

LOS ANGELES

IT IS MONDAY, June 5, 1972. "I'm just sick this morning," says a woman in the corridor outside the courtroom of U.S. District Judge W. Matt Byrne Jr. She is pointing to a banner headline in the morning paper, which announces that Angela Davis has been acquitted, up north in San Jose, of murder and kidnaping charges. Much of California's establishment, including Gov. Ronald Reagan, had long since decided that Davis was guilty, and so there is a distinct feeling here today that the forces of order have suffered a serious blow—inflicted by, of all things, the jury system.

This is more or less the starting point for another one of those quasi-legal, quasi-political adventures, the Pentagon Papers trial, as Byrne is convening hearings on the final pre-trial motions.

The U.S. Marshal for the Central District of California, Gaylord Campbell, is certain that things will proceed calmly. "It's not like Dillinger, you know," he tells a reporter new on the scene. "The man [Ellsberg] is on the street."

"The man" seems to have aged more than the year that has passed since the documents were published and he was indicted. He is dapper in a blue-cord suit, but a bald spot shows on the back of his head. (Later he will learn how to comb over that.)

Defense attorneys argue for hours, seeking early dismissal of the charges on a variety of grounds and a hearing on whether Ellsberg and Russo might be the victims of "selective prosecution." Chief prosecutor David R. Nissen is succinct; he insists, with a straight face,

Notes From

the

Ellsberg Trial

By Sanford J. Ungar

Part 5/27/73

Ungar, a staff writer, covered The Pentagon Papers trial for The Washington Post and is the author of "The Papers and the Papers."

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**Being fragments from a reporter's journal of a trial wherein Daniel Ellsberg and Anthony J. Russo Jr. are charged with conspiracy, espionage and theft for disclosing the Pentagon Papers and wherein the aforementioned case is dismissed because of government misconduct.**

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that "the prosecutor's motives are all filtered out through the grand jury system."

Some of the folks who will become regulars begin coming to court today. In the back row, for example, is Mr. Sullivan of the Los Angeles field office of the FBI, a short man with a ruddy face and an infuriatingly small handwriting—difficult to read if you get a glimpse—who comes and goes through the door quite often. Eventually, he will move to the prosecution's "family row" in front, and we will learn that he is a jolly fellow called "Sully" and that he probably knows more about Dan Ellsberg than Dan Ellsberg does.

*In between proceedings in the Pentagon Papers case, Byrne handles other chores. Today, June 19, while some of the spectators are knitting and others*

*are out for a coffee break, he sentences a 20-year-old convicted of draft evasion to three years' probation.*

*Ellsberg, apparently moved by the young man's plight, rushes out of the courtroom to talk with him, his brother and mother—all of them elated that the young man will not be going to jail. They don't seem to know who Ellsberg is, which appears to bother him, and they seem to want to be alone, which Ellsberg does not appear to notice.*

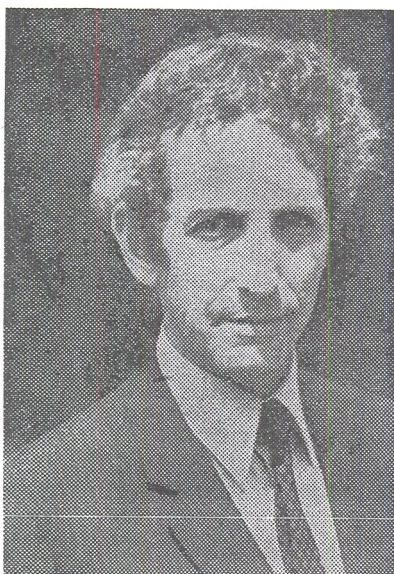
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**T**HERE IS A TENSE silence over the courtroom whenever Charles Goodell, formerly a United States senator and now one of Ellsberg's lawyers, rises to speak. Two of his former aides, now on the trial defense staff, fidget uncomfortably and exchange glances because Goodell sounds as if he is giving a Senate floor speech instead of a legal argument. It is too loud, too staccato, too rhetorical. For example, in responding to a prosecution accusation that the defense had leaked previously unpublished parts of the Pentagon Papers to Jack Anderson, he accuses Nissen of trying to "besmog this chamber with poisonous vapors."

Goodell's New York law firm charges a large amount for his time, but Ellsberg will later decide that it is not worth it and refuse to authorize payment of the Goodell bills. When the trial resumes after a several-month hiatus, caused by a battle over government wiretapping of a defense attorney or consultant, Goodell is no longer there. He is invited for one day toward the end as a spectator.

