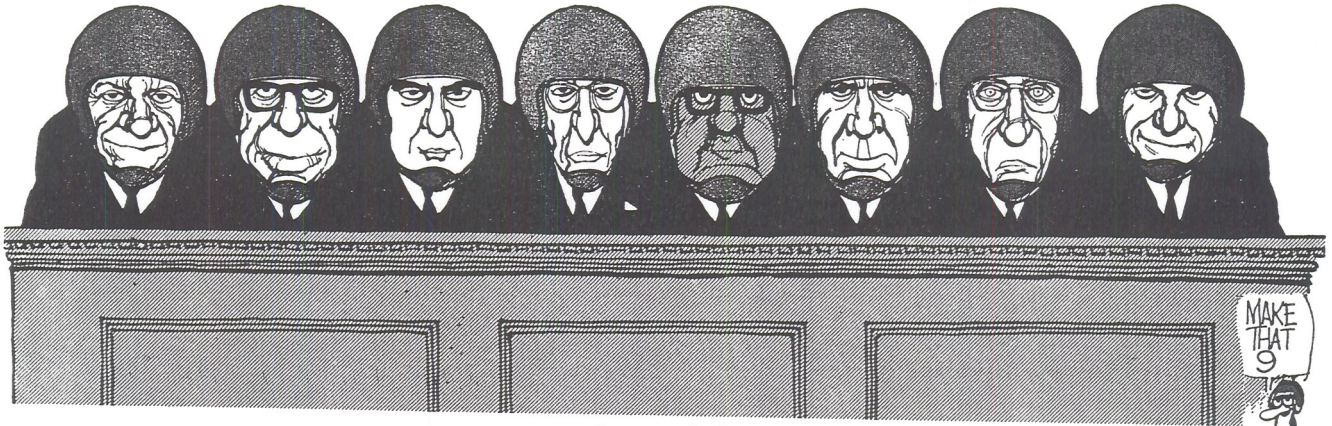


# SUPREME COURT WHITE HOUSE

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Stonewalled.

## THE SUPREME COURT

# A Unanimous No to Nixon

It was precisely 11:03 Wednesday morning when the marshal's cry of "Oyez, oyez, oyez" rang out in the marble-pillared Supreme Court Building. The eight Justices sitting in the case of *United States v. Richard M. Nixon, President of the United States, et al.* appeared from their chambers and sat behind the massive mahogany bench. Chief Justice Warren E. Burger shuffled his papers for a long moment and then began to read the decision constituting the sharpest judicial blow to a President since the court rejected Harry Truman's attempt to seize the nation's steel mills in 1952.

Definitively and unanimously, the court ended President Nixon's effort to withhold evidence from Special Prosecutor Leon Jaworski in the Watergate case. Nixon was ordered "forthwith" to turn over tapes and other records relating to 64 White House conversations to Judge John Sirica's district court for use by Jaworski in the upcoming trials of six of the President's aides.

The presence on the court of three conservative Nixon appointees (a fourth, William H. Rehnquist, had disqualified himself from the case because he had been a Justice Department colleague of two of the Watergate cover-up defendants) effectively pre-empted any charge that the President had been the victim of his liberal enemies. As if to emphasize the strictly legal, nonpolitical nature of its decision, the court did not once refer to the ongoing impeachment inquiry. Indeed, the ruling tried to ensure that the 64 taped conversations would not carelessly become impeachment evidence by instructing Judge Sirica to "discharge his respon-

sibility to see to it that until released to the special prosecutor, no *in camera* material is revealed to anyone."

In clear, nontechnical language, Burger elucidated the rulings of the high court, giving first general principles, then showing how each applied to the President's case:

► The court firmly rejected Nixon's argument that as head of the co-equal Executive Branch of the Government, he was entitled under the Constitution to determine finally the scope of his own privilege. On the contrary, the main theoretical plank of the court's opinion was the assertion of its supremacy in all matters of the law. The Judiciary's power to interpret the law, the decision said, "can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a presidential veto." Quoting directly from Chief Justice John Marshall's decision in *Marbury v. Madison*, the court said, "It is emphatically the province and duty of the judicial department to say what the law is" with respect to the claim of privilege presented in this case.

► The President's claims of Executive privilege must give way to the needs of the courts to settle a criminal case. Neither the separation of the Executive and Judicial branches nor the need for confidentiality "can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances." The court found that President Nixon's claim of Executive privilege was too "broad" and

"undifferentiated." It showed no danger to the nation if the tapes were turned over to Sirica for *in camera* inspection. "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 of law in the fair administration of criminal justice."

