

MITCHELL'S MOVE ON TAPES OPPOSED

Prosecutors See Attempt to Damage Criminal Case

By ARNO LD H. LUBASCH

Federal prosecutors argued yesterday that attorneys for John N. Mitchell were trying to damage or dismiss the criminal case against the former Attorney General by introducing the "momentous constitutional issue" of White House tape recordings.

The argument came at a hearing in Federal District Court here on a Government motion to quash a defense subpoena that seeks White House tapes and documents as evidence for the Oct. 23 trial of Mr. Mitchell and former Commerce Secretary Maurice H. Stans.

Judge Lee P. Gagliardi, who is in charge of the Mitchell-Stans case, said at the end of the one-hour hearing yesterday that he was reserving his decision on the subpoena dispute.

"Real Thrust" Described

The indictment against Mr. Mitchell and Mr. Stans alleges that they obstructed a Federal investigation of the fugitive financier Robert L. Vesco in exchange for his secret \$200,000 cash donation to President Nixon's re-election campaign last year.

Defense attorneys have issued a subpoena to Mr. Nixon for tapes and documents to obtain evidence to attack the credibility and motives of John W. Dean 3d, the former White House counsel, and other expected witnesses at the trial.

Arguing for the Government, Thomas Day Edwards said at the hearing that the "real thrust" of the defense move

was to hamper the prosecution of the case by inducing the President to invoke the doctrine of "executive privilege" to withhold the subpoenaed material.

This argument against the subpoena was supported in a 15-page memorandum submitted for United States Attorney Paul J. Curran by Mr. Edwards, who is chief of the Federal prosecutor's criminal division here, and Steven A. Schatten, an assistant prosecutor.

The memorandum contended, "The last thing that the defendants hope to get, and almost the last thing that they could reasonably suppose to exist in the White House files, would be evidentiary items admissible as part of their case at this trial."

'After Bigger Game'

"The defendants are plainly after bigger game," said the memorandum, which contended that the defense attorneys "desperately hope" to persuade Judge Gagliardi to require the White House to produce material that would compel President Nixon to invoke executive privilege.

"Upon the consummation of this devoutly - wished - for event," it continued, "they then hope to argue that sanctions should be imposed upon the Government in this case: presumably that the testimony of one or more Government witnesses be stricken or, as the real pot at the end of their rainbow, that this prosecution be dismissed."

The constitutional issue in the case involves the prosecution's responsibility to provide the defense with material that is useful in rebutting prosecution testimony, and the question of whether the President is privileged to withhold information that he feels cannot be released without hampering the orderly operation of the Government.

Responding for the defense,

John E. Sprizzo said that he represented the Government's contention that the subpoena was "ploy" to inject the issue of President Nixon's executive privilege.

Move Is Supported

Mr. Sprizzo, one of Mr. Mitchell's lawyers, maintained that the subpoena was a valid attempt to obtain trial evidence, including any tapes and documents on White House visits by Harry L. Sears, a New Jersey politician who is alleged to have been a go-between for the Vesco donation.

Mr. Edwards replied that he had been advised by the White House that "Mr. Sears had no conversations with President Nixon that were taped."

Judge Gagliardi observed that this information from the White

House "takes care of a very substantial part of the problem" but he indicated that it might be necessary to face the constitutional issue over a taped conversation between the President and Mr. Dean.

Because Mr. Dean reportedly told the President that he was seeking immunity from prosecution in return for his testimony, according to the defense, a tape of this discussion could be used in cross-examination to attack his credibility and motives for testifying.

The defense view suggests that Mr. Dean's expected testimony would have to be stricken from the record, possibly causing a mistrial, if the Government failed to produce the subpoenaed tape.

But the Government's memorandum argued that "there

postpone the trial to wait for a Supreme Court decision on efforts by the special Watergate prosecutor and the Senate Watergate committee to obtain White House tapes that

President Nixon has withheld under the doctrine of executive privilege.

Defense attorneys in the Mitchell-Stans case have also subpoenaed testimony and documents from the Senate

Watergate committee and other Congressional committees, but this has not raised a major constitutional issue.