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Daniel Ellsberg

## ELLSBERG, From Page C1

Prosecutor Nissen is perhaps the gutsiest individual ever to appear in an American courtroom. When the judge demands that each side provide its formal interpretation of a particular clause of the espionage act, Nissen simply says, "I don't understand what Your Honor's problem is." When Nissen loses patience with defense motions, he merely declines to respond. (At the very end, as the case starts to go down the drain because of extraordinary government actions against Ellsberg, he will tell Byrne that the defendant "has no constitutional right not to have his psychiatrist's office burglarized.")

The prosecutor runs a tight ship. In contrast to the chaotic defense side of the courtroom, the government table never has a piece of paper out of place. Nissen and his two associates invariably file in just two or three minutes before court is scheduled to begin. They never touch their pitcher of water.

Nissen is so neat and impeccably dressed and thoroughly pulled together that he becomes an obvious target for stares of amazement. He seems to plaster down his short black hair with greasy kid stuff (a theory develops that one juror, a Vietnam veteran, suddenly begins to imitate this hair style at mid-trial), and one young woman spectator tries to ride the elevators with him to determine whether he shaves between his eyebrows. On his feet, whether arguing or questioning, he cuts the air with his hands as if he is mincing a giant onion into a million pieces; when moving in for the kill, he begins to tap his fingers on the lectern.

Some feel that the jury might mistake

his efficiency for unmitigated hostility, but Nissen doesn't seem to worry about such matters. Nor does he seem to fret about alienating the judge, his old boss in the U.S. Attorney's office for Los Angeles. On the contrary, there are times when it looks certain that if Byrne doesn't shape up, the prosecutor might hold him in contempt at the end of the trial.

IT IS AUGUST 9, 1972, and the trial is over—for a while at least—because Supreme Court Justice William O. Douglas, after a hearing in Yakima, Wash., said that a suddenly discovered government wiretap raises serious procedural issues (for example, whether the defense is entitled to help the court determine its relevance) which must be resolved before it continues.

There are mixed feelings all around. After all, didn't both sides—government and defense alike—want this case to be going on during the 1972 presidential campaign? The defense was planning to accomplish some education on the war in Vietnam, the prosecution to take out after a major strain of illegality. (During the campaign, in fact, it will become a common Republican theme to compare Ellsberg's "theft" to the burglary and rugging of Democratic headquarters at the Watergate.) Defense attorneys will eventually concede that they pressed the wiretap appeal primarily because they did not trust the defendants' fate in the hands of the first jury and hoped that a delay of several months would require selection of a new one. It eventually does.

Dan Ellsberg carries a hairbrush in his briefcase so he can always prepare quickly for the television cameras on the courthouse steps. There's another brush stashed under the defense table—can it be that somebody there is pretending to tie his shoelaces but really primping for the jury?

THE MOST POPULAR man in the courtroom is the judge, no doubt about it. The new jurors are sworn in on Jan. 17 and immediately begin cooing over him. He could say "habeas corpus," and if he did it with that twinkle in his eye, and with his hands folded against his cheek, and the customary slide of his chair to the jury-box end of the bench, it would turn them on. (One of the television drawings that the viewers will never see captures him perfectly in this pose.)

The jurors should perhaps be told that while Matt Byrne is a bachelor, he is spoken for—many times over. In fact,

we learn to watch for one of his girlfriends to show up in the courtroom on a Friday. That is generally a sign that we may get out a little earlier than usual. (He never does learn, though, how every afternoon minute counts when you are on the West Coast and trying to meet deadlines in the East.)

This is Byrne's first major politically oriented case as a federal judge, and there are moments when he seems to be having a very unpleasant time up there. Word has it he has worked very hard, and his chambers are so consumed with issues of "national defense" and "conversion of property" and "conspiracy to defraud" that at one point, his two law clerks stop speaking to each other over a policy disagreement. The judge is said to be an ambitious man, eager for bigger

and better offices to hold. One might expect that to lead him to put some of his decisions on the momentous issues in the case on paper, so he can break into the lawbooks. But not one of these decisions is handed down in writing. He is constantly demanding case-law precedents from the lawyers for anything they want him to do, but he refuses to make any of his own. Maybe that is the real path toward satisfying ambitions, especially if you are a Democrat and the Republicans control all the access.

