

Jaworski Asks Judge Not to Drop Charges in Ellsberg Burglary

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WASHINGTON, May 31—The special Watergate prosecutor's office, in effect joining forces with the White House, asked a Federal judge today not to force a showdown—and perhaps dismissal—in the “plumbers” case because of a White House refusal to turn over subpoenaed documents.

In a brief filed with Judge Gerhard A. Gesell of United States District Court here, the prosecutors argued that the subpoenas for White House files submitted by John D. Ehrlichman and Charles W. Colson, were too broadly drawn and did not meet even “ordinary standards of specificity and materiality.” Mr. Ehrlichman and Mr. Colson are former high-level Presidential aides who are defendants in the case.

The brief, signed by Leon Jaworski, the special prosecutor, also supported President Nixon's claims of executive privilege and national security in connection with the subpoenaed papers.

The brief noted that Federal courts in the District of Columbia have previously held that the Presidential privilege yielded only when those filing a subpoena had “demonstrated a compelling need for the material.”

That “need,” Mr. Jaworski said, has not been demonstrated by Mr. Colson or Mr. Ehrlichman.

Nixon Stance Challenged

But the special prosecutor did carefully take exception to Mr. Nixon's contention that he had the sole right to determine what subpoenaed documents could or could not be made available to a court.

“The law of this circuit is clear that the courts, and not the President of the United States, must ultimately decide whether a claim of executive privilege justifies the President in withholding materials essential to a prosecution,” Mr. Jaworski said. Once legal relevance of a subpoenaed document has been established, he said, the court “will itself decide what is and what is not available.”

On the other hand, the special prosecutor said, in an obvious reference to the “plumbers” trial, a defendant in a criminal proceeding “is not rendered immune from prosecution simply because he can identify highly classified documents and claims them to be relevant, in even a negligible way.”

In a letter to Judge Gesell yesterday, James D. St. Clair, President Nixon's defense lawyer, similarly attacked the subpoenas and declared that Mr. Nixon would retain the right

to withhold the national security documents that the court deemed relevant even if withholding them led to the dismissal of charges.

The court should insist, the brief said, “upon a more precise description by the defendants of what privileged items, if any, may actually be material and important to their defense.”

Mr. Jaworski further noted that Mr. St. Clair acceded yesterday to another of Judge Gesell's demands—providing for the Watergate prosecutors to examine the same subpoenaed White House files made available to Mr. Ehrlichman and Mr. Colson.

“The President's response to that phase of the court's proposal seems adequate at this time,” Mr. Jaworski noted. Since the issues before Judge Gesell involved a request by the defendants—and not by his office—for access to the files, the special prosecutor added, “We see no reason to make resolution of the defendants' claim to access in any way dependent on assurance of similar access by our offices under these circumstances.”

Right of Inspection

Mr. Jaworski reserved the right to demand such access, however.

The issue being discussed in the prosecutor's brief is especially sensitive, a number of sources close to the case have acknowledged, because of what some attorneys consider Judge Gesell's excessive warnings to Mr. St. Clair during a hearing on the subpoenas last Friday.

At the time, the judge warned that unless the Nixon Administration permitted the defendants and the Watergate prosecutors to have full access to the subpoenaed files—some of which include more than two years of White House conversations—he would consider dismissing the case.

Mr. Colson, Mr. Ehrlichman and three other men were indicted last March for allegedly conspiring to burglarize the office of Dr. Daniel Ellsberg's former psychiatrist in 1971.

At the time, the men were associated with the White House special investigations unit, also known as the “plumbers,” a special group authorized by President Nixon to stop leaks of national security information.

One of the group's first targets was Dr. Ellsberg, a former Pentagon official who has said he gave the press copies of a top-secret history of United States involvement in Vietnam that became known as the Pentagon papers.

Attorneys for Mr. Colson and Mr. Ehrlichman are expected to argue at a hearing Monday

on the subpoenas that Judge Gesell should either demand that the White House produce the documents or dismiss the case.

Mr. Jaworski's 21-page brief seemed to be aimed as much at the possibility of dismissal as at the status of the Colson-

Ehrlichman subpoenas. It sought repeatedly to draw Judge Gesell's attention to other means short of dismissal for handling White House's resistance to the disclosure of material.

Mr. Jaworski then noted that the White House simply could provide a factual summary of the requested materials “without unnecessary compromise of confidential information.”

Another alternative, the prosecutor said, would be to delete those portions of relevant documents that should not be disclosed.

A third solution would be to provide a representative sample “from a broader category of materials sought,” an obvious reference to Mr. Ehrlichman's subpoena for his notes on White House conversations between January, 1971, and April 30, 1973, the day he resigned.