In the

# Supreme Court of the United States



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RICHARD NIXON,

Petitioner,

vs

No. 76-944

WARNER COMMUNICATIONS, INC. and NATIONAL BROADCASTING CO., INC.,

Respondents.



Washington, D. C.
November 8, 1977

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| v. | : | No. 76-944 |
| WARNER COMMUNICATIONS, INC. and NATIONAL BROADCASTING CO., INC., Respondents. | : | |

Washington, D.C.
Tuesday, November 8, 1977

The above-entitled matter came on for argument at 10:08 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

WILLIAM H. JEFFRESS, JR., Esq., 2555 M Street, N.W., Suite 500, Washington, D.C. 20037; for the Petitioner.

FLOYD ABRAMS, Esq., 80 Pine Street, New York, New York 10005; for the Respondents.

EDWARD BENNET WILLIAMS, Esq., 1000 Hill Building, Washington, D.C. 20006; for the Respondent, Warner Communications, Inc.

# C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 76-944, Nixon against Warner Communications and others.

Mr. Jeffress.

ORAL ARGUMENT OF WILLIAM H. JEFFRESS, JR., ESQ.

ON BEHALF OF THE PETITIONER

MR. JEFFRESS: Mr. Chief Justice, and may it please the Court:

The tapes that are involved in this case were those that were produced, following this Court's decision, for use as evidence in the Watergate trial. The question in the case is whether the tapes, having served their purpose as evidence in that trial, will now be distributed by the clerk of the District Court to members of the public for broadcast, for sale, and for whatever other uses members of the public may wish to put them.

The case started when just prior to the Watergate trial three newspaper reporters requested Judge Sirica to provide copies of the tapes as they were played to the jury during the trial. Judge Sirica sought the guidance of the chief judge, who consulted other members of the District Court. It was the consensus of those judges of the District Court that while the ultimate decision ought to be left to the trial judge, providing copies of the tapes to the media would appear

first to be inconsistent with the Court's rule against the broadcast and dissemination of the recording by a court reporter of trial proceedings. And, second, it was the consensus of the judges that dissemination of the transcript to the public would appear to constitute more than adequate disclosure of what the tapes contained.

Judge Sirica agreed with that consensus and denied the requests.

A few weeks later but still during the trial, formal applications were filed by the respondents in this case to obtain copies of the tapes. Those applications were assigned to Judge Gesell of the District Court and were opposed by Mr. Nixon.

The clerk of the court filed an affidavit, at the request of Judge Gesell, which discussed the feasibility of reproducing the tapes that were played to the jury. The clerk noted that portions of the tapes--even of the court copy of the tapes--still remained confidential, that not all of the copy in the custody of the Court had been played to the jury. He concluded though, with sufficient technical assistance and sufficient time, it would be possible to reproduce a set of the tapes played to the jury that would be suitable for dissemination to the applicants.

On December 5th, Judge Gesell entered a memorandum opinion and order in the matter. He rejected the constitutional

claims of the applicants, based on the First Amendment. But he did find that there was a practice which he felt was supported by cases at common law and by the Manual for District Court Clerks which supported the claim of the respondents of a right to copy the tapes. He rejected Mr. Nixon's position that the tapes should not be provided for broadcast under any circumstances. But he reserved decision on the applications, pending the submission of a plan which he felt should, number one, show that it would not impose an undue burden on the clerk to make an disseminate the copies and, number two, would guarantee that there would be no--in his words--overcommercialization of the evidence.

Q Mr. Jeffress, during these proceedings, the trial was going on in Judge Sirica's court, was it not?

MR. JEFFRESS: During all of the proceedings that I have described so far, the trial was still going on. And Judge Gesell's December 5th opinion was entered before the trial was concluded.

The plan, however, of the respondents for dissemination of the tapes was submitted in late December. And by January 8th, when Judge Gesell ruled on the applications, the trial was concluded. Judge Gesell denied the applications without prejudice. He stated, and again I use his words, that "it was a prerequisite of any plan that commercialization of the tapes or any undignified use be minimized." And he felt

that no basis for distribution of the tapes that met this goal or that took the burden off the shoulders of the clerk had been submitted.

After Judge Gesell's decision, the applications were transferred back to Judge Sirica who, by this time, was free of his trial duties. After a hearing and obtaining further submissions from the parties, Judge Sirica entered an order which also denied the application without prejudice. Judge Sirica, like Judge Gesell, noted that, in his opinion, there were many obstacles that must be overcome before any release of the tapes might be made. But the sole issue considered by him at that time was the question of timing of any such release.

Judge Sirica felt that the special qualities of the tapes and the uses that undoubtedly would be made of them, should they be released, warranted withholding any dissemination of copies or any decision on whether to disseminate copies until the Appeals Court decided whether retrials would be necessary in the Watergate case.

In the Court of Appeals, by the time the case was decided, the convictions in the Watergate case, except for that of Mr. Mardian, had been affirmed. The Court of Appeals, however, decided to rule on the ultimate question in the case--that is, whether the tapes ought to be provided for broadcast and sale at all.

Q Mr. Jeffress, you say the ultimate question in the case, but may not the ultimate question in the case vary, depending on the stage of other proceedings in the courts involved?

MR. JEFFRESS: Your Honor, if I understand your question, what I meant by the ultimate question in the case was whether the tapes, given present circumstances, ought to be disseminated to the press and to members of the public. Nothing has happened since that time to change at least what the Court of Appeals stated to be the basis for its conclusion.

The Court of Appeals decided that there was a common-law right of access to judicial records that encompassed the right to obtain copies of those tapes. It held that the burden was on Mr. Nixon to establish that justice required making an exception to that common-law principle. And, third, it concluded that no such showing had been made. The Court said that Judge Sirica had abused his discretion in withholding any decision on release of the tapes until the Watergate appeals were decided. And paradoxically, because Judge Gesell had actually denied the applications, the Court characterized his decision as one in essence affirming his exercise of discretion.

If the Court please, preliminarily I would like to deal with a theme that runs throughout the opinion of the Court

of Appeals and the arguments of the respondents in this case. It said that the tapes are items of extreme historical importance. It said that there is an enormous public desire to hear them. It said that broadcasts, in providing these tapes to the public, will make the public better acquainted with their content than the public is and can be now, having access only to the transcripts.

We do not take issue with those three propositions, but we do say that they are not properly addressed to a court. The court has no authority, no power generally to decide what property, whether in the custody of the government or anyone else, ought to be broadcast. And these tapes are in the Court's custody solely by virtue of subpoena and solely for use as evidence in the Watergate trial.

Q Do you say then that even under this Court and the Court of Appeals and the District Court's presumably kind of housekeeping authority to decide what shall be done with exhibits until they are returned or exhibits that may not be the property of any one individual, it would not have the authority to grant the request of these respondents?

MR. JEFFRESS: Certainly, Your Honor, the Court has control of the exhibits and has authority to do with them anything that is necessary to fulfill the purpose for which they are in the Court's custody. It is our position that the relief that is sought here--the effect of releasing them for

broadcast--is not to serve those purposes, and that the interests that are retained in the material that is under subpoena should preclude the Court from making that sort of use of the materials.

Q Would you feel otherwise if these items had not been subpoenaed? Do you concede that then there would be a right to reproduce the tapes as tapes as distinguished from reproducing their contents?

MR. JEFFRESS: I do not at all, Your Honor. Number one, you would have the case of, for example, wire-tapped conversations. The person whose voice is wire-tapped or is recorded in the course of a wire tap does not own the tape on which that recording is made. But, nevertheless, it seems to me that the same considerations that we are arguing here this morning would apply to that and that the Court should not make public broadcasts, public release, of that tape recording.

Q It seems to me that the releasing court is not deciding as to the propriety or the actionability of the use that may be made of the tape after its release. It is simply authorizing the copying of something that is in its custody. If the people who get it out of the custody use it in a manner that infringes someone's right of privacy, it may be actionable. But is that a decision that ought to be made by the court that simply has custody of it?

MR. JEFFRESS: It is, Your Honor, for this reason. The Court has to make the decision as to whether to provide tapes of its own proceedings or tapes that it obtains from private parties to the public or to the broadcasters with knowledge of the uses that are going to be made of them. One thing that we do recognize is that this Court's decisions under the First Amendment would seriously limit any suit by Mr. Nixon, any suit by any other party, to prevent broadcasters from using the items that come into their custody that are released by the Court in any manner they might see fit. So, the only point at which the uses can be controlled is the point at which it is decided whether to put them in the hands of the broadcasters, whether to put them in the hands of the record companies.

Q It seems to me that really puts the cart before the horse. It puts all the constitutional freight really on the custodial court rather than--it seems to me it might be much simpler to just look at this as a problem of custody, copying by Joe Doaks or by NBC of something that is in custody and let the subsequent transactions in connection with the tape carry the constitutional freight.

MR. JEFFRESS: Your Honor, as I say, number one, our claims do not rest on constitutional right not to have the tapes disseminated. But as for the subsequent uses that might be made, whether we have a right of privacy or a right of

copyright or some cause of action in a federal court or in a state court to prevent those uses is an entirely separate question from whether the court, having obtained property from an individual for limited uses, might provide that to other people, knowing that those other people, members of the public, are going to make uses that are going to be offensive to the person from whom the property was obtained.

Q Why would you not say the question is whether the court could make them available to another person for any purpose?--because if you go on and say for obnoxious purposes, then the court really is going to have to distinguish between one use and another.

MR. JEFFRESS: Certainly for the court--and we do not think it would be unconstitutional for the court to provide a copy to a person who agrees and signs an agreement that he would merely use them to listen for research, that he would not disseminate them to other people.

Q You mean what privacy interest that you assert would not be invaded by that or what property interest would not be invided by that?

MR. JEFFRESS: Certainly there would be no further--

Q Just not as much.

MR. JEFFRESS: Certainly not as much.

Q Could I make sure of one thing: What is at issue here, the underlying tapes that were filed or is it just

the composite that was made by the Court?

MR. JEFFRESS: I think that it is fair to call it a composite. What happened was that Judge Sirica received the underlying tapes and excluded those things that were not relevant and were not admissible and produced what we call a court copy of the tapes.

Q It is not a court copy; it is an extract.

MR. JEFFRESS: It is an extract.

Q Are the original tapes involved at all? I mean, if you lose this case, will the underlying tapes be covered by the judgment, or do you know?

MR. JEFFRESS: Certainly the copies are nothing but the underlying tapes. And the only thing that the respondents have claimed in this case--they do not really claim a right to a copy of the entirety of the court copy, the trial copy, of the tapes. As I have said, that trial copy contains many conversations that are still confidential. Actually the item that the respondents claim a right to copy does not now exist. They ask that that item--i.e., a tape of all the conversations that were played to the jury--be produced.

Q Is that the only thing that is involved?

MR. JEFFRESS: That is all the respondents claim.

Q Is the extract that was played to the jury?

MR. JEFFRESS: The extracts, that is correct. It is about 22 hours of conversations.

Q That running tape that was made of the extracts. But the tapes or the copies from which that jury-played tape was made are not involved here?

MR. JEFFRESS: Copies could as well be made from those tapes as from the court copy, but the plan is to make the copies for dissemination from the court copy.

Q I am still not sure that you have answered my question.

Q What is involved is the 22 hours of electronic transcriptions that were introduced into evidence in the trial before Judge Sirica; is that not correct?

MR. JEFFRESS: And that are contained on the court copy of the tapes. You understand that no separate recording was made of those 22 hours. The machine was there. The special prosecutor turned it to the place he wanted and played it during the trial.

Q That is the material that would take seven man-days to reproduce, is it?

MR. JEFFRESS: That is correct. The process of reproducing these tapes required in the District Court approximately a three-page order.

Q Is it perfectly clear that the portions of the tapes that were not played to the jury are not involved here?

MR. JEFFRESS: The respondents do not claim a right to them, Mr. Justice White.

Q Why would they not have a right? They were in the custody of the Court. They were subpoenaed.

MR. JEFFRESS: We submit that their argument would seem to establish that they would. They, however, appear to concede that those conversations--

Q I suppose I should ask them why they concede that.

MR. JEFFRESS: That is correct.

Q There is no property-interest claim here, is there, because the Congress in effect condemned the originals under the act we construed last spring?

MR. JEFFRESS: If the Court recalls, the Court did not rule on the actual title to the tapes. And the Court will also recall that Mr. Nixon had claimed a title to those tapes.

Q You still do, do you not?

MR. JEFFRESS: And we still do.

Q If Mr. Nixon did have title to those tapes, Congress has provided just compensation for him in that act.

MR. JEFFRESS: That is correct.

Q So, he would have no property claim in this case.

MR. JEFFRESS: No issue in the case depends on whether he has title to the recordings or not. As I have said before, if these were wire-tap recordings, the same issues would be present. Or if they were subpoenaed from my custody

and they might belong to my brother-in-law or whatever, I do not think that that would control any issue that is presented in this case.

Q Mr. Jeffress, who in general were parties to these conversations in addition to the president?

MR. JEFFRESS: The president and his closest aides would summarize it generally. The conversations primarily concern Mr. Nixon and certain members of the cabinet and certain members of the White House staff.

Q Are any parties recorded in these tapes who were not associated with the White House?

MR. JEFFRESS: There are parties who were recorded on the original recordings that are in Judge Sirica's custody. If I recall correctly, there are not any portions that were actually played to the jury that involved such persons.

Q Mr. Jeffress, your argument is being recorded on that machine over there. Are you suggesting that there is any limitation on this Court from releasing the tape of your argument to the media or anyone else?

MR. JEFFRESS: If the Court please, it is my understanding that the Court does impose certain restrictions on release of the oral arguments.

Q That was not my question. Are you suggesting that there are limitations on our power to release the recording of your argument?

MR. JEFFRESS: No, I do not think so, Your Honor.

Q How is this any different from the recording that we are talking about?

MR. JEFFRESS: The recordings we are talking about are not the property of the Court. They were obtained by judicial process for a limited purpose from Mr. Nixon. There are reasons, we would submit, why courts do not and should not allow the broadcast of recordings made of judicial proceedings. But at the least those recordings are the court's recordings. They are recordings that the court has the absolute power to do with as they please.

Q We could release them if we decided to do so for playing on the 6:00 o'clock news tonight, or the 7:00 o'clock news, whenever it comes on.

