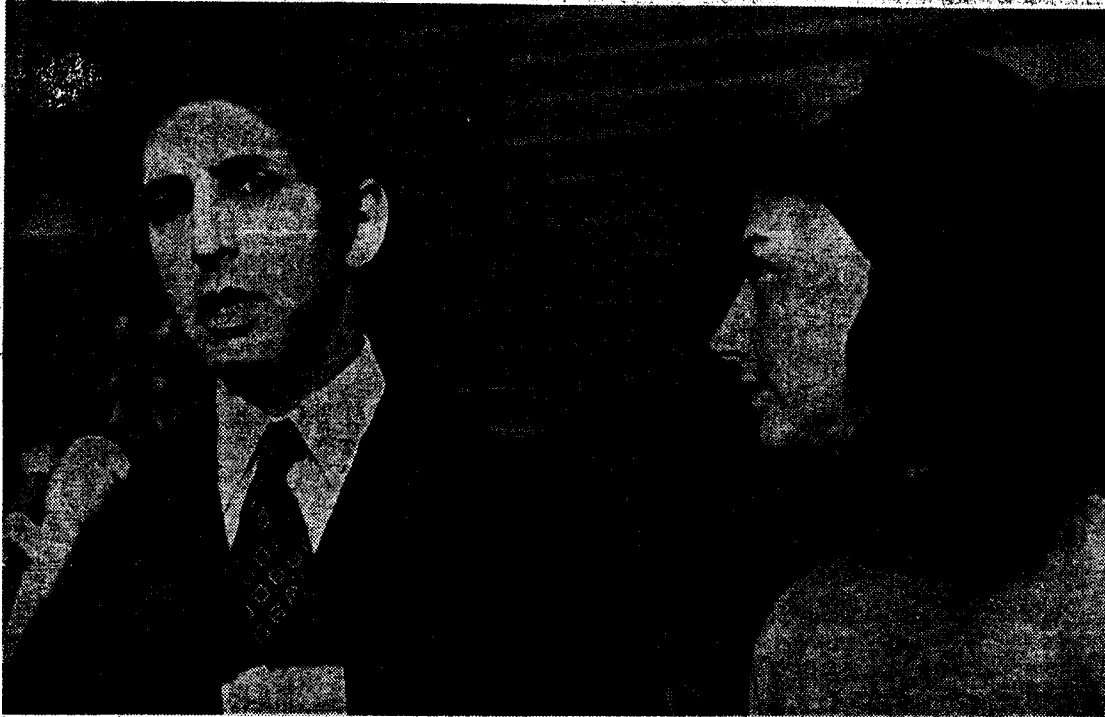


Supreme Court Rejects Ellsberg Appeal



Associated Press

David Ellsberg, his wife with him, talks to newsmen in Cambridge, Mass., about Supreme Court decision.

By Sanford J. Ungar

Washington Post Staff Writer

The Supreme Court cleared the way yesterday for an early resumption of the Pentagon papers trial in Los Angeles.

With only two justices dissenting, the high court declined to consider the appeal of the defendants in the case, Daniel Ellsberg and Anthony Russo, from lower court rulings denying them access to the contents of a federal government wiretap of one of their lawyers.

U.S. District Court Judge W. Matt Byrne, Jr. is expected to reschedule the trial, already delayed for almost four months by the wiretapping dispute, for early December or early January.

It was not immediately clear, however, whether the judge would retain the same jury of eight women and four men, sworn in on July 21 and barred ever since from reading or listening to any news about the controversial case. Ellsberg and Russo, both

former defense researchers for the Rand Corp. in Santa Monica, Calif., are charged with espionage, conspiracy and theft of government property in connection with the disclosure in June, 1971, of the Pentagon papers, a top-secret Defense Department history of U.S. involvement in Southeast Asia.

The case is considered a crucial test both of the federal government's power to control the dissemination of classified information and of the press's

ability to rely on "leaks" of such information from government bureaucrats.

Although the Supreme Court ruled on June 30, 1971, that the Justice Department had not justified its effort to impose a prior restraint on publication of the study by The New York Times, The Washington Post and other newspapers, the justices implied that the federal government had not justified its effort to

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Justices Reject Ellsberg Appeal, Clear Way for Trial Resumption

ELLSBERG, From A1- ment was entitled to bring criminal charges.

Ellsberg's indictment, and later Russo's, resulted from a federal grand jury investigation in Los Angeles.

Still pending in Boston is another federal grand jury investigation of Ellsberg, some of his academic colleagues, the newspapers and reporters who published the Pentagon papers, and Sen. Mike Gravel (D-Alaska), who released a copy of the study he had obtained from Ellsberg.

Ellsberg and Russo acknowledge that they duplicated a copy of the Pentagon papers from the Rand Corp. in 1969, when Ellsberg was still working there, but they insist that this violated no law.

They contend that their conviction, which would result in

defining secret information as "government property" and classifying such a leak as espionage, would seriously impair the First Amendment guarantee of freedom of the press.

The Pentagon papers trial was just getting under way last July when federal prosecutors revealed that one of 16 defense lawyers and consultants had been overheard in a non-court-authorized wiretap on someone else.

A prosecutor subsequently said that the surveillance—authorized only by the Attorney General—was of the "foreign intelligence variety, rather than one of those for "national security" purposes that was banned by the Supreme Court last June.

Byrne, after privately inspecting the wiretap log, said it was "utterly without signifi-

cance" to the case and could not "conceivably come within the attorney-client privilege," as contended by the defendants.

Ellsberg and Russo lost when they appealed Byrne's ruling to the Ninth U.S. Circuit Court of Appeals, insisting that they were entitled to inspect the surveillance logs and help determine whether the tap was legal.

Supreme Court Justice William O. Douglas stopped the trial on July 29, however, pending consideration of the dispute by the full high court.

Having rejected Justice Department requests to do so earlier, the Supreme Court set aside Douglas's stay only yesterday.

Justice William J. Brennan Jr. joined Douglas in saying that he thought the Ellsberg-Russo appeal should be considered by the high court.

But Brennan did not associate himself with Douglas's four-page dissenting opinion, which asserted that "the prosecution as well as the defense is required to live within the spirit and letter of the constitutional rules designed to keep government off the backs of the people and to take no shortcuts because of public hysteria or political pressures."

Douglas revealed that the disputed wiretap overheard a lawyer—not a consultant—and he said that the intercepted conversation concerned "wholly personal social and commercial matters."

He suggested that the case was perfect for setting new guidelines concerning the disclosure of wiretap logs in federal criminal cases.

Justice Department sources have previously told The Washington Post that only an order to disclose such logs would suspend the prosecution of what the Nixon administration considers a landmark case.