

Landmarks

Historic U.S. Supreme Court Decisions



Lesson 13

U.S. v. Nixon (1974)

Overview

This lesson looks at *U.S. v. Nixon*, the Supreme Court case that led to the resignation of President Richard Nixon.

First, students read about and discuss *U.S. v. Nixon*. Then in small groups, students role play legal advisors to a president who would like to invoke executive privilege in three cases, and students evaluate whether the Supreme Court would uphold executive privilege in these circumstances.

Objectives

Students will be able to:

- Identify and describe the following: special prosecutor, Saturday Night Massacre, Watergate burglary, and executive privilege.
- Explain the struggle between the president and special prosecutor over the tapes and how this struggle led to the Supreme Court case.
- Explain the president's two main arguments to the Supreme Court and how the court addressed them and decided the case.
- Evaluate whether the Supreme Court would uphold executive privilege in three hypothetical circumstances.

Preparation

Reading in the student text: "*U.S. v. Nixon* (1974)," pp. 68–72

Activity in the student text: "Executive Privilege," p. 73

Standards Addressed

National High School U.S. History Standard 30: Understands developments in foreign policy and domestic politics between the Nixon and Clinton presidencies. (2) Understands the events and legacy of the Watergate break-in (e.g., the constitutional issues raised by the affair and the effects of Watergate on public opinion; the involvement of the Nixon administration in the cover-up . . .).

California History-Social Science Content Standard 11.11: Students analyze the major social problems and domestic policy issues in contemporary American society. (4) Explain the constitutional crisis originating from the Watergate scandal.

California History-Social Science Content Standard 12.1: Students explain the fundamental principles and moral values of American democracy as expressed in the U.S. Constitution and other essential documents of American democracy. (5) Describe . . . the systems of separated and shared powers, . . . the importance of . . . enumerated powers

California History-Social Science Content Standard 12.5: Students summarize landmark U.S. Supreme Court interpretations of the Constitution and its amendments. (3) Evaluate the effects of the Court's interpretations of the Constitution in *Marbury v. Madison*, *McCulloch v. Maryland*, and *United States v. Nixon*, with emphasis on the arguments espoused by each side in these cases.

Vocabulary

Below are vocabulary words from this lesson. Their pronunciations and definitions can be found in the Glossary, which begins on page 91 of the student text.

affirm	attorney general	burglary	clemency
compulsory process	due process	grand jury	indictment
motion	oral argument	quash	separation of powers
special prosecutor	subpoena		

Procedure

I. Focus Discussion

A. Hold a brief discussion by asking students:

- How can a president be removed from office?

A president may be impeached by the House for “treason, bribery, or other high crimes and misdemeanors” and stand trial and be convicted by a two-thirds majority of the Senate. If convicted, the only punishment is removal from office.

- Which presidents have been impeached?

Only two presidents have been impeached—Andrew Johnson (Lincoln’s successor) and Bill Clinton. Neither was convicted by the Senate (although Johnson only escaped by one vote).

- Have any presidents resigned from office?

Only one: Richard Nixon. He resigned because he probably would have been impeached and convicted.

B. Explain that a U.S. Supreme Court decision led directly to Nixon’s resignation.

II. Reading and Discussion—*U.S. v. Nixon* (1974)

A. Ask students to read “*U.S. v. Nixon* (1974),” pages 68–72. Ask them to look for:

- What the struggle was about between the president and the special prosecutor.
- The arguments the president made to the court and how the court decided the case.
- What executive privilege is.

B. When students finish reading, hold a discussion using the questions on page 72.

1. What do you think a special prosecutor is? Why do you think a special prosecutor was appointed in this case?

A special prosecutor is normally appointed when there is an apparent conflict of interest between the prosecutor’s office and the person under investigation. The special prosecutor is normally a lawyer outside of government.

A special prosecutor was appointed because the Watergate burglary directed investigators toward the White House. Since the attorney general was a member of the president’s cabinet, there was an apparent conflict of interest in the Justice Department investigating the White House. Thus a special prosecutor was appointed.

2. What was the struggle between the president and special prosecutor? What was the Saturday Night Massacre? What was its result?

The struggle between the president and special prosecutor began when the special prosecutor requested that the president turn over taped conversations that the president had with his staff in his office.

The Saturday Night Massacre was the day (October 20, 1973) when President Nixon ordered the attorney general to fire Special Prosecutor Cox for subpoenaing copies of tape-recorded conversations from the president's office. The attorney general refused to fire Cox and resigned. Nixon then ordered the deputy attorney general to fire Cox. He also refused and resigned. The third in command, Solicitor General Robert Bork, obeyed Nixon's order and fired Cox.