Q And you are still drawing the distinction between the transcript, which is readily available to any attorney, and the original tape with all the voice inflections and everything else.

MR. JEFFRESS: Certainly, Your Honor. We submit that the Court of Appeals decision that the common-law right involved the right to copy tape recordings in the custody of the clerk is inconsistent with the recognition--the uniform recognition by the courts up to this time--that a tape is different from a transcript. And I might point out--

Q But you do not make that distinction as to your

own argument here. Your argument is being recorded by that machine, and it also will be transcribed, and there will be a transcript of it after this argument. Do you still suggest there is no limitation on our power to release the voice recording with all its inflections and everything else to the news media for broadcast tonight, if they want to?

MR. JEFFRESS: But if the Court please, this is a public--

Q Then you do not?

MR. JEFFRESS: No.

Q You do not?

MR. JEFFRESS: No, I do not contend that. But if the Court please, where you have wire-tapped conversations, where you have privately recorded conversations that are obtained by judicial process, you have a different kind of animal than you have in a recording that a person makes with expectation that it is being made in public discourse, with an expectation that it is even being made over television. It is not unusual for participants in private conversations to speak irreverently.

Q Was not all of that lost once it was played in court?

MR. JEFFRESS: No, Your Honor, it was not.

Q It was lost as to 12 people, was it not?

MR. JEFFRESS: The only thing that was lost--

Q Was it not? The 12 people on the jury heard it.

MR. JEFFRESS: But we have said, Your Honor, and contend--

Q Or you do not think that means anything?

MR. JEFFRESS: I do not think that it means--

Q It is no longer private, is it?

MR. JEFFRESS: It is no longer private. The only thing lost--

Q Then what are you arguing, limit it?

MR. JEFFRESS: We do not argue that there is an interest in confidentiality per se that is still maintained as to these tapes. We do argue that there is a legitimate interest, an interest that the Court may respect, and an interest that the Court should respect in a person whose private conversations are recorded and which contains the same sort of language, the same sort of discourse that would be--

Q It has all been released to the, quote, "public," end quote.

MR. JEFFRESS: It has been heard by certain members of the public. It has not been released to every disc jockey, every entertainer, to the television network, to be played on television, to be relentlessly--

Q Would there be a difference in a courtroom with 12 people and a courtroom that held 200 people? Would it be more public?

MR. JEFFRESS: No, I do not believe it would be. It would be played in a setting that is its very purpose, the very purpose for which the tapes would be produced. It would be played to do justice in a criminal proceeding. That is the purpose for which the tape recordings were produced.

Q And that is the reason that the respondents want to re-reproduce it for the public. It is a little larger public.

MR. JEFFRESS: They want to have it in a form where it can be played in any manner that they think appropriate. Broadcast on television, that is the purpose of some of the respondents. Others of the respondents say they would like to provide it for home use, for library use, for scholarly purposes. But the fact is that once released--the point I was trying to make before--

Q But my point is it has already been released.

MR. JEFFRESS: It has not, Your Honor, been released in the sense that copies have been provided for these uses. We submit that in these private conversations that are recorded, whether wiretap or otherwise, it is one thing. It is going to be embarrassing to the participants. It is going to cause them pain for those conversations to be disclosed, for those conversations to be printed in transcripts and disseminated.

Q Mr. Jeffress, as you know, there are some states

that televise trial proceedings. Suppose this had been a televised trial so that the recordings at issue here had been broadcast in the course of the trial. Would you still be making the argument you are?

MR. JEFFRESS: Yes, Your Honor, we would. And interestingly enough where at least the canon of judicial ethics permits the televised court proceedings, it requires the consent of the witnesses and the parties and of the counsel, which is essentially a waiver, a decision that that sort of intrusion on their privacy ought to be made.

Q This Court has never had any occasion to decide whether a defendant can refuse or a witness can refuse to appear if the proceeding is broadcast, has it?

MR. JEFFRESS: No, Your Honor, I do not believe it has.

Q The Estes case was the closest, I guess.

MR. JEFFRESS: The Estes case would be the closest, but that was a matter of due process to the defendant.

Q Mr. Jeffress, may I ask a question about how to go about deciding this case? I gather you would agree that in some instances it is appropriate to permit public copying and access to exhibits and in others it is not, depending on the impact on the privacy of the witness or the person producing the exhibit. I think that is implicit in your argument. If that is true, how is one to decide whether or not

to release something like this without hearing it? And that then leads to the question, Should we not have some kind of obligation to defer to the District Court, which has heard these materials which we have not heard?

MR. JEFFRESS: I would like to make two responses to that, Mr. Justice Stevens. First, I do not think you interpret my argument correctly when you assume that it is a matter involving the balancing of particular privacy interests in a particular case against whatever needs the public asserts for the material.

Where a subpoenaed exhibit that is not the property of the court comes into the custody of the court, we submit that the court should not, as a policy matter, make those available beyond the uses for which they were subpoenaed. None of the authorities recognize that the court has any such power--not the Manual for District Court Clerks, not any of the common-law cases.

The second response that I would like to make to that, Mr. Justice Stevens, is that in this particular case no district judge has exercised this discretion, even if it is a matter of discretion, to make release of the recordings.

As to exhibits, if an exhibit is obtained, the question arises, Is there a distinction between documentary and taped exhibits that come into the custody of the court under subpoena? Even as to documentary exhibits--

Q May I just stop you for a moment? You say the general rule is that no copying is permitted except in exceptional circumstances? Judge Gesell certainly thought the law was to the contrary on that.

MR. JEFFRESS: Judge Gesell found a practice in the District Court for the District of Columbia that exhibits were routinely made available for copying subject to contrary directions by the trial judge. So far as we are aware, no instance had ever arisen where there, number one, anyone had actually copied a tape recorded exhibit or, number two, anyone had copied any exhibit obtained from a private party over his objection.

Q Should the rule be different for tape recordings than for any other document or pictures or anything like that? Should you not have a general rule applying to all exhibits?

MR. JEFFRESS: We submit that there are reasons for a distinction, but we do contend that there should be a general rule for all exhibits. If a party, for example, under subpoena produces a photograph and there are reasons why that person, who has the entire power to control what is done with that photograph except for the subpoena, there are reasons to respect that person's wishes, if he should make the request, that that document not be provided for showing on television or in newspapers.

Q If that is true, why do you make a motion to

seal the record? That is the exception, not the rule.

MR. JEFFRESS: But if the Court please--

Q Is that true, that sealing the record is the exception and not the rule?

MR. JEFFRESS: Sealing the record is the exception but--

Q Then why do you do that if it is already sealed?

MR. JEFFRESS: Why do you not--

Q You said it is already sealed. You cannot copy it.

MR. JEFFRESS: The party could make a request for sealing of the record, but I might point out--

Q You mean if you go in the clerk's office and say, "I want to see the exhibits in such and such a case," they just hand them to you and you are allowed to copy them?

MR. JEFFRESS: They do not, Your Honor. They do not in most jurisdictions. There are three rules in fact, actual rules of district courts that prohibit that, except to the parties to the case.

If the Court please, I would like to reserve the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Jeffress.

Mr. Abrams.

[Continued on page following.]

ORAL ARGUMENT OF FLOYD ABRAMS, ESQ.

