

THE NATION

ton in 1971—were part of a trend toward repression by the Government. Mitchell accurately enough accused the protesters of "bullying people, shouting down those who disagreed with them," but he also venomously compared them with "Hitler's Brownshirts." He seemed unflustered when the U.S. Supreme Court last June declared some of his wiretapping orders unconstitutional.

Last week Mitchell was shaken by the indictments and looked years older than a few weeks ago. His voice trembled as he protested the grand jury's decision: "I can't imagine a more irresponsible action." Ironically, an often-cited Mitchell statement can only haunt him now. Defending the Nixon Administration, he told civil rights activists in 1969: "Watch what we do instead of listening to what we say."

Whether Nixon feels he has been be-

TRIALS

Pentagon Papers: Case Dismissed

I HAVE decided to declare a mistrial and grant the motion to dismiss." With these 13 terse words, Judge William Matthew Byrne Jr. ended one of the most extraordinary legal—and in many ways, illegal—proceedings in the history of American justice.

By his ruling, the judge cleared Daniel Ellsberg and Anthony J. Russo Jr., both of whom freely admitted that they had secretly copied and leaked the Pentagon papers, of eight charges of espionage, six of theft and one of conspiracy. But since the case had never reached the jury, the two were not declared innocent by acquittal, nor had they been vindicated by their defense

that Ellsberg, then a consultant with the Rand Corp. "think tank" in Santa Monica, Calif., was copying parts of the Pentagon papers at night on a Xerox machine in an advertising-agency office.

At about the same time, President Nixon became incensed by various news leaks and ordered the FBI to stop them. As the bureau's just-appointed director, William D. Ruckelshaus, now admits, the FBI failed in that mission; it did, however, set up a number of wiretaps without any court authorization. One of them was on the home phone of Morton Halperin, then a consultant for the National Security Council, and on that tap, the FBI heard some conversations by Ellsberg. Fully a year ago, Judge Byrne had demanded an account of all Government eavesdropping on Ellsberg, but Ruckelshaus disclosed the tap on Halperin only last week—and added the incredible news that all the tapes and logs of the overheard conversations had mysteriously disappeared from the files of both the FBI and the Department of Justice.

Valid Changes? All of these sensations—following the disclosures that the CIA had helped the Watergate raiders to break in to the offices of Ellsberg's former psychiatrist—took the trial far from its original purpose. The Government had been determined to prosecute Ellsberg and Russo as criminals. The defense was equally determined to raise the broadest legal and constitutional issues. Was a charge of espionage valid when the defendants had given no information to a foreign power? (Ellsberg had returned the actual papers to the Rand Corp. files.) Could theft be alleged when the culprits had stolen nothing but information? Could conspiracy be proved if, as many lawyers believe, the statute defining it is so loosely drawn as to be unconstitutional?

All these matters weighed heavily on Judge Byrne. Then, three weeks ago, the prospect that the case would end in a dismissal surfaced with Byrne's own disclosure that he had visited John D. Ehrlichman, who had offered him the directorship of the FBI, and that he had met President Nixon at the Western White House. The defense immediately demanded dismissal of the case. The judge refused, saying that he had declined to discuss the FBI offer with Ehrlichman and had done nothing improper.

As disclosure followed disclosure, the courtroom air became filled with defense cries of "taint" and motions for mistrial and dismissal, but Byrne hesitated. He was troubled because there were no very direct precedents to guide him. Indeed there could hardly be any, since both the charges and the revelations of the Government's



DANIEL ELLSBERG & WIFE, JUROR & ANTHONY J. RUSSO JR.
The circumstances offended the sense of justice.

trayed by Mitchell in the Watergate affair or whether the two men confided fully in each other about the scandal all along is still their secret. In demanding that everyone who has any complicity in Watergate be prosecuted fully, Nixon may well be hastening the day when Mitchell faces another legal ordeal. As for so many in this disheartening affair, the personal agony for both men is acute.

Richard Nixon pledged that his nominee as Attorney General, Elliot Richardson, and the special prosecutor Richardson has promised to appoint, will make sure that the guilty are punished. "They will get to the bottom of this thing," Nixon vowed. Yet in another sense, prosecutors and the courts got to the bottom of Watergate last January when seven insignificant men were convicted. A more momentous and agonizing question remains: Will anyone now get to the top of it?

based on the assertion of the people's right to know. Even so, the victory was so signal that as Byrne rose to leave the bench in U.S. district court in Los Angeles, the assemblage in the crowded courtroom rose, applauded and cheered him. Patricia Ellsberg rushed over to her stunned husband and asked plaintively: "Haven't you got a kiss for your girl?" (He had.) Defense Counsel Charles Nessen ostentatiously broke out a big cigar and lit it. The prosecution team filed out in tight-lipped silence. Later, a majority of the jurors said that they would have voted for acquittal if they had been given the chance.

