

United States v. Nixon: The Prelude

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Twenty-five years ago, as the staff lawyers in the Watergate Special Prosecutor's Office were organizing our investigation into the Watergate cover-up and related abuses, executive privilege was not one of our immediate concerns. President Nixon, however grudgingly, was allowing his senior aides to testify, including his former White House Counsel and by then principal accuser, John Dean. The major constitutional question that my legal staff had to confront was whether an incumbent President is subject to indictment. By mid-1973, as Special Prosecutor Archibald Cox was launching a comprehensive criminal investigation into President Nixon's activities, that issue seemed more than merely hypothetical.

All of that changed dramatically when a White House staff member, Alexander Butterfield, revealed to the Senate select committee conducting a parallel investigation (the "Ervin Committee") what even the most senior government officials inside and outside the White House never even suspected: "There is tape in the Oval Office." This news sent a thunderclap through Washington. For months President Nixon and his principal advisors during the suspected cover-up—former Attorney General John Mitchell, chief of staff H.R. Haldeman, and senior domestic counselor John Ehrlichman—had resolutely denied knowing anything about responsibility for the break-in at Democratic Party headquarters at the Watergate office building during the 1972 presidential campaign. They had branded Dean a liar as he gave chapter and verse in public testimony before the Ervin Committee accusing the three senior aides of deep complicity in covering up the Administration's own role in authorizing the break-in and then orchestrating the cover-up. When Dean disclosed his

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earlier reports to the President about their complicity, the President disavowed his former counsel.

Suddenly, a debate that appeared to turn solely on the credibility of various conflicting witnesses, with Dean far outnumbered, could be resolved through uniquely probative evidence: contemporaneous recordings of conversations with the President. Dean's testimony and meticulous White House logs of the President's meetings and telephone calls made it possible to pinpoint specific conversations likely to have involved Watergate.

President Nixon, however, promptly rebuffed requests that he voluntarily turn over to the investigators the tapes of those sessions, claiming that the need to encourage absolute candor in discussions between the President and his senior advisors created an absolute, constitutionally based "executive privilege" to withhold this evidence both from Congress and from the Special Prosecutor. Moreover, Article II of the Constitution invests the President with all executive power, including the power and responsibility to take care that the laws be faithfully executed. Relying on his role as Chief Executive, President Nixon staked out the constitutional theory that no subordinate officer, such as a specially appointed prosecutor acting on behalf of the President's "own" Department of Justice, had the right to challenge the President's decision that it was not in the national interest to release certain confidential information.

Cox then had to confront awful and ominous choices: Should he try to use the subpoena power of the federal grand jury probing the cover-up case in an effort to force the President to yield the pertinent tapes, or avoid a constitutional clash in which victory was by no means assured? The "right" decision was hardly as clear as it may seem in hindsight. If President Nixon remained obdurate—as he did, by refusing to honor any of the tapes subpoenas without a bruising fight—three of the four possible outcomes of a court battle would have directly undermined the core principle that the Watergate Special Prosecutor's Office had been conceived to establish: that even the President is not above the law. First, Cox mused that, if the courts sustained the President's claim to an absolute privilege, they would be recognizing, for the first time, a constitutional privilege to defy demands to produce the kind of evidence that any other citizen would have to yield. The result would be to shield high-level culprits, including the

President himself, from the processes of the law. Second, if the courts accepted the President's theory about the duty of a subordinate executive branch officer to bend to the Chief Executive's will, any President would be effectively immune from federal criminal investigation.

A third, alternative scenario seemed no more appealing—the prospect that the courts would uphold the Special Prosecutor's right to pursue the tapes, despite the presidential directive to the contrary, and would reject or overrule the privilege claim, but then would be met with irremediable defiance. The President quickly laid the foundation for this end-game strategy. He publicly suggested that, as head of a coordinate branch of government, he would no more be bound to acquiesce in the federal courts' view of his constitutional rights and immunities than they would have to accept his view of their legitimate powers. For a man who had devoted his life to the law and whose assignment was to vindicate the rule of law, Cox was understandably uncomfortable about setting in motion a process that not only would generate a constitutional crisis but that might end with the President's defying the Supreme Court—and getting away with it.

