The Burger Court Opinion Writing Database

Nixon v. Warner Communications, Inc.

435 U.S. 589 (1978)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 6, 1977

Re: 76-944 Nixon v. Warner Communications, Inc.

MEMORANDUM TO THE CONFERENCE

I took this case for a memo to propose two alternative solutions for consideration. Whether intrigued by the printed words on the first alternative I had in mind or for other reasons, I now focus on one solution which I am persuaded we should adopt.

Our grant in this case was to consider whether the respondents have a common law right that requires the District Court to permit them to obtain copies of the original recordings produced by Mr. Nixon in accord with our decision in United States v. Nixon, 418 U.S. 683 (1974).

A.

In United States v. Nixon we unanimously concluded that private Presidential conversations are presumptively

privileged and we acknowledged that the President has a legitimate expectation of privacy in his private conversations with close aides. Id., at 708. But we held that the President's "generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial," id. at 713, and affirmed the District Court's order that the original tapes be transmitted to that court for a carefully limited in camera inspection to determine what portions of the tapes were relevant and admissible in the criminal trial. In affirming the order, the Court noted that the District Court had the responsibility "to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice." Id., at 715. We quoted Mr. Chief Justice Marshall's admonition, made sitting as a trial judge United States v. Burr, 25 F. Cas. 187, 192 (No. 14,694) (CCVa 1807), that

> "[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual." United States v. Nixon, supra, at 715.

Mr. Nixon produced the tapes in accord with our holding.[4] After conducting an in camera inspection, the District Court transmitted to the prosecutor the portions of the tapes which it found relevant and admissible.

The District Court admitted portions of the subpoenaed tapes into evidence and permitted them to be played to the jury in open court; it provided headphones to the jurors and the spectators in attendance, enabling them to hear the evidence with minimum interference. In addition, it distributed to all present printed daily transcripts of the recorded conversations. Hundreds of persons, including media representatives, attended the three month trial. The transcripts were published in newspapers, magazines, and books and continue to be available at various book stores.

On November 12, 1974, six weeks after the trial had begun, three of the respondent broadcasting companies and respondent Radio Television News Directors Association filed an application, pursuant to Rule 47 of the Fed. R. Crim. Proc., for an order permitting them to make copies of the tape recordings introduced in evidence and played to the jury for the purpose of broadcasting the tape recordings to the public. In support of their request they asserted that the First and Sixth Amendments required that they be permitted to broadcast the requested recordings. The parties to the criminal trial and Mr. Nixon were served with copies of the application.

The District Judge determined that the applicants lacked standing to make the application as part of the

criminal trial and directed that the application be filed as a civil miscellaneous matter. He permitted those served with the motion seven days in which to respond.

The respondents' application was transferred to Judge Gesell because Judge Sirica (the original district judge) was occupied with the criminal trial. Mr. Nixon opposed the respondents' request. He asserted that the subpoena overcame his privilege of confidentiality only for the purpose of providing the tapes to serve the interests of justice. He argued that the broadcast of the tapes was not essential for that purpose and would intrude upon the privacy and the confidentiality of his communications far more severely than the playing of the tapes at trial. He also rejected respondents' argument that the First and Sixth Amendments required that their request be granted.

On December 2, 1974, respondent Warner Communications filed an application requesting an order permitting it and its subsidiaries to copy the tapes for the purpose of disseminating the recordings to the public by means of phonograph and tape recordings. Warner asserted a constitutional, statutory and common law right to copy the tapes that had been introduced in evidence and played in open court.

On December 5, 1974, Judge Gesell entered a memorandum and order on the respondents' application. He found that the respondents had no right to copy the tapes under the First Amendment but did have a federal common law right to inspect and copy exhibits received in evidence in a criminal trial "as a normal concomitant" of the Sixth Amendment public trial requirement. Although Judge Gesell recognized that petitioner had standing to protest the Court's release of the tapes, he concluded that petitioner had provided no reason to depart from, what he described as "general practice." Judge Gesell's memorandum did not give respondents' immediate access to the tapes. He ruled that no attempt should be made to copy the tapes until after the criminal trial and indicated that respondents would not be permitted to copy the tapes unless they developed a procedure which would prevent overcommercialization, provide copies to all persons on an equal basis, and function under the guidance of a responsible organization, agency or person on a non-profit basis. His memorandum expressed no opinion as to whether it would be possible to devise a suitable plan which would permit the district court to release copies of the tapes, but it solicited suggestions from the respondents, the defendants, and the Special Prosecutor as to the appropriate method of facilitating release of the tapes.

On January 8, 1975, Judge Gesell considered the respondents' proposals for releasing the tapes and rejected them. He denied the pending applications without prejudice and transferred the matter back to Judge Sirica for any further action that was appropriate. By this time, the criminal trial had been completed.

Between the time that Judge Gesell announced his memorandum and order and the time that he rejected the proposed distribution plans, the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107, Public Law 93-526, December 19, 1974, became law. The Act minimized the impact of petitioner's controversial claim of title to the tapes by giving the Administrator of the General Services Administration (GSA) complete possession and control over all of the original tape recordings, instructing every Federal Employee to deliver the tapes to the Administrator, and instructing the Administrator to make an effort to obtain complete possession and control of them. It deprived Mr. Nixon of the opportunity to restrict access to presidential recordings enjoyed by his predecessors and guaranteed that he could not prevent the use of the tapes when the interests of justice outweigh his interest in preventing disclosure. But the Act also provided specific limitations on public disclosure and protected Mr. Nixon's claims of privacy. It required that

the tapes not be released to the public except under regulations that protect the petitioner's right to assert any legal or constitutional right or privilege which would otherwise limit access to the recordings; it also required the Administrator to issue regulations to prevent access to the recordings by unauthorized persons.

On March 6, 1975, Judge Sirica held a hearing on the issue of "the timing of the release, if ever, of the tapes." He noted that Judge Gesell's order provided that no attempt to copy the tapes be made until after the trial. He requested briefs on the issue of whether the "trial" was over for purposes of Judge Gesell's decision even though appeals from the convictions were pending. He concluded that the trial was not over for purposes of release of the tapes until the appeals had been completed. In reaching his conclusion he said that, absent some compelling reason, the court should not take action that created a possibility of prejudice to the rights of the criminal defendants in the event of a retrial.

Judge Sirica could see no reason to order immediate release of the tapes in view of the availability of transcripts of the tapes and the likelihood that GSA would not consider releasing copies, under its regulations as they existed at that time, for four and one-half years.

He considered GSA's proposed scheduling and timing of the release of the tapes for copying as an indication that there was little need for immediate release, even though he thought it questionable that GSA's regulations applied to the tapes played at the criminal trial.

Judge Sirica did not explain why he thought it questionable that the proposed regulations applied to the tapes introduced in the trial other than to cite GSA's Report To Congress on Title I, Presidential Recordings and Materials Preservation, Act, P.L. 93-526 (March 1975) at E-8. The portion of the report cited is as follows:

> Barring court restrictions, the first group of tapes (other than those played in the "Cover-Up" trial) would be released 6 months after processing begins. The complete set of 880 tapes will be processed and public reference tapes made available approximately 3 years from the start of full-scale processing.

On April 4, 1975, Judge Sirica denied without prejudice, the respondents' petition "for immediate access" to the tapes for the purpose of copying.

