

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

In 1972, five burglars were caught breaking into the Democratic National Committee Headquarters at the Watergate Office Building in Washington, DC. Media and government investigation of the break-in revealed that the burglars were associated with the campaign to re-elect President Richard Nixon. The inquiries also revealed that the president and his aides had probably abused their power in other ways as well.

During the congressional hearings on the break-in scandal, it was revealed that President Nixon had installed a tape-recording device in the Oval Office. The special prosecutor in charge of the case wanted to get tapes of the Oval Office discussions to help prove whether President Nixon and his aides had abused their power and broken the law. President Nixon tried to stop the special prosecutor from obtaining the tapes and even had him removed from his job. However, a new special prosecutor, supported by the ruling of a federal District Court judge, again requested the tapes. The president responded to this demand by releasing edited transcripts and shortened versions of the tapes. His refusal to comply with the special prosecutor's demands was challenged in another federal District Court case. The court ordered the president to respond to all of the special prosecutor's requests. When the president appealed this decision to the U.S. Circuit Court of Appeals, the special prosecutor asked the Supreme Court of the United States to hear the case instead.

In front of the Supreme Court of the United States, President Nixon's lawyers argued that the case could not be heard in the courts because it involved a dispute within the executive branch. In case the Supreme Court disagreed, President Nixon's lawyers also argued that the president's executive immunity and privilege should protect the tapes from being subpoenaed. The concept of executive privilege, though not specifically detailed in the U.S. Constitution, is based on the constitutional separation of powers. It provides the president with a certain level of confidentiality of communication with his aides, especially where defense and national security are concerned. President Nixon's lawyers argued for an absolute executive privilege based only on his discretion.

The special prosecutor, however, argued that executive privilege is not absolute and that in this case, the confidentiality normally accorded a president and his aides had to give way to the demands of the legal system in a criminal case. To give the president absolute executive privilege, he claimed, would amount to an unchecked power that could undermine 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. Based on the reading, what is “executive privilege?”

Executive privilege gives the president a certain level of confidentiality in his communications with staff members so as to promote forthright discussions on issues, especially those dealing with national security.

3. While executive privilege cannot be found in the U.S. Constitution, it is derived from the separation of powers outlined there. Explain how applying the separation of power leads to the claim of executive privilege.

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.

4. In what type of circumstance might the nation’s interests allow the president to keep his communication with aides confidential?

The president always has a strong interest in receiving information and views confidentially. Where there are strong countervailing interests, such as the need for effective and impartial law enforcement, the President's claims are strongest in matters of national security and defense, such as discussions about disrupting terrorist networks.

5. Executive privilege and rule of law are both important concepts for American democracy. How should the courts determine which is more important when the exercise of executive privilege interferes with the rule of law?

Student answers will vary. The court's position on this issue becomes apparent in the decision. Students are likely to follow the Court's position, which calls for a balancing and weighing of the contending values in the particular case at hand.