Nevertheless, he saw it as his duty to pursue the trail of evidence, even though it led directly into the Oval Office. One important ingredient in risking that course, though, was the vote count. Cox had been the Solicitor General in the Kennedy Administration and continued to follow the Court's work closely as a Harvard Law School professor. I had just joined him as his Counsel after serving as Deputy Solicitor General in charge of the federal government's criminal cases in the Supreme Court. And Cox's executive assistant, Peter Kreindler, had recently finished clerking for Justice William O. Douglas. As the three of us did our prognostications, we assured each other that our constitutional arguments would probably command a majority of the Supreme Court. Never, though, did we anticipate the unanimity that the Court eventually forged in the Nixon Tapes decision¹ a year later.

So, Cox issued the first subpoena for White House tapes and I went over to the White House and served it. As expected, the President remained adamant, but Chief Judge John Sirica of the district court promptly ordered him to comply, rejecting

1. *United States v. Nixon*, 418 U.S. 683 (1974).

the President's claims.² The en banc United States Court of Appeals for the District of Columbia Circuit denied the President's petition for mandamus to quash the subpoena and ordered compliance.³ As its stay of enforcement was about to expire, the President ordered Cox to take no further steps to enforce the courts' decrees. Cox found this order intolerable. When he refused to desist, the President ordered him fired. Attorney General Elliot Richardson, who had appointed Cox, resigned rather than execute the order. Deputy Attorney General William Ruckelshaus also declined to do the deed, and the President fired him. To stop the bloodletting inside the Justice Department, the ranking survivor, Solicitor General Robert Bork, dismissed Cox.

This "Saturday Night Massacre" was the climax of the Watergate affair. It provoked what the White House quickly recognized was a firestorm of public outrage. It impelled the House of Representatives to pursue impeachment. It forced the White House to accede to appointment of a new Special Prosecutor, a savvy and stubborn Texas trial lawyer, Leon Jaworski. It left the President with no choice but to turn over the subpoenaed recordings. And it so tarnished President Nixon's standing at the bar of justice that a Supreme Court line-up that we had never imagined a few months earlier eventually became the death blow to his presidency: a few months later the Court issued a *unanimous* ruling upholding the Special Prosecutor's authority to demand evidence from the President, overruling the claim of absolute privilege, and ultimately requiring the President to produce another batch of subpoenaed tapes. One of those tapes contained the "smoking gun," proof that the President had helped orchestrate the cover-up conspiracy from the very beginning.

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The case that eventually reached the Supreme Court and ended the Nixon presidency arose from a seemingly garden-variety subpoena the Watergate prosecution trial team issued under Rule 17(c) of the Federal Rules of Criminal Procedure insisting that the President produce additional tapes for use at the trial of the recently indicted cover-up conspirators, John Mitchell et al. The President had never accepted the

2. *In re Grand Jury Subpoena to Nixon*, 360 F. Supp. 1 (D.D.C. 1973).

3. *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973).

constitutional doctrines that both Judge Sirica and the D.C. Circuit had embraced before the Saturday night massacre. He continued to assert that, at least unless and until the Supreme Court itself “definitively” rejected his constitutional claims, he would refuse to turn over any more tapes. Thus, we had to plan our litigation strategy quite carefully to increase our chances of securing such a “definitive” ruling.

First, side-stepping the delicate question whether an incumbent President is indictable, we urged the grand jury to find that President Nixon was an “unindicted co-conspirator,” and it did so. Although this finding remained sealed until we reached the Supreme Court, the charge that the subpoenaed evidence was likely to show the President’s own complicity in crimes for which his friends and advisors were to be tried tended to undermine his efforts to seize the high ground and argue that he was simply defending the powers of the “Office of the Presidency.”

Second, once Judge Sirica rejected the President’s motion to quash the trial subpoena,⁴ and as soon as President Nixon’s lawyers filed papers seeking review in the D.C. Circuit, we took back control of the initiative. Using a truly extraordinary mechanism that the Supreme Court entertains only once every twenty years or so, we immediately sought Supreme Court review—“certiorari before judgment”—to bring before the Court Judge Sirica’s ruling in our favor without awaiting a decision by the court of appeals.