► The special prosecutor has the standing to sue the President even though he is an appointee of the Executive Branch and thus technically a subordinate of the President. The court concluded that "the unique facts of this case" remove it from an ordinary intra-branch dispute. Jaworski was given "unique authority and tenure" to prosecute the Watergate case: indeed, the President agreed that he could only be removed with the consent of congressional leaders. He thus has "explicit power to contest the invocation of Executive privilege in the process of seeking evidence deemed relevant to the performance of these specially delegated duties."

The decision in favor of Jaworski was reached with plenty of debate but remarkably little serious disagreement among the court's members. Assembled in their conference room on July 9, the day after oral arguments were presented by Jaworski and Presidential Lawyer James St. Clair, they needed little more than an hour to decide on the main elements of the ruling. Chief Justice Burger began the discussion by suggesting that the interests of the nation—and of the court—would best be served by a





**SPECIAL PROSECUTOR JAWORSKI**  
*Privilege—but not whim.*

unanimous decision. The other Justices were only too happy to agree.

Having decided on the importance of unanimity, the court began attacking the issues raised in the case one by one. In short order, a consensus in favor of Jaworski emerged. By the time the main question was decided—that priority be given the Watergate defendants' right to a fair trial over the President's general claim of Executive privilege—there was a perceptible sigh of relief in the room. The Justices were even unanimous in refusing to consider the President's claim that the Watergate grand jury exceeded its authority in naming Nixon as an unindicted co-conspirator. By rejecting consideration of the issue as "improvidently granted" (unnecessary for resolving the main questions of the case), the Justices let stand the grand jury's action.

**Draft Opinions.** There remained the often tedious and difficult task of ironing out the reasoning for the opinion. Burger exercised his prerogative to assign the writing of the opinion to himself. It was agreed that all the Justices would circulate memorandums or draft opinions on the case by the end of the week, and that Burger would attempt to incorporate them into the final opinion. A decision that all eight Justices could sign was approved in a discussion last Tuesday afternoon. The court quickly announced that it would be released the following morning.

Because the opinion was written in committee sessions, it never attempted to storm rhetorical heights. Individual flair and inspired turns of phrase gave way to a straightforward, almost ped-

agogic recitation of basic principles in the American legal system: the supremacy of the court in interpreting the Constitution, the rights of defendants to a fair trial, and the duty of the Judiciary to provide checks and balances on the power of the Executive Branch.

**Unique Case.** But for all that, the ruling was a narrow one. For one thing, as the President pointed out the day the decision was announced, the court "re-affirmed both the validity and the importance of the principle of Executive privilege." The court, agreeing that "deference" should be accorded the "President's need for candor and objectivity from advisers," stated that the Chief Executive must be assured of confidentiality when discussing policy alternatives. Thus "the privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution." Stripped to its essentials, the court's decision placed one important restriction on Executive privilege: a generalized claim of confidentiality cannot be invoked to withhold criminal evidence. "It addressed particular circumstances in a particular and unique case," says Yale Law Professor Alexander Bickel. "Questions such as when Executive privilege exists and how much it should be enforced are still unanswered."

This, in the view of many lawyers, has a built-in potential for danger. Chief Justice Burger's opinion not only validates Executive privilege, it lays down general conditions where it should be observed—when "military, diplomatic, or sensitive national security secrets" are at stake. Thus it leaves a crucial question: Has the court now given sanction for future Presidents to use a claim of national security to withhold almost any other kind of information?

"The court has done something that may be mischievous," says Harvard Law Fellow Raoul Berger, author of *Impeachment: the Constitutional Problems*. Berger fears that Executive privilege "could be extended to the whole Executive Branch or used to deny information to a Congress." Indeed, the court seemed to imply that if Nixon could have credibly made a national security argument for not releasing the tapes, the decision might have gone the other way.

On balance, however, other scholars hold that the effect of the Supreme Court's action is likely to place limits on the power of the presidency. The significance of the court's opinion, says Columbia University Law Professor Abraham Sofaer, lies in its assertion that "Executive privilege does not mean Executive whim. The President does not have absolute discretion and is subject to the rules of law." Though the court gave theoretical sanction to Executive privilege, it also created a precedent for overriding the President's authority to invoke it. That precedent may yet turn out to be a crucial one in Nixon's impeachment.