B

On appeal, the Court of Appeals did not address the respondents' constitutional claims. Rather it said that the common law right to inspect and copy judicial records extends to exhibits introduced at trial and held that the

District Court had "misconceived the nature of its discretion" to reject respondents request for immediate access to the tapes. The court held that Judge Sirica should have required the petitioner to show that justice requires that respondents' request for immediate access be denied rather than requiring the respondents to show a compelling reason for enforcing their common law right to copy exhibits. Having defined the scope of the District Court's discretion in ruling on respondents' request, the court concluded that there was no justification for denying immediate access to the tapes for the purpose of making copies. It directed that the parties and the District Court attempt to develop a plan for the release of the tapes conforming to the requirements of Judge Gesell's initial memorandum. It said that the District Court had considerable discretion in developing a plan.

Although I think the issue of whether Judge Sirica's order was a final order appealable under the Cohen doctrine may be debated, I see no need to enter the debate in this case. Footnote 35 of the opinion of the Court of Appeals indicates that the court treated the appeal as a petition for a supervisory writ of mandamus and asserted jurisdiction on that basis as well as on the basis of Cohen. The court noted that its review on mandamus was limited to determining whether the trial judge

misconceived the nature of his discretion and said that the "appealability issue" was not dispositive in view of its holding that the District Court misconceived the nature of its discretion. If the court treated the appeal as a petition for mandamus under 28 U.S.C. 1651, it seems that the court was entitled to consider the questions presented. If the Court accepts the disposition proposed in this memorandum, there will be no need to address the issue of 28 U.S.C. 1291 jurisdiction for the result will be the same even if the Court of Appeals had 1291 jurisdiction as well as mandamus jurisdiction.

The petitioner contends that the tape recordings at issue here are not court records subject to a common law right of inspection. He claims that release of the tapes to the respondents for copying would wrongfully infringe upon his retained or residual property and privacy interests in the tapes. He also claims that granting the respondents' request would distort the balance between Presidential confidentiality and the needs of justice established in United States v. Nixon, supra. Furthermore, he argues that neither the First nor the Sixth Amendments require the District Court to release copies of the tapes.

The respondents contend that the Court of Appeals correctly held that the common law right to inspect and

copy judicial records extends to exhibits, like the tapes at issue here, and that release of the tapes will not infringe upon any legitimate property or privacy interest of the petitioner. They claim that release of the tapes is consistent with United States v. Nixon, supra. Furthermore respondents assert that their right of access to the tapes protects important First and Sixth Amendment interests. Respondent Warner Communications also argues that the First Amendment guarantees its right to inspect and copy tape recordings introduced as evidence in a public trial.

C

There is very little authority on whether there is a common law right to inspect and copy exhibits introduced in a criminal trial pursuant to a subpoena duces tecum but owned by a third party. Indeed, the Court of Appeals said that it found only one case in which inspection of exhibits was sought. Cert. Petition 14a n 33. In this case the issue is complicated by the unique status of the tape recordings requested. The validity of petitioner's claim of title to the tapes at the time of the subpoena is a sensitive issue. The Congress has declared petitioner

"a legitimate class of one" for the purposes of condemning, protecting, and preserving the recordings and has provided strict guidelines for retention of and public access to the recordings at issue here. Respondent Warner Communications contends that the Presidential Recordings Act does not apply to the tapes at issue here because they are only copies of the original tape produced in accord with U.S. v. Nixon. But to speak of these tapes as "copies" is in a sense a misnomer. The District Court copied the original recordings while they were in its custody for the limited purpose permitted by U.S. v. Nixon and § 102(b) of the Act. The respondents seek access to the copies precisely because they are indistinguishable from the original recordings. To be effective the Act's protection against disclosure to unauthorized persons should apply to copies made by authorized persons while in possession of the originals.

In view of the unique and specific statutory provisions governing the retention and release of the tapes at issue in this case, we need not address the difficult issue of whether all citizens have a common law right to copy any exhibits owned by third parties that may be introduced in a public trial. Assuming there is such a right, Congress has rendered it inapplicable to these tapes. The Presidential Recordings Act clearly and

specifically gives the Administrator of the GSA complete possession and control of the tapes "notwithstanding any other law," § 101(a), and instructs the Administrator to prevent access by unauthorized persons, § 103. The respondents' request that the District Court permit them to obtain copies of the tapes does not come within any of the limited and specific provisions for access provided in the Act.

The respondents cannot claim access as persons designated by the petitioner under § 102(c) or as agencies of the federal government under § 102(d).

Respondent Warner Communications contends that § 102(b), which makes the tapes available for use in judicial proceedings, supports its request. But that section is a limited exception that the Administrator's general duty to obtain control of the tapes and prevent public access except as authorized by regulations promulgated under § 104. In my opinion, § 102(b) permits only that public access which must occur when the tapes are subpoenaed and introduced as exhibits at trial in order to serve the interests of justice. Once the trial is over and the interests of justice have been served, the Act provides the exclusive means of access to these tapes.

To interpret § 102(b) as permitting judicial discretion to release copies of these tapes to any member

of the public would distort the basic scheme of the Act as it was described in Nixon v. GSA, 97 S. Ct. 2777, 2789-91 (197). The Act specifically provides that the Executive Branch, through GSA, shall have complete control of the disposition of the tapes subject to the limited exceptions established in § 102 and the public right to access pursuant to § 104 under GSA regulations. When the Court rejected the constitutional attack upon the Act presented in Nixon v. GSA, it relied in part upon the fact that Congress gave the Executive Branch complete control over the tapes and limited public access. In view of the importance of the maintenance of executive control of the tapes under § 101(a), id. at 2789-91, and the limits on public access contained in § 104, id. at 2787 n 4, 2793, we should construe § 102(b) narrowly as far as it gives the courts discretion to grant public access to the tapes.

Respondent Warner Communications suggests that the criteria for public access regulations support its application. But the respondents are not entitled to obtain copies of the tapes from the District Court pursuant to either § 104 or GSA's proposed regulations for public access under that Section. Although the proposed regulations permit researchers to obtain copies of the tapes from GSA in accord with procedures similar to those suggested by Judge Gesell, the regulations indicate only

that GSA agrees that any release of copies of the tapes must be done in a way that minimizes commercialization and other undignified uses of the recorded material. GSA has not made, and indeed there is a substantial question as to whether the Act would permit it to make, any attempt to transfer to the District Court GSA's delegated authority to distribute copies of the tapes.

I perceive no reason why respondents have any rights to these tapes beyond those defined by Congress. The task of monitoring any plan for releasing copies of the tapes so as to prevent overcommercialization is basically an administrative task within the expertise of GSA rather than one suited to administration by courts.

Along these lines I would reverse, leaving respondents free to present their claim for access to the Administrator of GSA in due course. According to the congressional staff personnel dealing with the GSA regulations, the proposed regulations should become effective early in 1978. Disposing of this case in this manner permits us to avoid solving the general common law issue on this unique set of facts with so little development of the issue in lower courts.

Regards,

Proposed regulations and statute attached

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 12, 1977

Re: 76-944 Nixon v. Warner Communications

MEMORANDUM FOR THE CONFERENCE

In proposing the following two forms of question to be dealt with in Supplemental Briefs, I invite comment:

1. Whether, as to these particular tape recordings, the statutory modes of access established by Congress in the Presidential Recordings and Materials Preservation Act should be substituted for whatever common law rights there may be to secure copies of public court records in general?

2. Whether, given the provisions for public access established in the Presidential Recordings and Materials Preservation Act, the Court should resolve this case on the basis of whatever, if any, common law right the respondents may have to secure copies of alleged public records in general?

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 15, 1977

MEMORANDUM TO THE CONFERENCE:

Re: 76-944 Nixon v. Warner Communications

I believe the following represents a reasonable synthesis of the various suggestions for questions to be addressed by counsel in supplemental briefs:

1. Does the Presidential Recordings and Materials Preservation Act apply to the tape recordings sought by respondents in this case?