The Saturday Night Massacre resulted in political outrage, and President Nixon was forced to appoint a new special prosecutor, Leon Jaworski.

3. What trial set the stage for the Supreme Court confrontation between the president and the special prosecutor? What did the special prosecutor want for the trial? Why?

The upcoming trial of seven former Nixon aides set the stage for the Supreme Court. A grand jury had indicted the seven for conspiring to hinder the investigation of the Watergate burglary. The grand jury named the president as an unindicted co-conspirator.

For the trial, the special prosecutor wanted 64 tapes believed to contain critical conversations between the president and the defendants. The special prosecutor obtained a court order demanding that the president produce them. The president refused and the case was appealed to the U.S. Supreme Court.

4. What were the president's two main arguments to the court? How did the court answer them? Do you agree with the court's decision? Why or why not?

The president's two main arguments were:

- a. Disputes between members of the executive branch of government should be resolved by the president, not by the courts.
- b. Based on doctrine of separation of powers, the tapes were subject to an absolute privilege and therefore the president should not be required to hand over the tapes. The president as chief executive decided that tapes of confidential communications between himself and his advisors were privileged.

The Supreme Court's responses to these arguments were:

- a. The dispute was a matter for the courts because it involved evidence that might be presented at a pending criminal trial.
- b. Interpreting the Constitution is a part of the judicial power of the United States, and therefore it is the court's responsibility to determine whether the Constitution commits a matter to Congress or to the executive branch of the government.

As for whether the students agree with the court's decision, accept reasoned responses.

5. What is executive privilege? How did the court and Nixon administration disagree on the privilege? Which do you think is right? Explain. The court balanced two interests in deciding whether to uphold the privilege. What were they? Do you think the court made the right decision in which interest prevailed? Why or why not?

The court agreed with the president that there was an executive privilege. Executive privilege derives from the powers assigned to the executive branch. The president needs privacy in communicating while carrying out his duties.

The court disagreed with the administration on whether the privilege was absolute. The court said the privilege could be overcome by countervailing interests.

In this case, the court balanced two interests: the interest of the executive in “a broad, undifferentiated claim of the public interest in the confidentiality of conversations” and the interest of preserving the integrity of the criminal justice system and the needs of the defendants who were awaiting trial. The court found that the interest of the criminal justice system overcame the president’s interest.

As for whether the court made the right decision, accept reasoned answers.

6. What do you think is the greatest legacy of the case? Why?

Accept reasoned responses. The article suggests that the greatest legacy was the reaffirmation of *Marbury v. Madison* in holding that when a constitutional question comes to court, the Supreme Court has the final word, and no one, including the president, is above the law.

III. Small-Group Activity—Executive Privilege

- A. Tell students that claims of executive privilege still arise. Inform them that they are going to get the chance to role play legal advisors to the president and evaluate whether the president can validly claim executive privilege in three cases. Divide the class into groups of three to five students each.
- B. Review with students “Activity: Executive Privilege” on page 73. Answer any questions students may have.
- C. When the groups finish, call on one group to report on Case #1. Hold a class discussion. Repeat this process for each of the remaining cases. Below are suggestions for each case.

Case 1. The president was not even involved in this conversation, but the secretary of commerce is a member of the president’s cabinet. The countervailing interest is the integrity of the civil justice system. Accept reasoned answers on whether this interest is sufficient to overcome the president’s presumptive executive privilege.

Case 2. It is not stated whether the president was involved in any of these conversations. The White House counsel is close to the president. The former assistant attorney general worked in the Justice Department. The countervailing interest is the congressional oversight of the executive branch, which is essential to the system of checks and balances in our government. Accept reasoned responses on whether this interest is sufficient to overcome the president’s presumptive executive privilege.

Case 3. This involves direct conversations between the president and outside advisors. This could involve national security, but the hypothetical has stated that the president has a “generalized interest in confidentiality.” The countervailing interest again is the congressional oversight of the executive branch, which is essential to the system of checks and balances in our government. Accept reasoned responses on whether this interest is sufficient to overcome the president’s presumptive executive privilege.

***U.S. v. Nixon* (1974)**

Is the President Above the Law?



On August 9, 1974, President Nixon prepared to board a helicopter and depart from the White House after resigning. He extended his hand to Gerald Ford, his successor as president.

