NYTimes JAN 31 1974

Diverting Testimony

John D. Ehrlichman's attempt to obtain sworn testimony from his former boss, Richard M. Nixon, seems destined only to confuse and compound the disorder besieging the Administration.

If it could be regarded as a serious move to compel the President to testify under oath and submit to cross-examination, as Mr. Nixon's associates in Watergate have already done, then it could be welcomed as a promising development. But the ploy of issuing a subpoena on the President of the United States seems quite possibly nothing more than a legal smokescreen that will presumably occupy the energies of a bevy of lawyers and much valuable time in a number of courts before being resolved. The White House wasted no time yesterday in saying that the President would refuse to appear in person, but might consider submitting written responses to questions.

Once the legal questions are resolved, the purpose of this extraordinary move is still puzzling. What would be the substance of the President's testimony, even if it could be obtained? If they expect anything at all, Mr. Ehrlichman and his lawyers presumably believe that Mr. Nixon's testimony would help their case, would confirmed that the former Presidential aide was acting as a Federal officer within the framework of orders in directing the activities of the White House "plumbers," including the illegal burglary in 1971 at the office of Daniel Ellsberg's Los Angeles psychiatrist.

To make such an assertion in a court of law would only render Mr. Nixon more vulnerable to impeachment; Republican members of the House Judiciary Committee have already said they could hold Mr. Nixon personally responsible for criminal acts of his associates only upon evidence of the President's knowledge of or involvement in these acts.

Should Mr. Nixon refuse to assume any of the responsibility that Mr. Ehrlichman seeks to shift, he would be undermining the defense of his former associate. The risk to the President in this course is obvious, considering the useful information that Mr. Ehrlichman might be able to provide the Special Watergate Prosecutor if there seemed no other way for him to escapea long prison term.

The word is being put out that Mr. Ehrlichman, fully expecting the President to avoid giving testimony, will move to abort his California trial on the ground that material evidence has been withheld. But the principle of "exculpatory evidence," which can provide grounds for declaring a mistrial, applies only when material evidence helpful to the defendant is available to the prosecution and not to the defense. Mr. Nixon may indeed be a material witness, as Judge Gordon Ringer of the California Superior Court has stated; but if the President's version of the events is not given at all, Mr. Ehrlichman's defense lawyers cannot accuse the state prosecution of withholding it.

John J. Wilson, Washington attorney for both Mr. Ehrlichman and H. R. Haldeman, insists that Mr. Ehrlichman has not broken with Mr. Nixon. Perhaps not, but his attempt to compel Presidential testimony can hardly make things any easier for the White House.