"Have To" History: *United States v. Nixon* (1974)

Stuff You Don't Really Want To Know (But For Some Reason Have To)

Three Big Things:

1. In 1972, five men working for the Nixon Administration were caught breaking into Democratic National Headquarters. Investigations revealed much wider-spread wrongdoing by the White House – and efforts by the President himself to cover it all up.

2. When it was revealed that the President recorded his conversations, the tapes were subpoenaed by Congress; Nixon refused, claiming "executive privilege."

3. The Supreme Court ruled against the President, who resigned to avoid impeachment. "Watergate" became shorthand for all things corrupt, especially in reference to major political scandals.

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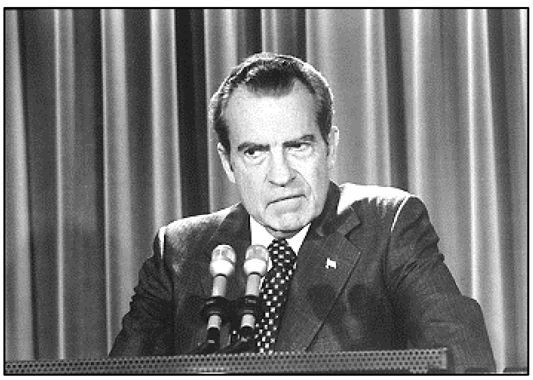
Background

President Nixon was a very naughty man. Or, at least, he did some *very* naughty things (and then lied about it).



Richard M. Nixon began his political career in the House of Representatives, where he served the 12th District of California from 1947 – 1950. In 1950 he successfully ran for one of the state's two Senate seats, which he held until asked to be the running mate of Dwight D. Eisenhower in the Presidential Election of 1952. While Eisenhower focused on the positives – what he wanted to do for the country – Nixon handled the negatives, attacking opponents and criticizing Democratic policies. It was a successful strategy; Nixon became Vice President in 1953.

Nixon's involvement in the Eisenhower Administration was much more active than had been typical with prior VPs. He chaired security meetings when the President was absent and interacted with foreign leaders around the world. Nixon was virulently anti-Communist, but surprisingly diplomatic and seemingly unflappable in the face of protests, violence, or other challenges from detractors. He served under President Eisenhower for eight years.

Nixon attempted to ride this momentum to his own administration in 1960 but lost to John F. Kennedy in one of the most famous elections of the 20th century. JFK was young, optimistic, handsome, and Catholic, while Nixon was, well… *himself.* Nixon next sought the governorship of California in 1962, but again fell short. During his concession speech, Nixon's frustration boiled over as he told the reporters that they wouldn't "have Nixon to kick around anymore." He was *done* with politics.

He probably meant it at the time, but it didn't last long. Six short years later, in 1968, he was elected President.

President Nixon

By 1968, the Vietnam War was beginning to look to many Americans like nightmarish quagmire we remember today. The Civil Rights movement was in full swing but faced violence and ugly backlash with every success. JFK had been assassinated in 1963, Malcolm X in 1965, MLK in April of 1968, and Robert Kennedy – on his way to becoming the Democratic nominee for President – in June. These were days of sex and hippies and drugs and war protests, and while pop culture too often overlooks the many folks simply going to school or work and trying to live their daily lives as best they could, the nation was arguably in its most self-destructive phase since the Civil War.

When times are good, Americans want freedom. When things turn chaotic and dark, however, most people want structure. Decency. A return to "normalcy." It was out of such times that Nixon re-emerged, promising to restore
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law and order. He appealed to the "silent majority" he believed still knew how to be proper Americans. His "southern strategy" played on white resentment of black progress and used thinly veiled nativism to secure the support of conservatives and a shaken middle class in whatever part of the country they resided.

It seems to have worked. Nixon won by a substantial majority of electoral votes and the Republican Party picked up seats in both the House and the Senate.

Nixon's victory did nothing to reduce his hostility towards the press, however. He blamed them for Kennedy's victory eight years before. He was angry over the 1971 release of the Pentagon Papers which proved that President Lyndon B. Johnson had lied about the Vietnam War – not just a little, but a LOT, and not just to the public, but to Congress. (It wasn't that Nixon felt particularly protective of Johnson; it was just inconvenient to deal with the resulting skepticism and heightened scrutiny of the office – particularly when trying to do shady, illegal things.)

It wasn't just the press. He was paranoid about the Democratic Party, war protestors, and his own place in history as well. A covert group of trusted minions known as CREEP (the Committee to Re-Elect the President) engaged in a variety of illegal activities attempting to thwart Nixon's many perceived enemies. They broke into offices, stole secrets, infiltrated opposition groups – whatever it took to enforce unquestioned loyalty with little regard for either decency or the law. As Nixon would later tell interviewer David Frost, "when the President does it, that means it's not illegal."