Not only did this tactic avoid the delay of a full round of litigation in the appellate court, it gave us what I considered a subtle but significant right: to style the caption of the case in the Supreme Court. In earlier stages where the President was seeking mandamus, the appropriate caption was “*Nixon v. Sirica*,” making it seem that this was a dispute between the President and a lowly district judge, or between the executive branch and the judicial branch. In our petition for certiorari, we created the caption that now appears in the United States Reports: “*The United States v. Richard M. Nixon*.” Our goal was to strengthen our constitutional arguments by assuming the mantle of “counsel for the sovereign people of the United States” seeking to enforce the obligation of every citizen,

4. *United States v. Mitchell*, 377 F. Supp. 1326 (D.D.C. 1974).

including one who just happened also to be the President, to give evidence.⁵

Reinforcing what I must acknowledge was a bit of posturing were two other gambits designed to convey to the Justices that it was the Watergate Special Prosecutor, not President Nixon, who was speaking for "the United States." By custom (and now by Supreme Court Rule⁶) the pleadings presented to the Supreme Court by the Solicitor General on behalf of the United States Government bear gray covers; any other party must use a different color. By moving first, we appropriated that hallmark of counsel for "the Government." In addition, by tradition, the Solicitor General as the Government's chief lawyer before the Supreme Court always sits at the counsel table on the right side of the Chamber facing the Court, whether appearing as petitioner or respondent. We also claimed this symbolic position on the morning of the three hours of oral argument the Court set for the case.

On only one other procedural gambit did Special Prosecutor Jaworski balk at following my recommendation. Virtually alone in this era, the Solicitor General and his staff, who regularly appear before the Supreme Court on behalf of the Government, maintain the custom of wearing formal dress for argument, gray swallow-tail morning coat and striped

5. Recently, the Independent Counsel investigating the Whitewater and Lewinsky matters, former Solicitor General Kenneth Starr, tried to follow these "precedents" in cases involving White House claims of executive privilege, attorney-client privilege, and "presidential protective privilege," but with mixed results.

When the White House sought Supreme Court review of an Eighth Circuit decision rejecting a claim of attorney-client privilege for the debriefing notes of White House counsel who interviewed the First Lady after her grand jury testimony, the White House sought to establish a playing field tilted symbolically in its favor by styling its petition *Office of the President v. Office of the Independent Counsel*. The Independent Counsel objected, relying on the Nixon Tapes precedent, but the Court did not require any change. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), cert. denied, 521 U.S. 1105 (1997).

After the judge supervising the grand jury in Washington overruled a string of privilege claims and the White House appealed to the D.C. Circuit, the Independent Counsel immediately sought certiorari before judgment, again relying on the Nixon Tapes case and styling the cases *United States v. Clinton* and *United States v. [Treasury Secretary] Rubin*. The Court accepted those more tendentious captions, but denied the petitions, expressly admonishing, however, that "[i]t is assumed that the Court of Appeals will proceed expeditiously to decide this case." 118 S. Ct. 2079 (1998).

6. Rule 33(e).

trousers. Jaworski and I were to divide the argument, he taking the opening forty-five minutes and I an equal amount of time for rebuttal. I urged that we don formal dress to add the final touch to our role as counsel for the people of the United States. He demurred, firmly insisting that I should be happy he was not going to wear a Texan's more customary garb, complete with cowboy boots!

The then-junior Justice, William Rehnquist, had disqualified himself from the case, because he had served President Nixon as Assistant Attorney General for Legal Counsel. Instead, he was placed in charge of allocating tickets to the dignitaries, reporters, and spectators who wanted a seat for the argument. Jaworski, Presidential counsel James St. Clair, and I made our arguments in the allotted three hours. There were no surprises until, barely two weeks later, the Chief Justice summoned us back to Court to hear him deliver a unanimous opinion unambiguously upholding the Special Prosecutor's right to pursue the evidence and the federal court's power to order the President to reveal it. By any definition the decision stripped President Nixon of the chance to ignore a non-"definitive" ruling against him.

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Apart from relief and satisfaction with the outcome, our reaction was far more guarded than one might think. First, in a real sense, even though the forced disclosure of the "smoking gun" tape compelled President Nixon to resign two weeks later, he won on a major constitutional issue. The Court ruled that executive privilege does exist. And it is not simply some judicially fashioned common-law evidentiary privilege, but a full-fledged constitutional privilege rooted in the separation of powers, albeit a qualified rather than absolute privilege.

Second, we thought—rather naively, as it now turns out—that it was highly unlikely that future Presidents would find themselves on the business end of a federal grand jury investigation. We assumed that the Court's holding on executive privilege would rarely if ever be cited or refined in later cases. Instead, we speculated that the principal practical import of the "Nixon Tapes" case would be its ruling defining the standards for issuing Rule 17(c) pretrial subpoenas in conventional criminal cases!

This symposium demonstrates just how short-sighted we were.