2. If so, do the provisions of that Act, and regulations promulgated thereunder, supersede whatever common law right, if any, respondents may have to secure copies of the recordings sought?

Bifurcating the proposition into the two questions seems to me desirable for clarity.

I will have the Clerk proceed accordingly.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 17, 1978

RE: 76-944 - Nixon v. Warner Communications, Inc.

MEMORANDUM TO THE CONFERENCE:

Notwithstanding the supplemental briefs, I remain of the view that Congress has taken this whole subject matter out of the courts and placed it in the hands of GSA. This does not rule out a future case challenging the manner in which that discretion is exercised, but I remain where I was. We can discuss on Friday.

Regards,

WEB

WEB
1/17/77

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 14, 1978

PERSONAL

File

Re: 76-944 - Nixon v. Warner

Dear Lewis:

I am not in complete agreement with any of the opinions that have circulated in this case thus far. Your opinion comes close but conflicts with my position in two respects.

Page 9 of the opinion seems to recognize a common law right of access to exhibits introduced in evidence by a party. It says that "the right in question is a presumption of entitlement to records introduced in evidence" and that "the decision regarding access is one best left to the sound exercise of the court's discretion." Even though footnote 11 states that the Court only assumes that the right of access applies to the tapes at issue here, the implication remains that there would be a recognized public right of access to records obtained from a party to a case. Thurgood emphasizes that implication in his dissent.

My own position is that exhibits never become "public" property and must be returned to their owners once the judicial process is over and the interests of justice have been served. But there is little precedent on the issue and I see no need to debate about it in this case because we are construing a unique statute. I would have no objection to page 9 if you revised it to state clearly that the Court does not decide the issue, but only assumes for the purposes of this case that the right of access applies to these exhibits in these special circumstances.

My second objection is more substantial. As I read it, your opinion holds that the Presidential Records Act does not apply to these tapes and that the GSA has neither the right to obtain them nor the obligation to request them. My position is much closer to Byron's. It is that the Act applies to the tapes under Section 101(b). I realize that the limits on the types of material covered by that section are not clear, but these tapes are copies

of tapes subpoenaed from Nixon's personal custody and they have added historical value because they are the tapes that were played at the trial. I do not think that Congress intended to limit 101(b) to items having great historical value as of August 9, 1974.

You may have a point when you say that we should not order the district court to give the tapes to the GSA. Technically the issue is not before us because GSA has not requested the tapes and the district court has not refused to yield them to GSA. But I see nothing wrong with a statement noting GSA's obligation under the statute to receive or to make reasonable efforts to obtain the tapes and the district court's obligation to comply should GSA request the tapes. I would make crystal clear that on demand the court must surrender the tapes to GSA under the statute.

If you think that it is possible and are willing to accommodate my view so that it, at least, does not directly reject my position in this case, I would be happy to join it. Otherwise I will write separately or join Byron's opinion in part at least.

Regards,

WJB

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 27, 1978

PERSONAL

Re: 76-944 - Nixon v. Warner Communications

Dear Lewis:

Thank you for responding to my comments. The modifications of your opinion reduce my concern somewhat, but I am still bothered by the problems that I discussed in my letter of March 14.

I continue to resist the idea that there is "a presumption of entitlement to" material introduced in evidence "rebuttable upon a showing of facts or circumstances warranting non-release." I see nothing on pages 17-23 of Nixon's brief that concedes any right to copy exhibits, as opposed to court records like docket sheets, pleadings and transcripts which are public property. An exhibit never becomes court property.

Your opinion refers to numerous cases recognizing a right of access to transcripts and other public records. But few of the cases you cite on pages 7-9 of your opinion expressly address the issue of access to exhibits introduced at trial. And those cases, in my opinion, are not a sufficient basis for a holding that there is a federal common law presumption of entitlement to copy exhibits that are introduced at trial.

Sloan Filter Co. v. El Paso Reduction Co., 117 F. 504 (CC Colo. 1902), for example, involved a dispute over access to the testimony of a patent infringement suit. Although the court said that the petitioner could obtain a copy of the testimony and documents on file, its order related only to the testimony, not exhibits. Ex Parte Drawbaugh, 2 App. D.C. 404 (1894) and In Re Sackett, 136 F.2d 248 (1943) denied requests to seal the records of patent cases. They contain dicta indicating that a request to copy exhibits might be granted, but neither case involved an actual request to copy exhibits. With so little development of the issue in the lower courts, it

seems extremely unwise to me to reach out to establish a presumption of entitlement to copy. This is how the Court "drifted" into some of the absurd holdings in double jeopardy -- which we must now unravel.

Perhaps I can illustrate my views with the following hypothetical. Suppose Kissinger and the State Department became involved in a suit regarding the recently rejected portrait. The portrait would necessarily be put in evidence. The public could see the portrait in the courtroom, but I cannot accept the idea that anyone is entitled to photographic copies of the portrait without the consent of -- in this case Gardner Cox -- the owner.

It may be that he will be able to rebut the "presumption of entitlement" by showing that permitting photographs of such a portrait would infringe property rights, but what justification is there for the presumption regarding a right to copy in the first place? The portrait remains private property even though introduced in evidence. Those who desire copies should seek them from the owner.

Although you may disagree with me, I am not yet sure our disagreement will prevent me from joining your opinion. The language regarding the presumption does not seem necessary to the logic or result of the opinion. Page 9 would be acceptable to me if the first full paragraph were revised to read along the following lines:

> The relatively few judicial decisions on the subject do not establish a comprehensive definition of what is referred to as the common law right of access. Nor do they identify all of the factors that must be weighed in determining whether access is appropriate when the right applies. But it is not necessary to attempt to define the contours of this alleged common law right in this case because, assuming for the purpose of this case only that the common law confers upon the District Court discretion to release copies of these tapes, we conclude that it would be an abuse of discretion to grant release.

On the subject of the application of the Presidential Recordings Act to these tapes, my position has not changed. But since you avoid the issue in footnote 15, I may go along with that part of the opinion and possibly write separately to express my own position regarding the Act and the District Court's duty to yield the tapes to GSA -- on request.

The principal problem I have is the language on page 9. If that problem can be resolved, I will be happy to join you.

Regards,

WEB

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 5, 1978

PERSONAL

Re: 76-944 - Nixon v. Warner Bros.

Dear Lewis:

I will join you, of course, and will decide whether to "add a word" in ample time to get this out the next round.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 7, 1978

Re: 76-944 - Nixon v. Warner

Dear Lewis:

This will confirm my earlier personal memorandum to you joining your opinion.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 12, 1977

RE: No. 76-944 Nixon v. Warner Communications

Dear Chief:

I wonder if we need ask the parties to do any more than "submit supplemental briefs addressing the bearing on this cause, if any, of the Presidential Records and Materials Preservation Act and regulations issued thereunder." It occurs to me that the two questions you suggest may tip our hand too far. Moreover the regulations were not issued until after briefs were filed, indeed perhaps not until after argument, and this may suggest an occasion for all parties changing the view expressed very briefly in their briefs that the Act was completely irrelevant to the issues presented.

Sincerely,

Bill

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 13, 1977

Re: No. 76-944, Nixon v. Warner Communications

Dear Chief,

It seems to me that the single question phrased by Lewis would, with one addition, adequately cover the ground:

> "Whether the Presidential Recordings and Materials Preservation Act applies to the particular tape recordings sought by respondents and, if so, do the provisions of that Act, and the regulation promulgated thereunder, supersede whatever common law right respondents may have to secure copies of the desired recordings"? (additional language underscored)

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 9, 1978

Re: No. 76-944, Nixon v. Warner Communications, Inc.