On July 24, 1974, the Supreme Court issued a unanimous decision in *U.S. v. Nixon*. The court upheld an order requiring President Richard Nixon to produce tapes of 64 conversations with four of his top aides. One of those tapes—the “smoking gun”—resulted in a firestorm of indignation in Congress and throughout the nation. Two days later, the House Judiciary Committee voted to impeach the president. On August 9, the president resigned—the first president in U.S. history to do so.

The Special Prosecutor’s Quest for Tapes

The decision in *U.S. v. Nixon* followed a year of political and legal controversy over the powers of a “special prosecutor” appointed to investigate an unusual burglary. Early in 1972 (an election year) five men had been caught breaking into the Democratic Party headquarters in the Watergate building in Washington, D.C. The FBI discovered that the burglars were tapping telephones and that they were being paid with money from the Republican Committee to Re-Elect the President. President Richard Nixon and his top aides denied any knowledge of the break-in. Nixon ordered the attorney general to appoint a special prosecutor to uncover the facts surrounding the Watergate burglary.

Archibald Cox, the special prosecutor, began his investigation in May 1973. By then, the burglars had already been indicted and had pleaded guilty. Evidence had also been uncovered that the White House was involved with the break-in and had authorized the payment of “hush money” (and perhaps a promise of clemency) to make sure that the burglars wouldn’t talk.

A Senate committee was also investigating Watergate and the cover-up. Some of Nixon’s top aides who testified before the Senate denied knowing of the break-in or of a cover-up. But others, and particularly the president’s counsel, John Dean, told of a cover-up. If what John Dean told the Senate was true, the president and his aides were guilty of obstructing justice and other crimes.

A bombshell fell on July 13, 1973. A witness told the Senate investigating committee that the president had installed a tape recorder in his office in early 1971. All his conversations had been recorded. The tapes were likely the only way to resolve the ongoing disputes over the credibility of conflicting witnesses. Both the special prosecutor and the Senate committee asked the president to turn over the tapes. The president, however, refused. He claimed that “executive privilege” protected these conversations. He cited the need to encourage candor in discussions between him and his advisors. The privilege, he said, was constitutionally based and absolute.

Assigned to investigate the break-in and suspected cover-up, Special Prosecutor Cox believed obtaining the tapes was critical. Cox subpoenaed the tapes. (A subpoena is a court order for a person to appear in court or to produce evidence for the court.) The president asked Cox to drop the subpoena. Cox refused. On October 20, 1973, Nixon ordered Attorney General Elliot Richardson to fire Cox. Richardson refused and resigned. Nixon ordered the deputy attorney general to fire Cox. He also refused and resigned. The third in command at the Justice Department, Solicitor General Robert Bork, obeyed Nixon’s order and fired Cox. This event became known as the “Saturday Night Massacre.”

It caused a political uproar, and Nixon was forced to appoint a new special prosecutor a week later. The new special prosecutor, Leon Jaworski, continued the quest for the tapes.

Early in 1974, two months after Jaworski was appointed, a grand jury indicted seven former Nixon aides for conspiring to hinder the investigation of the Watergate burglary. (John Dean was one of those indicted.) The grand jury also named the president as an unindicted co-conspirator. Trial was set for September. In preparation, Jaworski obtained a court order demanding that the president produce 64 tapes believed to contain critical conversations between the president and the defendants. The president filed a motion to quash the order in District Court. The motion was denied. After the president filed an appeal in Circuit Court, the special prosecutor filed a petition asking the Supreme Court to take the case. The court granted the petition and heard arguments on July 8. Two weeks later, on July 24, 1974, Chief Justice Warren Burger delivered the court’s unanimous decision. (Justice William Rehnquist did not participate in the decision. Before he was appointed to the court, he had worked with former Attorney General John Mitchell, one of the defendants.)

The President’s Arguments

The president made two main arguments to the court. First, he argued that whether the tapes should be produced was simply an “intra-branch” matter—a dispute between two officers of the executive branch (himself and the special prosecutor). As head of the executive branch, the president should settle the dispute. Such a dispute, he contended, was not a matter for courts to decide. Writing for the unanimous court, Chief Justice Burger rejected this argument. Burger pointed out that a criminal trial was pending, and the dispute involved evidence that might be presented at trial. Therefore, Burger concluded, the dispute was clearly a matter for the courts.

