

'Plumbers' Trial May End If the U.S. Withholds Data

NYTimes By SEYMOUR M. HERSH MAY 23 1974

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WASHINGTON, May 22—The Federal judge in the White House "plumbers" trial raised the possibility today that he would be forced to dismiss the case if the Government refused to turn over evidence that was helpful to the defendants.

The judge, Gerhard A. Gesell, sternly told attorneys for the Watergate special prosecutor that he might have no other recourse. "If the court rules the documents are relevant and material, and the Government doesn't produce them, the prosecution ends," he said.

"There's going to be no executive privilege or national security privilege in this case," he said. "If something is relevant to this case, the Government is going to produce it."

At issue here is so-called national security materials held by the Government that the defendants contend is relevant to their defense. The prosecution, on the other hand, contends that the materials are not relevant.

Yesterday, at a pretrial hearing, Judge Gesell agreed to rule on whether he would issue subpoenas for the material. This would be a necessary step before he could rule on whether he would dismiss the case.

If the subpoenas are ap-

proved by the judge, and if the documents turn out to contain exculpatory material—that is, material in the hands of the prosecution that would tend to prove the innocence of the defendants—then the defendants have a constitutional right to those documents.

If the Government refuses to turn over exculpatory material, Judge Gesell, as he said today, has no recourse but to dismiss the case. The usual procedure is for the Government to turn over the material in camera to the judge, who then decides whether it is exculpatory.

If Judge Gesell, after reading the material found all of it to be exculpatory, he would then give the Government the choice of releasing the exculpatory material to the defendants or withholding it. The penalty for withholding it, under a Supreme Court ruling, would be immediate dismissal of the case.

Thus, if the subpoenas are issued, the Nixon Administration will be in a position to force dismissal of a potentially embarrassing trial.

There is one other possibility: Judge Gesell could read the documents in camera and de-

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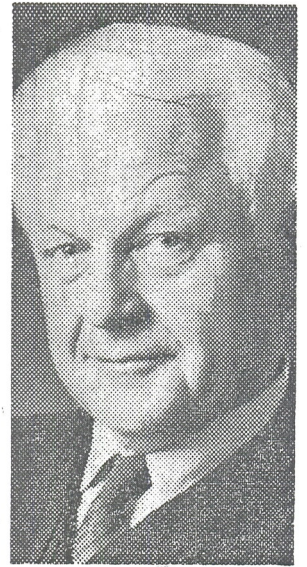
cide that they were not exculpatory.

Asked by Judge Gesell whether he agreed that the prosecution would end if the Government refused to turn over relevant and material documents, William H. Merrill, head of the prosecuting team, said that he did.

The issue arose during a discussion of possible exculpatory material in the Government's possession. Charles R. Breyer, an assistant special prosecutor, told the judge that he was reluctant to make available Government information not relevant to the case and that was covered by national security or executive privilege. This information, he indicated, was included in documents that were of some possible value to the defense.

Review Is Permitted

The issue was quickly resolved when Mr. Breyer agreed to permit defense attorneys to review the documents in full



Judge Gerhard A. Gesell

before some portions were excised.

The clash—if one does occur—will come if the White House or other executive agencies re-

fuse to make available materials for which the judge approves.

It was unclear how far Judge Gesell would be willing to go in response to the defendant's requests for documents, but two of the five defendants—John D. Ehrlichman and Charles W. Colson, former high-level Presidential aides—were known to have been involved in many sensitive areas of national security at the time of the break-in.

In an action involving different documents, the judge agreed with the defendants that they were entitled to have access to their personal files in the White House and late today issued a subpoena includes all documents germane to the case, whether exculpatory or not.

The judge also promised to intervene in an attempt to obtain any relevant material from Congress. At least one committee, Judge Gesell was told, was reluctant to turn over its tran-

views in connection with the White House special investigations unit, known as the "plumbers."

Judge Asks Cooperation

The ad hoc investigations unit was set up by President Nixon in mid-July, 1971, and authorized to stop leaks to newspapers. While investigating Dr. Daniel Ellsberg, who has said that he provided the press with the Pentagon papers—a story of United States involvement in the Vietnam war—the plumbers staged a clandestine break-in on Sept. 3, 1971, at the office of Dr. Lewis Fielding, Dr. Ellsberg's former psychiatrist.

Last March, a Federal grand jury indicted Mr. Ehrlichman

and another former high-level White House aide, Charles W. Colson, and four others for violating Dr. Fielding's civil rights, a felony offense.

In return for his efforts to maximize disclosure in the case, Judge Gesell told the defense attorneys, he needed their cooperation.

David I. Shapiro and William S. Frates, attorneys for Mr. Colson and Mr. Ehrlichman, have contended that the break-in was motivated by considerations of national security and that their clients had not intent to violate Dr. Fielding's civil rights by entering his office.