

Douglas Hears Ellsberg

By Sanford J. Ungar
Washington Post Staff Writer

YAKIMA, Wash., July 28—Attorneys for the Justice Department, Daniel Ellsberg and Anthony Russo flew to this city at the foot of the Cascade Mountains today for an emergency hearing before Supreme Court Justice William O. Douglas to determine whether the Pentagon Papers trial must begin in Los Angeles Monday.

The future of the case—a major test of the federal government's power to control the disclosure of secret documents—has been in doubt for five days while the prosecution and defense fought over government wiretapping.

A week ago, in a secret filing with U.S. District Court Judge W. Matt Byrne Jr., the prosecutors acknowledged that one of 16 defense attorneys and consultants had been overheard during a conversation with an unidentified third party who was the target of electronic surveillance.

Ellsberg and Russo are charged with conspiracy, espionage and theft of government property in connection with their leaking of the Pentagon Papers, a top secret Defense Department history of U.S. involvement in Southeast Asia.

Their attorneys contend that the defendants' constitutional rights will "unquestionably" be violated if they go to trial without full information on the wiretap, even if it proves to be unrelated to the case.

Relaying on recent Supreme Court decisions, they demand the opportunity to participate in any court determination of the wiretap's legality and its relevance to the trial.

Ellsberg and Russo, their attorneys said in court papers this week, "face an extremely lengthy and expensive trial, far longer and more expensive

than the vast majority of federal criminal trials.

"If the evidence to be forthcoming has been tainted by illegal surveillance, or if the attorney-client privilege has been violated by the government," they added, then the defendants "should not be made to undergo the hardships that the trial would entail.

Even the defense attorneys concede, however, that the issue is not clear and that their appeal raises a unique question concerning the fourth Amendment prohibition of unreasonable searches and seizures and the Sixth Amendment right to counsel.

Previous high court decisions dealing with wiretapping mainly involved cases in which the defendants themselves were overheard during electronic eavesdropping or their attorneys were intercepted while talking about the specific case on trial.

In the Pentagon Papers case, an attorney or consultant is not public information exactly who was overheard else about a matter not obviously linked to the trial.

Byrne, ruling on Tuesday, said his private inspection of the surveillance log submitted by the prosecution convinced him that it "is utterly without significance or relation in any way to this case. Nothing said in the intercepted communication could conceivably come within the attorney-client privilege."

A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit upheld Byrne on Thursday, saying he was entitled to inspect the wiretap log privately and that the defendants had no standing to raise the surveillance issue before trial.

Special government prosecutors, who contend that Byrne was wrong in the first place to

require disclosure of any surveillance of attorneys and consultants have cautioned against any new postponement of the case—already more than a month behind schedule—because a jury has already been sworn to hear the evidence.

The defense, which insists that even an "innocuous conversation" could be related to the case, then went to Douglas, who has jurisdiction over all emergency appeals in the Ninth Circuit. Douglas said

Wiretap Plea

that the wiretap dispute was sensitive enough to require a full hearing.

But Douglas was eager to return to his summer home in nearby Goose Prairie, rather than remaining in the Los Angeles area. He ordered the defense and prosecution lawyers to follow him north for a session this afternoon at the federal building in Yakima, where he has a summer office. Douglas stopped en route in Portland, Ore., for a dental appointment.

The opposing lawyers flew here after a brief session before Byrne in Los Angeles this morning.

Byrne declined to proceed with debate on the remaining pre-trial motions "in all due deference" to Justice Douglas' right to issue a ruling.

In the event that the stay is denied, however, Judge Byrne tentatively set Monday morning for the final pre-trial hearing, to be followed by opening arguments to the jury that afternoon.