

A Sharp Order to Nixon's Lawyer

Washington

A federal judge ordered President Nixon's lawyer yesterday to check directly with the President to make sure Mr. Nixon understands that failure to turn over subpoenaed documents in the Ellsberg break-in case could result in dismissal of the charges.

James D. St. Clair the President's chief Watergate attorney, arrived at the court at the deadline set for the White House to turn over the personal files of former presidential aides John D. Ehrlichman and Charles Colson, two of the five defendants, for their use in their defense against conspiracy charges.

St. Clair moved to quash the subpoena but he was interrupted by U.S. District Judge Gerhard A. Gesell.

"What kind of a case do you think this is, Mr. St. Clair?" Gesell said. "It is not for the President to determine what documents ought to be produced. I want those documents produced."

Gesell set a deadline of Thursday for St. Clair to check with Mr. Nixon and respond in writing, and scheduled a hearing for the following Monday.

"The President must know he is taking these actions deliberately on the aborting of

this case," Gesell said in some of the sharpest statements made from the bench in the long Watergate proceedings.

"It seems to me to be advisable for me to have the understanding that the President understands personally the action he has taken," Gesell said. "The action he has taken could lead this case toward dismissal . . ."

"The President must make his choice."

Gesell emphasized he was not making "the ultimate decision" that he would dismiss the charges if Mr. Nixon continues to resist, but he said it is a possibility.

On leaving the courthouse, St. Clair said he believes "the President does not want to see the case dis-

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missed" but added he would not "get into matters I have discussed with my client."

Gesell earlier had turned down requests by defense lawyers to dismiss delay or move the case from Washington and order the trial to begin as scheduled June 17.

The White House maintains the need to protect presidential confidentiality requires that the material not be turned over.

Attorneys for Ehrlichman and Colson said they need the material to prepare a defense against charges of conspiracy in the 1971 break-in at the Beverly Hills office of Dr. Lewis Fielding, psychiatrist to Pentagon Papers defendant Daniel Ellsberg.

Also charged in the case are G. Gordon Liddy, Bernard L. Barker and Eugenio Martinez, all convicted of participation in the Watergate break-in.

When St. Clair arrived at the court without the documents, he was asked if the White House is prepared to go all the way to the Supreme Court if necessary to fight the subpoenas. "If it goes that far, sure," he replied.

But during the 45-minute proceeding, Gesell told St. Clair that his motion to quash the subpoena could not be appealed.

Gesell suggested as a possible compromise that Ehrlichman, Colson and their lawyers examine the papers and select whatever they felt were necessary, and that the special prosecutor examine those documents to see what others were needed.

St. Clair said that "as of this moment" he did not know whether he could agree with that proposal and waive executive privilege.

"There is no privilege," Gesell said sharply. "We're in a wholly different area. We are confronted with a trial. When the government has evidence it is not disclosing, it can lead to a dismissal in the proceedings. We're not in any civil fishing expedition."

In the morning hearing, lawyers for Ehrlichman, Colson and three other defendants argued the case was subject to undue pre-trial publicity and a trial would expose national security matters involved in the break-in.

But Gesell denied their motions saying:

• "The President not only lacks the authority to authorize the Fielding break-in but also . . . he did not in fact give any specific directive permitting national security break-ins."

• "The President has repeatedly denied prior knowl-

edge or authorization of the Fielding break-in, and the available transcripts of the confidential tape recordings support that claim."

• "This is a case where it cannot be fairly said the media has generated the publicity. The publicity has been generated by proper congressional activity and activity by the President, also proper. The special prosecutor has not been shown to have acted irresponsibly in regard to publicity matters."

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