

White House, Judge Gesell Soften Hard-Line Stances

Ehrlichman Case

By Timothy S. Robinson
Washington Post Staff Writer

Federal Judge Gerhard A. Gesell and attorneys for President Nixon avoided a confrontation yesterday and compromised at least temporarily on the issue of release of documents for the defense of former top Nixon adviser John D. Ehrlichman, who faces criminal charges in the Ellsberg break-in.

The compromise includes agreement by the White House to waive its previous insistence on executive privilege over many documents already turned over to Ehrlichman for preparation of his defense and a sworn statement by presidential counsel J. Fred Buzhardt that other documents sought by Ehrlichman are not relevant to his defense.

For his part, Gesell substantially modified his sharply phrased claims to be the sole arbiter of what subpoenaed material now under lock and key in the White House would be relevant to the Ehrlichman trial.

Gesell said the White House has "progressed substantially" in its stand on production of the documents, and indicated he may again schedule Ehrlichman for trial with the other three defendants in the case as early as next week.

Gesell, while substantially subdued in comparison with his previous stinging rebukes

See GESELL, A6, Col. 1

GESELL, From A1

during encounters with White House lawyers, made it clear plan closely to make sure that no snags developed in its implementation.

Several legal observers who have been following the Ehrlichman case saw room for serious disagreement between Ehrlichman's attorneys and the White House in the new plan and predicted that the issue of White House refusal to produce documents would return once Ehrlichman used the White House process to narrow down his request for materials. They saw Gesell's acceptance of the plan as a "test" of the White House procedures.

The acceptance of the plan was announced by Gesell about a half-hour after he was scheduled to release orders enforcing Ehrlichman's pre-trial subpoenas. Many legal observers said those rulings could have included an order that the President show why he should not be held in contempt of court for refusing to produce subpoenaed materials.

Gesell referred to his planned rulings in a colloquy with Buzhardt during the brief court proceeding yesterday afternoon. "I was up a good number of hours last night. I was about to reach a decision none of us would have liked to see," he said.

The White House position was announced in a motion filed by the Watergate special prosecutor's office asking that Gesell reconsider his Tuesday ruling that Ehrlichman's trial must be postponed indefinitely because of the White House refusal to produce the documents.

The special prosecutor's office, itself normally at odds with the White House over access to documents, has sided with the President in this issue and filed Buzhardt's sworn affidavit to support its motion.

Ehrlichman's attorneys appeared stunned when they learned the judge might reinstate their client for trial as soon as next week. They said Ehrlichman had returned to the West Coast after Gesell's Tuesday ruling.

Neither of the White House changes in position—the waiver of executive privilege

and Buzhardt's personal review of the subpoenaed material (as opposed to a review by a White House staff member with less specific knowledge of the case)—approaches a more basic objection that Gesell had voiced concerning the continued White HOUSE DENIAL of access to the notes by Ehrlichman's attorneys.

That denial deprives Ehrlichman of his right to effective assistance of counsel, Gesell has said in open court. However, he apparently saw yesterday's movement on the part of the White House as substantial enough to allow the case to proceed, according to persons familiar with the case, reserving any further ruling pending the outcome of the compromise.

Ehrlichman has had access to the notes himself for several months, but his attorneys have been arguing — with Gesell's agreement — that they should be able to review the documents with the former aide. The President, meanwhile, has relegated the attorneys to an adjoining room so Ehrlichman can consult with them on the material without showing it to them.

The subpoenaed materials at issue are Ehrlichman's handwritten notes of conversations with the President for a 2½-year period. The special prosecutor's office has suggested that Ehrlichman accept the President's proposal that he alone review the notes and narrow the subpoena to specific documents.

If he does narrow his request after a search of the files, the White House could again step in and refuse to produce a specific document. That would again place Gesell and President Nixon in a dispute over who has final authority over production of documents in a criminal case: each says he alone can make that determination.

The waiver of executive privilege concerns stack about three inches high of subpoenaed notes that have already been produced by the White House. While the notes had been turned over to the judge and attorneys in the case last week, the President had maintained a claim of executive privilege that, if upheld, would have precluded their use during a trial.

Those portions of files were

produced after a White House aide searched the subpoenaed materials for anything relating to the Ellsberg break-in or the Pentagon Papers case in general. Buzhardt testified last week that he had reviewed the aide's work and had deleted some of the files that the aide had felt was relevant.

Yesterday's affidavit by Buzhardt took the search a step further. In it, the president's counsel swore that he himself had searched the notes—he later said it took him nearly eight hours to go through the several-foot high stack—and had found no other material relevant to the case.

Ehrlichman's attorneys maintained yesterday before Gesell that they were aware of at least two instances in which Ehrlichman's notes that could be relevant to his defense had not been turned over to them by the White House.

Gesell told them to specify those two instances or others to him tomorrow morning to "test the completeness of this review" by Buzhardt. Presumably, if those two instances or others are found to be relevant, Judge Gesell could again take steps to enforce the subpoena.

Yesterday's hearing followed more than two weeks of an on-again, off-again dispute between Gesell and the President over production of White House documents for use at Ehrlichman's trials. At one point, Gesell had said that the President's action "borders on obstruction" of justice and suggested that a contempt charge and dismissal of the case could be a direct result of the refusal to turn over the material.

Those continuing confrontations led to Gesell's oral decision Tuesday to indefinitely postpone Ehrlichman's trial pending the outcome of a ruling enforcing the subpoena. That enforcement ruling was scheduled for 3 p.m. yesterday, until the special prosecutor filed his motion around 12:30 p.m. for reconsideration of the severance of Ehrlichman from the other three defendants in the case.

Gesell then called a 3:30 p.m. hearing with attorneys from the White House, the special prosecutor's office,

and the defendants present in his courtroom.

He said the new motion "raises the 11th, perhaps almost the 12th, hour possibility there has been a sufficient change in the position of the White House to warrant the court to re-examine the matter."

He asked Buzhardt if it were true that the executive privilege claim was waived on certain documents, and Buzhardt replied: "Yes, that's correct."

After further discussion with Buzhardt concerning the White House compromise, Gesell said the plan "answers the questions in the court's mind and it does appear we may be in a position to go forward as to all defendants."

Andrew C. Hall, representing Ehrlichman, strongly protested that he didn't see any substantial change in the White House stand because Ehrlichman's attorneys still could not see the documents. Gesell cut him short, explained the two changes and said that the acceptance of the plan would not preclude the same issue being raised later in Ehrlichman's behalf.

The trial of the three remaining defendants—former White House aide G. Gordon Liddy and Eugenio Martinez and Bernard L. Barker—had been scheduled to begin next Monday. Gesell indicated that if Ehrlichman is rejoined to the case, the trial of all the defendants might be postponed for a short time while Ehrlichman's attorneys try the White House arrangement on the files.

The four men 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. Ehrlichman is also charged with four counts of lying to government investigators probing the break-in.