

Court Blocks Ervin Panel On Request for 5 Tapes

Gesell Decides Pretrial Publicity Could Prejudice Rights of Defendants— Nixon Argument Is Also Rejected

NYTimes By DAVID E. ROSENBAUM FEB 9 1974
Special to The New York Times

WASHINGTON, Feb. 8—Judge Gerhard A. Gesell of the United States District Court dismissed today a suit by the Senate Watergate committee to obtain five tapes on the ground that the "blazing atmosphere" of the committee's hearings might prejudice rights of potential defendants, including President Nixon.

It was not clear whether

Excerpts from Gesell's order are printed on Page 60.

the committee would appeal the ruling. Senator Sam J. Ervin Jr. of North Carolina, the committee's chairman, and Samuel Dash, the chief counsel, declined to make immediate comment. Senator Howard H. Baker Jr. of Tennessee, the Republican on the panel, said that he did not favor an appeal.

Judge Gesell, a Democrat who has the reputation of

being one of the most liberal judges on the Federal bench here, rejected Mr. Nixon's contention that 'the public interest is best served by a blanket, unreviewable claim of confidentiality over all Presidential communications.'

For example, Congressional demands for similar evidence during impeachment proceedings "would present wholly different considerations," the judge declared.

But the factor of "critical importance" in this particular set of circumstances, Judge Gesell said, is "the need to safeguard pending criminal prosecutions from the possibly prejudicial effect of pretrial publicity."

"That the President himself may be under suspicion does not alter this fact, for he no less than any other citizen is

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entitled to fair treatment and the presumption of innocence," the judge said in a seven-page order.

If the committee decides not to appeal, the ruling will end the panel's seven-month battle to gain access to tapes of the President's Watergate conversations.

The suit for the five tapes was a test case for the committee, and, had it won, it would have pursued another subpoena for more than 500 other tapes and documents.

Public Playing of Tapes

From the outset, the committee made it plain that, if it obtained the tapes, it would play them in public.

All five tapes are in the hands of the Watergate special prosecutor, Leon Jaworski, and he has said that at least four of them will be produced in evidence at forthcoming criminal trials.

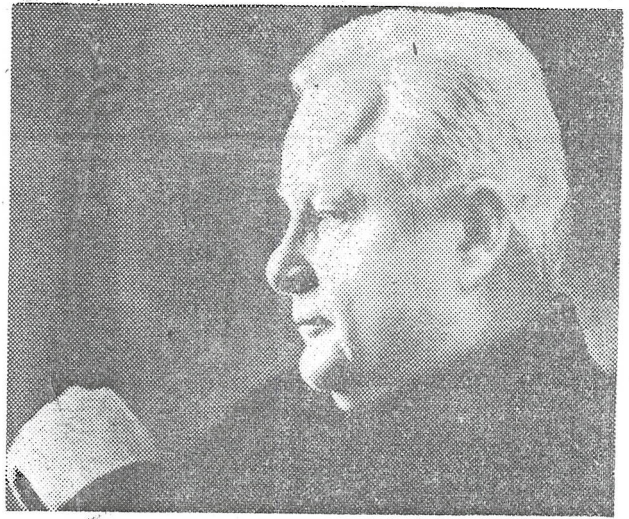
But Judge Gesell's order, if it is not reversed, apparently means that most of the President's conversations will never be played publicly.

The five tapes sought in the committee's subpoena involve conversations between the President and John W. Dean 3d, and the committee sought the evidence to prove or disprove Mr. Dean's testimony of the President's complicity in the Watergate cover-up.

The tapes were originally subpoenaed last July 23, a week after their existence was made known in public testimony by Alexander P. Butterfield, head of the Federal Aviation Administration. After Mr. Nixon refused to comply with the subpoena, the committee asked the court to force him to do so.

Chief Judge John J. Sirica of the District Court dismissed the committee's suit in October on the ground that the court had no jurisdiction over the matter.

In December, however, Congress passed legislation specifically granting the court jurisdiction over the case, and the United States Court of Appeals



United Press International

Judge Gerhard A. Gesell

for the District of Columbia sent the case back to the District Court, where it was assigned to Judge Gesell.

Throughout this time, there has been a running constitutional argument between Mr. Nixon and Senator Ervin. The President contended that the confidentiality of his communications with his aides was protected under the doctrine of executive privilege. Senator Ervin argued that there was no protection for communications that involved political matters or criminal wrongdoings.

Since he dismissed the suit on the ground of potential pretrial publicity, Judge Gesell did not deal at length with the constitutional question, saying only that the President could not make a blanket claim of privilege.

It is necessary, the judge said, "to weigh the public interests protected by the President's claim of privilege against the public interests that would be served by disclosure to the committee in this particular instance."

'Pressing Need' Doubted

In this case, he said, he does not believe that "the committee has a pressing need for the subpoenaed tapes or that further public hearings before the committee concerning the content of those tapes will, at this time serve the public interest."

There was some risk, Judge Gesell declared, that the publicity surrounding public release of the tapes would make it difficult to select an unbiased jury.

Noting that there had been a number of indictments in Watergate-related cases and that more are expected by the end of this month, Judge Gesell said that various charges and countercharges could be best resolved "by our established judicial processes."

"By their very nature," the judge continued, the committee's hearings could not "provide the procedural safeguards and adversary format essential to fact finding in the criminal justice system."

The committee has had to face the issue of pretrial publicity repeatedly in recent weeks.

Last month, the panel decided to postpone further hearings until after a jury was selected and sequestered in the New York City trial of former Attorney General John N. Mitchell and former Commerce Secretary Maurice H. Stans.

Yesterday, acting at the request of Mr. Jaworski, the committee voted to postpone issuing its final report until after indictments had been handed up and defendants have pleaded in Watergate cases.

The judge said that maybe the panel should end its hearings altogether.

"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 intimately related to pending criminal proceedings," the judge declared.