

Gesell: Nixon Nearing Obstruction of Justice



By James K. W. Aberton—The Washington Post
Richard G. Kleindienst leaves District Court after receiving suspended sentence.

Controls Over Files 'Offensive'

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By Timothy S. Robinson
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President Nixon's refusal to allow defense attorneys for former top White House aide John D. Ehrlichman access to all of Ehrlichman's own notes of conversations with the President "borderers on obstruction . . . (and) is totally offensive to all of our concepts of justice," a federal judge said yesterday.

The ultimate sanction that U.S. District Judge Gerhard A. Gesell could impose on President Nixon for his continued refusal to allow total access to the subpoenaed material is a contempt of court citation, and the legal process that could lead to such a ruling was begun in Judge Gesell's courtroom yesterday.

In the course of the hear-

ing, it was revealed that although Mr. Nixon has refused to allow Ehrlichman's attorneys to see large portions of Ehrlichman's White House files, the President has at the same time been quietly complying with several requests of another subpoena from Ehrlichman's lawyers in the same case.

Ehrlichman and his attorneys have said that total access to his White House files is necessary to prepare his defense against charges of conspiring to violate the civil rights of Dr. Louis Fielding, the psychiatrist for Pentagon Papers codefendant Daniel Ellsberg, whose Los Angeles office was burglarized by the White House "plumbers." Judge Gesell signed a subpoena ordering that the files be opened to Ehrlichman and his attorneys by May 24.

However, the White House has limited the access of Ehrlichman's attorneys to portions of files the White House determines to be relevant to any possible Ehrlichman defense in the case. Ehrlichman is also charged with one count of lying to the FBI and three counts of lying to a grand jury in the Ellsberg case.

Yesterday's hearing began as the latest in a series of courtroom arguments over the production of White House documents to be defense evidence in the Ellsberg case, with Judge Gesell growing increasingly angry with President Nixon's apparent refusal to comply with judicial orders.

When it became necessary for either the prosecution or defense to move formally against the White House to force compliance, Ehrlichman's attorney, William S. Frates, reluctantly asked for a hearing to determine whether the person who has control of the documents at the White House should be ordered to "show cause why he should not be held in contempt."

During the hearing, it became clear that the only such person was the President of the United States,

See EHRlichman, A6, Col. 1

EHRlichman, From A1

and if a "show cause" order is issued, he would be forced to convince the judge why he should not be held in contempt.

Judge Gesell took the question of issuing a show cause order under advisement and is expected to issue a ruling in a few days.

During yesterday's hearing Gesell said he was "astounded, totally astounded" at the President's position on production of the subpoenaed materials.

"I just don't see how I can tolerate it in terms of this case and in fairness to this defendant, (Ehrlichman)," Gesell told the President's attorney, Jamse D. St. Clair. Gesell urged St. Clair to "lend your best efforts... to see that this obvious affront to the processes can be clarified."

In their second heated courtroom confrontation in two weeks, Judge Gesell told the President's lawyer that there had been "no cooperation" on the part of the White House.

"We are down to trial and we are down to dilatory tactics. We are not going to go through this lawyering any longer," Gesell told St. Clair.

White House counsel J. Fred Buzhardt testified during yesterday's hearing that Ehrlichman's files—which consist of bound volumes of his handwritten notes of meetings with the President and other White House officials—are kept in a vault in the Executive Office Building.

"The President is the approving authority for access to that room," Buzhardt said.

Meanwhile yesterday, it was learned that the White House has already turned over some other subpoenaed material to Ehrlichman, his attorneys and the special prosecutor's office under court order that they not be made public. These items include at least one White House tape.

This release of some materials under a protective order was referred to by Judge Gesell as another reason for his lack of understanding why the President would not release the Ehrlichman files under similar

ground rules.

The President has filed a formal claim of executive privilege covering the Ehrlichman files and declared that many items included in the files or referred to in Ehrlichman's notes are vital to the national security.

"...I cannot conceive that with the release he has given of all this material under a protective order, already, to counsel, that he is genuinely concerned about Mr. Ehrlichman being represented by Mr. William) Frates—that he thinks that is some kind of a tremendous hazard to the future of the nation," Gesell said. Frates is Ehrlichman's defense attorney.