ON BEHALF OF THE RESPONDENTS

MR. ABRAMS: Mr. Chief Justice, and may it please the Court:

I would like to start by trying to be as clear as I can about precisely what the tapes are that involved here and the degree to which they have already come into the public domain. Some of these tapes were subpoenaed by Special Prosecutor Cox in 1973. And after the Court of Appeals ordered them to be turned over by Mr. Nixon and after Mr. Cox's dismissal, they were turned over. Others were subpoenaed by Special Prosecutor Jaworski. And after this Court's ruling in 1974, they were turned over.

With respect to the tapes involved here, we do not deal with any other than those introduced as exhibits in the Mitchell trial. All were heard in open court. And indeed all were heard not just by the 12 jurors, Mr. Justice Marshall, but by everyone in the court because everyone that came into the court was provided with earphones so that they could be heard by everyone. The computation in this case is that something on the order of 1300 individuals heard some or all of the tapes. So, everyone in the courtroom heard everything that is at issue in this case. And all of the tapes have been printed. And, as Mr. Nixon's brief correctly states, all of the tapes, the transcripts of them, continue to be available

around the country for public reading and reflection.

Q That is the printed transcripts.

MR. ABRAMS: Yes, sir, all of the printed transcripts are available.

What has been missing from the public is what we came to court to seek, the right of the public not present in court to hear the tapes that everyone in court heard. There is no question here about the ability to reproduce these tapes without destroying the original tape from which they were made. The clerk of the court so stated in his affidavit, and we have not heard anything to the contrary from Mr. Nixon. Nor is there any issue as to Mr. Nixon seeking their return in any sense of these tapes. His reply brief submitted to this Court last week explicitly disclaimed any effort on his part to get these tapes back from the clerk--page 17 of his reply brief.

The legal issues, as we see it, that are before this Court are relatively narrow. But before I reach them, I would like to be very clear as to what Judge Gesell held in his opinion which the Court of Appeals correctly stated it was, as it were, affirming. Judge Gesell's first opinion--only opinion, as it were, in this case--said in so many words that the tape exhibits are in evidence--I am quoting now--and have therefore come into the public domain and the public should have a chance to hear them. Mr. Nixon's opposition was denied by

Judge Gesell. Judge Gesell, to be sure, required us to formulate a plan for distribution of the tapes and a plan which would avoid certain commercialization and the like. We submitted a plan; it was rejected by Judge Gesell.

Judge Sirica then held a hearing and refused to--

Q Why was he concerned about commercialization? If it is open, why not commercialize it?

MR. ABRAMS: Mr. Justice Blackmun, I think he was improperly concerned about commercialization after the initial distribution of the tape. I think it was quite within the Court's province to say that in the first instance, when the tapes were to be reproduced--that is to say, a master tape made and initially distributed to the public--I think it was proper, at least we take no quarrel with the proposition, that as to that he could properly say that the Court should say that there should be no commercialization. The only problem that we have with Judge Gesell's opinion is that he may have inferred--we do not think he did in his first opinion, and Mr. Nixon, incidentally, did not think he did in his first opinion--he may have inferred that after the tapes were out to the public, that there were constitutional limitations which could be placed on its use. In so far as Judge Gesell did believe that, we think he was incorrect.

Q Do you have any quarrel with Judge Gesell's suggestion that whatever plan you came up with, you had to pay

for the time of the clerk of the court and that you could not just turn the court into an annex of CBS in order to get the tapes--

MR. ABRAMS: We have no problem with that at all, Justice Rehnquist, and we have now submitted to the Court a plan which would take everything off the Court's hands, under which the National Archives would take full responsibility for the making of the tape and the distribution of the tape to the public at minimal cost. We do not need and we do not seek any aid from the Court here at all, save the ability to have these tapes reproduced by the National Archives and then distributed generally to the public.

Q Mr. Abrams, how about my question to Mr. Jeffress on the parts of the tapes, of the original tapes or the copies of the tapes, that were not played to the jury?

MR. ABRAMS: They are not involved here, Mr. Justice White. We have taken the position in this case that all we are seeking are court exhibits. The material which Judge Sirica received, which was not admitted into evidence, we had made no claim for in this case. They have never been made available generally to the public. They were not heard in open court.

Q But they were subpoenaed.

MR. ABRAMS: Yes.

Q They were lodged in court and they are still

there, are they not?

MR. ABRAMS: They are in court, but they are not public record. They are in Judge Sirica's vault, as it were. And they are under a protective order.

Q So are the tapes you are after there in his vault.

MR. ABRAMS: Yes, sir.

Q Who knows whether they are public records?

MR. ABRAMS: Yes, the question is whether they are public records.

Q How do you distinguish between the two, the parts that were played to the jury and the parts that were not?

MR. ABRAMS: Because the parts we seek are court exhibits. The parts we seek were played--

Q You mean they were admitted.

MR. ABRAMS: They were admitted.

Q Admitted into evidence.

MR. ABRAMS: Into evidence.

Q Is that as far as you go on exhibits?

MR. ABRAMS: That is all we are seeking, Your Honor, yes.

Q I did not ask that. Does your theory only go that far?

MR. ABRAMS: Our theory goes this far. We think the Court of Appeals was correct in saying that as a general

matter, materials held by the Court are available to the public--as a general matter--at least in the context where they are court exhibits and have been admitted into evidence.

There is material, to be sure--grand jury, for example, we are told. The material is submitted to a grand jury. That is not, by anyone's standards, public information. And we do not seek any such information. We do not take the position in this case, Mr. Justice White, that we are entitled to everything that finds its way to court in some fashion or another. We accept the proposition of the Court of Appeals that there are situations in which things, even when introduced in evidence, may not be made publicly available for one reason or another. Of course if it is introduced in evidence under seal--

Q What reason?

MR. ABRAMS: If it is contraband, for example. If it is, for example, pornographic literature. If it is subject to copyright laws.

Q How about the copyright laws? Suppose it was copyrighted material that was introduced into evidence.

MR. ABRAMS: There is case law which we believe is correctly decided at the lower court level indicating that copyrighted materials introduced in evidence may not be reprinted certainly without violating the copyright law. As to whether they may be obtained--I am pursuing Mr. Justice

Rehnquist's question earlier--obtain and where one could print, as it were, and take one's chances, that may be. We would not even object to a rule, and we do not even go so far in this case as to urge a rule, which would routinely allow anyone to walk in and get ahold of copyrighted material in that sense.

Q There are trademark copyright cases where even the pleadings are secret.

MR. ABRAMS: Yes.

Q And are sealed. Even the pleadings.

MR. ABRAMS: Absolutely.

Q What about the question I put earlier? May this Court impose limitations on the distribution of the recording of your argument today, limit it to particular purposes and particular groups, and deny it to CBS or the news media generally, if we want to?

MR. ABRAMS: You understand that is a delicate question for me, Mr. Justice Brennan.

Q It may be, but I wish you would answer it.

MR. ABRAMS: I certainly think that there is a vast distinction between any limitations placed by courts, including this Court, on the use of arguments or trials or the like than there is on--

Q Which way does it cut? We can or cannot?

MR. ABRAMS: You have more authority, in my view,

under authority such as the Estes case to limit the public dissemination of the tape of this argument than would be the case of an exhibit filed in this Court, which I would urge upon you is more generally available.

