

Disagreeable to All

More often than not, U.S. judges are magisterial black-robed referees who leave the legal combat to the attorneys appearing before them. Sometimes, however, they join the fray, as in the just-completed Watergate trial in Washington, where both prosecution and defense seemed so reluctant to mix it up that Judge John J. Sirica was moved to do his own questioning (see THE NATION). In the Pentagon papers trial in Los Angeles, it is Judge William Matthew Byrne Jr. who has been forced into taking on both sides.

Unlike the Watergate case, there has been no lack of aggressiveness by either prosecution or defense. The Government is assiduously prosecuting Daniel Ellsberg and Anthony Russo, but it insists that the Pentagon papers affair is a narrow case of espionage, theft and conspiracy. The defense, meanwhile, has sought to litigate the causes and ills of the Viet Nam War. As a result, the opposing attorneys have spent an increasing amount of time arguing with Matt Byrne.

13 of 20. Nonetheless, Byrne has coolly kept control of the proceedings—and his temper. But it has been a close thing in recent days. Since last April, he has been asking if there were any government studies indicating that the national defense had been unharmed by publication of the papers. Prosecutors steadfastly denied knowing about any such studies. Then a Defense Department witness confirmed their existence. Angrily, Byrne excused the jury and demanded copies. The prosecution dawdled. The first excuse was Lyndon Johnson's funeral, then bad weather was said to have delayed an Air Force jet bringing the reports from Washington.

As the days passed, Byrne's cholera mounted. With increasing disdain he denied prosecution motions to block revelation of the reports. The last of the studies finally arrived, and after reading the five-inch stack of documents, Byrne ruled last week that the bulk of them had to be turned over to the defense. Reason: They tended to prove the innocence of Ellsberg and Russo on at least some of the charges. According to the Government analyses, said the judge, 13 of the 20 documents that Ellsberg and Russo released did not damage the national defense in any way—a seeming contradiction of what Government witnesses have been saying. Since a key part of the prosecution's charges rests on espionage laws that require proof that the national interest has been threatened, the development is a significant plus for Ellsberg and Russo.

Defense lawyers next sought to prove that Government officials purposely suppressed some studies. Indeed, Edward A. Miller Jr., a retired Air

Force lieutenant colonel who wrote one of the reports, testified that he had seen a memo indicating that such studies should be "removed from the files." Miller added that he had been told the same thing by the memo's supposed author, Charles W. Hinkle, the Pentagon's director for security review. Hinkle, who was Miller's direct superior, then took the stand to say he had "no recollection" of anything of the sort. That plopped the matter right back in Judge Byrne's lap and left him once again in the middle. If he concludes that the Government did try to withhold the studies, it would greatly add to the

LOS ANGELES TIMES



JUDGE MATT BYRNE
Into the fray.

importance of the studies' evidence and might leave the prosecution open to censure by the court.

It is not that Matt Byrne is anti-prosecution. In this trial, his firmness has been felt by both sides. "Confine yourself to the argument," he sharply instructed Defense Lawyer Leonard Boudin, who was trying to slip in extraneous material. And when Defense Attorney Charles Nesson stumbles in his questioning, as he seems to do often, the judge has dryly admonished him: "Bad form, Mr. Nesson. Rephrase it."

Byrne shares the federal bench with his father, now a senior judge in the same district court. Before the younger man came to the bench he served for three years as U.S. attorney for Central California, a job he filled so well that he was generally conceded to be one of the two or three best U.S. attorneys in the country (out of a total of 93). His record was so impressive that at the age of 40 he was appointed to his present post by President Nixon—despite the fact that he is a Democrat.

When the relatively liberal judge's name was drawn for the highly publicized Ellsberg-Russo trial, just 2½ months after his appointment, the defendants cheered their luck in expectation that they would get fair treatment. Byrne's own reaction: "My God!" He saw right away the work load and controversy that would be involved. It has propelled him into the national spotlight—and all but ended the handsome bachelor's once-active night life. He also misses the hunting and fishing trips that used to take him frequently to Baja California. Noted for his careful preparation, Byrne, 42, now spends his nights and weekends poring over the huge volume of reading involved in the trial. He has read all 7,000 pages of the Pentagon papers, plus thousands more pages of grand jury testimony and research. "He's determined not to make a mistake," says one close associate.

That being so, why has he decided to take such an active judicial role, a tactic that carries greater risk of having an appeals court overrule him? "I think his course is the highest kind of law, a search for truth," says his friend, University of Southern California Law Dean Dorothy Nelson. "One thing that's always been said by some about Matt Byrne is that he's just too darned agreeable to both sides. Maybe before this case is over he can at least be too darned disagreeable to both sides."