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## **Watergate: An Anatomy Of A Constitutional Crisis**

### **Introduction**

On August 9, 1974 Richard M. Nixon resigned as President of the United States of America. Nixon's resignation came after the Supreme Court ruled he could not claim executive privilege to withhold private recordings of Oval Office conversations he had made during his presidency. These tapes revealed that Nixon and his advisors had conspired to suppress evidence and information regarding the Watergate break-ins. The attempts on the part of the executive branch to use executive privilege to shield itself from releasing criminally damning evidence was a constitutional crisis, although some scholars debate this. Constitutional crises occur when constitutional actors become embroiled in conflict that escalates to the point that the government is incapable of functioning as intended, under the Constitution. A comparison of other constitutional crises or near crises, such as Ohio's public defiance of the Supreme Court's ruling in *M'Culloch v Maryland*(1819), President James Buchanan's adherence to his constitutional obligations which prevented him from keeping South Carolina from seceding, and the conflicting state interpretations versus federal interpretations of the Supreme Court's ruling in *Brown v Board of Education* (1954,1955), with those of Nixon's Watergate will demonstrate why Nixon's Watergate was also a constitutional crisis. Nixon's actions during the Watergate cover-up, particularly his abuse of executive power, not only created political and criminal crises, but forced a constitutional one as well.

## Constitutional Crises

Constitutional crises, as the name indicates, are disputes between constitutional actors (whether it be an entire state, government branch, or an individual official) that reach a level where the government and/or individual branches cannot function as intended as a result of the dispute. Two legal scholars, Sanford Levinson and Jack Balkin detail the three subcategories of constitutional crises that can occur. The first subcategory is a public defiance crisis, which occurs when, "political leaders publicly claim the right to suspend features of the Constitution in order to preserve the overall social order and to meet the exigencies of the moment."<sup>1</sup> This type of crisis occurred in the case of *M'Culloch v Maryland (1819)*, when the state of Ohio sent armed state representatives into a federal bank to forcibly collect state taxes, in public defiance of the Supreme Court ruling. The second type of crisis, a strict adherence crisis, occurs when, "all relevant actors comply with their widely accepted constitutional duties and roles, but following the accepted understandings of the Constitution fails to resolve an existing political crisis or leads to disaster."<sup>2</sup> The most noted example of this type of crisis is President Buchanan's refusal to act outside of his narrowly defined Constitutional obligations to prevent South Carolina from seceding from the Union, resulting in Civil War. The third, and most common type of constitutional crisis, an interpretation crisis, occurs when "the relevant actors all proclaim their constitutional fidelity; they simply disagree about what the Constitution requires and about who holds the appropriate degree of power."<sup>3</sup> In the case of *Brown v. