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Broadcasting the Nixon Tapes

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SOMEDAY, PERHAPS, all of us will get to hear the tape recording that put the finishing touches on the Watergate cover-up trial. But not just yet. Judge Gerhard Gesell, after first ruling that the recordings were in the public domain and would thus be made available for copying, has now backed off. Because no one produced a plan to minimize "commercialization" or "undignified use" of the tapes, he dismissed the petitions of the television networks and a recording company for permission to copy them. His decision not only leaves up in the air some interesting legal questions and important public policy questions. It also removes, at least for the time being, the opportunity for millions of Americans to satisfy themselves about the judgments others have made on the true meaning of the words on those tapes.

It seems to us that the way in which Judge Gesell has handled this matter has served more to confuse the situation than to clarify it. The basic question is whether the news media and other interested parties have a right to copy and reproduce the sounds on a tape recording used in evidence at a criminal trial. That question is difficult enough, since an affirmative answer might be construed as opening a crack in the present bar against the recording or photographing of actual trials. But Judge Gesell has obscured it by ruling that the right to copy those sounds exists if a way can be found to limit commercialization or undignified use of them. While we sympathize with what the judge would like to do—the idea of hearing Mr. Nixon's voice against a background of rock music is not attractive—we don't see how he can accomplish his aim legally.

For a long time, it has been clear that other kinds of evidence used in trials are available to the news media and other parties for copying. Transcripts of testimony can be made or purchased, documents used in evidence can be reproduced, and other evidence that does not yield itself to mechanical reproduction can be photographed. In no instance we know of has a court attempted to put restrictions in advance on how those copies, once made, could be used. Occasionally, a gross abuse of this process has resulted in a libel suit, but generally the undignified use of such material—and such uses do occur—has been ignored as one of the prices to be paid for an open judicial system. We simply do not understand how a right to copy a tape recording can be conditioned on how the copy will be used when the right to obtain a transcript of that same conversation cannot be so conditioned.

It may be, of course, that Judge Gesell has developed some concern about the rightness of his original holding that the right to copy the tapes exists at all. If so, his concern would be understandable, in terms of the precedent that might be set; there could be a certain logic to the progression from permission to copy a recording that is in evidence to permission to record a witness' live testimony. The courts do not seem ready yet to admit electronic journalism into the courtrooms, although we think they will some day. But it seems to us that a distinction can be drawn between the two situations—these tapes, after all, were made before trial and the release of them for public use cannot influence the content of them in the same way that live recording in the courtroom could conceivably influence the content of testimony in a trial.

It is not just our curiosity about the tapes—and we admit to wanting to hear them—that leads us to believe there is a legitimate public interest in the release of them. Some of those who heard the tapes in the courtroom as the jury heard them have reported that the inflections of the voices, the pauses, and the other sounds give greater dimension to the story than the written transcripts can provide. Some say the proper interpretation of these sounds points clearly toward guilt; others, among them some of the defendants, argue to the contrary. The point of releasing the tapes is not to resolve that conflict but to let the American people evaluate it as they may.

The idea behind the guarantee of public trials, written into our Constitution at a time when secret trials were fresh in mind, was to establish and maintain confidence in the judicial process. It is to achieve that goal that trials are open and court records are public. The only exceptions tolerated are in situations involving overriding judicial or national security concerns. We do not see why fear of commercialism or undignified use should be elevated to such overriding importance as to deprive the public of the opportunity to reach its own conclusions about the Watergate cover-up case on the basis of the "best evidence." In this instance, the "best evidence" is the actual sound—rather than the mere writen transcripts—of tape recordings that were played openly in the course of the cover-up trial.