Some of the prosecution testimony and defense cross-examination of government witnesses is maddening. For a time, one gets the impression that Brig. Gen. Paul F. Gorman—who has been temporarily assigned to the trial by his superiors—will never leave the witness stand. Ever. Today, Jan. 24, he drones on endlessly, seeking to prove the hypothetical proposition at the heart of the espionage case: that if a "foreign analyst" had gotten hold of the Pentagon Papers in 1969, when Ellsberg and Russo first photocopied them, this could have caused grave "injury" to the United States and "advantage" to a foreign power. That proposition had been more or less rejected in 1971, during civil suits against the newspapers that published the documents, but now the country has another try.

From the resources and brass being poured into the prosecution, you know that somebody up top has to care a great deal about convicting Ellsberg and Russo.

JUROR NUMBER ONE, Cora C. Neal, who is just about the first person we see every morning now, looks nasty. Surely she will be the

hanging juror, the one who would convict. She even complains about a television sketch artist because he gets pencil shavings on her chair. Now and then, I think I've made eye contact with a juror—in my fantasy existence, which flourishes while I am sitting here endlessly, I become convinced that someone in the second row of the jury box is actually welcoming me back after I've been away for a few days—but not Cora Neal. Just a cold stare.

It is Feb. 8, and Gorman is still on. The delay has been caused by the discovery that the Pentagon and the Justice Department had withheld from the court internal studies of the Pentagon Papers that contradict the basic prosecution premise of their link to the "national defense." The general is trotting out his vocabulary on cross-examination, and today the judge asks him to define his terms: verbiage, generically, transmutation, communal-



Judge W. Matt Byrne Jr.: He could say "habeas corpus" and it would turn the jurors on.

ity, inter alia, ipso facto, genre, modus operandi, coup d'etat, pinnacle, benchmark and carte blanche. "White card" is his literal definition of "carte blanche"; that should clarify things nicely for the jury.

By the way, we will learn later that Mrs. Neal is not the meanie she looks to be. Apparently, each morning, before marching into court, she clowns around in the corridor and lines up all the others in military fashion. She has simply decided that it would be wrong to smile in court, and so she wears a deliberate frown all day. As for her

views on the case—"I took a salesmanship course once, and I was prepared to go in there and sell them all on the innocence of Ellsberg and Russo."

"Wow, this place is like a church" is Katherine Barkley's first reaction on arriving in Byrne's courtroom, which has alternating floor-to-ceiling panels of green marble and dark brown wood. It is one of those grandiose, fluorescent-lit rooms where dramatic events occur but the acoustics are terrible, so there are always half a dozen people leaning forward with hand cupped on ear.

Ms. Barkley, Tony Russo's wife but never to be known as "Mrs. Russo," is one of the freest spirits in the whole affair. She is frankly bored with court and often stays home to write poetry. In February, she begins selling organic, meat-free sandwiches to the defense staff, public and press (a 25-cent surcharge for reporters because "you can afford it") as her contribution to the defense fund-raising effort. This grievously offends the blind man with the food concession in the courthouse snack bar, and before long word is passed from the judge, through the marshal, that she should stop. She writes to Byrne, saying "no" and asking if he would like to buy a sandwich.

WHEN EVERYONE first arrived in Los Angeles for the trial last summer, the "Ellsberg people" set up shop in Bunker Hill Towers, a Holiday Inn-like apartment complex downtown, just a few blocks from the courthouse and overlooking the intersection of the Harbor, Hollywood and Pasadena Freeways. The "Russo people" wouldn't go near it, not even for meetings, because they learned that it was the result of an urban renewal project that destroyed an old chicano neighborhood, and there were rumors that it was owned by some "rich Republicans."

