

Nixon's Refusal to Yield His Tapes
Could Jeopardize Some Watergate
Prosecutions

TWO CASES CITED BY LEGAL EXPERTS

Rulings by Supreme Court Barred Convictions When Evidence Was Withheld

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WASHINGTON, July 27 — President Nixon's refusal to yield the tape recordings of his Watergate conversations could, if sustained by the courts, jeopardize the prosecution of some suspects in the case.

Following the President's challenge yesterday to subpoenas for the tapes from the Senate Watergate Committee and the special prosecutor, Archibald Cox, legal experts pointed to possible parallels in two cases decided by the United States Supreme Court—Jencks v. United States in 1957 and Brady v. Maryland in 1963.

In the first, Clinton E. Jencks, a labor union official, was convicted of swearing falsely that he was not a Communist. Two undercover agents of the Federal Bureau of Investigation had testified against him, and he demanded that their earlier written reports be turned over for possible use in his defense.

The Supreme Court threw out his conviction because the Government refused to make the agents' reports available.

Court Ruling Quoted

Justice William J. Brennan Jr., who still sits on the Court, wrote in the Jencks case:

"The criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce . . . relevant statements or reports in its possession of Government witnesses touching the subject matter of their testimony at the trial."

Quoting an earlier case with approval, Justice Brennan added, "Since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental powers to deprive the accused of anything which might be material to his defense."

Even in cases where national security matters are involved, he said in effect, the Government must choose between disclosing pertinent statements or letting the defendant go free.

Later in 1957, Congress added the essence of the Jencks decision to the Criminal Code, except that the law states that the judge may either strike the testimony of the witnesses, involved or declare a mistrial at his discretion.

Statements Withheld

In the Brady case, a man was convicted of murder. During the trial, the statements of a companion, made outside court, in which he admitted that he and not Brady had done the actual killing were withheld from Brady's attorney.

Justice William O. Douglas wrote that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process." He thus extended the Jencks rule to bar not only the withholding of witnesses' statements but also of any evidence that might tend to exonerate.

Both cases could apply to the Watergate trial.

A number of the prospective Government witnesses, such as Herbert W. Kalmbach, Mr. Nixon's former personal attorney, may have discussed the case in conversations that were recorded. And it is highly likely that evidence relevant to the trials is present on the tapes.

Asked about the problem at a news conference at the White House yesterday, Leonard Garment, the acting Presidential counsel, replied in part.

"Many of the most difficult issues of constitutional government involve making determinations of a balance of competing constitutional considerations. In certain cases, one or the other. That determination was made by the President."

Wright Letter Cited

Mr. Garment also referred reporters to the letter sent to Mr. Cox on Monday by Prof. Charles Alan Wright, the constitutional lawyer who will represent Mr. Nixon in the forthcoming legal tests.

In the letter, Mr. Wright argued that on occasion "there are circumstances in which other legitimate national interests requiring that documents be kept confidential outweigh the interest in punishing a particular malefactor."

Mr. Cox said this morning that the tapes might contain evidence showing innocence as well as guilt, but he refused

to deal with the question of what he would do if they were unavailable but exculpatory—that is, showing innocence.

In effect, he said that he would cross legal bridges as he arrived at them.

But other sources in the prosecutor's office said that Mr. Cox had in fact given a good deal of thought to the problem, and that was one of the reasons he was willing to press the President so hard in the courts to get access to the tapes.