When Gesell first ordered that the subpoenaed documents be produced on May 24, and St. Clair appeared in his courtroom without them instead, the judge told St. Clair to go back and tell Mr. Nixon that refusal to produce documents could result in dismissal of the case.

St. Clair responded last week with a letter in which the President suggested the compromise approach of letting Ehrlichman and his attorneys look at the documents and then having the President decide whether specific documents could be released.

Judge Gesell accepted that compromise after St. Clair made a representation in court that all documents would be made available originally to Ehrlichman's attorneys for their persual.

However, when Ehrlichman's lawyers arrived at the White House they found that they had access only to portions of the files that the White House had decided were relevant to the case.

Gesell asked St. Clair yesterday to "advise the court why the commitments that you made to me in open court have not been followed.

"I told you that it was not the President's function to determine what was relevant and material to this trial. It was the court's," Gesell said. "Are you saying for him (the President) that he will not comply with the

court's order?"

St. Clair replied: "I think that is a fair statement, your honor."

After Judge Gesell said that Frates would have to press the issue or waive Ehrlichman's rights to access to the documents, Frates made an oral motion to begin the hearing on issuance of a show cause order.

Ehrlichman himself took the stand to describe the notebooks and their relevance to his defense. He said the notes of his conversations with the President were "not verbatim but would give me an accurate recollection" of his various duties and activities in the White House at the time of the alleged conspiracy.

It was Ehrlichman's first appearance as a witness in a Watergate-related proceeding since he testified before the Senate Watergate committee last July. He appeared thinner, more tanned and relaxed for his brief court appearance than he did during his four-day grilling before the Senate committee.

Ehrlichman and Buzhardt were the only two witnesses during the hour-long hearing.

Buzhardt explained how the White House examined the documents to which Ehrlichman has been given access. That procedure included a review of Ehrlichman's raw notes by a young White House lawyer for any

referenced to Ellsberg or Pentagon Papers leaks.

Buzhardt said he then deleted several pages of the files located by the researcher because he did not think they were relevant.

That procedure—having a White House lawyer unfamiliar with the case going through the documents and then his work being screened by Buzhardt before even making the material available to Ehrlichman's attorneys—sought to concern both Frates and Judge Gesell.

Assistant Special Watergate Prosecutor William J.

Merrill and his aides participated in the questioning of the two witnesses, but generally remained in the background during the hearing and away from intensive involvement in the Gesell-St. Clair confrontation.

Merrill said that he thought Ehrlichman should again examine his own files alone—a procedure the

White House will allow—and convey more specifically to his lawyers what they need. Then, said Merrill, the defense lawyers could be more specific in their subpoenae.

After completing the preliminary hearing in the contempt process, Gesell began another hearing on another subpoena filed by Ehrlichman against the President in which he had demanded 32 separate White House documents, including some tapes or transcripts of presidential conversations.

Gesell, St. Clair and Ehrlichman attorney Andrew Hall went through the subpoena item by item to determine the White House reaction to each. The President had earlier filed a motion to dismiss the whole subpoena as too broad, but during the itemization in court it was revealed that he had already produced some of the documents.

Other parts of the subpoena were dismissed by Gesell as too broad or vague, and others were taken under advisement by the judge pending further discussions between the White House and Ehrlichman's attorneys.

It was also disclosed yesterday that Ehrlichman has subpoenaed President Nixon, Secretary of State Henry Kissinger, Presidential chief of staff Alexander Haig and Buzhardt as possible trial witnesses. Judge Gesell canceled the subpoena against

