Watergate Panel's Tape Suit Dismissed

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U.S. District Court Judge Gerhard A. Gesell yesterday dismissed the Senate Watergate committee's suit to obtain five of President Nixon's Watergate tapes because of the risks of prejudicial pretrial publicity in pending criminal cases.

Gesell at the same time rejected Mr. Nixon's blanket claims of executive privilege for the recordings and held that the courts could order him to give them up. The judge strongly suggested that the tapes might have to be surrendered—even ahead of forthcoming criminal trials—if the House Judiciary Committee should demand them for its impeachment inquiry.

"Congressional demands, if they be forthcoming, for tapes in furtherance of the more juridical, constitutional process of impeachment would present wholly different considerations," Gesell ruled. "But short of this, the public interest requires at this stage of affairs that priority be given to the requirements of orderly and fair judicial administration."

The judge said the Senate Watergate committee had simply failed to show an overriding need for the tapes with criminal trials in the Watergate scandal so close at hand.

He called the need to safeguard those prosecutions from the possibly prejudicial effect of pretrial publicity "of critical importance" to his decision.

In contrast to the impeachment inquiry now under way in the House, Gesell said, the Senate committee's investigations into governmental misconduct are limited to the help they could provide Congress' legislative function.

"The committee has, of course, ably served that function over the last several months," the judge said, "but surely the time has come to question whether it is in the public interest for the criminal investigative aspects of its work to go forward in the blazing atmosphere of ex parte publicity directed to issues that are immediately and

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intimately related to pending criminal proceedings."

Gesell said it was up to the Senate committee to decide whether to keep pursuing such inquiries, but he said he did not think he should enforce its subpoena power when that might endanger trials in the courts.

"To suggest that at this juncture the public interest requires pretrial disclosure of these tapes either to the committee or to the public is to imply that the judicial process has not been or will not be effective in this matter," the judge said, "All of the evidence at hand is to the contrary."

Gesell made his ruling in a seven-page order that explicitly rejected most of Mr. Nixon's arguments against court enforcement of the Senate subpoena.

Besides invoking the risks of excessive pretrial publicity, the President had contended Wednesday in an unyielding letter to Gesell that the dispute was a "political question" beyond the power of the courts to resolve.

The judge had asked Mr. Nixon for "a particularized statement" of just what portions of the five tapes he was still unwilling to give up. Instead, the President simply stated that he had decided that disclosure of any of the recordings—all involving conversations between Mr. Nixon and former White House counsel John W. Dean III—"would not be in the public interest."

Gesell said the court rulings that led to surrender of most of the same tapes to the Watergate grand jury last year squarely contradicted the notion that the dispute was outside the province of the judiciary.

Citing the U.S. Circuit Court of Appeals decision here last fall upholding the Watergate grand jury's right to relevant evidence on the tapes, Gesell said:

"The reasoning of that court involving a grand jury subpoena is equally applicable to the subpoena of a congressional committee."

In addition, Gesell said: "The court rejects the President's assertion that the public interest is best served by a blanket, unreviewable claim of confidentiality over all presidential communications."

The judge said Mr. Nixon's unwillingness to submit the tapes to him for secret inspection or to come up with a more detailed claim of privilege "precludes judicial recognition of that privilege on confidentiality grounds."

However, Gesell said, the Senate Watergate committee had also failed to show, at least to his satisfaction, that it has a pressing need for the tapes "or that further public hearings before the committee concerning the content of those tapes will at this time serve the public interest."

Senate Watergate lawyers had charged that Mr. Nixon's expressed fears of excessive pretrial publicity were "both belated and unconvincing," but Gesell held that they were not out of place.

"The President has a constitutional mandate to see that the laws are faithfully executed," the judge said, "and should therefore quite properly be concerned with the dangers inherent in excessive pretrial publicity.

"That the President himself may be under suspicion," Gesell continued, "does not alter this fact, for he, no less than any other citizen, is entitled to fair treatment and the presumption of innocence."

Accordingly, Gesell said, "the public interest does not require that the President should be forced to provide evidence, already in the hands of an active and independent prosecution force, to a Senate committee in order to furnish fuel for further hearings which cannot, by their very nature, provide the procedural safeguards and adversary format essential to fact-finding in the criminal justice system."

In dismissing the Senate suit "without prejudice," Gesell indicated that it might be revived again later with more success. The Watergate committee's chief counsel, Samuel Dash, had no comment on the ruling, but another source said an appeal is likely.

Sen. Sam J. Ervin Jr. (D-N.C.), the committee chairman, has said repeatedly that he considers the issue of profound importance. Beyond that, some of Gesell's observations provoked sharp reactions on the committee staff.

"I have never seen a case handed down in which a judge scolded and condescended so much to a legislative committee," one Senate Watergate lawyer protested. "It just didn't sound very judicious to me."

Gesell said he recognized that his efforts to balance the conflicting claims involved could produce "only an uncertain result." But he said that in putting fair trials in the courts first, he felt he was giving "proper weight to what is a dominant and pervasive theme in our culture."