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Letters to the E

Of Watergate and Evidence

To the Editor:

Your recent reports of the House Judiciary Committee's insistence on receiving the original White House tapes are accurate in stating that this is because they are the "best evidence."

However, nowhere have you mentioned the particular forcefulness in law of the rule that second-hand evidence, such as copies of transcripts, may not be received by a judge, a jury or the Senate sitting as a jury if the original is available.

This rule has been carried through thousands of legal cases since the publication in 1765 of Blackstone's "Commentaries on the Law," which were the greatest legal influence in the drafting of our Constitution and which expressed the rule as follows:

"If the best legal evidence cannot possibly be produced, the next best legal evidence shall be admitted. But in general the want of better evidence can never justify the admission of hearsay, interested witness, or the copies of copies, etc." (Vol. 3, page 368).

I have stressed the word "possibly" because our courts have done so. They recognize no exception waiving the best evidence where it would be difficult, awkward, embarrassing or incriminating. This insistence on originals would apply particularly to the White House transcripts, which have been submitted by President Nixon on his own behalf as an "interested witness." The errors and omissions shown by the transcripts themselves make the original tapes all the more essential as the best evidence.

STEPHEN A. WISE

New Canaan, Conn., May 26, 1974

To the Editor:

Perhaps the most pernicious legacy of this corrupt Administration will turn out to be the systematic and cunning perversion of the orderly processes of law as practiced by the executive branch. It is possible to detect, in the trials of the Ellsberg and now the Watergate defendants, an ingenious manipulation of the result by means of the Brady rule, which requires exculpatory evidence in possession of the prosecution be divulged to the defense.

It can credibly be argued that the refusal to reveal Brady evidence, which contributed heavily to the dismissal of the Ellsberg case, was a deliberate strategy on the part of the Administration to avoid an acquittal, which looked imminent and which would have severely damaged an executive whose theory of government depended so much on secrecy and the childishness of the electorate.

It also can be argued that the refusal to release tapes, imagined by some to contain exculpatory evidence, is a White House strategy to secure the dismissal of the case against the Watergate defendants, the motive being loyalty to dedicated servants who might be found guilty. After all, among these are people described by the President as "two of the finest public servants it has been my privilege to know." True, it can be surmised that evidence exculpatory to the defendants would transfer the responsibility for their misconduct upward, thus posing an increased threat to the President; this may furnish an additional motive for his intransigence.

Fortunately, in the trial at hand, there appear to be no grounds for a Brady dismissal. The rule applies to possibly exculpatory evidence known to and held by the prosecution, whereas at present the prosecution is fighting its own Chief Executive for possession of that evidence. Failure to gain possession can only redound to the discredit of the President, not the prosecution. If the accused are wrongly found guilty because of this withheld evidence, it is an impeachable offense. If they are wrongly acquitted because of it, that is also an impeachable offense: The President "shall take care that the laws are faithfully executed."

S. A. MORSE

Woodsville, N. H., May 27, 1974