Q You say "more authority." That does not sound as though you concede we have plenary, total, and final authority, do you?

MR. ABRAMS: Your Honor, I do not deny for a moment that you have complete authority to do that. In giving an answer to Mr. Justice Brennan's question, what I was attempting to urge was that it would give me a lot of constitutional qualms if you were to limit the accessibility of court exhibits in this very courthouse. I could not deny that you could do it, but it would seem to me inconsistent with many years of American practice.

Q That is academic perhaps because you could get them before they got here.

MR. ABRAMS: Yes, and if other courts were to do the same thing, I would make the same argument to them.

Q I am not sure how my Brother Brennan reacts to your answer to his question, but it seems to me a perfectly good answer exactly the opposite to which you gave could be made, that an exhibit furnished by a third party and simply drawn into court by judicial process perhaps ought to have more protection from dissemination than the proceedings of a public

body that are pursuant to rule and that do not involve any unwilling participation by third parties.

MR. ABRAMS: Mr. Rehnquist, I cannot be put in the position of disagreeing that the constitutional arguments for limiting dissemination of the arguments here are very weak. I think that there is a strong constitutional case to be made for having as public a disclosure as is possible of this very proceeding. I take it the reason it is not made available are the kinds of reasons that are referred to in the Estes case, the possibility of inhibiting counsel, affecting the dignity of the court proceedings. Our position that you cannot inhibit an exhibit, that there is nothing in what is involved in this case which is analogous--

Q Why do you get to a constitutional question? Is it not in both cases basically a housekeeping question of what a particular court is going to do with material physically in its possession?

MR. ABRAMS: As a housekeeping matter, Justice Rehnquist, it does seem to us to have long-standing roots, as the Court of Appeals said. But as a general matter, copies may be made of things held in courts, subject to exceptions and subject to abuse. But as a general proposition, court records are available to be inspected by the public and copied by the public.

Q Do you go so far as to say that the Constitution

requires this Court to maintain that taping process over there?

MR. ABRAMS: The taping of this proceeding, Your Honor? No, I would not, Your Honor. It seems to me--

Q So, we could do away with it and not violate the Constitution?

MR. ABRAMS: I think so, Your Honor.

Q Do you claim a constitutional right to get these tapes?

MR. ABRAMS: We do make a constitutional argument, Justice White. We do argue that, pursuant to the Cox Broadcasting case, or at least pursuant to the same theory as the Cox Broadcasting case, which is not this case, that there is a lot more--

Q Cox did not go that far.

MR. ABRAMS: No, sir, it did not. And I do not mean to suggest that it did. It is our position in this case that if Cox is correctly read, as I do, as saying that there is an advantage to the public in the widespread dissemination of information even as offensive as the name of a rape victim and that the privacy interests and the father of a rape victim can be overcome, must be overcome, because the information is contained in a court record.

By parity of reasoning in this case, court exhibits introduced in evidence, not to say these court exhibits introduced in evidence, should be made public.

Q Short of a constitutional argument, what are you arguing?

MR. ABRAMS: Short of a constitutional argument, we argue, as did the Court of Appeals, that there is a long-standing common-law practice and right to make copies of court documents and to make copies of court exhibits, that this right is not an absolute right, that it has exceptions to it, that none of the potential exceptions to it ought to be applied in this case, and that indeed there is a very significant argument to be made in favor of release of these tapes.

I would put it this way, Justice White--we think that even if the Court of Appeals had adopted an opposite test, a presumption against release of information such as this instead of one placing the burden on Mr. Nixon, we think we could meet that test in this case. We think in this case there is such a public interest and there is such a public utility in having these tapes made available that even if the presumption were against us, we could meet it.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Williams.

ORAL ARGUMENT OF EDWARD BENNETT WILLIAMS, ESQ.

ON BEHALF OF RESPONDENT, WARNER COMMUNICATIONS, INC.

MR. WILLIAMS: Mr. Chief Justice, may it please the Court:

I think it would be useful if I spent just a couple

of minutes, if the Court please, identifying what I conceive to be the non-issues in this case which have been raised as questions in the courts below in the tortuous journey of this case over three years to this courtroom.

First of all, the peg to which Judge Sirica latched his memorandum and order is now moot. There are no more prospective defendants, no more prospective trials and, therefore, no more prospective prejudice.

Secondly, we are not here contending that in every single instance there is a right to inspect and copy and distribute every exhibit that goes into a courtroom in the trial of a case. We recognize that in the exercise of discretion of the trial judge there may be instances where he will deny that right where there are property rights involved, where there are illegal wiretaps which are offered in evidence, where in a wiretapping criminal case, for example, or where there is contraband offered as part of the prosecution's case in a criminal trial.

Q Do you think, in other words, it is pretty much in the trial judge's discretion?

MR. WILLIAMS: I think there is an exercise of discretion here for the trial judge, Mr. Justice Stewart.

We are not here assailing the traditional rules of court which preclude access and distribution of the tape recordings of trials or indeed of court arguments. We are not

here making that assault.

Q Mr. Williams, would it be a valid reason for a trial judge to deny the right to copy if he felt that the material would be embarrassing to a witness and might discourage future prospective witnesses from wanting to come forward and testify in trials and so forth?

MR. WILLIAMS: I do not think, Your Honor, that embarrassment per se would be a legitimate reason for denial of access. Indeed, I think that is what petitioner's position is reduced to.

Q How about a photograph of someone hurt in an automobile accident or a particularly unattractive photograph, something like that?

MR. WILLIAMS: I think that would be within the discretion of the court.

Q Would it be a permissible reason to deny on the ground of embarrassment to the witness?

MR. WILLIAMS: If there were a proprietary right and if--

Q No; no proprietary right, just pure embarrassment.

MR. WILLIAMS: I do not think embarrassment per se would be sufficient, Your Honor.

Q Would ever be sufficient.

MR. WILLIAMS: And I say this with no meanness of

spirit. But I think that is what petitioner's argument is reduced to. It is that an alleged conspirator has the right not to be embarrassed by the sound of his inculpatory words solely because he was president when they were uttered. I think that is the reduction of the petitioner's argument in this case.

Q Mr. Williams, the Court of Appeals said the normal practice is that court exhibits are returned to their source when the case is over. These cases are over. Suppose the exhibits had been returned and then you wanted to get them.

MR. WILLIAMS: I think our position is, Mr. Justice White, we are not engaging in any debate about title. We are saying that while they are in the custody of the court, we have the right to inspect and copy, and they are in the custody of the court. And I think had they been returned, we would be on a different footing.

Q Yes, but the Court of Appeals made its judgment when the cases were still going on. And it said normally the exhibits are returned when the cases are over. The cases are over and they have not been returned.

MR. WILLIAMS: They have not been returned, Your Honor, because I understand that the Manual for the Clerks of Court, which has been promulgated out of a judicial conference, mandates that records of this kind be kept for a period of ten

years. They are in the custody of the Court. They have not been returned. And our position is quite narrow. It is that while they are in the custody of the Court, we have a time-honored, traditional common-law right to inspect those documents and to copy them and make such distribution--

Q Is it common law for the federal courts?

MR. WILLIAMS: It is a common-law right in the District of Columbia. It has been recognized for 100 years and--

Q Federal common law.