Judge Byrne, 42, a blond and sporty bachelor who once directed President Nixon's Commission on Campus Unrest, came to his decision after 4½ long months of trial. Not until its final weeks were the murky beginnings of the case disclosed. Perhaps as early as 1969, and certainly by early 1970, the FBI knew

interference and misconduct were unprecedented. Defense Counsel Leonard Boudin tried to cajole Byrne with the coy suggestion: "I'm hopeful that in future when I'm asked to cite a precedent, I'll be able to cite one made by Your Honor in this case."

Byrne had three basic alternatives: 1) declare a mistrial, which would expose the defendants to retrial before a new jury; 2) dismiss the indictments in such a way that the government could never again prosecute these defendants for the same alleged offenses (these two might be combined); or 3) send the case to the jury and decide later whether to throw out a possible guilty verdict if further investigation incriminated the Government still more deeply.

Only a Glimpse. When Byrne mounted the bench to announce his ruling, the courtroom was packed. The corridors were filled with pass holders who had been unable to squeeze in. With the jurors absent during procedural arguments, the jury box was crammed with newsmen. Byrne began briskly: "I am prepared to rule on the motion for dismissal."

First Byrne offered the defense a choice: Did it want to press for dismissal or take the risk of letting the case go to the jury for a final verdict? It took Boudin & Co. only a one-minute huddle to answer: "Dismissal." Byrne had obviously anticipated this and had the appropriate ruling prepared. He read it quickly but clearly. The Government, he noted dryly, had made an "extraordinary series of disclosures" regarding the activities of several agencies. He had tried to develop "all relevant information" about these activities, but "new information has produced new questions, and there remain more questions than answers."

Of the special investigative unit that White House officials had set up, and which burglarized Psychiatrist Lewis Fielding's office, Byrne said: "We may have been given only a glimpse of what this special unit did, but what we know is more than disquieting." As for the CIA's assistance, he said that the agency was "presumably acting beyond its statutory authority and at the request of the White House."

"No investigation is likely to provide satisfactory answers," he said, "where improper Government conduct has been shielded so long from public view"—and where the files are missing or have been destroyed. "It is the defendants' rights and the effects on this case that are paramount," Byrne declared, "and each passing day indicates that the investigation is further from completion as the jury waits."

The charges against Ellsberg and Russo raised "serious factual and legal issues," and Byrne said he would have liked these to go the full course—meaning a jury verdict and possibly appeals to higher courts. But, he concluded, "the conduct of the Government precludes the fair, dispassionate resolution of

these issues by a jury. The totality of the circumstances of this case offends a 'sense of justice.'" Hence he ordered a mistrial and dismissed the indictments. One of the few precedent cases that Byrne could cite was one that reached the Supreme Court in 1952, in which Justice Felix Frankfurter established the doctrine of dismissal if Government action "shocks the conscience of civilized men." Byrne, a civilized man, was plainly shocked.

When the courtroom applause died, there remained the unresolved questions about the legality of the Government's charges—and of Ellsberg's actions in taking and releasing the documents. In the corridors, an ugly sus-



JUDGE WILLIAM MATTHEW BYRNE JR.
More questions than answers.

picion was voiced by defense counsel: perhaps the Administration had deliberately flunked its last assignment from Byrne, about the Halperin wiretap, because it was being increasingly embarrassed by the disclosures that Byrne was forcing. By failing to meet Byrne's demands, the Administration had given him good reason for dismissing the case and had thus forestalled any further investigation that he might order. It had thereby plugged the leaks of Watergate West.

Ellsberg and Russo plan to sue Government officials for \$2,000,000 in damages and expenses (their legal costs already total \$900,000). For this process, they threaten to subpoena the President himself. In that, they are not likely to succeed, but the Pentagon papers trial, in another guise, may be in the courts and the headlines for months or years to come.

OPINION

Is Everybody Doing It?

