

Judge Denies U.S. Security Justified Ellsberg Break-In

Gesell Rules the President Has No Right to Authorize a Warrantless Search Even in Foreign Intelligence Peril

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WASHINGTON, May 24 — The Federal judge in the White House "plumbers" case ruled today that the President has no constitutional right to authorize break-in and search without a warrant even when national security and foreign intelligence are involved.

In the ruling, Judge Gerhard

The text of Gesell decision is printed on Page 13.

A. Gesell of the United States District Court declared:

"The Fourth Amendment protects the privacy of citizens against unreasonable and unrestrained intrusion by Government officials and their agents. It is not theoretical. It lies at the heart of our free society."

Judge Gesell also said that defendants were not entitled to cite "national security" as a legal justification for their participation in the break-in of the office of Dr. Daniel Ellsberg's former psychiatrist in 1971.

Hotly Disputed Area

Legal experts said that Judge Gesell's ruling on the Fourth Amendment, which is subject to appeal, could, if upheld, be a landmark in that it placed a specific prohibition on the powers of the President in foreign intelligence and foreign affairs—a legal area now hotly disputed.

Although, as Judge Gesell noted in his ruling, there was no evidence indicating that President Nixon had specifically authorized the break-in, the issue arose when the defendants contended that the President had delegated that authority to members of the "plumbers" unit.

"Whatever accommodation is required between the guarantees of the Fourth Amendment and the conduct of foreign affairs," Judge Gesell said, "it cannot justify a casual, ill-defined assignment to White House aides and part-time employees granting them an uncontrolled discretion to select,

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enter and search the homes and offices of innocent American citizens without a warrant."

The judge flatly rejected the defendants' arguments that recent Supreme Court decisions permitting wiretapping in some foreign intelligence cases had, in effect, granted the President the right to authorize physical break-ins in similar cases involving national security.

"The Government must comply with the strict constitutional and 'statutory limitations on trespassory searches and arrests even when known foreign agents are involved,'" Judge Gesell wrote in his 10-page decision.

The judge did rule, however, that the defendants could subpoena specific national security documents that would directly aid their defense and also show their knowledge and authority in such areas.

He warned that if such materials, deemed by him to be relevant, were refused by the Nixon Administration, "the court will use the full range of its sanctions, including dismissal, if necessary, to insure that defendants receive a fair trial."

Judge Demands Report

In a later hearing on a different issue, the judge warned James D. St. Clair, the President's attorney, that if the White House did not provide the defendants in the "plumbers" case with access to their personal files it "may very well lead to dismissal." He ordered Mr. St. Clair to consult with Mr. Nixon on the issue and file a report to him by next Wednesday or Thursday. 29, 30 MAY

The judge's decision sharply conflicted with President Nixon's stated interpretation in a news conference last Aug. 22 of the law regarding national security searches. The President said that he had not specifically authorized the 1971 break-in of Dr. Lewis J. Fielding's office by the "plumbers," but he added, in response to a question about the legality of such warrantless searches:

"I would also, however, refer you to the recent decision of the Supreme Court or at least an opinion that even last year which indicates inherent power in the Presidency to protect the

national security in cases like this."

Similarly, John D. Ehrlichman, the former Presidential aide who is a defendant in the "plumbers" case, argued during televised hearings last summer before the Senate Watergate committee that Mr. Nixon felt it was "well within both the constitutional duty and obligation of the Presidency" for the "plumbers" unit to break into the psychiatrist's office.

The sweeping constitutional issues on which Judge Gesell ruled today were raised during pretrial arguments this week in the Government prosecution of the "plumbers," an ad hoc special investigations unit set up by President Nixon in July, 1971, and authorized to stop newspaper leaks.

In March, the five defendants, who include John D. Ehrlichman and Charles W. Colson, former high-level Presidential aides, were indicted for conspiring to violate the civil rights of Dr. Fielding, Dr. Ellsberg's former psychiatrist. Dr. Ellsberg a former Pentagon official who has said that he made public the Pentagon papers on the Vietnam war, was one of the prime targets of the unit.

Security Issue Rejected

The special Watergate prosecutor's office has consistently maintained that "national security" has no relevance to the burglary of Dr. Fielding's office. The defendants, in turn, have contended that their intent in breaking into the office was not to violate Dr. Fielding's civil rights, but to carry out a mission of national security.

