



Presidential Powers Under the Constitution and the Courts

Executive Privilege, Presidential Immunity and the Pardon Power

Executive Privilege

Executive privilege is the right of a president of the United States and other members of the executive branch to maintain confidential communications under certain circumstances within the executive branch, and to resist some subpoenas and other oversight by the legislative and judicial branches of the government in pursuit of particular information of personnel relating to those confidential communications.

Roots of the Privilege

- An implied privilege of the presidency rooted in the separation of powers doctrine
- In order for the executive branch to do its work within its constitutional sphere people need to be able to give their candid opinions, both spoken and written, without fear of being called to testify about them before Congress or the courts.

Some Historical Examples

In 1792 Washington declared he didn't have to give internal documents relating to a military defeat by Maj. Gen. Arthur Sinclair but did eventually turn over some papers "the public good would permit."

In 1804 Aaron Burr wanted Jefferson subpoenaed to appear at Burr's trial along with some documents. Jefferson refused to testify but "voluntarily" sent some personal letters.

1796

1792

1804

In 1796 Washington refused to comply with a House request for documents relating to the negotiation of the Jay Treaty with Great Britain. Provided documents to the Senate but not the House.

Some Historical Examples (cont.)

Andrew Jackson refused a Senate demand for a list of people he consulted about removing federal deposits from the Second Bank of the United States. Senate censured Jackson but never got the documents.

Eisenhower claimed executive privilege to keep information about internal conversations, meetings or written communications between WH staff to McCarthy Committee hearings.

Nixon and the Watergate Tapes

- President Nixon's attempt to use executive privilege to block release of the "Watergate tapes" made the concept relevant again in modern times.
- This was the first time the Supreme Court ruled on the question
- It recognized the constitutional basis of the privilege
- Also took great pains to define its contours and limits

Nixon and the Watergate Tapes (cont.)

- U.S District Court hearing a criminal case against several officials involved in the Watergate break-in.
- Court issue a subpoena *duces tecum* (a court order directing an individual to produce some physical evidence such as documents, or here tape recordings.)
- Materials to be reviewed by a judge *in camera* (i.e., privately in chambers) before deciding if materials are admissible in court

Nixon and the Watergate Tapes (cont.)

- Nixon claimed an absolute privilege
- Argued the district court lacked jurisdiction because dispute between President and Special Prosecutor was an intra-branch argument
- Not a case or controversy under the judiciary's Article III authority
- Nixon's lawyer moved to quash the subpoena



Nixon and the Watergate Tapes SCOTUS Decision

- Justices rejected Nixon's jurisdictional argument
- "[M]ere assertion of a claim of 'intra-branch dispute' without more has never operated to defeat federal jurisdiction."
- "Courts must look beyond names that symbolize the parties to determine whether a...case or controversy is presented."
- Court emphasized that the subpoena related to "a pending criminal prosecution...in a federal court, alleging violation of federal laws, and is brought in the name of the United States as sovereign."

Nixon and the Watergate Tapes

SCOTUS Decision (cont.)

- Under Article II, section 2 Congress has vested in the Attorney General power to conduct criminal litigation for U.S. government
- Also vested in A.G. power to appoint subordinate officers to help
- A.G. delegated authority to Special Prosecutor under regulation granting explicit power to contest invocation of executive privilege
- Inconsistent with these laws and regulations to NOT conclude Special Prosecutor had standing to bring this action, and that it is a “justiciable controversy.”



Nixon and the Watergate Tapes SCOTUS Decision (cont.)

- Then Court addresses the privilege claims
- Nixon claimed the separation of powers doctrine precluded judicial review of the President's claim of privilege
- He also argued that if the President did not prevail on the claim of absolute privilege the Court should hold as a matter of constitutional law that the privilege still prevailed over the subpoena *duces tecum*.

- Court quotes John Marshall that “it is emphatically the province and duty of the judicial department to say what the law is.”
- Court has consistently ruled on issues regarding powers of the various parts of the federal government, so it has authority to interpret claims regarding authority deriving from those powers.
- The protection of confidentiality of presidential communication flows from his enumerated powers and so has constitutional underpinnings.
- BUT neither the SOP doctrine nor the need for confidentiality ALONE can sustain an absolute claim of immunity FROM JUDICIAL PROCESS.

Nixon and the Watergate Tapes SCOTUS Decision (cont.)

Nixon and the Watergate Tapes

SCOTUS Decision (cont.)

- When the privilege depends solely on the broad, undifferentiated claim of public interest in presidential confidentiality a confrontation with other values arises.
- Absent a claim to protect MILITARY, DIPLOMATIC or sensitive NATIONAL SECURITY SECRETS it is difficult to believe that confidentiality of presidential communications is significantly diminished by the production of such material for IN CAMERA INSPECTION by the district court.

Nixon and the Watergate Tapes

SCOTUS Decision (cont.)

- The Court wrote that an absolute, unqualified privilege would impede the primary constitutional duty of the judiciary to do justice in criminal prosecutions and would “plainly conflict with the function of the Courts under Article III.”
- The Framers designed the government with three, interdependent branches and to read Article II to grant the President an absolute privilege against a subpoena essential to enforcing criminal statutes would upset the constitutional balance of a workable government and impair the role of the courts under Article III.



Nixon and the Watergate Tapes SCOTUS Decision (cont.)

“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 generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.”