A national motto seems to have changed from *E Pluribus Unum* to *Omnnes Idem Faciunt*—Everybody's Doing It. The President himself has helped propagate that notion. In his TV speech on Watergate two weeks ago, he assured the nation that "both our great parties have been guilty of such tactics . . . the campaign excesses have occurred on all sides." Last week Vice President Agnew concurred. This is not the first time that governments have been linked to scandals, from Teapot Dome on down, said Agnew.

In a strange way, Nixon and Agnew were thus close to agreeing with the line pushed hard by the far left, that it is the entire system, the Establishment and all its works, that is to blame for whatever is wrong in the U.S. Most of the public appears to agree, at least about politics. In a Gallup poll taken just after the President's TV talk, 58% of the respondents said that there was little difference between the corruption of the Nixon Administration and that of other Administrations in the last 25 years. People who were queried last week voiced similar viewpoints. Said Mrs. James Aycock, a Gastonia, N.C., housewife: "If we got rid of all the shady people in Washington, who'd be left to run the Government?"

James Howell, chief economist of The First National Bank of Boston, shrugged off the newest revelations. "Who are we kidding here? Sam Rayburn and Lyndon Johnson did everything in the book. They just never got caught."

Bad Actors. Current news of public officials indicted or newly convicted of crimes sustains the ancient cliché of democratic life—that politics is a dirty business. Yet most professional politicians and a great many other observers of American life are convinced that despite all the depressing evidence, American politics is not endemically corrupt, and that Watergate is not to be used for glib generalizations.

How to prove it? The proof that something is *not* happening is always difficult. Without being naive, longtime watchers of Congress and the bureaucracy insist that what is really remarkable is the general absence of corruption. Most of the 100 U.S. Senators and 435 Congressmen live in modest circumstances, work hard, and earn every penny of their scarcely extravagant salaries. So do the vast majority of the unsung bureaucrats and local officials. In the past dozen years, only a handful of Senators and Congressmen have been accused—let alone convicted—of corruption or outright crimes. Given the parade of temptations, the siren appeals of lobbyists and special interests, it is a wonder not that so many of them are "doing it" but so few.

Of all the accused in the Watergate

THE NATION

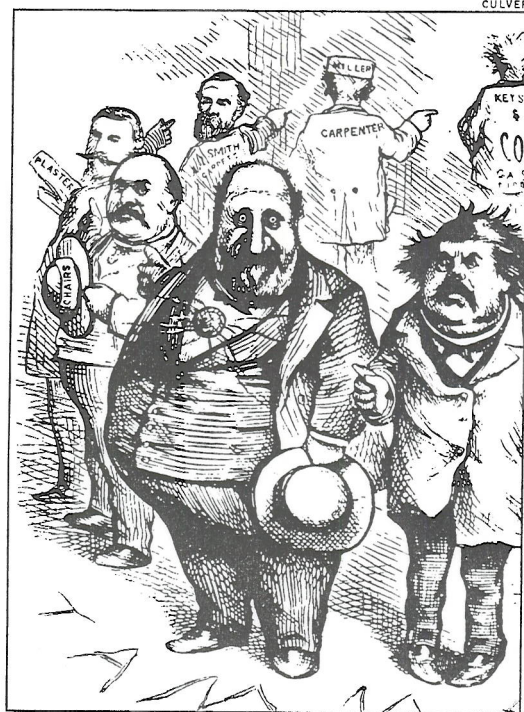
scandal, none was elected to political office. Almost all were appointed by Nixon. A glance at the list of alleged conspirators recalls Sam Rayburn's grumble when he considered John F. Kennedy's best and brightest: "I'd feel a lot better about them if one of them had run for sheriff once."

Says Senator Philip Hart, the Michigan Democrat: "The level of decency among politicians is at least as high as it is among lawyers. Most of the bandits and bad actors in Watergate are not politicians. Whatever they are, they're not politicians." Representative John Anderson, an Illinois Republican, provides the bottom line: "Watergate was an aberration . . . it should not be viewed as some new evidence that all the timbers are rotten."

Corruption certainly exists, but it is important to make distinctions—between larger and lesser transgressions, between various motives and aims. The big city machines, forever symbolized by Boss Tweed, were rotten, but some also performed necessary social functions. The Teapot Dome affair of Harding's Administration, the freezer and

coat giveaways of the Truman and Eisenhower eras, were corrupt acts based on organized greed, some massive, some relatively modest. Watergate is a far greater malignancy. These conspirators wanted to short-circuit the electoral and judicial processes, to rewrite the book on national security, to manipulate the standards of ethics and morality.

