

Ehrlichman Trial Put Off Indefinitely

6-12-74
By Timothy S. Robinson
Washington Post Staff Writer

Citing President Nixon's "resistance to lawful trial subpoenas," U.S. District Judge Gerhard A. Gesell yesterday ordered an indefinite delay in the trial of former top White House aide John D. Ehrlichman on charges in connection with the Ellsberg break-in.

The separation of Ehrlichman from the other defendants means that he might not face trial until next year, if then, on the Ellsberg burglary charges. In addition, legal observers said it provides him with several tactical legal advantages at a later trial.

The President has refused to allow Ehrlichman's lawyers access to Ehrlichman's handwritten notes of his conversations with the President so that they and the judge can determine if they are relevant to his defense. Instead, Mr. Nixon has said that only the President will make that determination and could withhold documents from the court.

Judge Gesell said he would today "issue specific orders to enforce the subpoenas in order that appropriate pretrial release of the pertinent documents . . . now in the custody of the President can be accomplished."

Such orders, according to several legal observers, could include requiring the President to tell the court why he should not be held in contempt for his refusal to produce all the documents.

However, those same sources—familiar with both contempt procedures in general and Judge Gesell in particular—said the Judge could still stop short of issuing a final "show cause" order at this time.

Instead, they said, the judge might link such an order with a deadline by which the subpoenaed documents could be produced. Also, they suggested that he might ask the President's lawyers to present

legal arguments on whether a contempt order could be enforced against a sitting President.

Judge Gesell made it clear yesterday, however, that he felt forced to postpone Ehrlichman's trial because of the White House position.

The President has proposed that only Ehrlichman be allowed to look through the subpoenaed files without notes, while his attorneys could sit in an adjoining room and confer with him after his perusal of the documents. Mr. Nixon would then make the final determination whether specific

See **EHRlichman, A4, Col. 1**

EHRlichman, From A1

notes could be released as defense evidence for the Ehrlichman trial.

That plan, said Judge Gesell yesterday, is unacceptable, because "It denies him (Ehrlichman) the right to counsel.

"It is unacceptable for another reason. The President flatly refuses to make the documents available to the court in camera (secretly) and thus makes it impossible for the court to perform its duty," Judge Gesell said "Therefore, the court rejects the proposal."

Ehrlichman's attorney, William S. Frates, told the judge he also found the plan "completely unacceptable." He said it "denies the defendant

and his counsel of an opportunity to properly prepare the case."

The postponement of Ehrlichman's trial in the Ellsberg break-in case leaves the trial of former White House aide G. Gordon Liddy and Miamians Eugenio Martinez and Bernard L. Barker scheduled to begin next Monday.

Persons familiar with the break-in case said yesterday that Barker and Martinez, whose major proposed defenses have been rejected by the judge, are faced with three options at this point: to enter pleas; to proceed to a quick trial without Liddy based on a set of stipulated facts—a move that would preserve their legal issues on appeal—or to go to trial with Liddy on the conspiracy charge.

Liddy is still reportedly ready for a full trial on the charges as scheduled.

Ehrlichman is also charged in the Watergate cover-up case scheduled to begin before U.S. District Judge John Sirica on Sept. 9. That trial is scheduled to last for several months.

Depending on the outcome of that trial, the House impeachment inquiry and a final court ruling on whether the President could withhold defense materials through a claim of executive privilege—as has been claimed by the chief executive in the Ellsberg case — Ehrlichman may never face trial on the Ellsberg break-in, according to knowl-

Yesterday's 15-minute hearing before Judge Gesell, which ended in Ehrlichman's severance, was the latest in a series of courtroom legal confrontations between the judge and the President.

The judge, meanwhile, has maintained throughout the sessions that the court must make that final decision concerning the production of subpoenaed White House materials and said at one point that the President's refusal to produce them "borders on obstruction" of justice. Ehrlichman's notes were subpoenaed by his attorneys with the specific written approval of Judge Gesell as to their relevance.

Presidential attorney James D. St. Clair, who has confronted the judge on behalf of

the President in the past hearings, was not present yesterday. Presidential counsel J. Fred Buzhardt represented the White House yesterday, but did not speak during the hearing.

Gesell instead asked Frates for his position on the White House plan.

"... Ehrlichman finds the proposal completely unacceptable and in violation of the Sixth Amendment, which provides that in all criminal prosecutions the accused shall enjoy the assistance of counsel for his defense," Frates replied.

Assistant Special Prosecutor William H. Merrill, recommended, however, that Frates accept the proposal. "I think if he tries it, he might like it," Merrill added.

Merrill continued to maintain that the subpoenas are too broad and should not be enforced. An examination of the files by Ehrlichman could lead to a more narrowly drawn subpoena, Merrill added.

"I believe the White House proposal, although not satisfactory to everyone in all respects, at least provides a reasonable basis of proceeding further and that it should be tried to see if there is something that we come up against where there is a problem," Merrill said.

Judge Gesell said unequivocally, however, that the White House proposal was unacceptable.

"In view of this resistance to lawful trial subpoenas, the court feels it is necessary for the court at this time to sever Mr. Ehrlichman from the remaining defendants and to continue his trial at a later date," Judge Gesell said.

A separate trial for Ehrlichman can lead to several tactical advantages for his defense, according to persons familiar with legal procedures here and the Ehrlichman case specifically.

For example, Ehrlichman will not have to sit through a lengthy conspiracy trial during which much of the evidence may be directed against his codefendants. Claims of "guilt by association" in such situations have been often raised by attorneys in conspiracy trials.

In addition, Ehrlichman can now call as witnesses the other alleged coconspirators in the break-in case. If they had all been tried together, the other defendants could not be forced to take the stand because of their right against self-incrimination.

In arguing earlier for a severance, Ehrlichman's attorneys had said that conspiracy prosecutions offer many ad-

vantages for the prosecutor, but "creates a serious danger of unfairness to the defendant." Gesell denied that severance motion during a pretrial hearing last month.

Ehrlichman appeared pleased by Judge Gesell's actions, but denied that his demands for evidence were contrived to force dismissal of his indictment. Dismissal is another possibility that has been suggested by Judge Gesell if Ehrlichman is not given access to evidence that would aid his defense.

Ehrlichman told reporters yesterday, though, that "if all the evidence can be presented on my behalf, then I'll be exonerated."

Ehrlichman and the three other remaining defendants are charged with conspiring to violate the civil rights of Dr. Lewis Fielding, who was Pentagon Papers codefendant Daniel Ellsberg's psychiatrist, by breaking into his Los Angeles office. In addition, Ehrlichman faces four charges of lying to federal investigators.

Ehrlichman also still faces a California perjury charge in connection with the break-in. A trial date for this charge was delayed pending the outcome of the federal trial in Washington, and the impact of Gesell's order on the state charges is unclear.