

Seeks Reversal of Douglas

Justices Weigh Ellsberg Case

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LOS ANGELES, July 31 — The fate of the Pentagon papers case hung in the balance today, as the Supreme Court weighed a request by Solicitor General Erwin N. Griswold to set aside a stay of the trial granted by Justice William O. Douglas on Saturday.

Chief Justice Warren E. Burger reportedly was consulting other members of the high court, scattered around the country on their summer vacations, about whether they should convene in special session to consider the controversy, which centers on government wiretapping of a con-

versation involving a defense attorney or consultant.

Attorneys for Daniel Ellsberg and Anthony Russo, defendants in the case, sent a telegram to the clerk of the Supreme Court asking that any further action be postponed until the defense has had several days to reply to the Solicitor General's petition.

They also demanded that Justice William H. Rehnquist "excuse himself from any participation whatsoever" in the Supreme Court's deliberations on the issue.

"The grounds of this request," they said in a telegram, are that Rehnquist, President Nixon's most recent

appointee to the high court, "was assistant attorney general when the Attorney General authorized the prosecution" of Ellsberg; that "he could well have been" serving in the Justice Department at the time the "foreign intelligence" wiretap at issue was authorized by the Attorney General; that he was involved last year when the Justice Department attempted to prevent newspaper publication of articles based on the Pentagon papers; and that "he has already testified for the government on the legal issues involved in this case" before a congressional subcommittee.

See ELLSBERG, A5, Col. 8.

ELLSBERG, From A1

Before the defense telegram had even been received in Washington, asking for permission to file its response by Friday, the chief justice ordered that the defense answer be submitted by Wednesday noon.

In the meantime, U.S. District Court Judge W. Matt Byrne Jr., who is presiding over the case here, called the jury already sworn to hear the case into court to announce that there had been an unavoidable delay of the trial.

Dismissing the jury until Aug. 9, Byrne said "the pre-trial matters we have been considering involve purely legal issues that are now pounding in the appellate courts."

Despite the judge's renewed admonition to the 12 jurors and 6 alternates not to discuss the case with anyone, there was growing concern here about whether they could be insulated from information about the dramatic events of the past week, when the trial was repeatedly rescheduled as the defense pressed its appeal.

The jury is not sequestered. In his brief filed with the Supreme Court today, Griswold said that if the jury is discharged pending resolution of the wiretap dispute, "the United States will have forever lost its right to a trial of

this indictment."

Conceding a major point to the defense, the Solicitor General observed that "jeopardy attached" to the defendants as soon as the jury was sworn into service. To start a new trial under the same indictment, he added, "would constitute double jeopardy," which is banned by the Fifth Amendment.

Even a new indictment apparently would not solve that constitutional problem, since the Fifth Amendment states that no person "shall . . . be subject for the same offense to be twice in jeopardy of life or limb."

Griswold argued that the stay issued by Douglas after he held an emergency hearing on the matter in Yakima, Wash., last Friday—"is completely unjustified."

The validity of Byrne's refusal to disclose a wiretap log to the defense, Griswold said, "cannot be argued and under settled principles can only be litigated on appeal, if the defendants are convicted."

"If it were to stand, the Solicitor General added, Douglas's stay "would have a disastrous impact upon this important criminal prosecution," putting the trial off until at least October.

Ellsberg and Russo are charged with conspiracy, espionage and theft of government property in connection with their disclosure of the Pentagon papers, a top-secret Defense Department history of U.S. involvement in South-

east Asia.

The case is widely considered a test of the federal government's ability to control dissemination of secret documents and of the press's ability to operate on the basis of frequent official and unofficial "leaks."

The case ground to a halt last week, after the defense learned that the prosecution had privately filed a wiretap log with Byrne that revealed the interception of a conversation involving one of 16 defense attorneys and consultants.

The dispute went to the Supreme Court after a three-judge panel of the 9th U.S. Circuit Court of Appeals upheld Byrne's ruling that the intercepted conversation "was utterly without significant or relation to this case" and "could not conceivably come within the attorney-client privilege."

But the defense contends that it must be permitted to see the log and help make that determination.

In acting on Griswold's request, the Supreme Court apparently has several choices, including convening a special session, which it is believed to have done only four times in its history.

Chief Justice Burger also has the option, however, of informally polling the justices and conducting a telephone vote.

The defense sought to foreclose the prospect of an informal court vote on the stay by requesting, in its telegram, "an opportunity to argue and fully brief the matter before the court."

The request for Rehnquist's disqualification raised anew the brewing controversy over his participation in recent cases that arose while he was still assistant attorney general in charge of the Justice Department's office of legal counsel. His was the deciding vote in the government's favor in several of them.

Although he could seek informal advice from others, it is up to Rehnquist alone to decide whether to disqualify himself.