Dear Lewis,

I am glad to join your opinion for the Court in this case with one minor caveat. The caveat is that my tentative views in the Houchins case (in which John Stevens is writing the opinion for the Court) may seem to be in some tension with your treatment of the First Amendment claim in this case. This may possibly require me to write two or three sentences in explanation, but this possibility must, of course, await developments in the Houchins case.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 12, 1977

Re: No. 76-944 - Nixon v. Warner Communications

Dear Chief:

Your proposed questions are o.k. with me.

Sincerely,

Byron

The Chief Justice

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 27, 1978

Re: #76-944 - Nixon v. Warner Communications, Inc.

Dear Lewis,

Because my preferred vote in this case from the first has been to reverse and to dispose of these tapes under the statute, I am glad to see in your circulating draft that "the existence of the Act is a decisive element in the proper exercise of discretion with respect to release of the tapes." But because the Act is decisive and because it does provide a mechanism for the early public release of materials like these, I do not agree that the matter should be left in the hands of the District Court. I would direct that the tapes be delivered to the Administrator for handling under the statute.

You conclude that the Act does not cover these tapes because §101(a) speaks only of original recordings; but even so, aside from the arguments the Chief Justice has made for coverage under the Act, §101(b) provides that the Administrator shall handle all papers, documents, memorandums, transcripts, and other objects and materials which constitute the Presidential "historical materials of Richard M. Nixon, covering the period beginning January 20, 1969, and ending August 9, 1974." Section 101(b) refers to 44 U.S.C. §2101 for the definition of "historical materials." Section 2101 in turn provides that such materials include all papers, photographs, motion pictures, "sound recordings, and other objects or materials having historical or commemorative value." It would be difficult to believe that the tapes at issue, containing extracts from recordings made during the critical period and in part introduced at an historic trial, would not be among those objects that the Administrator would be authorized to receive.

I had understood a residual interest in privacy would play a major role in the Court's reversal. I disagreed because last term in Nixon v. Administrator, 433 U.S. 425, 455-465 (1977) the Court had rejected any constitutionally based claims of privacy with respect to recorded conversations dealing with the public business. Although a presumed privacy interest does not appear to play a major part in your circulating draft, to the extent that you recognize it and perhaps imply that those responsible for disposing of the tapes must consider it, I do not concur. Of course, with respect to materials for which he is responsible, the Administrator could, as a matter of policy, weigh privacy interests in the scales; and in referring to and approving Judge Gesell's standards, the Administrator in his regulations has to some extent done so that regulation has passed muster with Congress. My only point is that I would not imply that he is obligated to do so, as a constitutional matter or otherwise.

I have shown this to Bill Brennan and he is in agreement.

Sincerely,

Mr. Justice Powell

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 3/14

Re: #76-944 - Nixon v. Warner Communications, Inc.

Recirculated: _____

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joined by MR. JUSTICE BRENNAN,
MR. JUSTICE WHITE,/ dissenting in part.

Although I agree with the Court that the Presidential Recordings Act is dispositive of this case and that the judgment of the Court of Appeals should be reversed, my reasons are somewhat different, for I do not agree that the Act does not itself reach the tapes at issue here. It is true that §101(a) of the Act requires delivery to the Administrator and his retention of only original tape recordings and hence does not reach the tapes involved here. But §101(b) is differently cast:

> "(b)(1) Notwithstanding any other law or any agreement or understanding made pursuant to section 2107 of title 44, United States Code, the Administrator shall receive, retain, or make reasonable efforts to obtain, complete possession and control of all papers, documents, memorandums, transcripts, and other objects and materials which constitute the Presidential historical materials of Richard M. Nixon, covering the period beginning January 20, 1969, and ending August 9, 1974.
>
> "(2) For purposes of this subsection, the term 'historical materials' has the meaning given it by section 2101 of title 44, United States Code."

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

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SUPREME COURT OF THE UNITED STATES

No. 76–944

Richard Nixon, Petitioner, v. Warner Communications, Inc., et al. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[April —, 1978]

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins, dissenting in part.

Although I agree with the Court that the Presidential Recordings Act is dispositive of this case and that the judgment of the Court of Appeals should be reversed, my reasons are somewhat different, for I do not agree that the Act does not itself reach the tapes at issue here. It is true that § 101 (a) of the Act requires delivery to the Administrator and his retention of only original tape recordings and hence does not reach the tapes involved here. But § 101 (b) is differently cast:

> "(b)(1) Notwithstanding any other law or any agreement or understanding made pursuant to section 2107 of title 44, United States Code, the Administrator shall receive, retain, or make reasonable efforts to obtain, complete possession and control of all papers, documents, memorandums, transcripts, and other objects and materials which constitute the Presidential historical materials of Richard M. Nixon, covering the period beginning January 20, 1969, and ending August 9, 1974.
>
> "(2) For purposes of this subsection, the term 'historical materials' has the meaning given it by section 2101 of title 44, United States Code."

"Historical materials" are defined in 44 U. S. C. § 2101 as "including books, correspondence, documents, papers, pam-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 15, 1977

Re: No. 76-944, Nixon v. Warner Communications

Dear Chief:

Since I do not agree with the idea of additional briefs in this case, I will go along with the majority.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

3/14/77

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-944

Richard Nixon, Petitioner, *v.* Warner Communications, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March —, 1978]

MR. JUSTICE MARSHALL, dissenting.

As the court below found, respondents here are "seek[ing] to vindicate a precious common law right, one that predates the Constitution itself." *United States* v. *Mitchell*, — U. S. App. D. C. —, 551 F. 2d 1252, 1260 (1976). The Court today underscores the importance of this right, recognizing "a presumption of entitlement to records introduced in evidence." *Ante*, at 9. It also recognizes that the court with custody of the records must have substantial discretion in making "the decision regarding access." *Ibid.*

The Court nevertheless holds that, contrary to the rulings below, respondents should be denied access to historically significant materials. It finds "decisive" the existence of the Presidential Recordings and Materials Preservation Act. *Id.*, at 17. By its express terms, however, the Act covers only "original tape recordings," § 101 (a), and it is undisputed that the tapes at issue here are copies, see *ante*, at 3 n. 3, 14 n. 15. Indeed, in a commendable display of candor, petitioner has conceded that the Act does not apply. Supplemental Brief for Petitioner, at 2.

That a statute intended by Congress to ensure "the American people . . . full access to all facts about the Watergate affair," S. Rep. No. 93-1181, 93d Cong., 2d Sess., 4 (1974), should now be used as an excuse for denying such access is "ironic," as MR. JUSTICE STEVENS points out, *post*, at 4, and more than a little sad. In the midst of a situation brought

Recirculation

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–944

Richard Nixon, Petitioner, *v.* Warner Communications, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March —, 1978]

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I would not disturb the Court of Appeals' adherence to the historic role of the judiciary by yielding to the one-shot action of the Legislative and Executive Branches on a matter that both sides of this litigation concede should be solely ours to resolve.

Pp. 1-2

6 APR 1978 Recirculation

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-944

Richard Nixon, Petitioner, v. Warner Communications, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March —, 1978]

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Nothing in the Act's history suggests that Congress intended the courts to defer to the Executive Branch with regard to these tapes. To the contrary, the Administrator of General Services had to defer to the District Court's "expertise" in order to secure congressional approval of regulations promul-

P. 1

10 APR 1978 Recirculation

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-944

Richard Nixon, Petitioner, v. Warner Communications, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March —, 1978]

MR. JUSTICE MARSHALL, dissenting.

