

U.S. Wiretap Heard Ellsberg

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LOS ANGELES, July 24—The Pentagon papers trial burst into an uproar today, after it was revealed that the government had, during the course of wiretapping directed against someone else, overheard the conversations of defense lawyers or consultants in the case.

Defense attorneys, accusing the special government prosecutors of bad faith, demanded that the trial of Daniel Ellsberg and Anthony Russo be suspended until they obtain full details on the electronic surveillance.

But chief prosecutor David R. Nissen refused to specify in open court which of 15 defense lawyers and consultants had been picked up in the wiretapping.

"It would be of no benefit to anyone to reveal who was overheard," he said.

To notify the defense of the names and circumstances, Nissen argued, would mean that an unspecified electronic surveillance "installation, which is being operated lawfully, could be jeopardized."

Unknown to the defense or the public, the prosecution had filed secret details of the surveillance with U.S. District Court Judge W. Matt Byrne Jr. Friday night.

That filing was an appendix

to a public affidavit by assistant prosecutor Warren P. Reese, asserting that "none of the oral or wire communications of any of the (attorneys and consultants) have been overheard, except as may hereafter be disclosed to the court" in secret.

Since the public affidavit was filed at 4 p.m. Friday and the clerk's office in U.S. District Court here closed for the weekend at 5 p.m., "hereafter" was apparently within that hour.

The defense contended that the surveillance triggered into operation a 1969 Supreme Court decision that said attorneys for criminal defendants are entitled to see the actual logs of wire-tapping to make their own determination of whether the information known to the government could possibly prejudice the trial.

Whether that case, *Alderman v. United States*, applies here was unclear, however, since it and other precedents involved the interception of conversations involving the defendants themselves, rather than their attorneys and other staff members.

But Byrne, in an action that the prosecution has labeled unprecedented and unjustified, earlier had granted a defense motion to require disclosure by the government of any surveillance of attorneys and consultants since they became involved in the Pentagon papers case, in which Ellsberg and Russo are charged with conspiracy, theft and espionage.

Any such surveillance, the defense contends, may affect the confidential attorney-client privilege and cause serious prejudice to the defendants.

Under the terms of Byrne's disclosure order, the defense submitted a list of 15 names and their addresses and telephone numbers to be checked by the government.

That list includes Leonard B. Boudin, chief counsel for Ellsberg, whose daughter has been sought by the FBI for two years in connection with a bomb explosion in a New York townhouse. Charles E. Goodell, the former Republican senator from New York who was reportedly the subject of Army intelligence surveillance; Tom Hayden, defendant in the "Chicago Seven" trial who has often visited Hanoi, and Richard Falk, a Princeton international law professor

who has access to the Vietnamese Communist delegations at the Paris peace talks.

The defense contends that this case provides the first practical test of a unanimous Supreme Court decision last month outlawing so-called "national security" wiretaps without a court order.

Leonard I. Weinglass, chief counsel for Russo, argued that unless Byrne determines immediately whether the wiretap involved in the Pentagon papers case was illegal, that high court decision could be reduced to mere "words on a printed page."

When Byrne suggested that a hearing on the legality of the surveillance might be delayed until after the trial, Weinglass cited another recent case in which the Supreme Court affirmed a lower court order that the government must make a full disclosure before trial or drop its case.

The wiretapping was revealed in court for the first time today when Byrne remarked that he had seen the prosecution's "in camera" (secret) filing on the subject over the weekend.

Weinglass, who was at the time in the midst of an argument over the "inadequacy" of the prosecution's public affidavit, was aghast at the revelation.

Turning momentarily pale, he told the judge that this was "an incredible development" which required that the trial be halted entirely until the defense learned more about the nature of the surveillance and

until a hearing could be held to determine its effect on the case.

Boudin rose to declare the government's secret filing "one of the most serious and shocking and shameful episodes in this entire case."

He accused the prosecution attorneys of being "dishonest" and said the defense was faced with an "absolutely intolerable situation."

In the future, Boudin said, the defense will be required to "parse these affidavits" filed by the prosecution in order to determine the truth.

Byrne, who appeared to be somewhat surprised himself

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that the defense had not been informed of the secret prosecution filing, temporarily delayed a ruling on how the wiretap controversy should be handled.

In the meantime, he de-

layed final selection of six alternate jurors to sit in the case and put off until at least Wednesday the prosecution's opening statement to the eight women and four men selected as jurors last week.