

Daniel Ellsberg and Anthony Russo, defendants in the Pentagon Papers case, yesterday asked the Supreme Court to prohibit the federal government from wiretapping for "foreign intelligence" purposes without a court order.

Broadening the basis of their demand for a high court hearing that could further delay, or even cancel, their trial, Ellsberg and Russo said that such electronic surveillance and its use in criminal cases "violates the Constitution in several respects."

They asked the court to accept their case as the opportunity to extend its decision in June that so-called "national security" wiretaps without a search warrant are illegal.

In that decision, the Supreme Court left open the question of whether the same ground rules should apply to surveillance in the "foreign" field.

Even if the court draws a distinction between the two kinds of wiretapping, Ellsberg and Russo argued in their petition yesterday, there should be new restrictions on federal prosecutors' use of "wiretapping materials" in criminal prosecutions.

The Ellsberg-Russo filing five days ahead of a deadline set by Justice William O. Douglas when he halted their trial last month, was the latest development in a heated controversy over the effects of government wiretapping on the Pentagon Papers case.

The Justice Department, which has 20 days to reply, is expected to urge that the Supreme Court postpone consideration of the issues until after Ellsberg and Russo have been tried on charges of conspiracy, espionage and theft of government property.

In the meantime, attorneys for the two men are preparing a civil suit against the Justice Department, seeking full details of the wiretapping in the case and payment of money damages for alleged violations of their rights.

The special prosecutors in the Pentagon Papers case have said publicly only that one of 16 defense attorneys and consultants was overheard

in a conversation with someone else who was under surveillance for "foreign intelligence" reasons on the order of the Attorney General.

U.S. District Court Judge W. Matt Byrne Jr., who was presiding over the Los Angeles trial when it was halted, privately reviewed the wiretap log and said the intercepted conversation had no relevance to the case.

He was later upheld by a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit.

But the defense contends that such a determination can be made only in an adversary hearing before trial. Attorneys for Ellsberg and Russo insist on an opportunity to help determine whether the wiretapping tainted the evidence in the case or affected the confidential attorney-client privilege.

The first step, they said in yesterday's Supreme Court petition, must be a decision on whether the wiretap was legal—an issue never ruled upon by Byrne.

The defense attorneys also argued for the first time in yesterday's filing that an adversary hearing on the matter is required by the omnibus Crime Control Act of 1968 and the Organized Crime Control Act of 1970.

With legal arguments from both sides in hand by mid-September, the Supreme Court will have the opportunity to decide whether to accept the Ellsberg-Russo appeal at the first conference of its new term in October.

If the court agrees to hear the case, the Pentagon Papers trial could be postponed well into 1973. The prosecution was begun in the summer of 1971, just after newspapers published articles based on the top-secret Defense Department history of U.S. involvement in Southeast Asia.

In the meantime, in a situation believed to be unprecedented in American judicial history, the jury of eight women and four men selected to try the case has been kept in reserve until the Supreme Court decides what to do.

The jurors are not sequestered, but have been ordered not to read or listen to anything about the well-publicized case.

Ellsberg Asks New Limits on U.S. Wiretaps

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