

## **United States v. Nixon / Background ••—Answer Key**

---

In 1972, five burglars were caught breaking into the Democratic National Headquarters in the Watergate Office Building in Washington, DC. Among other activities, the Democratic National Headquarters was responsible for raising money for and coordinating campaigns for Democratic candidates, including the presidential candidate. Media and government investigations discovered that the burglars were connected to the White House, which at the time was occupied by President Richard Nixon, a Republican. In addition, these investigations revealed that the president and his aides probably had abused their power in other ways as well.

Congress held hearings on the scandal to investigate wrongdoing by the president and his aides. During those hearings, it was discovered that President Nixon had a tape recorder installed in the Oval Office. These tape recordings probably had conversations between the president and his aides that could support some of the accusations against them. The special prosecutor in charge of the case wanted to hear these tapes, but President Nixon did not want to give them up. President Nixon even had the special prosecutor removed from his job to stop him from obtaining the tapes. However, the next special prosecutor also requested them. This time a federal court judge ruled that the president had to hand over the tape recordings.

In response, the president released edited transcripts and shortened versions of the tapes, but these were not good enough to meet the court order. The special prosecutor again challenged the president in the U.S. District Court. The District Court once again ruled against the president and ordered him to give up the complete tapes. When the president appealed the District Court's ruling to the United States Circuit Court of Appeals, the special prosecutor asked the United States Supreme Court to step in and settle the dispute. The Supreme Court agreed to hear the case.

Before the Supreme Court, Nixon's lawyers argued that the courts could not hear the case because it was a dispute within the executive branch over which the courts had no power or jurisdiction. They also argued that the tapes should be protected by the president's executive privilege. Executive privilege means that the communication between the president and his aides has a certain level of confidentiality. While it is not a right specifically given to the president in the Constitution, it is based on the constitutional separation of powers. Executive privilege reflects the belief that those in the executive branch should be able to communicate with the president, sharing their ideas without concern that their opinions will become the knowledge of the other branches of the government or the public. Having this freedom encourages advisers to be as honest and forthcoming as possible, which helps the president to make an informed decision. This is particularly important in matters of national defense. President Nixon's lawyers

argued that only the president should be able to decide when his communications with his aides can be revealed to the public or other branches of the government.

The U.S. Department of Justice, representing the people of the United States argued, however, that executive privilege was not absolute. In this case, those normally confidential communications were very important for a criminal case. If the president had the power to decide when his communications could be revealed to the public, then he could cover up information about illegal activities. This would be dangerous for the legal system and the rule of law.

## Questions to Consider

1. Why might a president want to record conversations held in the Oval Office? Why do you think President Nixon taped his conversations even though he was discussing illegal activities with his aides?

A president might want to record conversations in the Oval Office for a number of reasons. First of all, it is likely that many conversations are highly complex and yield many ideas on difficult topics. Perhaps a president would like to review conversations again to remind him of what was discussed. Another reason is that a president may want to have a record of events for memoirs after leaving office. Why President Nixon recorded conversations of illegal activities is difficult to answer. Perhaps he just assumed that there was no risk to doing so and many advantages to having a record of what was discussed during these difficult circumstances.

2. Executive privilege itself cannot be found in the U.S. Constitution, but it comes from the separation of powers in the U.S. Constitution. Explain what executive privilege is and how it helps keep the executive branch independent from the other branches of government.

Separation of powers gives each branch of government a certain protection from the meddling of the other branches. Executive privilege, by granting a certain level of confidentiality to discussions, helps ensure that forthright conversations about difficult and controversial topics are not subject to scrutiny by other branches of government. It might make the participants in those discussions more willing to speak their mind, knowing they will not be the subjects of congressional or legal inquiry for their opinions.

3. Describe a circumstance in which it would be beneficial to the nation for a president to keep communication with aides confidential.

Generally speaking, in matters of national security and defense, such as discussions about disrupting terrorist networks.

4. Who should determine when the communications between a president and presidential aides should be revealed, the president or the courts? If the president never has to reveal conversations that are needed for a criminal trial, what effect could this have on the legal system?

Student answers to the first part of the question will vary. The problem with granting this power to the courts is that the courts may not fully realize the importance of certain

conversations to the national security. One might say the courts are exercising executive power. The problem with granting this power solely to the president is that it gives him the ability to conceal illegal acts. One might say the president is exercising judicial power. If a president never has to reveal information needed for a criminal trial, one might say that this creates a system where the president is above the law, which was definitely not the intention of the framers of the U.S. Constitution. Others might say that this begs the question of who can explain the law; perhaps in the area of executive privilege, the executive decides what the rule is.