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The Court nevertheless holds that, contrary to the rulings below, respondents should be denied access to significant materials in which there is wide public interest. The Court finds "decisive" the existence of the Presidential Recordings and Materials Preservation Act. *Id.*, at 17. The Act, however, by its express terms covers only "original tape recordings," § 101 (a), and it is undisputed that the tapes at issue here are copies, see *ante*, at 3 n. 3, 14 n. 15. Indeed, in a commendable display of candor, petitioner has conceded that the Act does not apply. Supplemental Brief for Petitioner, at 2.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 13, 1978

Re: No. 76-944 - Nixon v. Warner Communications, Inc.

Dear Lewis:

Please join me.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 12, 1977

No. 76-944 Nixon v. Warner Communications

Dear Chief:

This refers to your memorandum with respect to framing the question for supplemental briefing.

What would you think of a revision of your second suggestion along the following lines:

> "Whether the Presidental Recordings and Materials Preservation Act applies to the particular tape recordings sought by respondents and, if so, do the provisions of that Act supersede whatever common law right respondents may have to secure copies of the desired recordings?"

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 23 FEB 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-944

Richard Nixon, Petitioner, *v.* Warner Communications, Inc., et al. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[February —, 1978]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether the District Court for the District of Columbia should release to respondents certain tapes admitted into evidence in the trial of petitioner's former advisers. Respondents wish to copy the tapes for broadcasting and sale to the public. The Court of Appeals for the District of Columbia Circuit held that the District Court's refusal to permit immediate copying of the tapes was an abuse of discretion. 179 U. S. App. D. C. 293, 551 F. 2d 1252 (1976). We granted certiorari, 430 U. S. 944 (1977), and for the reasons that follow, we reverse.

I

On July 16, 1973, testimony before the Senate Select Committee on Presidential Campaign Activities revealed that petitioner, then President of the United States, had maintained a system for tape recording conversations in the White House Oval Office and in his private office in the Executive Office Building. Hearings on Watergate and Related Activities Before the Senate Select Committee on Presidential Campaign Activities, 93d Cong., 1st Sess., Book V, 2074–2076 (1973). A week later, the Watergate Special Prosecutor issued a subpoena *duces tecum* directing petitioner to produce before a federal grand jury tape recordings of eight meetings and one

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 28, 1978

No. 76-944 Nixon v. Warner

Dear Byron:

Thank you for your comments on my circulated draft of an opinion in this case. My tentative reaction to your several points is as follows:

I.

I see two problems with your thought that we direct the District Court to turn the court copies of these tapes over the the Administrator. First, the Administrator is not a party to this case seeking custody. Section 101(b)(1) of the Act provides that the Administrator "shall receive" historical materials of the Nixon Presidency, but he is not complaining of any failure to deliver the copies to him. It is not clear where we would find the authority to direct that they be delivered to a person not claiming entitlement to their custody. I suppose we could enter such an order, but it would seem entirely gratuitous.

My second problem is that I do not think the Act can be read as broadly as you suggest. The definition of "historical materials" in 44 U.S.C. § 2101 - the general archival administration statute - must be read together with the specific limitations contained in §101(b)(1) of the Presidential Recordings Act. That section refers to objects and materials "which constitute the Presidential historical materials of Richard M. Nixon, covering the period beginning January 20, 1969, and ending August 9, 1974." The closing date was the date of Nixon's resignation. These copies were, so far as the record shows, both created and used in the trial after that closing date.

Perhaps one could argue that since they are copies of actual materials created during the relevant time period, they are covered by the Act. But this reading would embrace all the GPO and privately printed transcripts of the Watergate tapes, imposing a duty upon every person who purchased a copy to turn them over to the Administrator. Moreover, every xerox copy ever made of any transcript would have to be collected by the Administrator for all time and such copies could never be destroyed, §102(a). Further, I suppose it could be viewed as meaning that the Congress which contemplated public distribution of copies also contemplated simultaneous creation of a duty to turn those copies back to the Administrator as soon as they were purchased. I appreciate, of course, that you would not construe the statutes to produce these absurdities. But it would, I think, be difficult to draw a rational line.

You also comment that these tapes have inherent value as the ones introduced in the historic trial. This is, of course, true. But the difficulty is that the episode that lends these tapes their historical importance - the Watergate trial - occurred after the period with which the Act is concerned. There is no basis in the legislative history for attributing to Congress any intent to preserve materials of historical value relating to events subsequent to the Nixon Administration. On the contrary, the legislative history clearly establishes that Congress was concerned with preserving the materials the Administration itself had generated. See, e.g., 20 Cong. Rec. H11207-H1208 (daily ed. Dec. 3, 1974)(remarks of Rep. Brademas); id., at H11210 (remarks of Rep. Brooks); 18 Cong. Rec. S18233-S18235 (daily ed., Oct. 3, 1974) (remarks of Sen. Nelson); id., at S18239 (remarks of Sen. Ervin.) That concern explains the Act's cut-off date as of Nixon's resignation.

II.

I am not entirely sure that I follow your final thought. My opinion expressly refrains from telling the Administrator how to evaluate the conflicting interests under the Act. See Opinion at 16 n. 18. The Administrator, of course, is obligated by §§104(a)(5) and (7) to consider any person's claim of privilege or privacy, including Nixon's. In Nixon v. Administrator, 97 S.Ct. 2777 (1977), we decided only that Nixon had no privacy interest that would preclude government archivists from

taking possession of and listening to the tapes. Bill Brennan's opinion explicitly refused to decide other issues. It carefully noted that "the Act's screening process is designed to minimize any privacy intrusions, a goal that is further reinforced by regulations which must take those interests into account." 97 S. Ct. at 2801 (emphasis added). Bill's opinion specifically cited §104(a)(7) for the proposition that Nixon's privacy concerns would be considered under the regulations.

This requirement exists entirely apart from anything said in my opinion. The opinion does not purport to decide the merits of any privacy claim Nixon may assert. It merely states that "in the context of court custody of the tapes," Opinion at 13 (emphasis added), the arguments Nixon makes would have to be evaluated and weighed in balance were it not for the controlling presence of an alternative means of public access - the Act - which obviates the difficult judicial task. The opinion speaks only to court consideration of the common law right of access to judicial records, not to how the Administrator should decide any question in carrying out his independent duty under the statutory standards.

III.

A majority of the Court, according to my notes, concluded that these copies should not be turned over to the respondents for commercial exploitation free of the oversight of the Administrator and the protective provisions of the Act. The opinion hints in footnote 3, at page 4, that the Administrator should take custody of the original tapes, which are still in the custody of the District Court. The ultimate disposition of the copies at issue here, however, simply is not before us.

Sincerely,

L.F.P.

Mr. Justice White

lfp/ss

cc: The Confernce

12-21

Stylistic Changes Throughout

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: 9 MAR 1978

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-944

Richard Nixon, Petitioner, *v.* Warner Communications, Inc., et al. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[February —, 1978]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether the District Court for the District of Columbia should release to respondents certain tapes admitted into evidence in the trial of petitioner's former advisers. Respondents wish to copy the tapes for broadcasting and sale to the public. The Court of Appeals for the District of Columbia Circuit held that the District Court's refusal to permit immediate copying of the tapes was an abuse of discretion. 179 U. S. App. D. C. 293, 551 F. 2d 1252 (1976). We granted certiorari, 430 U. S. 944 (1977), and for the reasons that follow, we reverse.

