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Power in the Court:
United States v. Richard Nixon and Judicial Manipulation

A Research Paper Submitted To

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Imagine that Nixon had not installed a secret taping system in the White House, then “the truth [about the Watergate burglary] probably never would have been known.”¹ According to that scenario, what began as a simple break-in and bugging of the Democratic National Headquarters, located inside the Watergate Hotel Complex on June 17, 1972 by five members of Nixon’s Committee to Re-elect the President, would not have forced Nixon to resign the office of President of the United States because the evidence to bring charges against Nixon would not have existed. The tapes that were released during the Watergate investigation incriminated Nixon to the point that he would either have to resign or face impeachment by the House of Representatives and most likely, a conviction by the Senate. But was the Supreme Court correct in its decision to force Nixon to release these tapes? The answer is no. Nixon had a right to invoke executive privilege as evidenced by legal precedent. Therefore, the Supreme Court overstepped its boundary within the separation of powers in an attempt to curb the power of the presidency and increase the power of the judiciary.

For Nixon to keep defendants in the burglary case from revealing their association with his administration, he had to pay each one hundreds of thousands of dollars and in one case, over one million dollars to ensure their silence.² This silence, however, was shattered on June 30, 1973 when former White House Counsel John Dean testified before the Senate Watergate Committee that the Nixon administration and Nixon personally

¹ William A. DeGregorio, *The Complete Book of U.S. Presidents: From George Washington to George W. Bush*, 2004 ed. (New York: Barnes and Noble Books, 2004), 598.

² John Dean, “The Watergate Cover-Up.” Edited by Richard Goldstein. *Mine Eyes Have Seen*. (New York: Touchstone, 1997) 356.

were attempting to cover-up their Watergate investigation.³ Soon afterwards, in mid-July 1973, Alexander Butterfield testified to the same committee about the existence of a White House taping system. This taping system would ultimately link Nixon to the Watergate cover-up. News about the existence of a taping system prompted Watergate Special Prosecutor Archibald Cox to subpoena the tapes that he believed related to his investigation. However, Nixon refused to turn them over, citing executive privilege. This led to the beginning of the court battles to force Nixon to comply with the subpoena.

In the meantime, he maintained his innocence on the Watergate matter, claiming “I had no prior knowledge of the Watergate break-in; I neither took part in nor knew about any of the subsequent cover-up activities.”⁴ This claim, however, was contrary to what Dean and Butterfield had stated earlier. On October 13, 1973, the US Court of Appeals disregarded Nixon’s claim to executive privilege and ordered him to comply with Cox’s subpoena. This challenge to Nixon’s power enraged him. It drove him to want to fire Special Prosecutor Cox, and despite protests from members of his administration, he proceeded to have Cox fired.⁵ But Nixon would have tougher problems.

On March 1, 1974, two of Nixon’s main advisors, H.R. Halderman and John D. Ehrlichman were indicted by a grand jury.⁶ This same grand jury also named President Nixon as an “unindicted coconspirator,” meaning that they had reason to believe that

³ David Thelen, “Conversations Between Alexander P. Butterfield and David Thelen About the Discovery of the Watergate Tapes.” *Journal of American History* 75, no 4 (March 1989) : 1245-1262.

⁴ Richard Nixon. “Nixon’s Second Watergate Speech,” Transcript of Speech on 15 August 1973. <<http://www.watergate.info/nixon/73-08-15watergate-speech.shtml>>. 14 September 2004, 2.

⁵ David Thelen, “Remembering the Discovery of the Watergate Tapes.” *Journal of American History* 75, no 4 (March 1989) : 1227.

⁶ Richard Nixon. “Nixon’s Second Watergate Speech,” 2.

Nixon was trying to hide something by not releasing the Watergate tapes.⁷ This forced Nixon to continue to fight the subpoena even harder, continuing to insist that he was innocent, while claiming that as president, it was his right to invoke executive privilege. Nixon continued to reason that if the tapes were made public, presidential aides in the future would be hesitant to confide useful advice to the president that could be essential for governing.⁸ He explained that legal precedent has allowed for individuals with special relationships to keep information confidential and to refuse to testify against an individual even if their testimony were crucial to a case. To back up his point, Nixon cited doctor-patient confidentiality and the confidentiality between a husband and wife as examples. Nixon insisted that his relationship with his aides was no different and that he needed his communications to remain confidential because of the nature of his job.⁹ But neither the US Court of Appeals, nor the US District Court would accept this logical reasoning. They insisted that they had the right to tell Nixon whether he could invoke executive privilege.¹⁰ Thus, they began to infringe on the separation of powers.

By April 30, 1974, after the House Judiciary Committee got in on the action of subpoenaing Nixon's tapes, Nixon gave in a little and released edited transcripts of some of the conversations that the court and the House of Representatives were seeking.¹¹ But these edited transcripts were not good enough for the US District Court. Shortly after Nixon released them, the US District Court with a desire to cause further embarrassment to Nixon and with the intent to decrease presidential power increased its demands. They now wanted presidential aides to betray the president and to submit to the court any

⁷ Warren Burger. "United States v. Nixon," 418 U.S. 683 (1974), 2.

⁸ Richard Nixon. "Nixon's Second Watergate Speech," 2.

⁹ *Ibid.*, " 4.

¹⁰ Warren Burger. "United States v. Nixon," 418 U.S. 683 (1974), 3.

subpoenaed documents they possessed.¹² This act was a complete infringement on the separation of powers, as the judicial branch tried to usurp the president's authority over his subordinates. The US District Court was making it known that only the court could decide the rights of a president, and in essence was saying that it was more powerful than the executive branch. This battle for Nixon's tapes and documents raged on to the Supreme Court, in what would be known as *United States v. Richard Nixon*.