Clearly these were different times. We're fortunate to have evolved so far beyond such things.

The Watergate Break-In

In June of 1972, a group of men known as "The Plumbers" who worked for CREEP, broke into the Watergate Office Building which housed, among other things, Democratic National Committee Headquarters. It's not clear specifically what they hoped to accomplish, but it seemed they might be looking to bug some phones and steal a few files. The break-in was reported the next day in the press, but relatively minor news at first. The White House denied all knowledge of or involvement in the effort.

Over time, however, persistent investigation and reporting – particularly that of Bob Woodward and Carl Bernstein at the *Washington Post*, began to uncover deeper shenanigans in and around the Oval Office. While Nixon had not ordered the break-in, he had clearly been involved in covering it up. The President used a strategy of repeated denials, constant misdirection, and hyperbolic accusations regarding the motives of his accusers to offset each new revelation. Eventually, the average American was both too numb to know *what* to believe and tired of hearing about it or trying to make sense of it. Nixon was re-elected easily in 1974, but the issue refused to die.

Eventually a Special Prosecutor was appointed (Archibald Cox) and the Senate began hearings into the break-in and related events. During these hearings, it was unexpectedly revealed that the President secretly recorded every discussion taking place in the Oval Office or on the Oval Office phone. "Hmm," the Senate thought. "*Those* sure would be handy to have." So, they subpoenaed the tapes.

Nixon at this point insisted that the Special Prosecutor to drop the investigation. He wouldn't, so Nixon ordered his Attorney General to fire Cox. He refused, so Nixon accepted his resignation. He then ordered the Deputy Attorney General to fire Cox, with the same results. Finally, Nixon tried the Solicitor General, Robert Bork, at that point the Acting Attorney General. Bork fired Cox and kept his job, thus concluding the "Saturday Night Massacre." (Bork was later nominated to the Supreme Court by President Reagan but could not secure Senate approval.)

Nixon tried to pacify Congress with heavily edited transcripts, summaries, and audio excerpts, but the Senate wanted them *all*. More and more, the public was beginning to agree. In 1974, the issue reached the Supreme Court.

United States v. Nixon (1974)

Attorneys for the President argued that the separation of powers as mandated by the U.S. Constitution meant the Judicial Branch lacked justiciability in this case, which was strictly between the President and Special Prosecutor –

both members of the Executive Branch. In short, it was a family matter. The Court had no role.

Their slightly more plausible argument was that "executive privilege" protected the President from being forced to release the tapes. High level politicians, foreign leaders, and advisors must be able to speak with candor to the President, knowing their privacy would be protected. If high-level conversations were subject to public scrutiny, people would speak less openly and honestly. Politics would trump effective leadership.

Attorneys for the rest of the U.S. government argued that even if executive privilege did require some discretion as to what information could be made public, there was a nevertheless substantial state interest in a fair and complete criminal investigation. It wasn't just the President; men were going to prison for their roles in the break-in, the cover-up, and whatever else was being revealed along the way. There was every reason to believe these tapes contained specific information related to the investigation; justice demanded their release.

In other words, they weren't looking for launch codes or wanting to publish 'behind-the-scenes" dirt on controversial foreign policy decisions. They wanted to know if there was a record of the President saying, "Let's break the law and then cover it up" or "Hey, Dean – nice job on that felony offense!"

The Decision

In their unanimous decision, penned by Chief Justice Warren Burger, the Supreme Court ordered the President to turn over the tapes. They'd be listened to "in camera" – in chambers, privately, to determine which parts were relevant to the case without revealing state secrets or other privileged information to the public.

The "separation of powers" argument, it turned out, did not mean what the President's attorneys wanted it to mean:

> *In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.*
>
> *While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.*

Besides, the Chief Justice added, the issue was before the Court not *in spite of* the separation of powers, but specifically *because* of them. Quoting Chief Justice John Marshall's opinion in *Marbury v. Madison* (1803), he concluded, "it is the duty of the courts to say what the law is."

As to executive privilege, the Court acknowledged that the Executive requires some expectation of confidentiality. Military secrets, national security, difficult policy choices, all required the sort of blunt debate and absolute honesty impossible without it. But the President wasn't claiming that national defense secrets were involved, or sensitive foreign policy choices, or complex policy debates. He was claiming a blanket right to operate in absolute isolation and without accountability. That, the Court said, is not how it works.

Aftermath

Twelve days later, the White House released the tapes. It was soon discovered that some sections had been erased, despite the Court's order. The rest, however, provided more than enough damning information to eliminate any chance of Nixon surviving impeachment. A few days after the release of the tapes, the President resigned. Gerald Ford became President, and later pardoned Nixon.

Although Nixon lost his case, the Court's decision in *United States v. Nixon* did acknowledge for the first time a degree of executive privilege. Numerous administrations since have made similar claims, looking to protect themselves in the name of protecting the country. At the same time, "Watergate" or anything with "-gate" tacked on to the end has become popular shorthand for any number of political scandals or controversies.