MR. WILLIAMS: Yes, sir.

Q In response to Justice Stevens' question, Mr. Williams, you referred to Mr. Nixon's right to claim embarrassment. Do you think he has the right to assert similar claims or contentions on behalf of people whose voices might be heard on the tapes?

MR. WILLIAMS: I think he has not, Your Honor. And fortunately the persons whose voices were heard on the tapes were all parties defendant in the case below, captioned U.S. v. Mitchell, et al., in petition for certiorari was denied in this Court last spring. There are exceptions to that. There are two advisers to the president who are not parties defendant to that case, whose names appear in those tapes and whose voices are heard on those tapes. They have not seen fit to register objection or claim embarrassment. And I

suggest that that is a concern that can easily be handled at the time that the method for distribution is promulgated in the Federal Register. They should be given an opportunity to come in and assert what Mr. Justice Stevens pointed out a few moments ago, their right not to be embarrassed or their right if they--

Q Why should they be given that right? You say that is an insufficient basis for an objection anyway.

MR. WILLIAMS: I think it is an insufficient basis, but there are a lot of rights which are asserted with an insufficient basis such as petitioner's right in this very Court, in my opinion.

Q Mr. Williams, suppose you have a celebrated criminal case, kidnapping, rape, murder, something of that kind, and one of the elements of evidence introduced at the trial are statements made which in the aggregate amount to a confession by the defendant or one of the defendants at some point, at least at a point where the court admits them in evidence, and these statements are all on the record now in the trial, not subpoenaed in the ordinary sense but produced by the prosecution, now--

MR. WILLIAMS: Extrajudicial statements, Mr. Chief Justice?

Q Made outside of court--

MR. WILLIAMS: Extrajudicial.

Q --perhaps at a time when he was in custody or perhaps not.

MR. WILLIAMS: Yes, I understand.

Q At any rate, they are received in evidence. They are on the record of the tape recording of the trial.

MR. WILLIAMS: Yes, Your Honor.

Q And in written transcript. The jury then acquits the defendant and at the conclusion then efforts are made, as are made here, to produce them for broadcasting, for tape recording, to juxtapose the admissions, the confession, against the jury's verdict.

MR. WILLIAMS: Yes, sir.

Q Do you think that would be subject to being broadcast?

MR. WILLIAMS: I think so, Your Honor, for these reasons. Just as the written transcript of the trial would be available for publication by newspapers, periodicals, and publishers if they chose to use the transcript--and we are all familiar with many instances where transcripts have been used as bases for books.

Q You do not see any difference between the voice and the printed word?

MR. WILLIAMS: I do see a difference, Mr. Chief Justice. I think a fortiori the argument obtains that they should be relaesed if they are oral as distinguished from

visual exhibits for these reasons. If you look at the transcripts, the written transcripts of the exhibits which are in question here, you will see that they are laced with the expression "uh-uh," U-H-U-H. Now, "uh-uh" can be "uh-uh," or it can be "uh-uh," or it can be "uh-uh?" And each of those has a separate and distinct meaning. And I think when representations are being made with respect to oral conversations held extrajudicially, the very best representation of those oral conversations is not in a written document but in an oral transcript.

And so I say, Mr. Chief Justice, that the argument is a fortiori when we are dealing with conversations.

Q Suppose after that, after the jury acquits this person, the judge, as some judges have been known to do, excoriates the jury, a matter which we know, in the code of professional conduct is discouraged, if not forbidden. Would the members of the jury have any basis for stopping the broadcasting of the judge's denunciation?

MR. WILLIAMS: I think they would have no more basis for stopping the broadcasting, Your Honor, than for stopping the publication. And we are all familiar with news stories that have been written in recent years about judges remonstrating with juries for their verdicts. And I say once again, Your Honor, that the same rights should obtain with respect to reproduction of that orally. Of course we have, as you know,

Mr. Chief Justice, rules throughout our federal system which foreclose the right of access to the tape recordings of the trial proceedings in all of our courts, and that applies also to our appellate courts.

Q What if after then, in this hypothetical case, the court having denounced and excoriated the jury which has found the defendant not guilty and thereby discharging him, the court then proceeds to denounce and excoriate the defendant himself. You would say then too that is available for broadcasting?

MR. WILLIAMS: Yes. We have all had that experience, Mr. Chief Justice, and I think it is a part of the proceeding. It may be an unfortunate part of the proceeding. It becomes part of the court record. It is in the written transcript and therefore in the public domain. And I suggest also, absent the rule which forecloses access to the oral transcript of the trial proceeding, that there should be a right also to broadcast such a--

Q What about the validity of that rule against access to the oral recording?

MR. WILLIAMS: I think it is a good and salutary rule at the trial court level, Mr. Justice White, because I think the search for truth is difficult enough. When we look at the fragility of a human's powers of perception, the fragility of their powers of recollection, the fragility of

their powers of expression, and then introduce their veracity, it is difficult enough without putting him on stage and having them conscious of the fact that every word that they utter in a courtroom is being recorded. I think that would be an inhibiting factor.

Q If Mr. Nixon had been a witness in this case and had objected to having his testimony recorded and then broadcast, you would say that if the court acceded to his request and forbade publication, you would accept that?

MR. WILLIAMS: There is such a rule existing now--

Q Yes, yes.

MR. WILLIAMS: --so you would not have to make that argument. But I think if there were not such a rule and he said, "I do not want to be recorded," I think he would lose that just as if he said, "I do not want to have my words taken down on the transcript." I think he would lose that because I think the court would say quite properly that we want to have a check on the accuracy of the court reporter, and we need it.

Q But if the court said, "Mr. Nixon, you do not need to make that request because we have a court rule that we do not turn loose any of our oral recordings of our trials," you would accept that?

MR. WILLIAMS: That is what I think the court would say, Mr. Justice White.

Q And you would accept that?

MR. WILLIAMS: If I were counsel for Mr. Nixon, would I--

Q No, no, no. If you were counsel for the broadcasters who would like to take the oral transcript and broadcast it, the oral recording and broadcast it.

MR. WILLIAMS: I would accept that for the reasons that I have just--

Q Just yes. Just yes, you would accept it.

MR. WILLIAMS: I have answered that, I think.

Q Yes. Yes, indeed.

MR. WILLIAMS: I have answered that because I believe there is a different rule that obtains at the trial level from that which obtains at the appellate level.

Q What is the rule at the appellate level?

MR. WILLIAMS: At the appellate level, my understanding is, Mr. Justice Brennan, that we may not have access to the oral arguments of this Court or any circuit court across the land. I do not think that is a salutary rule. I think it is a wrong rule, sir. But I am realistic enough to recognize that if I made that contention and lost, I would have nowhere to go. [Laughter]

Q You might. You might. The Congress enacted a statute saying that all such records of arguments here be made public under the Freedom of Information Act. We of course

might have further recourse to say then the recordings will not be made. Is that so?

MR. WILLIAMS: Oh, you could certainly do that, yes, sir.

