

# Judge Decides Ehrlichman Can Be Tried With Others

## Gesell Says White House Eases Claim of Executive Privilege—Hints Trial Will Be Delayed a Week or Two

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By SEYMOUR M. HERSH

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WASHINGTON, June 12—In a surprise decision, Federal District Judge Gerhard A. Gesell reversed himself today and said that he would reinstate John D. Ehrlichman as one of four defendants in the White House "plumbers" trial.

He also indicated that the trial, scheduled to begin next Monday, would be delayed a week or two.

Judge Gesell made the ruling, which he said would be confirmed in a formal order tomorrow, after attorneys for the special Watergate prosecutor's office filed a last-minute motion for reconsideration. They warned that if Mr. Ehrlichman's trial was delayed there would be "perhaps no trial at all" for him.

The prosecutors also provided the judge with an affidavit from J. Fred Buzhardt Jr., the White House counsel, stating that he had reviewed Mr. Ehrlichman's personal notes in the White House files and had found nothing in them "which bears on the issue of guilt or innocence of defendant Ehrlichman."

President Nixon's refusal to provide Mr. Ehrlichman and his attorneys full access to all those notes, plus Mr. Nixon's insistence on having the final right to determine which other documents could be provided to the court, led Judge Gesell yesterday to sever Mr. Ehrlichman's trial from that of the other defendants and delay it indefinitely.

In a brief hearing this afternoon, Mr. Buzhardt told the judge that he thought Mr. Nixon would waive his claim of executive privilege on a file of personal correspondence that had also been subpoenaed by Mr. Ehrlichman.

Although Mr. Buzhardt made no further concessions or prom-

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ises regarding White House claims of authority to withhold information under the doctrine of executive privilege, Judge Gesell observed, "We have progressed substantially. The claim of executive privilege has been removed."

Under questioning from the judge, Mr. Buzhardt also specifically waived executive privilege for a series of White House documents that were supplied to the court in secret last week. The White House counsel told newsmen later that, under guidelines previously established by the President, executive privilege was waived upon delivery of the documents to Judge Gesell.

Mr. Ehrlichman, who was President Nixon's chief adviser for domestic affairs until he resigned in April, 1973, as the Watergate scandal unraveled, has sought full access for himself and his lawyers to personal notes he had taken on White House conversations.

### Sought for Defense

He wants the notes to help prepare his defense against charges of making false statements to a Federal grand jury and the Federal Bureau of Investigation and of conspiracy to violate the civil rights of Dr. Lewis Fielding, former psychiatrist to Dr. Daniel Ellsberg.

Mr. Ehrlichman and the three other defendants—G. Gordon Liddy, Bernard L. Barker and Eugenio R. Martinez—are accused in connection with an alleged burglary of the office of Dr. Fielding to gain information about Dr. Ellsberg, who has said he gave the press the secret Pentagon papers on Amer-

ican involvement in the Vietnam war. The burglary has been attributed to a special White House unit, called the "plumbers" because its job was to stop leaks of sensitive information.

A number of well-informed lawyers and some members of the special prosecutor's office privately criticized Judge Gesell yesterday for what they considered unnecessary action in severing Mr. Ehrlichman's case from the others. Some of the same sources made clear after the hearing today that they believed the judge had made a significant retreat in reinstating Mr. Ehrlichman and, in doing so, had exaggerated the significance of Mr. Buzhardt's specific waivers of Presidential privilege.

### Declines to Disagree

Mr. Buzhardt, asked later by a newsmen if "there was anything promised today that wasn't available yesterday," smiled and responded, "I guess that's a matter of construction," "that's clear, I'm not going to disagree with a judge."

But the White House counsel said, "No," when he was subsequently asked whether the President had less privilege today. "I don't know of any instance where we've changed our position," Mr. Buzhardt added.

That position was taken in a letter sent Friday to Judge Gesell by James D. St. Clair, the President's Watergate counsel, in which Mr. Nixon insisted that he alone would decide whether to provide any of Mr. Ehrlichman's personal notes deemed relevant to his defense.

Judge Gesell declared that proposal "unacceptable" yes-

terday and said that the President "flatly refuses to make the documents available to the court in camera and thus makes it impossible for the court to properly perform its duties."

In a brief submitted today, Leon Jaworski, the special prosecutor, said, in effect, that the judge had acted hastily in severing Mr. Ehrlichman's case without first determining that any of the materials Mr. Ehrlichman sought were in any way relevant.

Mr. Jaworski noted that seven other executive agencies and individuals, including the National Security Agency, the State Department and the Justice Department, had satisfactorily responded to Ehrlichman subpoenas by presenting affidavits to the court stating that they had searched their files and found nothing relevant to Mr. Ehrlichman's defense.

The Buzhardt memorandum, Mr. Jaworski argued, "now placed the subpoenaed Ehrlichman notes in precisely the same posture as the materials defendant Ehrlichman subpoenaed from numerous governmental agencies."

### Complains About Press

Judge Gesell seemed today to fully accept Mr. Jaworski's reasoning and noted that, pending evidence of bad faith, such Government searches of possibly helpful materials were "prima-facie satisfaction" of subpoenas such as Mr. Ehrlichman's.

In his brief, Mr. Jaworski also noted that Mr. Ehrlichman "still has complete access of his files" and could, if he chose, consult with his attorney about them outside the secure file

room where the records are kept under 24-hour guard.

The judge, who has privately complained about what he termed excessive news media coverage of his threats to hold President Nixon in contempt of court, publicly criticized the press's reporting today of his indefinite delay and severance of Mr. Ehrlichman's trial.

That arose when Andrew C. Hall, an Ehrlichman attorney, complained that Ehrlichman's chief attorney, William S. Frates of Miami, returned home today and was not available to protest the judge's change of mind.

The judge characterized Mr. Frates's decision to go home as a mistake and insisted that he did not contemplate an indefinite delay in Mr. Ehrlichman's trial, only a delay of a few days or weeks.

"He must have been reading the headlines in the newspapers," the judge caustically told Mr. Hall.