

# Mitchell Loses Move For Tapes

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NEW YORK, Oct. 18—A federal judge here today quashed a subpoena for President Nixon's tapes issued by lawyers for John N. Mitchell.

But in doing so, U.S. District Court Judge Lee P. Gagliardi warned the government that he might have to review the tapes, if any of them pertain to the government's prosecution of Mitchell, Maurice H. Stans and Robert L. Vesco.

In effect, the judge told the government to inform him by Tuesday if any White House document or tapes exist that involve any of the witnesses to be called in the case.

If so, he said, he wants to review any such material himself to determine its relevance to the trial of Mitchell, Stans and Vesco.

The government has withheld the names of the witnesses it intends to call. Only John W. Dean III of all White House aides named in the Mitchell subpoena is sure to testify, since he has been named as an unindicted co-conspirator.

The trial of Mitchell, the former Attorney General, Stans, the former Secretary of Commerce, and Vesco, a financier who has been out the United States for eight months, is scheduled to begin Tuesday.

Those three, plus New Jersey politician Harry L. Sears, who will be tried later, were indicted here in May on charges of conspiracy involving obstruction of a federal investigation of Vesco's business dealings in exchange for a secret \$200,000 payment to the Nixon campaign from Vesco. Stans and Mitchell were also indicted for lying to the grand jury that investigated the contribution.

Judge Gagliardi made it relatively clear in court this morning that he would deny defense appeals to move the trial outside New York City to a community less permeated by publicity about Watergate

and related activities.

He said he would make his final determination of venue Tuesday but said that "I do urge, regardless of the decision, that everybody be prepared to proceed here October 23."

The judge based his ruling today on the "Jencks Act," which requires the government to make all materials it has pertaining to a witness available to the defense after that witness testified. That material then can be used by the defense to test the credibility or consistency of the witness.

If such material exists on any witnesses, the judge said, and the government withholds tapes or any other material, "on any grounds, including those of 'executive privilege,' then the government must either forego the calling of the witness . . . or must conclusively demonstrate that any such material is in fact neither relevant nor evidentiary.

"It is, we think, obvious that the question of relevancy is solely for the court, and cannot be determined on the basis of a representation by the prosecutor's office.

"In the event that an in-camera examination results in a determination that the material, though relevant and admissible, should not be published because it is protected by executive privilege," the judge said, "the court will have reached what the U.S. attorney refers to as 'the constitutional issue,' and then will rule upon the appropriate course of action."

The judge reserved the right to examine whether executive privilege would be at issue in the trial, and said he wanted to dispose of the matter before the trial begins and not have a long delay in the midst of the trial, since the jury will be sequestered. Trial is expected to take six weeks or more.

The Mitchell subpoena was for all tapes and materials at the White House involving Sears—the accused go-between for Vesco and an old friend of Mitchell—in which Vesco was the subject, and materials involving Dean, Hugh Sloan, John D. Ehrlichman, Edward Nixon, Donald Nixon Sr., Donald Nixon Jr., Fred Fielding, Peter Flanigan, William F. Rhatican and Vesco and his contribution and the examination of his businesses by Securities and Exchange Commission.

"The subpoena," said Gagliardi, "is a tleas tin part overbroad." At another point, he said "it is clearly a fishing expedition."

At another point, he said that "any subpoena calling for conversations between unspecified persons is unreasonable and is therefore quashed for lack of specificity."

The judge said the prosecution was wrong, however, in contending that he should steer clear of constitutional issues in this trial.