The president’s second argument relied on the doctrine of separation of powers. He argued that the tapes were subject to an “absolute”



Rose Mary Woods, Nixon's secretary, demonstrated how she might have accidentally erased part of a tape important to the Watergate scandal.

privilege—one that is not limited—and should therefore not be turned over to the special prosecutor. The president's counsel argued that the president, as chief executive, had decided that tapes of confidential communications between himself and his advisors were privileged. The court, he said, should defer to the president's decision. The president's counsel argued that executive privilege was "part and parcel" of the separation of powers. He pointed out that the privilege "necessarily includes the right of the holder of the privilege to decide when it is to be exercised." The question, according to the president's counsel, was "who decides" when to exercise it. The answer, he argued, is "that it is for the Chief Executive, not for the judicial branch, to decide when the public interest permits disclosure of Presidential discussion."

The court disagreed. It held that interpreting the Constitution is part of the "Judicial Power of the United States." Article III of the Constitution vests this power in the judicial branch. Citing the

1962 Supreme Court case of *Baker v. Carr*, the court stated that deciding whether the Constitution commits a matter to Congress or to the executive "is a delicate exercise in Constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." Or to put it more simply, citing *Marbury v. Madison*, it is "the province and duty of the judicial department to say what the law is."

Does the Constitution Provide an Executive Privilege?

"Executive privilege" was not mentioned in the Constitution. Nor was it discussed in the debates over the Constitution's adoption. In fact, the phrase was first coined in the 1950s. Even so, the Supreme Court found a constitutional basis for the claim of executive privilege. The privilege, according to the court, derives from the powers assigned to the executive branch. In carrying out

the duties of the office, the president needs to protect the privacy of his communications with those who help him. It is clear, Chief Justice Burger wrote, that if the president's advisors think that their remarks could be made public, they might not be candid. This could hurt the decision-making process. The court stated:

“Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.”

While the court agreed with the president that a constitutionally based executive privilege exists, it did not agree that the privilege was absolute. In certain cases, involving military, diplomatic, or sensitive national-security secrets, the court implied that the president might have an unqualified privilege not to disclose information. (Even in such a case, a court would presumably examine the information to see whether it fit into one of these categories.) But in the case before the court, the privilege claimed for the tapes was based solely on a “broad, undifferentiated claim of the public interest in the confidentiality of conversations.” The court held that where the basis for the claim of executive privilege was only the public interest in maintaining confidentiality, the privilege was not absolute but only “presumptive.” In other words, the privilege could be overcome by an important countervailing interest.

Enforcing the Rule of Law

The countervailing interest here was the special prosecutor's need for the information. The court considered the weight of this claim. The subpoena for the tapes had been sought in the cases of seven former presidential aides, who would shortly stand trial. They would be tried under an adversarial criminal justice system in which the parties contest all issues before a court of law. The integrity of this system depends on full disclosure of facts. Compulsory process for the production of evidence is frequently necessary for courts to function. And just as the executive privilege is constitutionally based, so too are the rights of a criminal defendant. The Sixth

Amendment confers on every criminal defendant the right “to be confronted with the witnesses against him” and “to have compulsory process for obtaining witnesses in his favor.” And the Fifth Amendment guarantees that no person shall be deprived of liberty “without due process of law.”

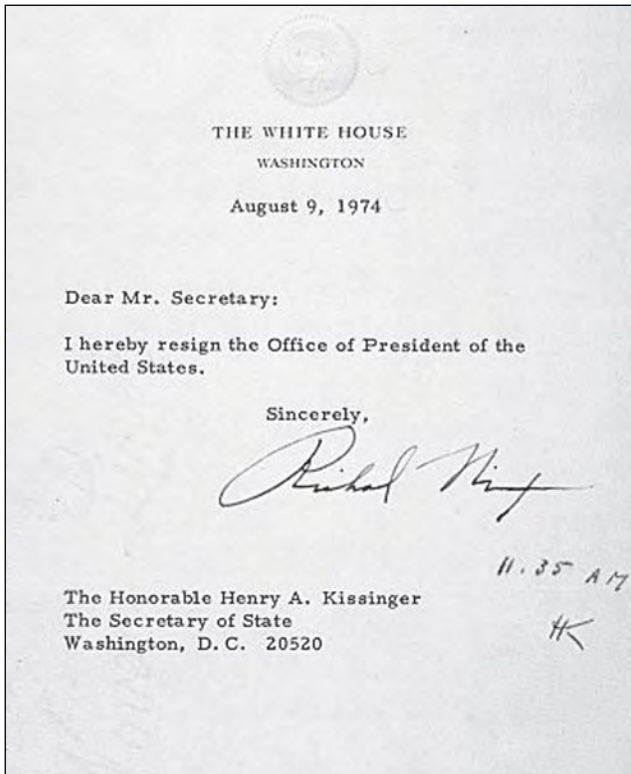
The court weighed the two interests. On one side was the importance of the confidentiality of the president's communications. On the other side was the importance of preserving the integrity of the criminal justice system and the needs of the defendants who were awaiting trial. The court concluded that the demands of due process prevailed:

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 in the fair administration of justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

The court affirmed the District Court's ruling and ordered the president to transmit the subpoenaed materials to that court.

