

# Judge May Excuse the Ellsberg 'Burglars'

President Nixon probably had authority to approve the 1971 break-in at the office of Daniel Ellsberg's psychiatrist if "foreign affairs" was at stake, a federal judge said yesterday.

Taking note of Mr. Nixon's statements that he never approved the burglary, U.S. District Judge Gerhard A. Gesell said this claim should be tested in court. Prosecution of the White House "plumbers" could be invalid if specific presidential approval was given for the break-in, he said.

Gesell's view that the president's role is crucial to the plumbers case was obtained in a transcript released of a closed conference he held with defense and prosecution attorneys on April 19.

Defendants in the case, scheduled for trial June 17, include former presidential aides John D. Ehrlichman and Charles W. Colson, former republican campaign aide G. Gordon Liddy and three Cuban-Americans from Miami, Bernard L. Barker, Eugenio R. Martinez and Felipe de Diego.

Gesell told attorneys he wanted to "nail down clearly . . . whether or not the President exercised his authority — if he has it, and in my assumption at this point

he does — in the field of foreign affairs, to direct an investigation in disregard of the Fourth Amendment."

That amendment protects citizens against unreasonable searches and seizures by authorities.

"I have some considerable concern as to whether the criminal prosecution should proceed if there was an explicit (presidential) directive and that was an uncontested fact," Gesell said.

Attorneys from the office of special Watergate prosecutor Leon Jaworski told Gesell their evidence indicates there was no presidential authorization of the break-in. At the judge's request, they have filed sealed evidence on this point.

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