Q Mr. Williams, you say you would have nowhere to go. What would be your argument that we could not put limitations on this--

MR. WILLIAMS: I would argue, if I were put into that position--which I am not, fortunately, today. As I said at the outset of this argument, I am not here assailing that rule or any rule covering that subject. But I certainly would argue that the transcript of my argument today is a public record of a judicial proceeding and that the public should have access to my oral argument and that if they have access to it, there is a concomitant right to copy. And the concomitant right to copy gets constitutional dignity, in my view.

Q And by copy you do not mean a--

MR. WILLIAMS: Written.

Q --written copy. You mean the precise oral--

MR. WILLIAMS: I do, Mr. Chief Justice, yes.

Q I think, Mr. Williams, we will look forward to how the tape comes out with your several inflections on U-H-U-H.

MR. WILLIAMS: Thank you very much.

Q May I add to this parade of horrible examples

by putting one more to you? Let us assume that instead of having this case, we had a case in which there was a domestic litigation between, let us say, a very high official in government and a wife internationally known. Let us assume further that you had tapes of various lurid indiscretions. Would you be making the same arguments for the availability of those?

MR. WILLIAMS: I think, Mr. Justice Powell, that in the exercise of the court's discretion it might refuse access to those if they were pornographic in nature. And I have carved that out as an exception. I think there are certain things where there are rights of privacy, where there are rights of privilege--for example, Mr. Justice White talked about the tapes that were not offered in evidence. They are privileged. So, we cannot claim those. They are presumptively privileged under this Court in 1974.

Q Mr. Williams, may I come back to my example? Where would the privilege be as between the parties to this divorce litigation?

MR. WILLIAMS: I would not say there is a privilege, Mr. Justice Powell. If the court in the exercise of its discretion believed that the testimony which had been taken in court constituted pornographic material, I think it might exercise its discretion to foreclose.

Q But only if the court concluded that the

recordings and the testimony constituted pornographic material?

MR. WILLIAMS: No, I think there are other situations where it could exercise its discretion, Mr. Justice Powell, to foreclose the right of distributing broadcast material.

Q Do you mean the super embarrassment of the parties?

MR. WILLIAMS: I think in cases--to delineate them specifically--I would think in cases where the prosecution offered illegally obtained wire-tapped material to prove a case against a wire tapper, where it offered hard core pornographic material to prove that the defendant trafficked in it.

Q That is not what Mr. Justice Powell is asking you about though. He is asking you about material that is actually admitted in evidence.

MR. WILLIAMS: It is admitted in evidence. And from the question he propounded, I assumed that he was talking about materials that were pornographic in nature.

Q And in a public trial?

MR. WILLIAMS: And in a public trial. And I suggest to the Court that in that instance the trial judge should exercise his discretion to not inhibit access to it because it is in a public trial. It would have been printed unless

he excluded the press.

Q And the reporters who heard it could not print it?

MR. WILLIAMS: No, I did not say that.

Q You said a public trial.

MR. WILLIAMS: No, I said they could print it, Mr. Justice Marshall. I think they can print it. If I were the trial judge, I would not put that inhibiting rule, regardless of the embarrassment that flowed. But it is a consideration that a trial judge might take in the exercise of his discretion. And all that we are saying here--

Q Suppose the recordings are laced with expletives.

MR. WILLIAMS: These are laced with expletives, and we contend that there is a right to inspect and copy them.

Q And broadcast them?

MR. WILLIAMS: I think--

Q Expletives and all.

MR. WILLIAMS: I do not think that we can get constitutionally into what use is made of those records once they are released because we run into countervailing First Amendment considerations, and we are now dealing in a question of taste rather than law.

Q You are not going to try to plead this decree then as a defense to whatever use--any suits that might arise

out of your subsequent use of the material. This is just a question whether you get access, not to your total right to use it for whatever purpose you see fit.

MR. WILLIAMS: It is a question, Mr. Justice Rehnquist, of access, copying, and distribution; and whoever distributes has to take the full risk of distribution and whatever actions may be brought by any aggrieved parties.

Q Mr. Williams, do you adhere to your answer that you gave me earlier that embarrassment is never a valid reason for denying access?

MR. WILLIAMS: I think it should not be a reason.

Q Unless it is pornographic. You have to go pretty far to get something pornographic.

MR. WILLIAMS: I think that what we are talking about here is material which, by the very--when I use the term "hard-core pornography," I am using really a description of material which is contraband, namely, the very possession of it.

Q You would not let the judge even balance embarrassment against other considerations. You would simply say embarrassment of a witness or a third party is never a valid objection?

MR. WILLIAMS: No, because I think whatever embarrassment there may have been has already taken place in the public trial and by the publication of the materials.

Q You do not think there would be additional embarrassment by the difference between the different kinds of "uh-uhs" that you described? I mean, after all, your whole position is there is a material difference between reading and hearing. Can there not also be a material difference in the terms of embarrassment as well as public interest?

MR. WILLIAMS: I think so. I think that embarrassment per se is not a sufficient basis for the denial of the common-law right and the concomitant constitutional right that flows from inspection.

Q Does not your position in part assume something of this nature, that if a courtroom holds 130 people and 130 are entitled to hear everything that goes on--as they are--that that means that there is some constitutional right of 13 million people to hear it by way of the reproduction of the recording?

MR. WILLIAMS: I think, Mr. Chief Justice, that there is a difference between extrajudicial recordings that are offered as exhibits in a trial and the transcript of the judicial proceedings per se. And I have said that we are not gainsaying the rule which inhibits the transcription of judicial proceedings because there are countervailing considerations, the inhibitions that witnesses feel when they are talking for oral rexordings. I think there is a difference. But we are dealing solely here, Mr. Chief Justice, with

extrajudicial recordings that were made exhibits in the court below, that were played to the jury, that were played to all the persons who were in the courtroom, that were visually transcribed, reproduced, sold as books, sold in the form of periodicals and magazine pieces across the world. That is what we are dealing with here.

Q Let me then return to Mr. Justice Powell's hypothetical, and you have divorce proceedings between two internationally prominent people, known all over the world, and the man is a prominent political or other public figure, and we reverse the roles that sometimes apparently occur and we have the husband suing the wife for divorce on the grounds of misconduct with respect to her visits to some gentleman's establishment, gentleman's apartment; and unkown to her, all of the conversations were recorded by this third party, ungallant as that might be. And the husband finds out about it and subpoenas them. Now you have the subpoenaed material brought into the courtroom, going one step beyond your response to Mr. Justice Powell just now. Now that is available too for all the networks.

MR. WILLIAMS: It is offered before the jury; and since it is a cause celebre as described by Your Honor, presumably it is offered to a packed courtroom and presumably it is published by the press and by the periodicals covering the trial so that at the moment the recording is played, it is

in the public domain, the facts are in the public domain, and it is now out, as it were. Now we have the question as to whether or not a member of the public can get access to the exhibit in the form of an oral transcript, and we contend yes, that there is a right, a common-law right, to get access and then a concomitant constitutional right to reproduce after getting access to that record. I think the court cannot concern itself at that time with what use is made. The user would have to take his risks thereinafter, whatever they may be, for actions that might be brought against him by an aggrieved party who would contend that he has a right, as Mr. Justice Stevens has pointed out, a right not to be embarrassed.

I do not know of any common-law right not to be embarrassed by one's own inculpatory words. And I think that finally is the position that the petitioner is urging before this Court today.

