

Ellsberg Jurors Watched As If Under Microscope

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LOS ANGELES — Juror number seven sometimes has a yellow rose peeking out from her purse. Number one never smiles.

At least six jurors are now arriving in court every day with notebooks, and numbers nine and ten chat with each other a great deal. Alternate number three seems so interested in the Pentagon Papers that every time he cannot see a line on the screen from his corner, he speaks up and complains.

What does it all mean?

No one knows for sure. But in the Pentagon Papers trial of Daniel Ellsberg and Anthony J. Russo Jr., as in any controversial case expected to last a long time, the jurors are watched as if under a microscope.

Assistant prosecutor Warren E. Reese, for example, who has not said a word in open court since the trial began on Jan. 17, sometimes swivels around in his chair to scan the jurors' faces, presumably to see if they are paying attention.

Often they are not. Already, individual jurors have been spotted taking catnaps when the going gets slow.

The jury, a fundamental institution in the American judicial system, has always been important. But in recent cases with political overtones, it has also become a cause and a major focus of strategy on both sides.

The inadequate way that

Judge Julius J. Hoffman handled jury selection in the controversial Chicago Eight trial was cited by a federal appellate court in its reversal of the five convictions in that case.

Great Latitude

Judge R. Dixon Herman allowed defense attorneys great latitude in the selection of the jury for the Harrisburg, Pa., conspiracy trial last year of the Rev. Philip Berrigan and other Catholic militants. Perhaps unknown to the prosecution, the foreman of the jury in that case had gone to college with the father of a worker on the defense team and was sympathetic.

Because of publicly available materials and the assessments of black psychologists who attended jury selection, defense lawyers for Angela Davis knew a great deal in advance about the jury that acquitted her of murder and kidnap charges last year.

In this case, there have been two juries.

The first one, which was sworn last summer but then sat idle for four months during a fight to the Supreme Court over government wiretapping of a defense lawyer, was dismissed after an appeals court told U.S. District Court Judge W. Matt Byrne Jr. that it would be "foolish" to proceed with the risk of prejudice during the delay.

Both sides had plenty of outside information to rely upon in the first jury selection for this case.

The prosecution used the

resources of the FBI, which had agents posted in the courtroom. The defense, to flush out known factors like party registration, used a system custom-designed by a psychiatrist from UCLA to measure "bias" from the jurors' answers to questions.

But Ellsberg and Russo, as well as their attorneys, were unhappy with the first jury, which was relatively uneducated, uninformed about the war in Vietnam, and unaware of the Pentagon Papers.

In fact, sources close to the defense now confide that the wiretap issue was pressed less for its own merits than as a way to get rid of the original jurors.

Confirming the mystery and unpredictability of the whole process, however, the jurors proved the defense to be way off the mark.

After they had been dismissed, half of them attended a Christmas party given by the defendants, bringing along ornaments for the tree and proclaiming their sympathy for Ellsberg and Russo.

One member of the first jury invited Russo to spend an evening watching television with his family and passed along all sorts of information — like the fact that none of the jurors could understand the indictment in the case — and gossip — such as their resentment against Byrne, as a "cheapskate," who would not provide them with free coffee in the jury room.

The new jury is much more to the automatic liking of the defense.

Its members are somewhat younger, less connected with Southern California defense industries, of a more varied ethnic composition (there are three blacks, one Mexican-American and two born in foreign countries), and more outspokenly opposed to U.S. policy in Southeast Asia.

One juror, Wilfred R. Baltodano, in his mid-20s, has a 40 per cent disability as a result of his service as a Marine in Vietnam.

During the second jury-selection process, Baltodano said the United States "should come home peacefully and lick our wounds, so to speak."

The defense was delighted to have Baltodano on the jury, but the fact that the prosecution passed up an opportunity to knock him off has led to speculation that it knew something significant about him that he wasn't saying in court.

While some other jurors shift uncomfortably in their chairs or gaze into the distance with a fixed stare, both Baltodano and the only other man on the panel, Monnell Pittman, seem to be paying rapt attention.

Males to Be Won

Since it is generally assumed that some of the women jurors will be naturally sympathetic to the defense, especially to Ellsberg — who constantly casts a wry smile toward the jury box — the men are

ered to be the "main audience" that must be won over.

But no one really knows how this is done, and a courtroom observer cannot help but wonder:

- Whether the jurors will feel more empathy for the well-organized and terse chief prosecutor with slicked-down hair, David R. Nissen, or the chaotic and somewhat disheveled defense team led by Leonard B. Boudin, who, as one person put it, "always looks like he slept in his clothes."

- Whether they will be more impressed by a parade of military witnesses or a group of former government officials expected to testify for the defense; and

- What effect President Johnson's death and the Vietnam cease-fire might have on them.

There are as many theories as there are observers. In the meantime, without many reliable yardsticks, the pundits are listening for the jurors' elevator small talk, watching the sandwiches they eat for lunch and monitoring the slightest facial gesture.