By now, however, feelings have melted; the Russos have moved in (it says "Barkley" on the door), most of the reporters covering the trial live there, and it is the focus of much of the life created by the event. One morning at the swimming pool, where

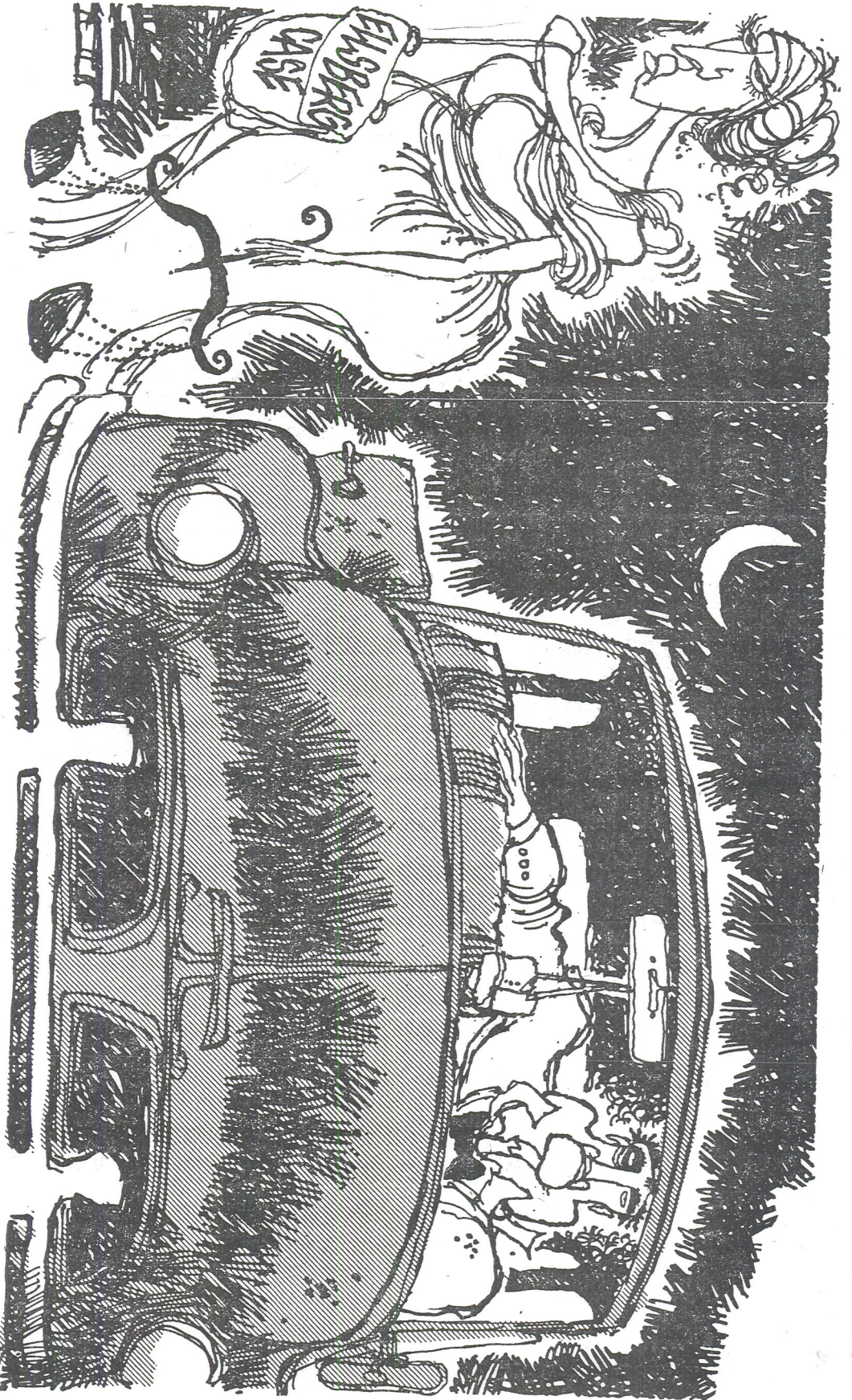
he has just completed his 40 laps, Dan Ellsberg announces that he is now down to his "Marine weight" and is toying with the idea of coming to court in uniform. Leonard B. Boudin, the chief defense counsel, and his wife Jean never draw the drapes in the living room of their apartment facing the courtyard, so in the evening on the way to the supermarket in Center Tower we can sometimes see Boudin and Ellsberg quarreling or otherwise get some feel for what is coming the next day. Probably one of the best sources of gossip is the man who runs the dry-cleaning concession. And then we can always check the garage to see if someone's car is in its spot.

The worst day to be at Bunker Hill is Feb. 21, when, at about 6:45 a.m., we have a little earthquake. The West Tower sways, the mirror in the bedroom swings and there is a low, eerie grinding sound. For weeks afterward the elevators still do not seem to work properly, and the earthquake, like the "altitude" in Denver, becomes a handy explanation for people's assorted aches and pains.

