

Nixon Is Adamant On Ellsberg Data

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President Nixon's lawyer said yesterday that the Chief Executive would withhold possible evidence that he considers vital to national security even if it means dismissal of charges against two former top White House aides indicted in connection with the Ellsberg break-in.

"The President is not desirous of having these, or in fact, any indictments of former governmental officials dismissed without a full and fair trial, but he must implement the constitutional responsibilities of his office by not jeopardizing the national security even if it means that the court determines that these cases must ultimately be dismissed," presidential attorney James D. St. Clair said in a letter to U.S. District Judge Gerhard A. Gesell.

Gesell had instructed St. Clair last Friday to tell the President that dismissal of criminal charges against the five men, including former top White House aides John

D. Ehrlichman and Charles W. Colson, could be the direct result of White House refusal to release evidence that defense lawyers say is needed for their clients' defenses.

St. Clair had appeared in court before Judge Gesell in an attempt to block two subpoenas sought by Colson and Ehrlichman for portions of their own White House files.

The subpoenas were in two parts.

Ehrlichman and Colson are seeking their private notes of conversations with the President and others in the White House. In addition, Colson is seeking access to a secret, 10-page "damage assessment" drawn up by the White House in connection with disclosure of the Pentagon Papers.

On one portion of the subpoenas—Colson's and Ehrlichman's request for their notes—St. Clair wrote that there might be some chance of a compromise. On Col-

See GESELL, A10, Col. 1

GESELL, From A1

son's request for access to the "damage assessment," St. Clair also proposed a route around actual production of the document.

However, both suggestions leave the ultimate decision over the final production of the subpoenaed documents in the hands of the President, a position that Gesell indicated last Friday in very strong terms would not be acceptable.

The "damage assessment," said St. Clair, could be turned over to Judge Gesell for his personal inspection and looked at by the defendants under a specific order not to disclose its contents.

However, this procedure would be subject to "the condition that should the court find all or any part of the document relevant and material, the decision of whether the document or the relevant portion of it shall be declassified shall remain one for the Chief Executive and will not be assumed by the court," St. Clair wrote.

Judge Gesell said last Friday, however, that he "would not accept a document with the suggestion from the President that I won't disclose its contents," even if the judge decides that it is relevant to the defense's case.

"This is a public trial," Gesell told St. Clair then in a tense meeting. "We don't

have in camera (closed) hearings here."

The only apparent White House movement of its position came in response to the subpoena by Colson and Ehrlichman for access to their own notes of White House meetings. St. Clair said last Friday that the White House would only allow the two men, and no others, access to the files.

"... The President has authorized me to advise the court that he will authorize defendant Colson's and Ehrlichman's counsel to share the access of their respective clients to those materials, if any, within the described files that relate to the issues in this case," St. Clair said.

Then, according to the letter, the defense would tell the President what it needs from the files and those needs would be weighed by the President "as to whether the documents should be produced."

At that point, the special prosecutor's office would also be given access to the materials that the President decides should be made available to the defense, according to the letter.

Gesell suggested during the hearing last Friday that the special prosecutor should be given access to any material that is made available to the defense "so we won't have selective use of evidence by defendants."

At that time, St. Clair said that he could not agree to such a proposal and that

he would have to consult with his client. Yesterday's letter was after such consultation, and does not appear to go as far as Gesell suggested.

Gesell is vacationing in Maine and could not be reached for comment yesterday. He has scheduled a hearing on the issue of White House refusal to turn over subpoenaed defense evidence for Monday at 9:30 a.m.

Yesterday's letter from St. Clair also disclosed that further documents have been subpoenaed by the defense since last Friday's hearings. The specific subpoenaed documents have not been disclosed by the White House or defense attorneys.

Many of the additional documents fall under the heading of national security, St. Clair said in his letter to Gesell.

"At the direction of the President, I must also advise you that a number of these documents in all likelihood cannot be made public without substantial risk to the security of the United States," St. Clair said.

St. Clair also told Gesell that the special prosecutor's office had been warned last November that certain critical national security materials "could not be made available for use in a public trial if an indictment were returned" in connection with the White House plumbers unit.

In the Ellsberg case, five full or part-time members of that unit are charged with conspiracy to violate the civil rights of Ellsberg's psychiatrist, Dr. Lewis Fielding, by breaking into his Los Angeles office in September, 1971.

"The special prosecutor expressed the opinion at that time that such materials would not be relevant and therefore did not pose a bar to the prosecution of alleged offenses arising out of the activities of this unit," St. Clair said.

Since the materials have been requested in the form of pretrial defense subpoenas, the special prosecutor's office is not directly at odds with the President on his re-

fusal to surrender the documents. The pretrial subpoenas were signed by Gesell and can be enforced by him without any assistance from the special prosecutor's office.

While Gesell has ruled out any total national security defense to the breakin, he has said he will allow the defendants to seek to prove they had legitimate, national security reasons for meeting with co-conspirators during the time of the alleged burglary planning. Such evidence as Ehrlichman's also would show the defendants' concern over possible leaks of other national security materials to which Ellsberg had access, according to defense lawyers.