Nixon Is Warned On Aborting Trial

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Federal Judge Gerhard A. Gesell told President Nixon yesterday that by withholding documents sought for the criminal trial of two former White House aides Mr. Nixon "is acting deliberately . . . (in) aborting this trial."

At issue, Gesell said, is "the President's duty to enforce the criminal laws of this country where his former confederates are under indictment."

Gesell made his statements to Mr. Nixon's attorney, James D. St. Clair, who sought yesterday to get the judge to quash two subpoenas that seek the White House files of former top Nixon aides John D. Ehrlichman and Charles Colson, who face criminal charges in the Ellsberg break-in case.

During a tense, 20-minute hearing before a packed courtroom yesterday afternoon, Gesell instructed St. Clair to take the judge's message personally to the President. Gesell gave the lawyer until Thursday to return to court and deliver the President's response.

"It is advisable for me to have the understanding that the President personally understands the implication of the actions he is taking," Gesell declared. "It seems to me he is heading this case in the direction of dismissal . . . the President must know he is acting deliberately . . . (in) aborting this trial."

The files being sought by Ehrlichman and Colson as part of their defense against

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Ehrlichman and Coleson as the break-in charges include their personal notes on conversations with the President.

St. Clair contended the subpoenas are too broad and these "materials are not the personal papers of the defendants, but are official notes of presidential meetings reflecting both the decisions and the decision-making process of the executive branch on the widest conceivable spectrum over a period of approximately two and one-third years."

St. Clair brought with him a personal statement from Mr. Nixon to Gesell in which the President claimed executive privilege on the subpoenaed documents.

But Gesell in a stern lecture to St. Clair declared that the President had lost any privilege to withhold material when the federal government, which Mr. Nixon heads, brought an indictment that led to the defense's need for presidential documents.

"You are quite out of focus," he told St. Clair. "If these documents are not produced, the case must be dismissed. There is no privilege to the President . . . none. It is not up to the President to decide what documents to produce. I want those documents produced."

Earlier yesterday, in yet another decision in the complex break-in case, Gesell ruled that the President had no right to order implicity or explicity—a break-in in the name of national security.

"To hold otherwise, except under the most exigent (vital) circumstances, would be to abandon the Fourth Amendment (the right against unreasonable searches and seizures) to the whim of the executive in total disregard of the amendment's history and purpose," Judge Gesell said.

Five defendants—Colson, Ehrlichman, G. Gordon Liddy, Bernard L. Barker and Eugenio Martinez—are charged with conspiring to violate the civil rights of Dr. Lewis Fielding, who was the psychiatrist for Daniel Ellsberg, by breaking into Fielding's office in Los Angeles in September, 1971. Yesterday's legal arguments involved only Colson and Ehrlichman.

At the time of the break-in, Ellsberg had been indicted for leaking the confidential Pentagon Papers. To this day, Fielding has not been accused of having any connection with the leaks or any connection with Ellsberg other than having been his analyst.

Some members of the White House investigative unit known as the plumbers have described the purpose of the break-in as an attempt to see what information Ellsberg may have given the analyst about the Pentagon Papers leak.

The President had denied explicitly ordering the break-in, but the defense had argued that he did have authority to do so because of national security interests and that he had delegated this authority to Ehrlichman, Colson and others when he told them to stop leaks of classified information that could adversely effect American foreign policy.

But Gesell flatly rejected this. In his opinion, the judge wrote: "Whatever accommodation is required between the guarantees of the Fourth Amendment and the conduct of foreign affairs, it cannot justify a casual, ill-defined assignment to White House aides and part-time employees granting them an uncontrolled discretion to select, enter and search the homes or offices of innocent American citizens without a warrant."

Judge Gesell's national security ruling yesterday morning, with its own formidable language about the requirement that even the President must abide by the Constitution, was by itself a unique legal event of major proportions.

But it was followered yesterday at 2 p.m. by the rare scene of White House attorneys St. Clair and J. Fred Buzhardt sitting at the same counsel table in a courtroom with members of the Watergate special prosecution force.

As the courtroom dialogue unfolded, it seemed apparent that no middle ground would be reached during the hearing.

The issues were the assertion of presidential rights to executive privilege weighed against defense rights to evidence that possibly could aid their case.

St. Clair barely got a chance to begin arguing his motion to quash the subpoena before he was interrupted by Gesell: "This is not a grand jury. We're starting a trial."

That fact, said Gesell, puts the White House in a posture it has not yet faced in its refusal to turn over presidential documents.

