

Gesell Agrees to Nixon Plan Postponing Showdown on Files

By Timothy S. Robinson
Washington Post Staff Writer

U.S. District Judge Gerhard A. Gesell yesterday accepted a suggestion from President Nixon's attorney that postpones a White House confrontation with the court over production of evidence in the Ellsberg break-in case.

The suggestion accepted by Gesell will allow attorneys for former White House aide John D. Ehrlichman to examine Ehrlichman's files at the White House. The attorneys contend the files are needed to support Ehrlichman's defense.

However, Gesell continued to stress that ultimate refusal by the White House to turn over documents needed by the defense could result in dismissal of all criminal charges against the defendants. For the first time in open court, Gesell also added that another possible result of failure to produce evidence could be a contempt of court citation.

"Only the courts can determine relevance (of the subpoenaed documents)," Gesell said. "This is a matter of law, not policy and convenience."

Gesell scheduled a Friday hearing on a proposed list of specific documents to be drawn up by Ehrlichman's attorneys after perusing the White House files that they

say will be helpful to his defense.

Ehrlichman, as had codefendant Charles W. Colson, had subpoenaed their own handwritten notes of presidential conversations that they wanted to use in connection with their defense of the break-in charges.

Colson's subpoena is now moot, since he entered a guilty plea yesterday to obstructing justice in the original criminal prosecution of Pentagon Papers codefendant Daniel Ellsberg.

However, Ehrlichman's subpoena is still enforceable, as are several others he has filed for White House materials.

See GESELL, A8, Col. 1

GESELL, From A1

Two weeks ago, Gesell personally approved the original Ehrlichman subpoena, which asked for bound volumes of all his handwritten notes of White House conversations over a 2½-year span.

The White House moved to quash the subpoena, with a personal claim of executive privilege on the documents by President Nixon, who claimed the files were no longer Ehrlichman's personal papers but were instead presidential papers.

In a tense hearing before Judge Gesell last week, the President's lawyer, James D. St. Clair, was told in no uncertain terms that refusal to turn over the documents could result in dismissal of the case. He told St. Clair to take his message back to the President, and have the President respond to it in writing.

In response, St. Clair filed a letter with the judge suggesting that Ehrlichman's lawyers be allowed to examine the subpoenaed materials in the White House.

After examining the documents, Ehrlichman's attorneys will draw up a list of the ones they need and submit the list to St. Clair, the judge and the prosecution, according to Gesell.

"We are, I think, making progress," Gesell said. "I think Mr. St. Clair has been responsive and helpful as a result of our colloquy."

He again reminded participants in the trial that there are alternatives short of dismissal if the White House will allow certain documents to be at least examined as to their relevance to the case.

But, "There can be no fair trial unless material is made available to the defense in some form," Gesell said in urging the production of White House documents at

least in a preliminary screening process.

The problem of White House control of certain documents "overhangs all pending Watergate prosecution and should not remain unsolved," Gesell said.

Gesell once again said he would reject any suggestion from the President that the judge personally examine possible defense evidence to determine its relevance without lawyers present from both sides. Such a proposal, Gesell said, is "inconsistent with the judicial function."

"The court should not be involved in some sort of bar-

gaining with a coordinate branch of government," Gesell said.

William S. Frates, an attorney for Ehrlichman, asked the judge for permission to file an additional motion on pretrial publicity in connection with Colson's plea yesterday.

Gesell said the publicity issue is "continually open", and such a motion could be filed. However, he again said that he planned to attempt to impanel a jury before reconsidering his earlier rulings that the case could remain here and had not been tainted by prejudicial pretrial publicity.