If there is only one thing that I would like to teach the folks back East about when I get home, it is time zones. Sure, Victor, it's great to hear from you, but do you realize that for me it is 7 o'clock and this is Sunday morning?

IT IS FEBRUARY 27, 1973, and as the defense case opens today, Leonard Weinglass (at least three times, Byrne has called him "Weinstein," just as Judge Julius Hoffman did during the Chicago Seven conspiracy trial) promises the jury that there will be "a long list of very knowledgeable and expert people" as witnesses.

Long isn't the word for it. The defense has several problems in this regard. There are some people who want to testify, for various selfish reasons like getting themselves on the public record against the war now that it's easy to do so. Ellsberg, a long-time government adviser and researcher and in his time a card-carrying mili-



Peters in the Daytona Daily News

tarist, wants to have powerful, influential people on the witness stand—former Kennedy and Johnson advisers, professors at well-known universities, men who don't look like they're wearing a tie for the first time in a month.

Russo, on the other hand, considers most of Ellsberg's friends and favorites to be "war criminals." He prefers to present people who've been to Hanoi, who have never held a policy-making position with regard to the Vietnam war, who will say some brutal and shocking things to the jury.

The dispute on this issue has been going on for months, and the solution is a rather peculiar compromise: not a few of each, but lots of everything. "Overkill" becomes a favorite description.

Weinglass puts some of the defense contentions with admirable simplicity: "In this country we may freely exchange the books and information which our government produces . . ." The Pentagon Papers contained only "a few isolated military facts which bore no direct reasonable relationship to the national defense . . ." The information in the documents was "necessary to the ongoing debate about Vietnam" in 1969, when Ellsberg and Russo photocopied them.

The first defense witness, retired Adm. Gene LaRocque, has obviously been warned about prosecutor Nissen's cross-examining skills. Asked for all of the notes he made in preparation for testimony, he says he tore some of them up in tiny pieces and flushed them down the toilet at the Biltmore Hotel. We wonder if there won't be a plumber as a prosecution rebuttal witness.

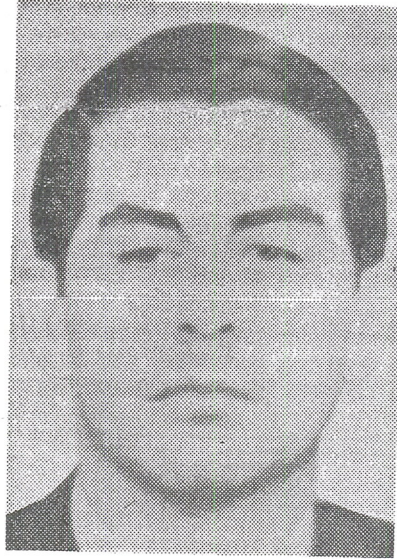
One morning, all the defense researchers and legal workers, mostly in their twenties, who have customarily come to court in sandals and blue jeans, suddenly show up with coats and ties or dresses. This is the result of a meeting the night before in which it was decided that the sloppy defense image desperately needed to be improved. A touchy matter, since one of the implicit principles of the defense is that one should not have an exaggerated respect for rules and regulations.

The coats and ties last less than a week.

SOMETIMES, WHEN prosecution objections to Leonard Boudin's questions have been sustained about 14 times in a row, I want to scream out a

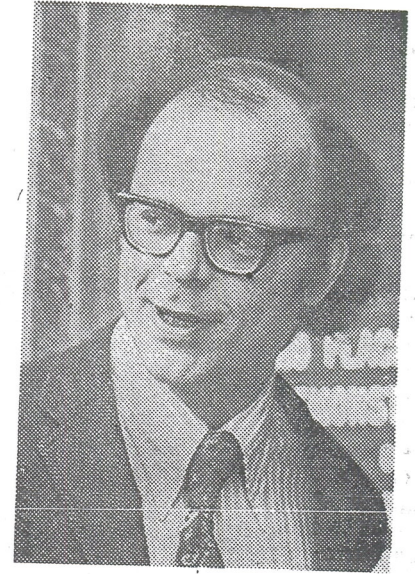
suggestion on how he can get the issue past the judge and into the record. One of those times is today, March 13.