St. Clair suggested that Ehrlichman could have access to his own files and tell his attorneys exactly what documents he needed, and then his attorneys could subpoena those specific documents.

Gesell asked if the special prosecutor's office would also be able to examine the same files to insure that Ehrlichman didn't choose only those portions that helped his case and not others that might work against him.

St. Clair said he was not in a position to agree to

such an arrangement without consulting his client. The White House has previously strictly limited the special prosecutor's examination of presidential files in criminal cases stemming from the Watergate scandal.

"Well," said Gesell. "It isn't the normal practice in a criminal trial to have a defendant make selective use of evidence."

St. Clair tried another tack, saying that more specific subpoenas would enable the President to "judge the public interest (in not releasing certain documents) against the necessity for use at trial."

That approach did not work with the stern-faced judge either. "We're in a totally different area. We're confronted with a trial. If the government has evidence that is relevant and material to the defense of a person on trial, it has an option to disclose that evidence or dismiss the indictment."

The President's lawyer looked up from the lectern and told the judge that he didn't agree with the judge's opinion that the President waived any privilege to presidential documents when the government filed the indictment.

Judge Gesell, known in the courthouse for his thoroughly researched opinions on cases before him, did not accept that stand at all.

As if lecturing a law student, Gesell cited at least 10 cases by name and number to the President's attorney, closing law books and stacking them by his side at the bench for emphasis.

"These are simply a few handy cases . . . There must be 40 to 80 clear cases in this line of authority that the government must produce evidence or drop the suit," declared Gesell. In a later similar reference, Gesell told the lawyer that St. Clair "appears to be ignorant'" of this line of cases.

Later, St. Clair suggested that Gesell might privately examine certain of the subpoenaed documents to see if they are relevant to the defense if Gesell would agree not to disclose them to anyone.

"I will not accept any document with the suggestion of the President that I won't disclose it if it is relevant to the defense," Gesell said. "I'm trying to give the defendants a fair trial."

When St. Clair said the President also wanted the defendants to have a fair trial, the judge countered: 'I would like to have evidence of it."

As the hearing drew to a close, Gesell again stressed his desire that the President be personally informed of the possible ramifications of any decision not to produce relevant documents.

"Such actions would raise many questions in other quarters," Gesell said in apparent reference to the House Judiciary Committee now holding impeachment hearings, "It is a very profound step to take."

Gesell said he was not threatening dismissal of the case immediately and has not yet made that "ultimate decision."

He said, however, that he wanted to make sure that the President understood that dismissal was a distinct possibility.

"The President must make his choice," Gesell said. "If the position of the executive is that there is no disclosure, I have a duty I have to perform."

White House refusal to turn over documents also is expected to be an issue in the separate Watergate cover-up case before U.S. District Judge John J. Sirica as well. While Gesell did not specifically mention that possibility, he apparently alluded to it in some of his next remarks.

"What I'm trying to say is that if this confronts the whole series of subpoenas . . . there is something to be said for facing up to it now," he added.

Regardless of any possible future compromise on production of White House documents, a motion to quash such as the one filed by St. Clair only "puts up the dukes," said Gesell at one point.

St. Clair maintained that there was an "error in the breadth of the request that generates the breadth of the reply."

Gesell scheduled a hearing for 9:30 a.m. on June 3 on whatever legal move the President takes next Thursday. He did not rule on the motion to quash the subpoena yesterday.

The national security opinion on any subpoenas that the defendants can issue for documents that fall within that category.

Defendants may ask for only national security documents that can prove they met with coconspirators in the case for "legitimate efforts to tighten security and prevent leaks within the government establishment."

In other words, they will be able to try to show a jury that there were reasons for them to associate other than to plan the Fielding breakin.

The documents must be those that the defendants wrote, received or read during the time covered by the indictment, and all such subpoenas must be answered by June 6, he said.

In that ruling, Judge Gesell made it clear that he was taking the burden off the prosecutor to provide such documents and placing the production of the documents under the power of the court.

"The court . . . is not limiting the government's ultimate duty to produce such material: if evidence relevant and material to the defense is suppressed despite a sufficiently specific demand from one of the defendants, the court will use the full range of its sanctions, including dismissal, if necessary, to insure that defendants receive a fair trial," Gesell said.

Those "sanctions," said numerous legal sources, also include the possibility of holding the President in contempt of court.

Meanwhile yesterday, Judge Gesell also denied all defense motions for a change of venue, dismissal of the indictment, or delay based on alleged prejudicial pretrial publicity.