HIGH COURT DENIES ELLSBERG APPEAL ON WIRETAP DATA

Refusal to Hear Plea Paves Way for Resumption of Pentagon Papers Trial

NYTimes NOV 14 1972

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Special to The New York Times

WASHINGTON, Nov. 13—The Supreme Court cleared the way today for the resumption of the Pentagon papers trial of Daniel Ellsberg and Anthony J. Russo Jr., who are accused of making public the top secret study of the origins of the Vietnam war.

In an unsigned order, the Court refused to hear an appeal by the defendants of the trial judge's refusal to let them see the transcript of a defense lawyer's conversation that had been picked up by a Government wiretap.

A stay issued by Justice William O. Douglas had stopped the trial last July, after a jury had been sworn in and only hours before the lawyers' opening statements were to have been made.

Two Justices Dissent

Today's action had the effect of dissolving that stay. The trial is expected to resume next month or early in January before Federal District Judge William Matt Byrne Jr. in Los Angeles.

Justice Douglas and Justice William J. Brennan Jr. dissented, saying that the Court should have heard the appeal. Four votes are normally required before the Supreme Court will hear a case, but the outcome today does not necessarily mean that the Court has turned a deaf ear to the defendants' wiretap plea.

In opposing the appeal, the Justice Department had argued that the Court would encourage "piecemeal" appeals of criminal cases if it kept this case on ice while it spent months reviewing the wiretap point. The Government pointed out that if Dr. Ellsberg and Mr. Russo were convicted, they could raise the wiretap issue in their appeal, along with all other issues raised by the case.

Lawyer Was Overheard

Justice Douglas charged in his dissent today that the issue was too important to be put off. He noted that the Supreme Court had ruled that defendants who had been overheard on an illegal Government wiretap had a right to see the transcripts before their trials, to assure them that no illegally obtained information was being used by the prosecution.

The same rule should be extended to overheard conversations involving defendants' lawyers, Justice Douglas asserted. He disclosed that the person overheard was one of the 15 defense lawyers, and

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not one of the four defense consultants.

The Justice Department had conceded last July that one of its "foreign intelligence" wiretaps, placed without court authority, had picked up a conversation involving either a defense lawyer or consultant. Judge Byrne read the transcript and refused to let the defense see it because he concluded that the conversation had nothing to do with this case.

Justice Douglas's dissent disclosed that the wiretap was on the telephone of a "foreign national," but he said "the conversation was an inquiry by one of the counsel concerning wholly personal social and commercial matters."

He noted that the Supreme Court had said that the Government must obtain court warrants to conduct "national security" eavesdropping against domestic groups, but that it had not ruled on warrantless wiretapping directed against foreign espionage.

Hearing Termed Needed

Because this conversation did not concern espionage, he argued that the Court should have given the case an early hearing to consider the Government's authority to set up "schemes of pervasive surveillance of foreign nationals that is unrelated to espionage."

Reached at his home in Cambridge, Mass., Dr. Ellsberg said the defense would ask Judge Byrne to dismiss the jury and pick a new one, on the ground that the jurors' attitudes might have been tainted during their long absence from the courtroom.

Since the trial was stayed, the names of newly enfranchised 18-to 20-year olds have been added to the prospective jury lists, but Dr. Ellsberg doubted if younger faces on the jury would help his cause. He said that many of them had cast hawkish votes for President Nixon, raising questions as to "how much it's worth to have younger people on our jury."

Dr. Ellsberg and Mr. Russo are accused of espionage, conspiracy to release classified documents and unauthorized use of Government information, growing out of their admitted release of the Pentagon papers when they were employed by the Rand Corporation, a Defense Department "think tank" in California. When the Supreme Court ruled in June, 1971, that The New York Times and The Washington Post could not be barred from publishing the material, it left open whether those responsible for the publication could be punished under the criminal laws.