

'Plumbers' Defense Wins A Point on Security Data

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WASHINGTON, May 21— A Federal judge decided today that he would permit defendants in the White House "plumbers" case to attempt to subpoena national security documents that they contended were relevant to their case.

The ruling, made by Judge Gerhard A. Gesell of United States District Court at pretrial hearings, fell far short of the demands made by the defendants, who had sought a broad array of classified documents.

At issue was the defendants' thesis that the documents were needed to prove conclusively that they had a reasonable basis for believing that the Sept. 3, 1971, burglary of the Beverly Hills office of Dr. Daniel Ellsberg's former psychiatrist was motivated by far-reaching national security concerns.

On another issue, Judge Gesell dismissed charges this morning against Felipe de Diego, one of the six men originally accused in the break-in, because he had been given immunity by two states and the Federal Government before his indictment. Mr. de Diego's subsequent testimony, the judge said, raised the issue of "taint" in the Government's presentation of the evidence because of the possibility that some of his immunized testimony would be used against him.

Objective Is Upheld

The judge also agreed with an objection lodged by William H. Merrill, an associate Watergate prosecutor, to the pending testimony this morning of J. Fred Buzhardt Jr., the White House counsel, Mr. Buzhardt was subpoenaed last week by David I. Shapiro, the attorney for one defendant, Charles W. Colson, on the ground that he would testify about some of the classified material that the White House and other agencies could make available.

After Mr. Merrill argued successfully that the White House aides testimony would be irrelevant, Mr. Buzhardt quickly walked out.

The five defendants, who include John D. Ehrlichman, President Nixon's former top domestic adviser, are accused of staging the break-in at the office of Dr. Lewis J. Fielding, Dr. Ellsberg's former psychiatrist, after Dr. Fielding had refused to discuss his patient with investigators from the Federal Bureau of Investigation.

The men involved were members of the White House special investigations unit known as the "plumbers" because they sought to stop leaks to news-

papers. The unit was authorized by the President in mid-July, 1971, after The New York Times began publication of the Pentagon papers. Dr. Ellsberg, who had said he made the Pentagon papers available to the press, was one of the first targets of the ad hoc unit.

The defendants were indicted last March by a Federal grand jury and accused of conspiring to violate Dr. Fielding's civil rights.

The bulk of the day was taken up with two questions: Did the defendants have a right to national security documents and did the Fourth Amendment permit a President to authorize or delegate authority for a warrantless break-in to obtain or protect foreign intelligence?

Mr. Shapiro contended yesterday that, since the constitutional law on such searches was "less than crystal clear," the defendants had a right to utilize a "national security" justification for the break-in.

Philip B. Heymann, a Harvard law school professor who argues the national security issues on behalf of the Watergate special prosecutors, disputed Mr. Shapiro's assertion that the constitutional law regarding the Fourth Amendment guarantees against unreasonable searches was unsettled on issues of national security.

"No case has ever suggested a national security exception to the Fourth Amendment," he said. "No Attorney General has ever claimed that he, or some subordinate official, has the right to authorize the break-in and seizure of papers."

He said that even if President Nixon had specifically authorized the break-in—which the President says he did not do—it would still be unconstitutional.

On another point, Mr. Heymann also disagreed with the defendants' thesis that the prosecutors had to prove that the "specific intent" involved in the crime was the violation of Dr. Fielding's civil rights.

Judge Gesell indicated his agreement with much of Mr. Heymann's argument but also said that he was going to permit the defendants to subpoena some national security documents in an effort to demonstrate what their intent had been in the alleged conspiracy.

The Judge made clear that he was troubled by the fact that Mr. Colson and Mr. Ehrlichman, the two former high-level aides who did not participate in the actual break-in, have denied any prior knowledge of the conspiracy.