

# U.S. Decides Against Appeal Of Dismissal of Ellsberg Case

6/7/73

By WARREN WEAVER Jr.  
Special to The New York Times

WASHINGTON, June 6 — The Federal Government officially dropped today its effort to prosecute Dr. Daniel Ellsberg and Anthony J. Russo Jr. for stealing and copying the Pentagon papers.

The Justice Department announced in a one-sentence statement that Solicitor General Erwin N. Griswold would not appeal the month-old decision of Federal District Judge William Matthew Byrne Jr. dismissing all charges against the two defendants and barring a second trial.

Judge Byrne ended the 89-day trial abruptly on the ground that the Government had made it impossible to achieve a "fair, dispassionate resolution" of the espionage, theft and conspiracy charges by its misconduct in both gathering and concealing evidence.

The Government's decision to drop the case was not unexpected. After Judge Byrne's ruling May 11, the chief prosecutor, David R. Nissen, said: "It appears that the posture [of the case] is such that no appeal will be possible."

Judge Byrne based his dismissal in part on reports that surfaced late in the trial that the Government had tapped Dr. Ellsberg's telephone in 1969 and 1970, during the period of the alleged conspiracy, but that all records and logs of this activity had disappeared from the Federal Bureau of Investigation.

Also involved was the emergence of the news, again a by-product of the trial, that White House agents had broken into the office of Dr. Ellsberg's psychiatrist in September, 1971, in an effort to obtain his medical records.

"The conduct of the Government has placed the case in such a posture that it precludes the fair, dispassionate resolution of these issues by a jury," Judge Byrne concluded.

"The totality of the circumstances of this case . . . offend a 'sense of justice.' The bizarre events have incurably infected the prosecution of this case," he said.

In declaring a mistrial, Judge Byrne specified that "the defendants should not have to run the risk, present under existing authorities, that they might be tried again before a different jury."

Had it wished, the Government could have challenged in the United States Court of Appeals Judge Byrne's authority to base his dismissal of the charges on the evidence before him and his conclusion that a fair second trial would be impossible.