The key issue was raised by David I. Shapiro, the attorney for Mr. Colson, who told the court that on Sept. 3, 1971, when the burglary took place, "such searches were not clearly prohibited either by express terms of the Constitution or laws of the United States or by decisions interpreting them."

Judge Gesell, in his opinion, took note of what he termed the "controversial" judicial responses in recent wiretap cases, but added that he could find nothing in those decisions indicating "an intention to obviate the entire Fourth Amendment whenever the President determines that an American citizen, personally innocent of wrongdoing, has in his possession information that may touch upon foreign policy concerns."

"Such a doctrine," the judge said in an implicit reference to Dr. Fielding as a citizen, "even in the context of purely information-gathering searches, would give the executive a blank check to disregard the very heart and core of the Fourth Amendment and the vital privacy interests that it protects."

The judge further explained that, "however desirable the break-in may have appeared to its instigators, there is no in-



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Judge Gerhard A. Gesell

dition that it had to be carried out quickly, before a warrant could have been obtained. On the contrary," Judge Gesell said, "it had been meticulously planned over a period of more than a month."

Intent Is Disputed

The judge also took exception to the defendants' argument that they had no specific intent to violate Dr. Fielding's civil rights because they "reasonably believed" that they had been authorized to enter his office.

"It is well established that a mistake of law is no defense in a conspiracy case to the knowing performance of acts," the judge wrote. "Defendants are alleged to have intended to search Dr. Fielding's office without a warrant, and their mistaken belief that such conduct did not offend the Constitution would not protect them from prosecution."

Judge Gesell conceded, however, that the defendants were entitled to present any factual material—even if it involves national security—to refute the contention that they conspired to break in and to show "their knowledge and authority in national security areas."

He set June 6 as the date for the return of the defense subpoenas, and warned defense attorneys that "a strict rule of relevance and materiality will be applied." The defendants have asked for a broad array of national security documents in an effort to demonstrate that their "intent" was not to violate Dr. Fielding's rights.

The judge noted that normally the defendants might be entitled to demand the documents from the Government prosecutors but could not do so in the present case.

"Here the Government is

prosecuting itself," he explained, "and those in the Government who have evidence needed by the defense are in an adversary position toward the special prosecutor and perhaps in some instances toward the defendants as well."

That conflict flared later in the day, when the White House—citing executive privilege—moved to quash the subpoenas for the personal papers of Mr. Ehrlichman and Mr. Colson. The subpoena had been forwarded Wednesday by the judge.

Warning to St. Clair

During a sometimes stormy 30-minute hearing, Judge Gesell repeatedly attacked the President's claim of executive privilege and warned Mr. St. Clair, "If it is the position of this Government that there will be no disclosure, I see no other conclusion from my reading of the law other than to dismiss."

He sternly warned Mr. St. Clair to take up the issue personally with President Nixon. "You appear to be ignorant of the cases [calling for dismissal if the subpoenaed materials were not furnished] and you appear not to have advised him," Judge Gesell said. He added, in what seemed to be a direct reference to the House impeachment hearings, that Mr. Nixon's action in the "plumbers" case could have ramifications, "in other quarters."

After the hearing, Mr. St. Clair, who did not lose his composure before the judge, told newsmen that "the President does not want to see the case dismissed."

Some lawyers have said that such a dismissal, if precipitated by the President's refusal to provide documents, could be another ground for impeachment.

At issue during the hearing were requests by Mr. Ehrlichman and Mr. Colson for access to their handwritten notes, many dealing with Presidential meetings, that are now considered part of the President's personal files.

The judge emphatically rejected Mr. St. Clair's claim of executive privilege as being "out of focus." He asserted, "there is no privilege in the President. He—the Government—brought this lawsuit and thus waived privilege. It's not for the President to decide what documents are relevant to this trial."

Some middle ground was reached, however, after Mr. St. Clair suggested that Mr. Ehrlichman and Mr. Colson would be permitted to look through their files and designate material that could be relevant to their defense.

On the thornier and more basic issue of whether similar members of the special prosecuting team, Mr. St. Clair said he did not have "authority" to make promises, and agreed to file a written proposal—after review with Mr. Nixon—next week.



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James D. St. Clair, left, and J. Fred Buzhardt Jr. arriving yesterday at court in Washington. Judge Gerhard A. Gesell told Mr. St. Clair that White House failure to provide defendants in the "plumbers" case with their personal files could lead to dismissal of the charges. He told him to consult with Mr. Nixon on the matter.