I

On July 16, 1973, testimony before the Senate Select Committee on Presidential Campaign Activities revealed that petitioner, then President of the United States, had maintained a system for tape recording conversations in the White House Oval Office and in his private office in the Executive Office Building. Hearings on Watergate and Related Activities Before the Senate Select Committee on Presidential Campaign Activities, 93d Cong., 1st Sess., Book V, 2074–2076 (1973). A week later, the Watergate Special Prosecutor issued a subpoena *duces tecum* directing petitioner to produce before a federal grand jury tape recordings of eight meetings and one

March 15, 1978

PERSONAL

No. 76-944 Nixon v. Warner

Dear Chief:

Thank you for sharing your concerns with me about my draft opinion for the Court.

As I am not sure we understand each other, I will comment rather fully on the two points you raise. Your first point relates to the existence of "a common law right of access to exhibits introduced in evidence by a party". It is necessary to keep in mind the possibility of a significant legal distinction between access to exhibits belonging to one of the parties (or voluntarily made available to a party), and exhibits that have been subpoenaed from a third party as in this case. For purposes of discussion I will refer to the former as "party exhibits" and to the latter as "non-party exhibits".

I had not understood that anyone, at either of our Conferences, denied a right of general access by the public and the press with respect to party exhibits filed as evidence in open court. Indeed, both petitioner and respondents in this case acknowledge the existence of a common law right of access to judicial records generally, which certainly would include party exhibits. See, e.g., Brief for Petitioner at 17-23; Brief for Respondent Warner Communications, Inc., at 22-27; Brief for Respondents NBC, et al, at 23-25. As stated on pages 7-9 of my opinion, the courts of this country recognize - without dissent, so far as I know - a general right to inspect and copy judicial records and exhibits. But none of these cases, so far as I could tell, addressed the question whether this access right applies equally to non-party exhibits. It is not necessary to resolve this issue in this case. Even if we make the assumption most favorable to respondents - namely,

that the right of access does apply to these third party copies of tapes - the District Court in exercising its discretion - should have withheld these copies from respondents.

On pages 10-12, I summarize the arguments pro and con that a District Court normally would consider in exercising its discretion. My opinion emphasizes that these particular tapes had been subpoenaed by the court, but states that this is merely one factor to be weighed (under my assumption) rather than controlling in itself. Finally, the presence of the Act - pursuant to which the originals must be taken over by the Administrator - justifies our doing what the District Court should have done, namely, denying access to respondents whose sole purpose is commercial exploitation.

In rereading my opinion, I believe modest changes on page 9 can make perfectly clear that we are not deciding whether there is a right of access to third-party exhibits, but merely assume the existence of such a right for purposes of this case. I enclose a marked up copy of page 9.

Your second point is that possibly Byron is right in thinking that §101(b) applies to these copies. Byron made this point some time ago and I thought a majority of us had put it to rest. I enclose a copy of my letter to Byron of February 28. Apart from what seems to me to be the absurdity of saying that the Act applies to all copies (and given xerox machines and printing presses, these could be countless), I think it would be most unusual - if not gratuitous - for us to order the District Court to turn these copies over to the Administrator who is not a party, who has not demanded them, and whose claim to the copies under §101(b) is - at least - dubious.

As is true with respect to your first point, there is no reason for us in this case to address the construction of §101(b). I note (parenthetically) that Byron's opinion is conclusory and reflects on its face no consideration of the legislative history or of the consequences of such an expansive interpretation of §101(b). It is wiser, I think, to dispose of this case without expanding the reach of the Act to all copies of Nixon's records.

A good deal may depend on one's overall perception of the rather large stakes that are ultimately at issue.

My opinion emphasizes the importance of following the orderly procedures prescribed by the Act, and which we identified in Nixon II. The centerpiece of these procedures is subsection 5 of §104(a), providing that the Administrator's regulations shall take into account:

> "(5) The need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials."

My recollection is that Byron believes that Nixon no longer has standing to interpose objection to providing full public access. I think you agree, as I do, with John Stevens' view that Nixon does have standing to oppose the commercialization of his voice. Having this in mind, it is quite important to reiterate in this case the applicability of the safeguards provided by subsection 5.

Finally, and in defense of my writing the opinion as I have, I summarize my understanding of how the case was assigned to me. At our second Conference, I reiterated in substance my views of this case. They were generally in accord with those expressed by Potter and Harry. Bill Rehnquist indicated that these views were his "second choice", his first being to resolve the case on some sort of "primary jurisdiction" analysis. He did say, however, that he would join an opinion along the lines, Potter, Harry and I had outlined.

To be sure, your position until that time was consistently in favor of turning the copies over to the Administrator. My recollection is, however, that you also said you could go along as a second choice with our views. I assumed as much when the case was assigned to me to write. I appreciate, of course, that we all may change our minds at any time. We are close enough together, however, to work this out. I will be happy to discuss it with you more fully.

Sincerely,

The Chief Justice

lfp/ss

J

~~1st~~ 9, 14, 18, 19

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

3rd DRAFT

Recirculated: 16 MAR 1978

SUPREME COURT OF THE UNITED STATES

No. 76-944

Richard Nixon, Petitioner, *v.* Warner Communications, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[February —, 1978]

MR. JUSTICE POWELL delivered the opinion of the Court.

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I

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March 28, 1978

No. 76-944 Nixon v. Warner

Dear Chief:

My thanks for your letter of March 27.

As you suggest, I think we are close enough together to "strike a bargain". I enclose page 9 of the opinion, reflecting changes that I think fully accommodate your views. I did not adopt precisely your phraseology because some might construe it as rendering unnecessary the "balancing" - appropriate to the exercise of a judge's discretion - that follows in pages 10-15.

It is important, I think, to retain that portion of the opinion (i) because it has been joined by Messrs. Stewart and Blackmun, and (ii) also because we identify and emphasize the seriousness of the arguments - pro and con - that should be considered by the Administrator (and perhaps eventually by other courts) in determining the extent and nature of access to the tapes and other Nixon records. As we made clear last Term in Nixon II, the Presidential Recordings Act does not allow access "upon demand". It requires consideration of the rights and interests of Nixon, and such other persons whose voices or writings may be involved, as well as of the public interest generally.

Also, it was my understanding that at least four of us thought the case should be analyzed on the basis of the trial court's discretion. There was not this much of a consensus as to the questions I have left open.

As an "addendum", I make one observation about your Kissinger example. The common law right identified on page 9 was limited to court records - as your letter suggests. I had intended, by footnote 11, to make clear that we were leaving entirely open petitioner's contention

with respect to third party records. In any event, the substance of your suggestion - that I have adopted - may make all of this somewhat clearer.

Again, I do indeed appreciate your thoughtful reconsideration. If my changes are satisfactory (or "reasonably" satisfactory), I will recirculate with the hope that Bill Rehnquist also will come aboard.

Sincerely,

The Chief Justice

lfp/ss

April 6, 1978

No. 76-944 Nixon v. Warner

Dear Bill:

The Chief and I have had the enclosed correspondence about this case. I am sure he would not object to your seeing this.

Although you would be welcome aboard, the Chief has indicated that he will join my opinion and possibly write something in addition. This will give me a plurality, plus the judgment of the Court. I will be grateful for with this in view of the widely divergent views expressed at Conference.

Thus, by all means feel free to do exactly as you think best.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

1 9, 19, 20

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: 6 AP[illegible]

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-944

Richard Nixon, Petitioner, v. Warner Communications, Inc., et al. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[February —, 1978]

MR. JUSTICE POWELL delivered the opinion of the Court.