Excerpts from *United States v. Nixon* (1974), Majority Opinion by Chief Justice Warren Burger
{Edited for Classroom Use}

In the District Court, the President's counsel argued that the court lacked jurisdiction to issue the subpoena because the matter was an intra-branch dispute between a subordinate and superior officer of the Executive Branch, and hence not subject to judicial resolution. That argument has been renewed in this Court with emphasis on the contention that the dispute does not present a "case" or "controversy" which can be adjudicated in the federal courts. The President's counsel argues that the federal courts should not intrude into areas committed to the other branches of Government…

In light of the uniqueness of the setting in which the conflict arises, the fact that both parties are officers of the Executive Branch cannot be viewed as a barrier to justiciability. It would be inconsistent with the applicable law and regulation, and the unique facts of this case, to conclude other than that the Special Prosecutor has standing to bring this action, and that a justiciable controversy is presented for decision…

A subpoena for documents may be quashed if their production would be "unreasonable or oppressive," but not otherwise… {T}he Special Prosecutor… must clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity...

Of course, the contents of the subpoenaed tapes could not at that stage be described fully by the Special Prosecutor, but there was a sufficient likelihood that each of the tapes contains conversations relevant to the offenses charged in the indictment. With respect to many of the tapes, the Special Prosecutor offered the sworn testimony or statements of one or more of the participants in the conversations as to what was said at the time. As for the remainder of the tapes, the identity of the participants and the time and place of the conversations, taken in their total context, permit a rational inference that at least part of the conversations relate to the offenses charged in the indictment…

{We now} turn to the claim that the subpoena should be quashed because it demands "confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce" …

In support of his claim of absolute privilege, the President's counsel urges two grounds, one of which is common to all governments and one of which is peculiar to our system of separation of powers. The first ground is the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process…

The second ground asserted by the President's counsel in support of the claim of absolute privilege rests on the doctrine of separation of powers. Here it is argued that the independence of the Executive Branch within its own sphere… insulates a President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications.

However, neither the doctrine of separation of powers nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for {carefully limited} inspection with all the protection that a district court will be obliged to provide.

The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Article III. In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.

While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

To read the Article II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of the courts under Article III…

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions, and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a "presumptive privilege" for Presidential communications…

But this presumptive privilege must be considered in light of our historic commitment to the rule of law… We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive… The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense…

In this case, we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice. The interest in preserving confidentiality is weighty indeed, and entitled to great respect. However, we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.

On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the court. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts, a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

We conclude that, when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

Name: _____ Class: _____

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1. Today, President Nixon is primarily remembered for Watergate and his subsequent resignation. What were several indications prior to Watergate that he could have had a long, successful political career otherwise?

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2. The article suggests that when times are chaotic or frightening, people want security – even if it means giving up some degree of freedom. Select and describe several specific examples from your own experiences or observations which either support or refute this suggestion. Briefly explain each.

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3. Explain the argument that "when the President does it, it's not illegal." Justify or refute this statement using as many specifics as possible. _____

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4. What was the "Saturday Night Massacre," and why was it (rather melodramatically) called that? _____

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5. Briefly explain the White House's argument why they shouldn't be required to release the tapes: _____

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6. Briefly explain the argument by U.S. attorneys that the President should be required to release the tapes: _____

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7. Summarize the Supreme Court's decision and the primary arguments they offered in support: _____

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8. If you only remember one thing about *United States v. Nixon*, what should it be, and why? _____

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Name: _____ Class: _____

Excerpts from *United States v. Nixon* (1974), Majority Opinion by Chief Justice Warren Burger

1. According to Burger, how had the Special Prosecutor cleared several essential "hurdles" in requesting release of the secret White House tapes? _____

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2. In support of the President's claim to "absolute privilege," his attorneys used two basic arguments, one of which the Majority Opinion acknowledges "is common to all governments." What is this argument and what gave it some legitimacy, not only in the case of the White House but among "all governments"?

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3. The other argument for "absolute privilege" involves the Constitutional "separation of powers." How did this supposedly protect the President from releasing the tapes, at least according to his legal representatives?

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4. What was one fatal flaw in these arguments, according to Burger? _____

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5. "{T}he allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the court. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice." Simplify and paraphrase this excerpt (put it into modern, plain, simple-but-accurate English):

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6. Offer one argument not made in the case summary or opinion excerpts why the President should be given greater latitude in how he handles private communications, internal security, or other situations which would constitute crimes if committed by average citizens without the same responsibilities:

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7. Offer one argument not made in the case summary or opinion excerpts why the President should be held to the same (or maybe higher) legal standards as other Americans, no matter what his or her pressures or responsibilities:

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