Q The gentleman whose conversations I am mentioning is not inculpated in any way. He is somewhat guilty but a third-party bystander so far as the trial is concerned. His voice and his conversations are--

MR. WILLIAMS: Mr. Chief Justice, Mr. Chief Justice, I am constrained to say that sounds like a male chauvinist remark, that he is not guilty.

Q No. No, he is not charged with anything.

MR. WILLIAMS: I thought he was--

Q No, he is a third party whose conversations are being produced in litigation between a husband and a wife.

MR. WILLIAMS: Uh-huh. But then I guess I have to quarrel, Mr. Chief Justice, with your premise that he has no guilt because I have to think him in equal guilt with the defendant wife, and I would have to once again say that he has no right not to be embarrassed by the sound of his inculpatory words if that were transcribed.

Q I do not like to prolong this unduly, but--[laughter]--let us change this, and it is the husband, the trial having been concluded and the matter having been terminated. It is the husband who does not want to further embarrass himself or his wife or anyone.

MR. WILLIAMS: I suppose he had an option not to bring the case on those grounds.

Q It is a little late in my hypothetical now of course.

MR. WILLIAMS: It is a little late. It is a little late. But I think that he has no standing, having brought the case and having offered the evidence in a public trial, having subpoenaed the transcript of the inculpatory words evidencing inculpatory conduct, now to claim that he will be embarrassed if it is further reproduced after it has been offered in open court--

Q The principle you are plugging for I suppose would cover the situation where the words, the voices, or whatever is said is not inculpatory at all.

MR. WILLIAMS: Oh, I think so, of course, a fortiori, a fortiori, yes.

Q So that it really is not the point here.

MR. WILLIAMS: I do not thing it is. I think embarrassment is really not--not the point.

Q The publication might be extremely embarrassing but it might not be inculpatory in the sense of being criminal or indicating any guilt. It is just embarrassing. And your principle would cover it.

MR. WILLIAMS: I believe it would, Mr. Justice White.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Williams.

MR. WILLIAMS: Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Mr. Jeffress, do you have anything further?

REBUTTAL ARGUMENT OF WILLIAM H. JEFFRESS, JR., ESQ.

ON BEHALF OF THE PETITIONER

MR. JEFFRESS: If the Court please:

To say that the injury that is involved here is one of embarrassment or one of mental anguish does not, it seems to me, demean the importance of the injury that will be suffered. We have plenty of instances in the law where

precisely such an injury is protected against. Certainly in the law of privacy. Certainly in the statutes in some states and court rules that provide for sealing the record in juvenile proceedings. That is what is involved in those cases, preventing--call it embarrassment, call it mental anguish. But the second thing is that we need to recognize that tapes are different from transcripts. The transcripts of course have already been disclosed. But tapes are susceptible to uses that are far more effensive to the people whose voices are captured on the tapes than are transcripts. And, as we have tried to point out, it is one thing to produce the tapes pursuant to subpoena for use in a criminal trial, but the effect of holding that there is a common-law right of the public to obtain copies of those items that are submitted pursuant to subpoena is in essence to say that the effect of a subpoena is not just to require production to the court and the parties; but the effect of a subpoena is to require production.

Q Why is it that the Court did not restrict the tapes in court, that he allowed them to be played rather than the transcript?

MR. JEFFRESS: That is a necessary--

Q Getting back to my original discussion with you, then not only the transcript was released from privacy but also the voices were released from privacy, correct?

MR. JEFFRESS: Yes, Your Honor, the Court felt that that was an incident of a public trial that ought to be done.

Q Could he not have ruled that you did not need it, you could be satisfied with the transcript? But the Court said you needed both; did not the Court say that?

MR. JEFFRESS: I am not aware of any order in which he said that there was a constitutional reason--

Q The Court did say that these could be played to the audience and everybody in that courtroom.

MR. JEFFRESS: Yes, he did, and he provided--

Q He made it to that extent public.

MR. JEFFRESS: That is correct, Mr. Justice Marshall, but he did not rule at that time that, while the tapes were going to be played in the courtroom and the trial was going to be conducted as publicly as a trial can possibly be, that once that trial was over there was any right of the public, any interest in the public in obtaining copies of those tapes to do with them whatever the public pleased.

I would like to mention one other thing. As for the Manual for District Court Clerks, it has been our position--and we think this is supported by the common-law cases, the cases that establish the common-law right--that the common-law right is applicable to materials that are property of the court. It is said that the Manual for District Court Clerks provides that in cases of great historical importance

that exhibits are to be retained by the clerk and are to become a part of the clerk's permanent records. But the quotation that is relied on by Judge Gesell, by the Court of Appeals, and by the respondents is not the correct provision of the Manual for District Court Clerks. The Manual in fact recognizes that the clerk should not dispose of documentary exhibits not physically filed with the case--that is, in the court jacket--and not claimed by parties to the case. That is item No. 10 in Chapter 13. In the comment to that it says that case exhibits impounded by the court or voluntarily submitted as evidence normally remain the property of parties to the case. So, the Manual does not stand for the proposition that these are part of the traditional court records that are subject to the common-law right of inspection.

And, as we have said, there is nothing in the purpose of a subpoena, there is nothing in the function of a court, that justifies the court in so treating them.

Q But does not the act that we had before us last spring affect at least the property of a claim that your client might otherwise assert?

MR. JEFFRESS: I believe the claim does affect any property right that he might assert. But, as I have tried to say, there is no question here of title to the tapes, no argument that we make depends on the title.

Q Are you distinguishing between property and

title?

MR. JEFFRESS: One thing is clear, Mr. Justice--no, I am not distinguishing between property and title. But I am saying that one thing that is clear is that the tapes are not the property of the Court. The tapes are in the custody of the Court for a limited purpose. Whether it is the Government of the United States through GSA or Congress that should decide whether to make these public or whether it is Mr. Nixon himself that should decide whether to make these public, the fact remains that it is not the Court, which has the tapes only for a limited purpose; and there is no common-law principle which would apply, regardless of ownership, and say that these sorts of exhibits must be supplied to the broadcasters and record companies.

Q Have these tapes now been delivered to the GSA, pursuant to the opinions of some time ago, last year sometime?

MR. JEFFRESS: Mr. Chief Justice, I must confess that I do not know whether the underlying original recordings have been delivered. The Court copies certainly have not.

Q Assuming for the moment that they were in the possession of GSA and not of the clerk, would the GSA be a necessary party to any effort to reproduce them?

MR. JEFFRESS: I certainly think the Court could not grant effective relief if the GSA were not a necessary party. But as the Court is aware and as explained in our reply brief,

the GSA originally took the position that no tape subject to that act would be copied and provided to the media and the public. That has gone backa and forth between GSA and Congress in course of changing and resubmitting regulations. And the current regulations, though still not final, appear to, or may at least, leave that decision dependent on the decision of this Court in this case.

Q In other words, we are talking not just about a housekeeping policy of the Court but GSA is going to make its decision dependent on what the housekeeping policy of the clerk's office of the District of Columbia is?

MR. JEFFRESS: Odd as that may seem, Mr. Justice Rehnquist, that appears to be what is in the latest proposed regulations submitted by GSA to Congress. It is provided that the distribution or dissemination of the tapes will depend on the ultimate relief granted in this case.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:25 o'clock a.m. the case was submitted.]

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