

Ellsberg's Lawyers

Ask Rehnquist Ban

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LOS ANGELES, July 31—The tangled court proceedings in the Pentagon papers case were further complicated today when the defense sought to disqualify Justice William H. Rehnquist from taking part in the Supreme Court's consideration of the case.

The request that Justice Rehnquist excuse himself came in response to a Justice Department application, filed with the Supreme Court this morning, that asked the full Court to overturn Justice William O.

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Douglas's stay of the Pentagon papers trial.

Justice Rehnquist was asked, in telegram to the Court, to excuse himself from any action on the stay because of his alleged connection with aspects of the Pentagon papers controversy when he was an Assistant Attorney General in the Justice Department.

In addition to those developments, the extraordinarily complicated legal situation that has grown up around the Government's efforts to bring Daniel Ellsberg and Anthony J. Russo Jr. to trial for disclosing the secret study on the Vietnam war was further muddled by the following developments:

¶ Solicitor General Erwin N. Griswold told the Supreme Court in the papers filed this morning that unless Justice Douglas's stay was overturned double jeopardy could prevent the case from ever coming to trial.

¶ Chief Justice Warren E. Burger reportedly began to poll the Justices on whether they desire to review Justice Douglas's stay. Six Justices are required to constitute a quorum, and sources close to the Court reported that four of the nine Justices — Thurgood Marshall, William J. Brennan Jr., Potter Stewart and Justice Douglas — have indicated that they do not think that the Court should interrupt its normal summer recess to act on the Government's application.

¶ The jury of 12 members and six alternates was excused for 10 days by the trial judge, with an admonition not to read or listen to broadcasts of any new reports on the case, "if there be any."

'Double Jeopardy' Hinted

In his plea, Mr. Griswold conceded a legal point that the defense had intended to raise, saying that the defendants had been placed "in jeopardy" when the jury was sworn in more than a week ago. Thus, if this jury must be discharged as a result of a long trial delay, a new trial might be barred by the Fifth Amendment's prohibition against double jeopardy.

The Solicitor General said that if Justice Douglas's stay is permitted to block the trial until the Supreme Court has disposed of a wiretap issue—a process that could take many months—the jury might have to be discharged and "the United States will have forever lost its right to a trial of this indictment."

The instructions of Federal District Judge William Matt Byrne Jr. to the jury—which on prior occasions have included having their spouses clip any articles about the case from the morning papers—appeared fragile in light of problems that were pointed out in Mr. Griswold's Supreme Court papers.

The Solicitor General said that no Supreme Court Justice had ever before stayed a trial after a jury was empaneled. He argued that Justice Douglas's "completely unjustified" act could have a "disastrous impact upon the prosecution."

Appeals Court Backed

"It is hardly feasible—at least, it would be wholly unprecedented," he said, "to keep this jury on a leash" for many months, possibly subject to prejudicial influences and inconvenienced by the necessity of future service.

The core of Mr. Griswold's argument was that the Court of Appeals had been correct in refusing to issue a writ of mandamus, a rarely used device by which the defense sought to order Judge Byrne to make the Government disclose the details of a wiretap prior to the trial.

Judge Byrne had ruled that

the intercepted telephone call from a line that was being tapped in a "foreign intelligence" investigation to a defense lawyer or consultant in this case had nothing to do with the Pentagon papers case, and that it need not be disclosed to the defense.

Mr. Griswold argued that such a use of a writ of mandamus would permit the "piecemeal" review of alleged errors in a criminal trial and that the defendants should have been required to raise it in their appeal if they are convicted.

In their telegram today, the defense lawyers asked to be given until Friday to file a formal response to Mr. Griswold's papers. At about the same time, Chief Justice Burger was issuing an order giving them until 9 A.M. Wednesday, Los Angeles time (noon Eastern daylight time) to file their response in Washington.

Justice Rehnquist was asked in the telegram not even to take part in the potentially crucial matter of assembling a quorum

of six Justices. The reasons cited by the defense, if accepted by Justice Rehnquist or by the Court, would presumably bar him from any later review of the case.

Arguments Against Him

They were that he was an Assistant Attorney General when the Justice Department began this prosecution; that he may have been in that job when the wiretap issue was authorized; that he may have taken part in the Justice Department's attempts last summer to stop The New York Times and The Washington Post from publishing the material; and that he testified for the Government on the legal issues involved in this case before a subcommittee of the House Committee on Government Operations.

Justice Rehnquist has not in the past felt that his prior connection with the Pentagon papers disqualified him from ruling on any case involving them. His role included telephoning The Washington Post in May of last year to deliver the Justice Department's formal notice that they would go to court unless the newspaper refrained from printing material from the Pentagon papers.

He voted with the majority last month when the Supreme Court ruled, 5 to 4, that Senator Mike Gravel of Alaska and his aides may be questioned by a Federal grand jury about their alleged role in the publication of the Pentagon papers in book

form by The Beacon Press. Senator Gravel has filed a petition for a rehearing of that decision, asserting that Justice Rehnquist should have been disqualified.

A similar petition for a rehearing has been filed in connection with another recent 5-to-4 decision, in which Justice Rehnquist was also in the majority, as the Court dismissed a suit that sought to block the Army's surveillance of civilian political activities. He had said in Senate testimony, when he was in the Justice Department, that he did not think the case had merit.