elaborately about the public's right to know—requested a secret session to question the juror.

It was perhaps arguable that the juror would be more candid and less nervous if she were permitted to discuss her problem without the press and the public looking on.

Things were taken a bit further, however. The judge denied a defense request to

have the transcript of the session sealed, but all agreed not to volunteer it to the press.

Court transcripts, even of chambers conferences or sessions at the bench, are officially public; but ever since, both prosecution and defense have been unable to spare that volume of transcript, even for a few minutes, whenever asked.

The judge's copy is never available to the press, says the court clerk, and there is no public copy of the transcript on file. The official court reporters have been asked if they can sell the press a copy, but have yet to respond.

The reason, one can only suppose, is a secret.



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Secrecy Over Secrecy