Boudin, an early member of the Lawyers' Guild, has an impeccable record for protection of people's civil liberties, and he has been involved in many



Prosecutor David Nissen: "perhaps the gutsiest individual ever to appear in an American courtroom."

of the major recent political cases, including the Spock trial and the Harrisburg conspiracy (Berrigan) case. But he is primarily an appellate lawyer, and things certainly do move slowly when he is behind the lectern. Except for Weinglass, in fact, the defense has no experienced trial lawyer on hand. This is the first time for Charles Nesson, the Harvard Law School professor (although the judge seems to like him best of all). Peter Young coins a splendid phrase now and then, but he, too, fumbles often. Dede Donovan is efficient but meek.



Anthony J. Russo Jr.

For all his procedural difficulties, Boudin turns out to be the clear favorite of the jurors, who love the way he puts his glasses on and takes them off, punctuates his performance with mumblings of "quite" and "precisely" and generally plays Clarence Darrow.

One of the best-known spectators at the trial is a woman, identity unknown, who wears a bright green wig, peace buttons as earrings, and odiferous, tattered clothes with dollar bills pinned on in various strategic locations. She lectures the rest of the audience during long recesses, and one night, after promising to do so, she shows up in the audience on the Merv Griffin Show. At another point she asks Jane Fonda for a kiss and, when refused, settles for an autograph.

"Danny boy," she tells Ellsberg, "the only thing to do is buy the jury"

IT IS APRIL 9, and Nissen asks Tony Russo, on cross-examination, why Russo, Ellsberg and the others who helped them photocopy the Pentagon Papers cut the "Top Secret" markings off the copies. "Because," Russo replies glibly, "the 'Top Secret' marking could scare somebody, if they didn't know how meaningless it is."

Jurors smile. Judge Byrne orders the answer stricken from the record.

Nothing gets harder after a time than an uncomfortable, poorly designed courtroom bench. Normally, the press sits in comfortable chairs at a table in the well of the court. But Judge Byrne has found out that we can overhear supposedly pri-

vate conferences at the bench that way. Besides, defense consultants need the chairs and the table is a perfect place to put the movie screen on which to show the Pentagon Papers.

We all shift and curse and struggle on the benches, but only three women reporters find relief. They buy cushions—marked "PRESS EXHIBITS 1, 2 and 3" and kept for them by the clerk—and ceremoniously name them in honor of Edmund Karl Heine, the World War II German agent whose espionage conviction was overturned because the information he had revealed was already in the public domain.

GEN. ALEXANDER M. Haig Jr., the Army vice chief of staff, testifies on April 25, and says absolutely nothing. But he is in uniform (a first), and the four stars on each shoulder sparkle. He is the first witness who seems to provide competition with the judge for the jurors' affections.

The puzzle is whether there is any reason for his appearance besides showmanship. He acknowledges, as reporters ride the elevator with him, that he hasn't read the Pentagon Papers. Could it be that the government fears that its case is going down the drain?

By April 27, we've been sitting for a long time and "almost" has become a totally meaningless word. Now the prosecution rebuttal case is starting to drag, and things have been interrupted once again because the prosecution failed to turn over to the court some government investigations of Ellsberg.

But there is hope. Nissen has made a mysterious in camera (secret) filing with the judge, who has rejected it and plans

to turn it over to the defense and public this morning. During one of those long pregnant pauses, while all trial participants are huddled at the bench, the press corps begins to speculate wildly about what this could be. Something to do with Watergate? Never. A message offering Byrne the directorship of the FBI, for which he is said to be a leading candidate? Impossible. Another wiretap? Not at this stage of the trial.

When the judge reveals that it is a memo from the Justice Department, alleging that Watergate conspirators E. Howard Hunt Jr. and G. Gordon Liddy burglarized the office of a Beverly Hills psychiatrist who once treated Ellsberg, there are gasps of disbelief, then uncomfortable laughs, and then a dash for the phones. This is, of course, the beginning of the rather unattractive end of the trial. We put a name to it: Watergate West.

This event is a watershed, seeming to teach that one should believe his own worst suspicions and be skeptical of no outrageous allegation. Because they were all true; as it would turn out, Byrne had been offered the FBI directorship during the trial and he went twice to talk with White House adviser John Ehrlichman about it. And there were new wiretaps. And more.

MAY 11, 1973—This time it really is over. In a radio interview, Ellsberg and Russo say it is now time to put "the real criminals" on trial. They feel that the conspiracy was within the government, not against it. "The demystification and desanctification of the President has begun," says Ellsberg. "It's like the defrocking of the Wizard of Oz."