

Ellsberg Case Judge Seeks Data

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The judge in the Ellsberg break-in conspiracy case has asked for all evidence bearing on whether President Nixon authorized the burglary so he can determine if the defendants are entitled to claim that they were acting for reasons of national security.

If the six defendants can show that they were acting on presidential instructions to conduct an operation that related to "foreign affairs," Judge Gerhard A. Gesell suggested, charges against them arising from the burglary of the office of Daniel Ellsberg's psychiatrist may have to be dismissed.

The defendants are charged with conspiring to violate the civil rights of Dr. Lewis Fielding, the Beverly Hills psychiatrist who formerly treated Ellsberg, the man who leaked the Pentagon papers to The New York Times.

Among other issues, they have argued that the burglary of Dr. Fielding's office, on Sept. 3, 1971, was conducted for reasons of national security, which they say would override Dr. Fielding's protection under the Fourth Amendment against unreasonable search and seizure.

"I have some considerable concern," Judge Gesell told prosecutors and defense attorneys last month, "as to whether the criminal prosecution should proceed if there was an explicit directive (from the President) and that that was an uncontested fact."

The judge's remarks, made in his chambers at U.S. District Court here at a meeting on April 19, were recorded by a court stenographer and a transcript was made public yesterday.

At the meeting, Gesell instructed the Watergate special prosecutor's office to give to

him and to the defense "any material that he has indicating that the President did, or that the President did not, authorize this search or have knowledge of the search before it was undertaken, or in any way directly or indirectly approved the search."

That material, he said, should include tapes, memoranda, or anything else "presently known to the special prosecutor."

In addition, he said, if any defendants claim that conversations with the President bearing on this issue may be preserved on tapes that special prosecutor does not yet have, then the special prosecutor should try to get those tapes "under any authority he

might want to use."

A spokesman for the office of Special Watergate Prosecutor Leon Jaworski said yesterday that the material had been submitted, "under seal," but would not say whether it tended to confirm or refute the President's assertion that he knew nothing about the Ellsberg burglary until long after it happened.

In any case, Jaworski's staff is apparently prepared to argue that it doesn't effect the conspiracy case one way or the other.

Assistant prosecutor Phillip Lacovara said at the meeting in Gesell's chambers last month that "even if the President had given specific instructions or purported authority for an actual physical incursion, that would not set aside the Fourth Amendment requirements in this matter."

The six defendants are: former White House domestic affairs adviser John D. Ehrlichman; former special counsel Charles Colson; Watergate conspirator G. Gordon Liddy, and three Cuban-Americans accused of actually carrying out the burglary, Bernard L. Barker, Eugenio Martinez and Felipe De Diego.

All of them directed or worked for the so-called White House plumbers, the investigative unit President Nixon set up in 1971 to find out who was leaking classified information to the press.

The President has denied that he ordered or approved of any illegal acts, including the burglary of Dr. Fielding's office, which occurred during the furor over publication of the Pentagon Papers.

Gesell told the defendants' lawyers that he was aware of the President's position but said, "I don't think it ought to rest at that, because one could argue that there may have been a statement made under the exigencies of the moment . . ."

Gesell said the national security issue is "basically a legal matter, which the court is going to have to resolve pre-trial."

He ordered up the material held by the special prosecutor, he said, "to try to nail down clearly in one form or another the question of whether or not the president exercised his authority—if he has it, and in my assumption at this point he does—in the field of foreign affairs, to direct an investigation in disregard of the Fourth Amendment . . ."