

Jury in Pentagon Papers Trial Sent Home Until Mid-October

By FRED P. GRAHAM
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LOS ANGELES, Aug. 9—The jury in the Pentagon papers case was sent home today until at least mid-October in what will apparently be the longest pause in the course of a jury trial in United States legal history.

Federal District Judge William M. Byrne Jr. declined to grant a defense motion for a mistrial, even though the defendants, Dr. Daniel Ellsberg and Anthony J. Russo Jr., formally offered to waive their constitutional protection against double jeopardy if the judge would do so.

They filed a paper agreeing not to object to a subsequent trial if the judge would dismiss the jury that was sworn in three weeks ago. This waiver of the Fifth Amendment's guarantee against double jeopardy was said by defense lawyers to be unprecedented in the Federal courts.

High Court Ruling Awaited

But Judge Byrne decided instead to wait until the Supreme Court announces, probably in October, if it will review the wiretapping appeal that has snagged the prosecution of the defendants. They are accused of espionage, conspiracy and misuse of Government property for allegedly making public the top secret study of the Vietnam war.

By delaying his decision on the mistrial motion, Judge Byrne will have the jury on hand to resume the trial if the Supreme Court should decline to review the appeal shortly after the Justices return from their summer recess Oct. 2.

If the Court should agree to hear the appeal, thus creating the prospect of a trial delay at least until early 1973, Judge Byrne could grant the mistrial motion in October and dismiss the jury.

The defendants' waiver of double jeopardy protection contained no time limits and would presumably remain in effect.

defense lawyer, told Judge Byrne today that if the trial was resumed in mid-October, 11 weeks after the jury was sworn in, it would be the longest known half in a criminal jury trial. The only case that approaches it was a 1958 case in which the jury was sent home for eight weeks while the defendant was allegedly ill, he said.

He and Leonard B. Boudin, another defense lawyer, argued that if the jurors were returned to their usual pursuits for so long, they were likely to hear and read things that could affect their impartiality.

Judge's Instructions

Judge Byrne called the 12 jurors and six alternates into court today and told them that they were free to travel until Sept. 15, but that after that they must inform the jury clerk of any trip of more than a week.

Judge Byrne repeated his instructions that they should not discuss the trial with anyone, including one another, and that they should report to him anyone who persisted in talking about it.

He suggested that they have someone clip out articles about the case before they read the newspapers and that when a radio or television commentary on the case began, they should "get up and walk out."

The hearing today found the prosecution and defense making arguments opposite to those each made last week, when the Government sought without success to persuade the Supreme Court to overturn Justice Douglas's stay, and the defense asserted that a delay of the trial would probably do little harm.

Prosecution's Plea

Today David R. Nissen, the special Justice Department prosecutor, remained the defense that it had filed Supreme Court papers saying the jurors might not be prejudiced by a long delay. He asked Judge Byrne to hold the jury until at least October.

Mr. Boudin recalled that Solicitor General Erwin N. Griswold had warned the Supreme Court that extreme complications could result if the jury were held until October.

Mr. Boudin said the defendants were willing to waive their right to claim double jeopardy because they did not want to capitalize on the confusion resulting from their wiretapping appeal and because they had no desire to avoid a trial on the secrecy issues posed by the case.

Tangled Situation

The judge's actions brought some tentative order to a tangled legal situation that has grown out of the Justice Department's concession July 21 that one of its "foreign intelligence" wiretaps had picked up a conversation involving a defense lawyer or consultant.

After the defense demanded that the Government disclose details of the wiretapping the lower courts upheld the Government's refusal to do so, Justice William O. Douglas stayed the trial until the Supreme Court can decide whether to review the wiretapping issue.

Leonard I. Weinglass, a de-