High Court to Rule On Commercial Use Of Nixon's Tapes

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The Supreme Court agreed yesterday to hear arguments on whether Watergate tape recordings made by President Nixon in the White House can be reproduced for broadcast and for sale as phonograph records and tape cassettes.

The action delays broad public access to the tapes for several months to a year or longer. If the court rules for Nixon, commercialization of the tapes probably never will be permitted.

The former President contends that the tapes should not be available "to be played at cocktail parties and in satiric production, and to enterprising and imaginative recipients."

But the U.S. Court of Appeals here, saying that the tapes "are not recordings of bedroom or other intimate conversations," held that "the embarrassment Mr. Nixon anticipates is largely that which results whenever misconduct or questionable conduct is exposed."

The appellate court ruled 2 to 1 that the tatpes should be made available. This decision faces review by the Supreme Court, which agreed to the review without comment.

The Watergate special prosector subpoenaed the tapes in 1974 as exhibits for the trial of two former Nixon White House top aides, H. R. Haldeman and John D. Ehrlichman, and former Attorney General John N. Mitchell. A jury later convicted them of obstructing justice and conspiracy in the cover-up after the 1972 break-in at Democratic National Committee headquarters in the Watergate office complex.

The tapes — running 16 to 22 hours after editing — were played for the jury and for about 1,900 courtroom spectators. Transcripts, which were not introduced in evidence, were widely sold in book form.

While the trial was under way, the three major commercial networks, the Public Broadcasting System, Warner Communications, Inc., which makes records and cassettes, and the Radio Television News Directors Association asked permission to copy the tapes in evidence for broadcast and recording.

Chief Judge John J. Sirica, who was trying the case, referred the request to Judge Gerhard A. Gesell. The government was agreeable to it, seeing no jeopardy to a fair trial. Nixon objected.

The tapes are not judicial records subject to copying, his attorney, Herbert J. Miller Jr., contended. Instead, he said, they are private property protected by the doctrine of executive privilege, which was temporarily yielded under judicial order.

To release the tapes for mass marketing would intrude further on "the privilege of confidentiality for presidential communications," invade Nixon's privacy and cause further embarrassment for him and those he taped in the White House, Miller argued.

But Gesell approved release of the tapes—after the trial—because the practice of making court exhibits available "reaches far back into our common law and tradition," he said.

After the jury convicted the defendants, however, Sirica held back on the ground that the trial had not ended. That is, he said, their rights could be prejudiced by distribution of the tapes in the event that they won appeals and new trials.

The broadcasters and Warner communications appealed Sirica's decision and won last October in the court of appeals. Denying public access to documentary evidence would be "inconsistent" with the effort of the common law to provide the public with complete information and with the practice of the District of Columbia circuit, Chief Judge David L. Bazelon said.

Emphasizing that the tapes were admitted into evidence to prove criminal misconduct in the White House, Bazelon said that the public's right to inspect and copy records overrides possible prejudice "at a hypothetical second trial" and the "question of taste" raised by Nixon's lawyers.

In a brief to the Supreme Court, Miller said distribution of the tapes should be allowed only if "justice requires" it. There is no justification for subjecting Nixon to the "additional indignity" of having his subpoenaed recorded words broadcast and sold, he said.

For Warner Communications, attorney Edward Bennett Williams argued that the "indignity is no greater than the embarrassment that may result from public reporting of unseemly facts revealed by courtroom testimony or in written exhibits."

Each of the former Nixon confidants drew a sentence of 30 months to eight years. Ehrlichman is serving his sentence in a prison camp in Arizona. Haldeman and Mitchell asked the Supreme Court last month for a new trial, claiming their first one was unfair.

The court took other actions:

LAWYER-CLIENT RELATIONSHIP

Last month, the court ruled that the right to counsel of a criminal defendant was not violated by a state undercover agent who attended two meetings with the defendant's lawyer. The agent had not communicated the information he gathered to the prosecution, the court emphasized.

In New York City, meanwhile, Louis C. Ostrer had been convicted in a stock manipulation scheme. Not until after the conviction did he learn that policemen unlawfully had eavesdropped on conversations between him and one of his attorneys—and had communicated the information to a federal prosecutor. Yesterday, the court let stand a ruling in which the Second U.S. Circuit Court of Appeals denied Ostrer a new trial.

STATE POLICE

The court decided to hear arguments over whether the 30 states that bar aliens from service as state troopers deny them the equal protection of the laws, and whether the allowances for meals that 15 states give troopers are income subject to federal taxation.