

A Trial and Jury In Legal Limbo

THE TRIAL OF Daniel Ellsberg, the man who turned over the Pentagon Papers for publication with the intention of more fully informing the American public about the Vietnam war, has been halted and is likely to stay in recess for several months, perhaps into 1973, while the Supreme Court decides what futher to do about it.

Chief Justice Warren E. Burger's announcement last Saturday that the Justices were declining to lift the order of Justice O. Douglas that had stayed the Ellsberg proceedings presents a new and novel situation in American jurisprudence. Never before in our history, it is said, has the Supreme Court intervened in a trial, once under way and the jury sworn in, to stay its progress while a point of law was appealed.

IN THIS CASE the point of law in dispute is a wiretap recording of a conversation involving one of the 16 lawyers and consultants for the defense of Ellsberg and Anthony Russo, who are charged with conspiracy, espionage and theft of Government property, i.e., the Pentagon Papers.

When the prosecution revealed that it had this wiretap record but refused to reveal the transcript of it to the defense, the defense lawyers were dissatisfied. Even though Judge W. Matt Byrne Jr. had ruled the wiretap inadmissible in the trial and hence of no effect, the defense took an appeal to the Ninth Circuit Court. There they lost. But Justice William O. Douglas, taking vacation-time appeals from the Ninth Circuit, found it "a profoundly important constitutional question" and gave the defense the right to appeal to the Supreme Court for a review.

This is what occasions the delay, as the Court won't be back on the bench till October 2 and has declined to act on Ellsberg in the meantime.

THE JUSTICE DEPARTMENT is very upset, since it is adamant against revealing the "foreign intelligence" wiretap in which the unnamed member of the defense team is involved and yet it fears that after a long delay with an impanelled jury it may not be able to proceed even if it should win the dispute in the Supreme Court. On the other hand, the Solicitor General told Burger that the alternative, to dismiss the jurors while the dispute is being resolved, might bring the Government up against double jeopardy and so relieve Ellsberg and Russo from any further prosecution whatever.

By trying Ellsberg the Government desires to demonstrate to several million Federal employees that they may not with impunity do as Ellsberg did. That is a valid aim. But if Ellsberg is guilty of an illegality, so is the Government. It engaged in an illegal snoop; if it had not done so its case would not now be in trouble. At all events, that seems to be Justice Douglas' view of the matter.