The Supreme Court, though, was no more understanding about Nixon's need for executive privilege, claiming that "any absolute executive privilege under Article II of the Constitution would plainly conflict with the function of the courts under the Constitution."¹³ It is interesting to note in this situation how the Supreme Court interpreted the law in a manner that was favorable to their branch of government. Nixon's counsel subsequently challenged the court's interpretation, claiming 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."¹⁴ This argument reasons that the court was interfering in a matter outside of its jurisdiction because the Special Prosecutor worked for Nixon and Nixon did not have to release information to a subordinate that he did not want to. But this argument fell on deaf ears.

At the same time that Chief Justice Warren Burger, who was speaking for the court, objected to Nixon's right of absolute executive privilege, he admitted that the court had never before forced a president to release confidential communications for use in a

¹¹ David Thelen, "Remembering the Discovery of the Watergate Tapes," 1227.

¹² Warren Burger. "United States v. Nixon," 418 U.S. 683 (1974), 3.

¹³ Ibid., 2.

¹⁴ Ibid., 5.

criminal case.¹⁵ However, Burger did not let that stop him from deciding the case in the court's favor, despite the assertion by political scientists Thomas Cronin and Michael Genovese that "the Court, over its history, has often avoided questions of presidential power."¹⁶ This Court, headed by Burger, had an agenda to limit the president's power. While it may sound fair and just of the Court to say that executive privilege cannot be invoked for the sole reason of seeking to keep information confidential when it is essential for a criminal case and the information does not involve national security, this interpretation seeks to provide a guideline for when a president can and cannot do something that they are allowed to do.¹⁷ The Court has said that Nixon has the right to invoke executive privilege, but only when the Court does not need information. This interpretation is an obvious and blatant attempt to curb the power of the presidency and increase the power of the judiciary.

In *Cox v. Hauberg*, it was determined that the President has the right to determine what information to give to the Special Prosecutor. Therefore, the Court's interpretation in this case by claiming that Nixon does not have a right to invoke executive privilege to keep his tapes private, is even a violation of the Supreme Court's own rulings and of the separation of powers.¹⁸ Burger's decision and his justifications conflict tremendously. He claims that "in the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others."¹⁹ But, that has not been the case in

¹⁵ Ibid., 6.

¹⁶ Thomas E. Cronin and Michael A. Genovese, *Paradoxes of the American Presidency* (New York: Oxford University Press, 1998), 253.

¹⁷ Warren Burger. "United States v. Nixon," 418 U.S. 683 (1974), 2.

¹⁸ Ibid., 5.

¹⁹ Ibid., 8.

this situation. Burger repeatedly stated in a dictatorial manner that the Court has the final say in interpreting the law and while this may be true, it does not mean that the Court was not interpreting the law in a manner that was favorable to their branch of government.²⁰ Political scientists Cronin and Genovese agree that “sometimes...in a clash of views the Supreme Court restricts or curbs” a president and his powers.²¹

Political scientist Theodore Lowi argues that the courts have too much control over presidential power and that the executive branch needs to be the dominant branch of government in this modern day because of their important role in running the economy and running the government’s bureaucracy.²² Lowi contends that the Congress has treated the president like a puppet and that the courts have accepted and promoted that treatment.²³ After the Supreme Court ordered Nixon to hand over the subpoenaed tapes, he complied, but complied very slowly. This slow adherence to the Supreme Court’s order led Congress to approve three articles of impeachment against Nixon: “obstruction of justice,” “abuse of power,” and “failure to comply with congressional subpoenas.”²⁴ Nixon believed these that charges were levied because the Democrats wanted to get rid of him so that they could face an easier opponent in 1976, Vice President Ford, who would succeed to the presidency.²⁵

Nevertheless, most analyzers of the case believe that the decision was fair and just, but Nixon maintained “that the presidency itself was a casualty of this ruling.”²⁶

Degregorio explains that the released Watergate tapes supported the testimony of the

²⁰ Ibid.

²¹ Thomas E. Cronin and Michael A. Genovese, *Paradoxes of the American Presidency*, 252.

²² Ibid., 187.

²³ Ibid.

²⁴ William A. DeGregorio, *The Complete Book of U.S. Presidents: From George Washington to George W. Bush*, 598-99.

²⁵ Richard Nixon, *RN: The Memoirs of Richard Nixon* (New York: Grosset and Dunlap, 1978), 1051.

cover-up that John Dean had testified earlier about to the Watergate Committee.²⁷ This was admitted as well by Nixon in his memoirs, where he commented that “Halderman and I discussed having the CIA limit the FBI investigation [of the Watergate burglary] for political reasons rather than the national security reasons I had given in my public statements.” This can also be learned by listening to the June 23, 1972 “smoking gun” Watergate tape.²⁸

The release of this “smoking gun” tape along with other subpoenaed tapes forced Nixon to resign because it was so politically damaging that he would have otherwise been impeached. Based on the conversation on this tape, the verdict in the *United States v. Nixon* case appears to be just, but that does not change the fact that Nixon should never have been forced to release these tapes to the Special Prosecutor. He was forced to release these tapes because the Supreme Court was out to increase its power at the expense of the presidency. The ensuing result of this decision is that it has weakened the governing ability of the chief executive. In the future, presidential aides will no longer feel confident that the information they provide to the president would remain confidential and, therefore, useful advice that could have been used to prevent or solve a crisis will not be offered.

²⁶ Ibid.

²⁷ William A. DeGregorio, *The Complete Book of U.S. Presidents: From George Washington to George W. Bush*, 598.

²⁸ Richard Nixon, *RN: The Memoirs of Richard Nixon*, 1052.

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