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19

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-944

Richard Nixon, Petitioner, v. Warner Communications, Inc., et al. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[February —, 1978]

MR. JUSTICE POWELL delivered the opinion of the Court.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 12, 1977

Re: No. 76-944 - Nixon v. Warner Communications

Dear Chief:

Your proposed questions are o.k. with me.

Sincerely,

WHR

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 16, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 76-944 - Nixon v. Warner Communications, Inc.

It struck me that it might be a mistake to have any further discussion of this case postponed until after the February recess, since now the briefs which we called for have been filed. The "suggestion of mootness" filed by respondents in No. 76-419 - Vermont Yankee Nuclear, was sufficient to cause that case to be listed on the Conference List last week, but I am not certain that the filing of briefs not containing any suggestion would automatically mean a case would be listed for discussion. I, for one, would prefer to renew our discussion of the merits of this case in the light of the supplemental briefs sometime before the Court recesses next Monday.

Sincerely,

WHR

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 7, 1978

Re: No. 76-944 - Nixon v. Warner Communications

Dear Lewis:

Please join me.

Sincerely,

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 14, 1977

Re: 76-944 - Nixon v. Warner Communications

Dear Chief:

My preference is for the form of question as amended by Potter's letter of December 13.

Respectfully,

The Chief Justice

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: MAR 3 '78

Recirculated: _____

76-944 - Nixon v. Warner Communications, Inc.

MR. JUSTICE STEVENS, dissenting.

The question whether a trial judge has properly exercised his discretion in releasing copies of trial exhibits arises infrequently. It is essentially a question to be answered by reference to the circumstances of a particular case. Only an egregious abuse of discretion should merit reversal; a fortiori, when the District Court and the Court of Appeals have concurred, the burden of justifying review by this Court should be virtually insurmountable. Today's decision represents a dramatic departure from the practice appellate courts should observe with respect to discretionary rulings.

There is, of course, an important and legitimate public interest in protecting the dignity of the Presidency, and petitioner has a real interest in avoiding the harm associated with further publication of his taped conversations. These interests are largely eviscerated, however, by the fact that these trial exhibits are already entirely in the public domain. Moreover, the normal presumption in favor of access is strongly reinforced by the special characteristics of this litigation. The conduct of the trial itself, as well as the conduct disclosed by the evidence, is a subject of great historical interest. Full understanding of this matter may

STYLISTIC CHANGES THROUGHOUT

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: MAR 13 '78

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-944

Richard Nixon, Petitioner, *v.* Warner Communications, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March —, 1978]

MR. JUSTICE STEVENS, dissenting.

The question whether a trial judge has properly exercised his discretion in releasing copies of trial exhibits arises infrequently. It is essentially a question to be answered by reference to the circumstances of a particular case. Only an egregious abuse of discretion should merit reversal; and when the District Court [1] and the Court of Appeals [2] have concurred,

[1] District Judge Gesell explained the normal practice in the trial court:

"As a matter of practice in this court, if requested, a copy of any document or photograph received in evidence is made by the Clerk and furnished at cost of duplicating to any applicant, subject only to contrary instructions that may be given by the trial judge at the time of trial. This privilege of the public to inspect and obtain copies of all court records, including exhibits while in the custody of the Clerk, is of long standing in this jurisdiction and reaches far back into our common law and traditions. Absent special circumstances, *any* member of the public has a right to inspect and *obtain copies* of such judicial records. *Ex parte Drawbaugh*, 2 App. D. C. 404, 407 (1894). . . .

"The Court stated in *Drawbaugh*, . . . any attempt to maintain secrecy, as to the records of the court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access and to its records, according to long-established usage and practice.

. . . . . .

"The Court has carefully reviewed transcripts of the tapes in issue. From this review it is apparent that Judge Sirica has assiduously removed extraneous material, including topics relating to national security and con-

[*Footnote 2 is on p. 2*]

Supreme Court of the United States
Washington, D. C. 20543

November 22, 1977

MEMORANDUM FOR THE CONFERENCE

Subject: No. 76-944, Nixon v. Warner Communications, et al.

This memorandum addresses the questions of the DC's and the CA's jurisdiction, as requested by the Court.

Summary: The DC had jurisdiction over resps' requests for access to the tapes either as ancillary to its jurisdiction over the criminal case, or under the general federal question or mandamus statutes, 28 U.S.C. 1331, 1651. The CA had jurisdiction under 28 U.S.C. 1291 to review Judge Sirica's final decision denying resps immediate access to the tapes; alternatively, it had jurisdiction under the All Writs Act, 28 U.S.C. 1361, to review that decision on mandamus.

Facts: 1. Preliminary Proceedings Before Judge Sirica. About two weeks before the Watergate trial began, three television network correspondents wrote to Judge Sirica and asked him to make the Nixon tapes available to the news media after they were played for the jury (Petn App. 4a n. 4). Judge Sirica denied the request (Petn App. 46a).

As a result, on November 12, 1974, about six weeks into the trial but with more than 3/4 of the tapes still to be played for the jury, resps NBC, ABC and CBS filed in the criminal trial a formal motion under Rule 47, F. R. Crim. P., asking Judge Sirica to allow them to have access to and make copies of tapes played for the jury so that they could "provide news coverage of this expremely significant trial in the manner which best fits the distinctive abilities of broadcast journalism" (R. Document 2, p. 7; CA App. 127-131). On November 19, Judge Sirica held that resps lacked standing to make a motion in the criminal case, and ordered that the papers be transferred by the clerk to a miscellaneous docket number without refiling (App. 22); on the same date, the case was assigned to Judge Gesell (R. Doc.1).

2. Proceedings Before Judge Gesell. On December 2, 1974, resp Warner Communications filed an application

seeking to copy the tapes "for the purpose of disseminating those tape recordings to the public by means of phonograph and tape recordings (R. Doc. 9, p. 1). This application was consolidated with the other.

On December 5, 1974, Judge Gesell held that applicants had a right under common law and under the prior practice of the court to copy the tapes, but that because of administrative and mechanical difficulties no attempt was to be made to allow copying until after the trial. In the meantime, however, the parties were invited to submit suggestions regarding a method of release (Petn App. 36a); subsequently, resps suggested a plan (App. 47).

Nixon asked Judge Gesell to certify for interlocutory appeal his December 5 decision upholding resps' right to access to the tapes (R. Doc. 13). Resps opposed on the grounds that they had submitted a plan for release of the tapes and that Judge Gesell's acceptance of such a plan would be final and appealable (R. Doc. 16). On January 6, 1975, Judge Gesell denied the motion (R. Doc. 17).

On January 8, 1975, a week after the close of the Watergate trial, Judge Gesell rejected resps' plan and transferred the case back to Judge Sirica (Petn App. 44a).

3. Final Proceedings Before Judge Sirica. On March 6, 1975, Judge Sirica conducted a hearing on the status of resps' applications, particularly "the timing of the reproduction and release of any of the taped conversations while [the Watergate] case is on appeal" (Tr. 2). 1/ He was primarily concerned about any prejudicial effect the release might have upon any retrials ordered either by the CA or by this Court (Tr. 5). During this brief hearing, resps pressed for prompt release (Tr. 8, 9), and the parties were invited to file written memoranda of law.

In their memo, the broadcaster-resps requested that the tapes be made available promptly: "[B]y the time the criminal appeals in this case are ultimately decided, the impact of the broadcast will have been much diminished. . . [T]here is much to be gained by the public being permitted promptly to hear the tapes. . . ." (R. Doc. 20, p. 4). Warner Communications argued that "the theoretical possibility [of new trials] is not sufficient to outweigh the strong public interest in prompt release of the tapes" (R. Doc. 21, p. 1).