The Legacy of *U.S. v. Nixon*

In the months leading up to the Supreme Court's decision, many people worried that the president might defy the court's ruling and refuse to turn over the tapes. The president had made public statements hinting at that possibility. And in oral argument, counsel for the president would not say whether the president would comply with the subpoena. Archibald Cox, the first special prosecutor, expressed fears that by filing suit he might have set in motion a process leading to the president defying the Supreme Court—“and getting away with it.” When the White House announced within eight hours after the court's decision that it would comply, many people expressed tremendous relief and



President Nixon resigned from office by submitting this letter to Secretary of State Henry Kissinger.

satisfaction with the outcome. As one commentator noted, Nixon's decision to comply gave "crucial confirmation to the authority of the Court in our constitutional hierarchy."

The court's ruling reaffirmed the holding of *Marbury v. Madison*. When a constitutional question comes to court, the Supreme Court has the final word, and no one, including the president, is above the law.

It was a decision of tremendous political importance. The so-called "smoking gun tape" was made public on August 5, 1974. It showed that just days after the Watergate burglary, Nixon had met with his chief of staff and planned to use the CIA to block the FBI investigation. The tape's publication ended most of the president's political support. Facing impeachment, the president resigned on August 9.

From a legal point of view, however, the decision left several issues open. For example, the court

did not indicate the weight it would give to executive confidentiality and to the public interest in civil lawsuits or in cases when Congress was seeking information. The court added in a footnote:

We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information, nor with the President's interest in preserving state secrets. (Footnote 19)

Thus, the decision did not say how the court might rule in a future dispute between Congress and the president over access to papers that the president does not want to disclose.

For Discussion

1. What do you think a special prosecutor is? Why do you think a special prosecutor was appointed in this case?
2. What was the struggle about between the president and special prosecutor? What was the Saturday Night Massacre? What was its result?
3. What trial set the stage for the Supreme Court confrontation between the president and special prosecutor? What did the special prosecutor want for the trial? Why?
4. What were the president's two main arguments to the court? How did the court answer them? Do you agree with the court's decisions? Why or why not?
5. What is executive privilege? How did the court and Nixon administration disagree on the privilege? Which do you think is right? Explain. The court balanced two interests in deciding whether to uphold the privilege. What were they? Do you think the court made the right decision in which interest prevailed? Why or why not?
6. What do you think is the greatest legacy of the case? Why?

ACTIVITY

Executive Privilege

The Supreme Court in *U.S. v. Nixon* for the first time ruled that executive privilege exists. But it ruled that it is a qualified privilege and not an absolute one. The court specifically did not rule on the balance between the president's need for confidentiality and (1) "the need for relevant evidence in civil litigation," (2) "congressional demands for information," or (3) the need to investigate secret information.

Imagine that you are legal advisors to the president. The president wants to invoke executive privilege in the three cases in the next column. Your task is to evaluate whether the Supreme Court would uphold a claim of executive privilege in each of these cases.

As a group, do the following:

1. Review the portions of the article on executive privilege. They can be found under the headings "Does the Constitution Provide an Executive Privilege?" and "Enforcing the Rule of Law."
2. Consider that the president has a "generalized interest in confidentiality" in each of the cases. Think about and write down what countervailing interests exist in each case.
3. Decide whether the countervailing interests in each case would be enough to overcome a claim of executive privilege.
4. Be prepared to report your decisions and reasons for them.

Cases

- #1. Bondo Parcel Corporation is suing Zebra Parcel Corporation for stealing its secret customer list that it compiled over many years. Bondo has requested that the secretary of commerce testify as to conversations the secretary had with the CEO of Zebra. Citing executive privilege, the president has ordered the secretary not to testify at the civil lawsuit.
- #2. The Senate Judiciary Committee is investigating whether the attorney general fired eight U.S. attorneys for political reasons. The committee has subpoenaed the former White House counsel and a former assistant to the attorney general. Citing executive privilege, the president has ordered them not to testify, and they have refused to testify.
- #3. In the aftermath of a failed military action, the House Committee on Foreign Affairs is investigating what went wrong and why. It has subpoenaed outside advisors who met with the president before the military action. The House committee wants to ask them what they told the president. Citing executive privilege, the president orders them not to testify, and they comply with the president's order.