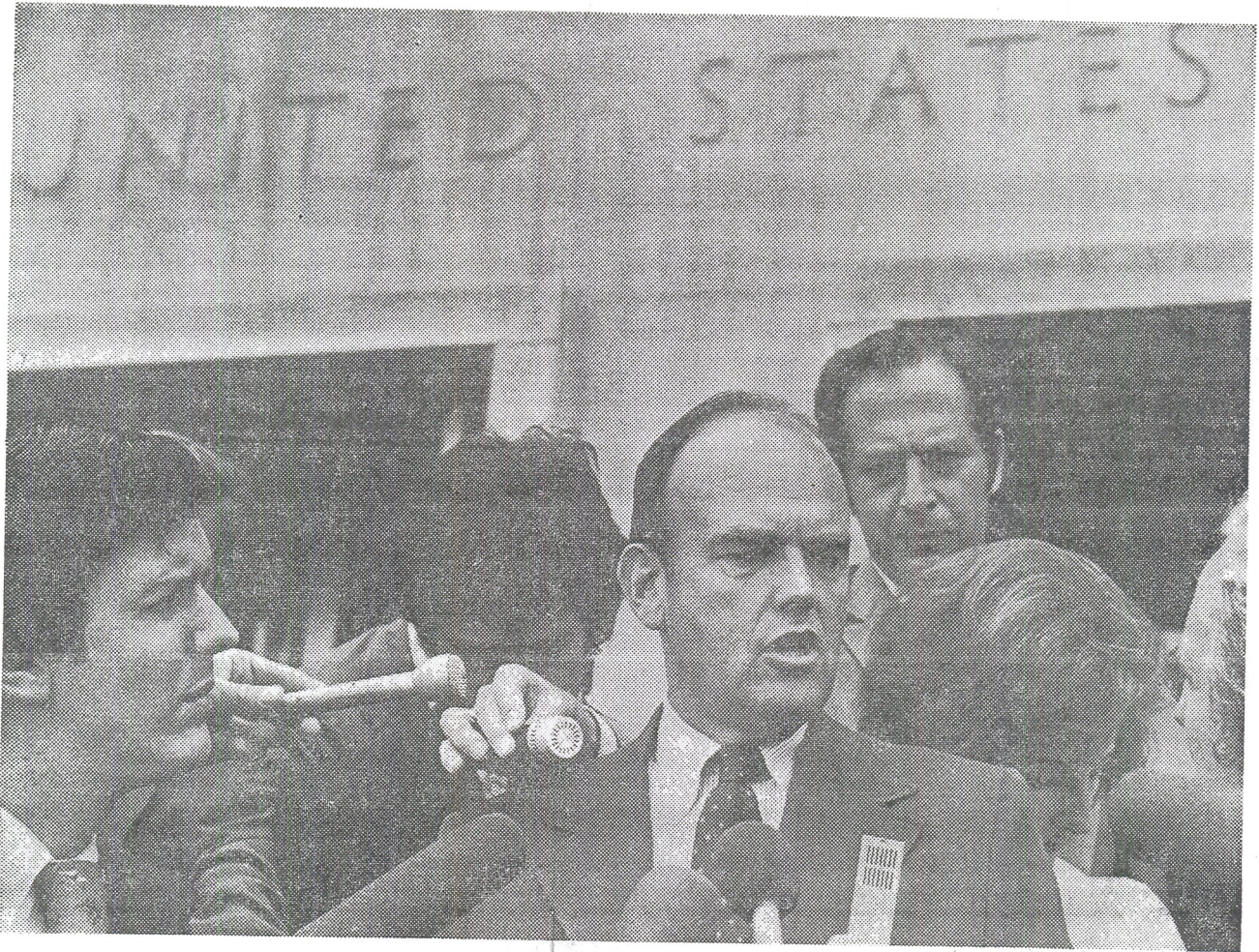
the President at St. Clair's request, but the others are still pending.

After the hearing, Ehrlichman told reporters that he was not attempting to negotiate a plea with the special prosecution staff, a move that some persons had predicted after one of his codefendants, Charles W. Colson, former White House Special Counsel, entered a guilty plea Monday.

"I wouldn't entertain it at this time because I'm not guilty," Ehrlichman said.

Ehrlichman also said he has not discussed his legal expenses with President Nixon and has not received any money from Nixon's close friend C.G. (Bebe) Rebozo, who was reported in yesterday's editions of The Washington Post as the controller of a secret defense fund offered for former White House Chief of Staff H. R. Haldeman.

Ehrlichman said he has set up a small trust fund for his defense with the help of four trustees.



By James K. W. Atherton—The Washington Post

John D. Ehrlichman talks with reporters after hearing before District Judge Gerhard Gesell in "plumbers" case.