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Judge Orders President to Testify in L.A.

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LOS ANGELES, Jan. 29—A judge today summoned President Nixon to appear as a material witness in behalf of John D. Ehrlichman and two other defendants in the "plumbers" burglary case.

The action, apparently unprecedented in any state court in American history, took only five minutes in Superior Court here today. But it caught even defense attorneys by surprise and sent reporters scrambling for phones, movie fashion.

The judge, Gordon Ringer, seemingly well aware of the drama of the moment, declared, "The court is persuaded that the Hon. Richard M. Nixon is a material witness for the defense." He then proceeded to approve a certificate "demanding President Richard M. Nixon to testify Feb. 25, 1974 and April 15, 1974."

Feb. 25 is the date set for a hearing on a motion for dismissal based on a defense claim that Ehrlichman, and the other defendants, David Young and G. Gordon Liddy, were acting as federal agents in their activities as members of the White House "plumbers" unit. The trial is scheduled to begin April 15.

The three are charged with conspiracy and burglary in the September, 1971, break-in at the Beverly Hills office of Dr. Lewis Fielding, a psychiatrist who had been treating Daniel Ellsberg, the central figure in the Pentagon Papers case.

In Washington, White House press aide Gerald L. Warren said, "Of course we have not received the order. When it is received we will consider it and an appropriate response will be forthcoming."

Judge Ringer's certificate amounts in effect to an out-of-state subpoena. But, it must be issued formally by a Superior Court judge in the jurisdiction in which the recipient resides, in this case the District of Columbia.

Even then, President Nixon's lawyers may challenge issuance of the subpoena, arguing that for reasons of executive privilege or some hardship, the President could not appear. The Washington judge would then make a ruling, which in turn could be appealed.

JUDGE GORDON RINGER
... "court is persuaded"

In actual practice, it is doubtful Mr. Nixon will over testify in the case. It is more likely that he would answer written interrogatories submitted to him on the subjects pertinent to the defense interest—in effect, a form of deposition.

See ORDER, A5, Col. 1

ORDER, From A1

Douglas Dalton, a co-counsel for Ehrlichman, said in court today that Mr. Nixon's attorney, James St. Clair, had informed him that the White House would be receptive to the idea of interrogatories.

"I never seriously expected the President of the United States to fly out here in Air Force One and testify voluntarily," said Joseph Ball, another Ehrlichman attorney. He added, however, that if he is unable to secure President Nixon's personal appearance he might have a possible appeal argument at some later point.

Ball said he was satisfied after talking with presidential counsel that Mr. Nixon would cooperate with the written interrogatory procedure.

The first subpoena ever directed at a President was one issued to Thomas Jefferson in 1807 in connection with the treason trial of Aaron Burr. Chief Justice John Marshall, sitting as a trial judge, upheld the summons—actually a subpoena duces tecum for some presidential papers that Burr's lawyers wanted.

pearance on the witness stand in far-off cities by pleading duties of state.

Jefferson did just that. He offered the papers requested and offered to sit for a deposition, but said he could not go to the Richmond, Va., court because that would set a precedent requiring him to jump about the country for other scheduled trials of Burr's alleged co-conspirators.

The same course was chosen by President James Monroe in 1818 when he became the second President to be served with a subpoena while office. Asked to testify at a court-martial, Justice Marshall made plain in his opinion that no one, not even the President, was exempt from personal subpoena. Likening the President to "the first magistrate of a state," Marshall said, "It is not known ever to have been doubted, but that the chief magistrate of a state might be served with a subpoena ad testificandum.

"If in any court of the United States, it has ever been decided that a subpoena cannot issue to the President, that decision is unknown in this court."

At that time, Marshall left the door open for a President to avoid a personal appearance. Monroe offered to give a deposition, but said official duties would not permit him to leave Washington for Philadelphia, the site of the trial.

In light of President Nixon's frequent trips to San Clemente, it might be difficult for him to use the official duties argument, but the statutes and precedents suggest that there are numerous legitimate reasons by which a President could argue for an interrogatory course over personal appearance.

Some form of presidential response, however, appears central to the defense strategy in this case, which seems to be building around the argument that the plumbers were agents of the federal government on a crucial national security mission.

The defense position maintains that the break-in could not be construed to have criminal intent and that the plumbers were "acting in good faith belief that they were federal officers investigating security leaks that were impeding the ability of the government to carry on foreign relations."

As federal officers, the defendants contend they should no more be subject to prosecution than a policeman engaged in an illegal search and seizure. (In addition, Ehrlichman claims separately that he had no advance knowledge of the burglary.)

In their application for a presidential subpoena, the defense argued that Mr. Nixon could testify that publication of the Pentagon Papers "raised serious questions about what other government documents might have been taken; that there was every reason to believe that there was a security leak of unprecedented proportion, creating a situation in which the ability of the government to carry on foreign relations could have been severely compromised; and that the security leak posed a threat so grave as to require extraordinary actions."

The actual burglary was conducted by three Cubans, with Liddy and E. Howard Hunt supervising. Nothing was recovered involving Ellsberg, but the plumbers went on to compile psychiatric dossiers on him with the help of the CIA. When their activities were exposed during the Pentagon Papers trial last year, charges against Ellsberg and his co-defendant, Anthony Russo, were thrown out.

Today's defense application to subpoena the President was unopposed by prosecutors of the Los Angeles County district attorney's office. Stephen Trott, the deputy in charge of the case, agreed that, within the scope of Judge Ringer's ruling that defense arguments should be heard, the President does appear to be a material witness.

"A guy is entitled to subpoena witnesses in his defense; it's a constitutional right, even though we may disagree violently with the substance of his argument," said Trott. "We're not afraid of what the President is going to say; we're not afraid at all."

If the defense is successful, it would give the prosecution a crack at the President as well—either in person or in the form of depositions. In his May 22, 1973, statement, one of the documents submitted by the defense, Mr. Nixon deplored some of the activities of the plumbers and claimed he never authorized "illegal means" to carry them out.

Ringer also approved a defense request that Egil (Bud) Krogh be summoned as a defense witness on the issue of the plumbers' status as federal agents.

Krogh, who was in charge of the plumbers unit, is scheduled to begin a six-month prison term next week after pleading guilty to a federal charge in connection with the burglary. He also may be a key government witness in the California case.