

White House Tapes Ruling Appealed

By Timothy S. Robinson
Washington Post Staff Writer

The Senate Watergate committee asked the U.S. Court of Appeals yesterday to find that a lower court judge erred when he refused the committee access to five White House tapes on the basis that such access might prejudice upcoming criminal trials.

U.S. District Judge Gerhard A. Gesell's ruling was based "on an apparently new rule of law that a legislative need for relevant evidence may be subjugated to the court's view of the need to prevent" pretrial prejudice, the committee lawyers said in a 40-page brief.

That ruling, the lawyers said, "is contrary to well-established principals that prohibit a court" from not backing a congressional action "simply because it disagrees with the legislative wisdom or policy behind that measure."

However, the committee said for the first time that it would agree to a protective order keeping the tapes private in order to minimize possible pretrial publicity.

The appeal is the latest in a series of attempts by the Senate committee to get access to the White House tapes, the existence of which was made public during testimony before it.

The tapes would prove of "immense, perhaps decisive value in determining the extent of malfeasance in the executive branch," the committee lawyers said.

"The committee has received conflicting evidence as to the extent of wrongdoing at the pinnacle of government . . .

"There has been serious, potentially credible evidence presented to the committee tending to show that the chief executive himself was engaged in wrong. There has also been evidence tending to exonerate him of such charges," the committee lawyers said, adding that they feel the tapes are necessary to clear up this conflicting testimony.

The committee's lawyers said "the extent of executive wrongdoing" is important in deciding the scope and form of corrective legislation concerning campaign practices.

"If presidential involvement were shown, there might arise a strong public mandate for thoroughgoing reforms; if no presidential involvement were revealed, the public and the Congress might be satisfied that lesser measures were adequate," they said.

In addition to its lawmaking function, the committee also has an "informing function" to be served by access to the tapes, the attorneys asserted.

"The major concern regard-

ing the informing function is that these tapes be released to the committee so that at some future time they may be made public and not forever kept secret from the nation," they said.

Citing the possibility that all Watergate-related cases may end in guilty pleas or that for some reason the tapes may not be allowed into evidence at trials, they added:

"(Committee access under a protective order) would ensure that the tapes are in the public domain and will not be forever hidden under a cloak of secrecy from the public that has the right, at some time, to know their contents."

"The court has substituted its judgment for the legislature's as to the public need for production of these tapes and ruled that, in this instance, the legislative need is subsidiary to that of judicial administration.

"It has done so in a situation where no potential Watergate defendant has entered an appearance in this case to complain that release of the tapes may work him harm, where the special prosecutor took no position on what action the court should take, and where the President has allowed many of his aides to testify fully as to the contents of the tapes, an action obviously inconsistent with the claim of

prejudicial pretrial publicity he now raises," they said.

The last reference was to a letter written by President Nixon on Feb. 6 in response to a request that he invoke a specific claim of executive privilege concerning the tapes. The President again invoked a blanket claim in that letter, but discussed "the dangers connected with excessive pretrial publicity" if they were released.