

Prosecutor May Join White House in Plea to Watergate Judge

By SEYMOUR M. HERSH

Special to The New York Times

WASHINGTON, May 29 —

There were indications today that the Watergate special prosecutor's office would join with the White House in urging a Federal judge to back away from his threat to dismiss the charges in a Watergate-related case because of President Nixon's unwillingness to provide two defendants with their personal papers.

James D. St. Clair, Mr. Nixon's counsel is expected to respond in writing tomorrow to a demand from Judge Gerhard A. Gesell of United States District Court that the White House open its Presidential files not only to the defendants but also to the Watergate prosecutors.

But a number of attorneys close to the case, interviewed in recent days, suggested that Judge Gesell had gone beyond the narrow question before him in a brief, but argumentative, hearing last Friday.

At the hearing, the judge warned Mr. St. Clair that if the White House did not agree to permit Charles W. Colson and John D. Ehrlichman full rights to their files, "I see no other conclusion from my reading of the law other than to dismiss."

The special prosecutor's office is expected to submit a written brief on the matter Friday. A number of sources said that the prosecutors would urge that the impasse be amicably settled, short of outright dismissal of the case.

No details could be learned from the prosecutor's office, but one source noted that Judge Gesell's threat of dis-

missal "really makes it [the dispute] seem something that it's not."

Similarly, Mr. St. Clair told newsmen after the hearing that "the President does not want to see the case dismissed." Some lawyers have noted that a dismissal based on the President's refusal to turn over evidence determined to be relevant could be another ground for impeachment.

Demand by St. Clair

At issue in last week's hearing was Mr. St. Clair's contention that the subpoenas from Mr. Colson and Mr. Ehrlichman were too broadly drawn and his demand that for that reason they be quashed.

Some attorneys noted that the dispute before Judge Gesell differed from the White House's attempt to "stonewall" the Watergate prosecutors and the House Judiciary Committee in their requests for more Presidential tapes and documents because, as Mr. St. Clair said in court last week, the White House was willing to respond to more specific subpoenas from Mr. Ehrlichman and Mr. Colson.

Mr. Ehrlichman and Mr. Colson, two former high-level Nixon aides now on trial, subpoenaed the White House last week for access to, and duplication of, any of their handwritten notes of Presidential meetings in mid-1971, when the ad hoc Presidential special investigations unit, informally known as the "plumbers," carried out an illegal burglary of the office of Dr. Daniel Ellsberg's former psychiatrist in Beverly Hills, Calif.

The handwritten notes were among the Presidential mate-

rials that Mr. Colson and Mr. Ehrlichman turned over to the White House's central filing system after resigning from their posts last year.

At Friday's hearings, Mr. St. Clair suggested to the court, "Perhaps the error is in the breadth of the request which generates the breadth of the denial."

"Now, if the requests were sharpened," Mr. St. Clair added, "and the means are available to these parties to make sharper requests — then we would all be able to deal with the matter on a far more selective and appropriate basis."

The White House counsel said that Mr. Colson and Mr. Ehrlichman would be permitted to examine their notes, without their attorneys, as have other defendants in Watergate cases, in order to be more selective about their requests.

A number of legal experts noted that if that procedure were followed, and the White House still refused to turn over personal files that were deemed necessary, the dispute still could be resolved short of dismissal.

Mr. Ehrlichman and Mr. Col-

son have maintained that there were "national security" reasons that justified the burglary of the office of Dr. Lewis Fielding, Dr. Ellsberg's former psychiatrist. They have argued that the specific intent of those involved in the burglary was not to violate Dr. Fielding's rights but to follow a national security directive from the President.

Dr. Ellsberg has said that in 1971 he "leaked" to the news media the secret Pentagon papers, which were critical of the United States role in the Vietnam war. The "plumbers" were set up to investigate and put an end to such leaks.

The special prosecutors have argued that the "national security" factors were not a valid defense and that the defendants were guilty of a simple "law and order" offense — that of breaking into the psychiatrist's office. Last week, Judge Gesell ruled out national security as a possible defense in the case.

Some sources noted that the special prosecutors have consistently maintained in pretrial hearings that the White House files being sought were not

relevant to the "plumbers" trial.

Because of that, one lawyer suggested, the special prosecutors would undoubtedly be willing to permit Mr. Colson and Mr. Ehrlichman to state as fact what was contained in their handwritten notes without producing them in court. "Even if they were exculpatory as to their motive," the lawyer said, "so what? It still wouldn't help them win the case."

A number of lawyers close to the case also expressed amazement at Judge Gesell's repeated threats to dismiss the case last Friday. Some noted further that the judge had also taken the unusual and, in their eyes, unnecessary step of urging Mr. St. Clair to permit the special prosecutor's office to have unlimited access and review of the Presidential files, a request that the special prosecutor had not made on his own behalf.

"A judge isn't supposed to do that," one experienced Federal lawyer said. "Our system is an adversary system with two sides, and the judge is not an adversary."