

# Missing Tapes Create Legal Mess

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## Washington

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 yesterday, 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.

### TANGLE

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 demanding documents or records are called) imposes any particular duties on the recipient — the duty to inform the court about the status of the records, for instance.

Experts interviewed yesterday 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 qualify as the crime of obstruction of justice, he said.

There has apparently been little litigation though, on whether a lawyer must tell the court if the material specified in a subpoena simply does not exist.

### EXPLAIN

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 U.S. 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?

### DECIDE

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 Israel suggests, this may be a hard standard to meet — not just legally but also politically, as Alschuler noted.

If 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 Israel, lying on that point would tend to "discredit the whole story."

### DESTROY

Sirica may decide, after listening to the testimony, that the White House had 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.

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.

