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The Tapes, Sirica and the Law

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WASHINGTON, Nov. 2 — In announcing that there are no tape recordings of two of the disputed Watergate conversations, the White House lawyers in one sense at least, have hardly done anything novel.

Nonexistence is "the easiest defense in the world" to a subpoena for documents or other bits of evidence, as one law professor put it today, and if the judge believes it, the matter generally ends. But usually that defense is made as soon as the subpoena is received. Mr. Nixon's lawyers made their announcement more than three months after the subpoena was issued—months in which the subpoena and the President's refusal to honor it caused a legal battle of constitutional dimensions.

News Analysis

The belated statement thus raises a tangle of legal questions beyond the popular question of whether the White House is telling the truth.

The first problem, chronologically anyway, is whether the receipt of a subpoena duces tecum (as subpoenas demandin documents or records are called imposes any particular duties o the recipient—the duty to inform the court about the status of the records, for instance.

An Untested Question

Experts interviewed today agreed that one basic duty is, simply, not to destroy the evidence—"that would be contempt of court," said Jerold H. Israel, professor at the University of Michigan Law School. It would also quality as the crime of obstruction of justice, he said.

There has apprently been little litigation though, on wheth a lawyer must tell the court if the material specified in a subpoena simply does not exist. The obvious reason is that in the normal situation a lawyer would say this, and right away.

Perhaps as a result, there is no clear duty on the recipient to make an immediate declaration.

There is another general rule, though, that the courts should not be asked to make rulings on important questions, such as constitutional issues, where there is no need to do so. Thus, if none of the nine conversations specified in the Watergate prosecution's subpoena of Mr Nixon were recorded, Mr. Nixon would have been obliged so to inform the court, or the prosecution, relatively soon after the subpoena was received.

As Dean Wayne Lafave of the University of Illinois Law School said today, though, the existence of at least some tape recordings meant that the courts would have had to consider the issues anyway.

Just when the White House should have informed the court, is not legally clear. According to experts, general ideas of fair play—and political considerations—are probably as binding as any precise statute

Clearly, the recipient of a subpoena must explain sooner or later why he is not turning over the material the subpoena calls for, and a lawyer's position as an "officer of the court" implies that he will make such an explanation as soon as possible, to avoid disruption of court proceedings.

The White House lawyers are making this explanation now, before Federal District Judge John J. Sirica, who had ordered the President to turn over the materials specified in the subpoena so the judge could decide which materials should be given to the grand jury investigating Watergate crimes.

That proceeding raises more questions—basically, what are Judge Sirica's options now?

Judge Sirica must decide whether the President is complying with the subpoena. And as Professor Al Alschuler of the University of Texas Law School said, "Nixon has put Sirica into sort of a tough position, because it's going to be a question of credibility."

Some people, lawyers and laymen alike, have quickly decided that the White House is, or probably is, lying. But the standard of proof is "proof beyond a reasonable doubt," and as Professor Israel suggests, this may be a hard standard to meet—not just legally but also politically, as Professor Alschuler noted.

"Anyone else you're 70 per cent sure they're lying, you'd do something about it," he said. But where the President's credibility is at issue, he said, "it's such a tough political question."

If Judge Sirica decides that the lawyers are not telling the truth about when they first learned of the nonexistence of the tapes, though, he may decide that they are not telling the truth on other matters as well. According to Professor Israel, lying on that point would tend to "discredit the whole story."

Judge Sirica may decide, after listening to the testimony, that the White House has the tapes or has destroyed them. In that event, he might begin contempt proceedings and cite Mr. Nixon for contempt or, he might tell the prosecution to refer the matter to the grand jury, without himself suggesting which way the jury should rule. The prosecution could seek an indictment for obstruction of justice.

The judge might also decide that there was no proof—or no adequate proof—that the tapes exist or did exist.

Whichever course he takes, the legal tangle will continue.

Even if the judge finds no contemptuous or criminal act, the prosecutor may himself seek an indictment. If the prosecutor does this, there will be a legal battle over whether or not a President still in office may be prosecuted.

There will be a similar legal battle, too, if the judge cites Mr. Nixon for contempt.

Other Cases Involved

There are also many unanswered questions regarding future prosecutions of others for Watergate-related crimes. Recently, while Mr. Nixon was insisting that he could withhold tape recordings on the ground that they were protected by executive privilege, many lawyers were suggesting that without the tapes many prosecutions would fail.

For one thing, the prosecutors would be deprived of evidence they could use to build cases against defendants. Also, defendants might be deprived of evidence they need to exculpate themselves. Under the law, a case must be dismissed if the government refuses to turn over to the defense any material it has that is favorable to the defense.

If it turns out that there are indeed no tapes or transcripts of the two conversations in question, the problem of dropping a case against a defendant does not arise.

But if it turns out that the White House purposely destroyed the tapes, then, where the information is material to a defendant's case (as it would be, for instance, if the former White House counsel, John W. Dean 3d, were charged with perjury), the case would have to be dropped.

The law is not so clear on what would happen if it turns out that the tapes did exist but were destroyed by mistake. A mistaken destruction would not be grounds for contempt, some lawyers suggest, because Mr. Nixon would not have had the necessary criminal intent. However, it might be sufficient grounds on which to throw out the prosecution of a defendant those defense would be helped by the tape.

With the stakes so high, it is likely that defendants would at least raise that possibility. And even if Judge Sirica had ruled that the President was not in contempt, the ruling would not necessarily be binding on the defendants. For defendants in future cases are not parties in the present proceedings before Judge Sirica; they could thus raise the issue anew, on their own.