- After Nixon resigned Congress passed the Presidential Recordings and Material Preservation Act
- Directs the Head of the General Services Administration (GSA) to take custody of Nixon's tapes and papers
- Nixon complained the law violated the SOP doctrine and would make it harder for future presidents to receive candid advice
- SCOTUS recognized that even former president could claim executive privilege
- Ruled that the screening process in the law was enough to protect this interest

Nixon v. Administrator of General Services (1977)

- Two watch-dog groups sue energy task force led by Cheney in civil action claiming violation of Federal Advisory Committee Act.
- Cheney claimed executive privilege
- Court did not resolve executive privilege question here but distinguished this case from United States v. Nixon (Watergate tapes case)
- Watch-dog groups' suit focused on their right to discovery
- In U.S. v. Nixon question was finding balance between President's need for confidentiality and the constitutional need for relevant evidence in a criminal proceeding

Cheney v. U.S. District Court for the District of Columbia (2004)

- SCOTUS ruled that a president could not be held liable for money damages in a civil suit for official action he took while in office
- This immunity applied to both sitting and former president and was ABSOLUTE
- Justice Powell wrote
“A rule of absolute immunity for the president will not leave the nation without sufficient protection against misconduct on the part of the chief executive. There remains the constitutional remedy of impeachment. In addition there are formal and informal checks on presidential action that do not apply with equal force to other executive officials...”

Nixon v.
Fitzgerald
(1982)

The president is subjected to constant scrutiny by the press. Vigilant oversight by Congress may also serve to deter presidential abuses of [office]. Other incentives to avoid misconduct may include a desire to earn re-election, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature. The existence of alternative remedies and deterrents establish that absolute immunity will not place the President 'above the law'".

Nixon v.
Fitzgerald
(cont.)

- Justice White wrote a dissent

“Attaching absolute immunity to the office of the President, rather than to particular activities that the President may perform, places the President above the law. It is a reversion to the old notion that the King can do no wrong...[T]he scope of immunity is determined by function not office. [T]he only question that must be answered here is whether the dismissal of employees falls within a constitutionally designed executive function, the performance of which would be substantially impaired by the possibility of a private action for damages. I believe it does not.”

Nixon v.
Fitzgerald
(cont.)

- Clinton civilly sued by Paula Jones for sexual harassment while he was Governor of Arkansas
- Clinton moved to have suit dismissed or postponed until he left office
- District Court held there was no presidential immunity to being sued for prior behavior, but stayed (postponed) the suit until he left office
- Appeals Court affirmed the lack of immunity but reversed the District Court's stay of the trial
- SCOTUS agreed with Appeals Court
- Immunity exists to safeguard the exercise of discretion by the office holder, so no immunity for unofficial conduct

Clinton v. Jones (1997)

Criminally Indicting a Sitting President

- 1973 OLC Memo written by Assistant Attorney general Robert Dixon during the Watergate scandal
- Cited by Robert Mueller in considering whether to criminally indictment President Trump
- 1973 memo reconsidered by the OLC in 2000

Criminally Indicting a Sitting President (cont.)

- In 1973 memo Dixon conceded that nothing in Constitution grants President immunity from criminal indictment
- No good argument that impeachment clause means indictment couldn't be brought prior to impeachment
- Although President COULD be indicted doesn't mean President SHOULD be indicted
- President's place in constitutional structure is unique
- President cannot be treated by the courts like any other individual

Criminally Indicting a Sitting President (cont.)

- President is head of entire Executive Branch of U.S. government
- No one else can constitutionally exercise President's authority without President's agreement
- Conflict of interest where President is both criminal defendant and in charge of department prosecuting the crime
- If President invokes executive privilege could be charged with suppressing evidence, if not could be hobbling future presidents
- Presidents cannot be compelled to appear in court, criminal defendants must appear in court

Criminally Indicting a Sitting President (cont.)

- Serious interruption in President's ability to govern while working on criminal defense
- Even if trial was put off until after President left office the reputational harm to the presidency would make it impossible to govern
- Correct approach is "to find the proper balance between the normal functions of the courts and the special responsibilities...of the Presidency."
- Dixon's conclusion that a President cannot be indicted was not a constitutional judgment but a balance of policy considerations

Criminally Indicting a Sitting President (cont.)

- Leon Jaworski agreed there was no constitutional ban on criminally indicting a sitting president
- There were a number of policy factors that weighed against it
- But failing to assess evidence against President shirked his office's responsibilities and set a dangerous precedent
- Concluded it was possible to name a president an unindicted co-conspirator in indictment of other conspirators

Criminally Indicting a Sitting President (cont.)

- OLC reconsidered 1973 memo in 2000 in light of subsequent SCOTUS decisions
- These were *U.S. v. Nixon*, *Nixon v. Fitzgerald* and *Clinton v. Jones*
- 2000 memo concluded that the logic of the 1973 memo still held
- “They balance the constitutional interests underling a claim of presidential immunity against the governmental interests in rejecting that immunity.”
- Even though *Clinton v. Jones* concluded defending against civil suit would not interfere with President’s ability to govern the burden of defending against a criminal case would intrude so as to violate the SOP doctrine

- Article II, section 2 grants the President the “Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”
- Includes the ability to pardon or reduce the sentence for all accused or convicted of federal crimes whether or not there has been a conviction
- Pardon power “extends to every offence known to law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgement.”

Presidential Pardon Power

- President has the power to decide what form a pardon will take
- Classic form is to excuse individual for entire crime, as if it never occurred
- But pardon can also reduce a person's sentence without excusing the crime
- President can pardon whole groups of people, not just individuals
- President can grant a pardon with conditions
- President can reduce a sentence but not increase it (*Schick v. Reed*)
- President cannot compensate individual in any other way as condition of a pardon.

Presidential Pardon Power (cont.)