Past Presidents, including Kennedy and Johnson, have of course stretched their powers to the limit. But nowhere in U.S. history does there seem to be the systematic breaking of laws by White House officials and the involvement of Government agencies that characterize the Watergate affair. As the *Charlotte Observer* put it, if the American majority believes that Watergate is "just a somewhat exaggerated version of politics as usual," then "the American political system is deathly ill." Perhaps the most important thing to rescue from the Watergate mess is the public's ability to make distinctions, both moral and legal. Fortunately, despite the pervasiveness of the everybody-is-doing-it line, the U.S. still appears to be shockable.



THOMAS NAST CARTOON OF BOSS TWEED

THE PRESIDENCY/HUGH SIDNEY

Some Lessons to Be Learned

THERE has been a liberation of sorts in Washington. The White House cops smile and sometimes even give a "Good morning." Calls to obscure aides, which used to disappear into nothingness, are sometimes returned. You can get a White House staff member to admit that President Nixon may have made a mistake.

The federal bureaucracy and even the Congress feel, at least for the time being, a certain release from political fear. The instrument of oppression has been dismantled. Its size and pervasiveness were sensed but could never be accurately documented until the Watergate dam broke. Now the city is being flooded with stories of an arrogant and ignorant White House cadre that amassed and abused power.

The larger question remains: Was it done on the direct orders of Richard Nixon? But no matter who may have ordered what, the lessons to be learned are many.

One of the lessons should be on the folly of filling the Cabinet with pliable and obedient men of limited experience and stature. One letter to a Cabinet member from John Ehrlichman began something like this: "The President has asked me to tell you how displeased he is with what you have done about . . ." The Cabinet member was petrified that this letter would get out. "Can you imagine what would have happened under Ike or Johnson if such a letter had been received?" mused a White House man. "Their Cabinet members would have taken the White House apart."

Another lesson to be learned is that the White House cannot be considered the repository of everything that is wise and right. The legend of omniscience should not be allowed to grow again. The list of adult men who received memos, phone calls or visits from presidential aides and responded with unquestioning haste is staggering. One former Nixon aide, still so young that he is back in college, remembers his own astonishment at what action a call from him could bring in a department. It became a game to many of these people who had never savored such authority.

Their special joy was intoning "the President wants . . ." That was enough to persuade many doubters. Another line that gained currency was "I have a mandate from the Pres-

ident . . ." What that meant nobody really knew, but it sounded authoritative. In case of defiance, the talk sometimes got rougher. One Nixon aide heard Ehrlichman bark: "If he won't do it, fire him." Another venomous official told doubtful minions: "Remember, you are all serving at my pleasure."

The monster grew, and we finally had the tawdry spectacle of the State Department throwing open its secret files to a shadowy unknown from the White House, of the CIA plunging into an illegal assault on this country's own citizens, of young officials being ordered to tell lies, of the operating head of the FBI burning evidence. "Can you imagine what J. Edgar Hoover would have done with those files if Ehrlichman and Dean had even hinted that he burn them?," chortled a White House survivor.

Buried in the Watergate tragedy are a few small tales of heroism. There is the Administration figure who got a directive from the White House that went against his agency's policy. He balked. "I'm ordering you," declared the White House aide. "By whose authority?" "The President's," came the answer. "That's funny," answered the bureaucrat, "I thought I was acting under the same authority."

Once the White House wanted immediate release of some new guidelines for business depreciation. "To hell with them!" roared then Deputy Secretary of the Treasury Charles E. Walker. He had an agreement with Congress that no action would be taken without prior consultation. He was on the phone until 2 a.m. and had to drag in most of the Administration's top economic advisers before he won his point of honor. But he did win.

While we are rummaging in the wreckage for heroes, it may be time to step back and give a cheer for the amorphous and maligned bureaucracy—the same old bureaucracy that has been alternately humiliated, squelched, ignored and attacked by all modern Presidents.

The CIA operatives in the ranks sounded the alarm about E. Howard Hunt Jr. when their superiors didn't. The FBI agents on the line forced out L. Patrick Gray III when he admitted he burned the files. Justice Department investigators whispered their dismay over the cover-up at higher levels. If Watergate yields dividends, it could be that next time a civil servant hears the line "I have a mandate from the President . . ." he will alert every one of his better instincts and ask every question he can think of before he acts.