1/ This transcript was not transmitted to the Court by the CA; it was obtained on November 17 in connection with the preparation of this memorandum.

On April 4, 1975, Judge Sirica denied "applicants' petitions for immediate access to the tapes," without prejudice (Petn App. 34a), presumably meaning that after the appeals and cert proceedings were over, applicants could re-apply. There is no suggestion that Judge Sirica did not intend Judge Gesell's December 5, 1974 ruling to be the law of the case (See Petn App. 34a). 2/

On April 23, 1975, resps filed their notices of appeal from Judge Sirica's order (R. Docs. 26, 27).

4. Proceedings in the CA. Although in their opening briefs applicants concentrated on the general question of their right to access to the tapes, without particular emphasis on the question of timing, they made it plain that they wanted access as soon as possible. The brief filed by the broadcasters actually framed the question to be whether they were entitled to release "at this time " (NBC CA Br. 2), 3/ a theme repeated later (id., 33, 39, 46); they argued that the release should not be deferred for years, but should be permitted while the case remained newsworthy (id., 40, 41). Likewise, the Warner Communications brief stressed that release had been denied when public interest in the case was at its strongest (Warner CA Br. 5), argued for prompt release (id., 20, 21), and asked the CA to order release "forthwith" (id., 44).

In addition to arguing that applicants were not entitled to any release, and that in any event release should be denied while the appeals were pending, the Nixon brief raised the question whether Judge Sirica's order was appealable (pp. 14-21). It was argued that Judge Sirica had not ruled on the merits of resps' claims and had not finally dismissed the applications, but rather that Judge Sirica, like Judge Gesell before him, had merely deferred the matter pending conclusion of the appeals.

The appealability question was addressed in resps' reply briefs. Warner Communications argued that its application sought immediate access and that it had been denied on the merits, with Judge Sirica expressly rejecting its argument that the public's immediate right to know was compelling and would be harmed if release was

2/Although Judge Sirica did qualify his consideration of when the tapes should be released by the phrase "if ever" (Petn App. 29a), this did no more than echo Judge Gesell's concerns that an acceptable plan for release might not be possible (See Petn App. 42a, 43a).

3/These briefs were also first obtained on November 17, 1977.

delayed until after the criminal appeals were decided. Warner stressed that it sought immediate release of the tapes, and that the effect of Judge Sirica's order was to deny everything sought by its application (Warner Reply Br. 1-5). The broadcasters' reply brief made similar arguments (pp. 19-25).

The CA discussed the appealability issue, although it is not clear that it was decided (Petn App. 14a-15a n. 35). The CA first noted that the dismissal was final even though made with leave to re-apply some time in the future, citing United States v. Wallace Co., 336 U.S. 793, 794-795 n. 1 (1949), and, in any event, that the order was appealable under the doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). However, the CA also said that the appealability issue was not dispositive in view of the fact that the DC had misconceived the nature of its discretion, thus suggesting that the CA actually may have reviewed the case under its mandamus power.

Discussion: 1. Jurisdiction of the DC. While I am not certain precisely which statute vests the DC's with jurisdiction in cases such as this, there undoubtedly is jurisdiction to receive complaints from persons who have unsuccessfully sought to exercise rights within the federal court system. Although jurisdiction was not discussed in Bell v. Commonwealth Title Ins. & T. Co., 189 U.S. 131 (1903), the Court there affirmed a decree of the U.S. Circuit Court for the ED Pa. directing the court clerk to allow the company to use indices of judgments prepared by the clerk, where access was denied to companies seeking to perform title searches for profit. The complaint in that case was filed in equity and did not allege any statutory authority, although it did claim a loss of more than $2,000 (1902 Records and Briefs pp. 22803-22804), the jurisdictional amount for federal question jurisdiction (See United States v. Sayward, 160 U.S. 493, 498 (1895)). The defendant asserted a lack of jurisdiction, (1902 R&Br. pp. 22805-22806), but the question was not pressed and was not ruled upon either by the circuit court or the CCA.

a. It may be that resps had a right to file a motion in the criminal proceeding itself. In Ex parte Uppercu, 239 U.S. 435 (1915), the petr had sought access to sealed court records (depositions) in a settled civil case in which he had not been a party, by filing a motion in the civil case. The defendant in the civil case opposed and the motion was denied on the ground that the petr had not been a party to the cause. This Court held that the petr had a right to the documents because he needed them to defend himself in court. Although the ordinary way to obtain such documents would be by applying to the

clerk, he could not have released them because of the judge's order sealing the record. Accordingly, the Court said that "the orderly course is to obtain a remission of that command from the source from which it came" (239 U.S. at 440), thus approving the filing in the civil case. Similarly, here Judge Sirica had custody of the tapes in connection with the criminal proceeding, and it was reasonable that any application to examine them should be made to him as part of that proceeding. Cf. also, Hoffman v. McClelland, 264 U.S. 552, 558 (1924).

b. However, there are at least two other probable grounds for DC jurisdiction: First, 28 U.S.C. 1361, the mandamus statute, would seem to fit the situation at bar, although I have been unable to find any cases in which it has been used against a court employee. Second, 28 U.S.C. 1331, the general federal question statute, would also seem appropriate for enforcement of a right arising under federal common law where the matter in question exceeds $10,000 (which it does here).

2. Jurisdiction of the CA. From the recitation of the facts, it seems plain that Judge Sirica's decision was final because it completely and finally disposed of resps' request for immediate access to the tapes, and hence was appealable under 28 U.S.C. 1291. Although the dismissal was without prejudice to file again after the appeals and cert were over (but presumably only if no new trials were ordered), cert was not denied until May 23, 1977, more than two years later, certainly long enough to deprive resps of access at a time when the matter was newsworthy (a particular concern to the broadcaster-resps.) In addition, Judge Sirica probably would have withheld the tapes pending any retrials and appeals from the retrials, thereby further delaying the release.(Although a new trial was awarded to Robert Mardian, the government dismissed the indictment on January 18, 1977.)

Moreover, even if an appeal under 1291 did not lie, the CA had jurisdiction to review Judge Sirica's order under the All Writs Act, 28 U.S.C. 1651, i.e., supervisory mandamus, just as this Court reviewed a similar order in Ex parte Uppercu, supra, 239 U.S. 435. Indeed, as previously noted, the CA actually may have done just that.

Judge Gesell's interlocutory ruling merged in Judge Sirica's final decision, and therefore it could be reviewed by the CA at the behest of the appellee as alternative basis for supporting the judgment of the DC.

3. Mootness: Of course, the question whether the pendency of the appeals in the Watergate case is a basis for denying access to the tapes is now factually moot (See Warner Br. 74). 4/ However, under the recurring question doctrine, see Nebraska Press Assn. v. Stuart, 427 U.S. 539, 546-547 (1976), the question probably is not legally moot. Moreover, the underlying question of whether the tapes should be released at all, which was properly decided by the CA, is not moot in any respect. Although the Court could have denied cert because the CA decision has restored the case to non-final status, this Court's jurisdiction over CA's is not limited by any notion of finality (28 U.S.C. 1254(1)), and review now may have been thought appropriate because of the likelihood that the Court will not be interested in considering the details of the DC's plan for release of the tapes.

Marc Richman

Marc Richman

4/Although the question of timing was submitted by petr (Petn 3, ques. 3), and was granted by the Court, petr has dropped the question (Petr's Br. 2) and the parties have not addressed that issue extensively (see Petr's Br. 51-56; NBC's Br. 54-55; Warner Communications' Br. 73-79).