

Judges Halt Ellsberg Trial

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LOS ANGELES, July 26—Supreme Court Justice William O. Douglas and two judges on the Ninth U.S. Circuit Court of Appeals today halted the Pentagon Papers trial, pending resolution of a bitter controversy over government wiretapping.

Ruling just 2½ hours before the prosecution was scheduled to present its opening statement against defendants Daniel Ellsberg and Anthony Russo, the unusual three-judge panel said that all pro-

ceedings in the case must stop until the Circuit Court has considered an emergency defense appeal.

When the jury of eight women and four men came into his courtroom at 1:30 p.m. Pacific time for what they expected to be the start of the trial, they were told by U.S. District Court Judge W. Matt Byrne Jr. to go home until further word.

An hour later, three judges from the court of appeals convened an emergency hearing on the defense request for a writ of mandamus against

Byrne. The writ would require him to disclose to the defense the contents of a secret prosecution filing to the court revealing that a defense attorney or consultant was overheard during a wiretap of some else.

According to the defense, recent Supreme Court decisions require a hearing before trial to determine whether the wiretap was legal, whether it taints the prosecution evidence in the case and whether it affects the confidential attorney-client privilege.

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Byrne had rejected that argument and refused to tell the defense even which person had been overheard.

Today's events unfolded with uncommon speed because the entire Ninth Circuit Court and Douglas were attending a judicial conference in Pasadena, just east of here.

Judges on the Ninth Circuit Court are ordinarily scattered as far apart as San Francisco, Phoenix and Seattle, and Douglas spends the summer at his home in Goose Prairie, Wash.

After working all night to prepare their appeal papers, Charles E. Goodell, the former Republican U.S. senator from New York who is one of Ellsberg's attorneys, Leonard I. Weinglass, chief counsel for Russo, and a law clerk rushed this morning to the Sheraton Huntington Hotel in Pasadena, where the judicial conference was meeting.

Appellate Judge Walter Ely, the senior member of the Circuit Court assigned to Los Angeles, assembled another member of the Circuit Court, James R. Browning, of Great Falls, Mont., and Douglas to hear the defense request to stay the trial.

A Supreme Court justice's participation in such a proceeding is extremely rare, but Douglas was apparently included since he—as highest judicial authority in the Ninth Circuit—might have been con-

sulted later anyway.

Another unusual aspect of the hearing, which was conducted in a hotel conference room, was that the defense law clerk, Mark D. Rosenbaum of Cincinnati, participated in the argument, although he has not yet completed his studies at the Harvard Law School.

No members of the public or press were present during that hastily convened session, but defense attorneys reported that Douglas had expressed particular concern over the fact that the defense had been prevented from knowing which member of their staff had been overheard in the wiretap.

The defense attorneys re-

turned to Byrne's courtroom during a brief recess in final pretrial proceedings.

In one significant ruling a few moments earlier, Byrne denied a government request that the final four still officially secret "diplomatic" volumes of the Pentagon Papers be kept from the public during the trial, although they will be submitted in evidence.

The defendants' right to a public trial, Byrne said, requires that "Any documents submitted into evidence in this trial will all be handled in the same manner."

When Ellsberg last year gave the press copies of the Pentagon Papers, a history of U.S. involvement in Southeast Asia, he withheld the "diplomatic" volumes.

Their contents were recently disclosed by columnist Jack Anderson. The Washington Post and others, but the prosecution had insisted that they were still entitled to protection as highly classified information.

This afternoon, a regular three-judge panel of the Ninth Circuit Court—Charles M. Merrill and M. Oliver Koelsch of San Francisco and Ozell M. Trask of Phoenix—heard 90 minutes of argument on the controversy in the federal heard by the other."

Weinglass contended that "it doesn't speak well for the adversary system and the court system when one party in a criminal case is overheard by the other."

Joined by Charles Nesson, another of Ellsberg's attorneys, he argued that the surprise and secret wiretap filing by the government presented novel issues never before considered by federal court in the way that they are now posed in the Pentagon Papers case.

But chief prosecutor David R. Nissen reiterated his contention that Byrne's order, requiring a government search with eight federal agencies for any electronic surveillance of the 15 defense attorneys and consultants, was itself unprecedented and unjustified.