

Appeals Court Rules Nixon Tapes Can Be Copied, Sold or Broadcast

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WASHINGTON, Oct. 26—The United States Court of Appeals here ruled today by vote of 2 to 1 that the White House tape recordings that were used as evidence in the Watergate cover-up trial may be reproduced, broadcast, and sold to the public in records as soon as a suitable plan for distributing the tapes is developed.

The ruling reversed a decision last year by Federal District Judge John J. Sirica, who banned public distribution of the recordings at least until the appeals of the four former Nixon aides who were convicted in the trial had been finally decided.

The appeals court acted at the behest of the three commercial television networks, the Public Broadcasting System, an association of radio broadcasters, and a record manufacturer, and over the strong opposition of former President Nixon.

Tonight, the office of Mr. Nixon's law-

yer, Herbert J. Miller, announced that the former President would appeal.

"The effect of the Court of Appeals' decision is to permit the commercial exploitation of recordings of Presidential conversations subpoenaed for use in a criminal trial," the law office said in a brief statement. "Accordingly, we will appeal."

The appeals court recently affirmed the convictions of three of the defendants in the cover-up case, John N. Mitchell, the former Attorney General, and John D. Ehrlichman and H. R. Haldeman, who were Mr. Nixon's top aides. It reversed the conviction of the fourth, Robert C. Mardian, a former Assistant Attorney General. The first three are entitled to appeal their cases to the Supreme Court, an often lengthy process. If Mr. Mardian is retried, and convicted, any subsequent

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appeals could take many months more.

If Mr. Nixon loses his appeal, however, or if the Supreme Court refuses to hear it, the case would be sent back to Judge Sirica for the development of a plan for distributing the tapes.

"Distribution should be prompt," the appeals court said, "and on an equal basis for all persons desiring copies."

The appeals court based its decision on what it called a "precious" common law right, one that predates the Constitution itself—the right to inspect and copy public records.

'Right Is Fundamental'

"This common law right is not some arcane relic of ancient English law," the court said, in an opinion by Chief Judge David Bazelon, "To the contrary, the right is fundamental to a democratic state. As James Madison warned, 'A popular government without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. . . A people who mean to be their own governors, must arm themselves with the power which knowledge gives.'"

The court held, specifically, that exhibits introduced at trial are judicial records, and thus are the kind of records that the public is entitled to inspect; and that while the right to inspect and copy such records is not absolute, there was no justification for denying it in the Nixon case.

Among other things, the court said, there was not a grave risk that distribution of the recordings could prejudice possible retrials of the defendants. The tapes were played to the jury at the trial, the court noted, and the transcripts were widely published in the press.

Nor was possible "embarrassment" to

Mr. Nixon a possible justification for denying public access to the tapes, the court said.

'Deal With Conversations'

"Even if preventing embarrassment may sometimes justify access restrictions, there is plainly no justification for such restrictions here," the court wrote. "The tapes at issue are not recordings of bedroom or other intimate conversations, and the embarrassment Mr. Nixon fears is not republication of highly personal matters. Rather, we deal with conversations between business associates admitted into evidence as proof of criminal misconduct.

"The embarrassment Mr. Nixon anticipates is largely that which results whenever misconduct or questionable conduct is exposed."

The court noted, as well, that the conversations on the tapes "relate to the conduct of Presidency, and thus they are both impressed with the 'public trust,' and of prime national interest." And, it pointed out, it "seems likely" that the recordings would eventually become public anyway, because of the 1974 statute that gave the Government custody of Mr. Nixon's papers and tape recordings.

The tapes involved in the court's decision are all those played to the jurors, press and spectators at the Watergate cover-up trial. There were 30 tapes in all, of which 28 were from Mr. Nixon's White House recordings.

The tapes made up the bulk of the prosecution's evidence. They established that Mr. Nixon had played a major role in the Watergate cover-up, that he had approved a scheme of clemency for those who took part in the burglary of the Democratic headquarters at the Watergate complex in exchange for the burglars' silence, and that he had far more knowledge of the cover-up, and had had it far earlier, than he had previously acknowledged.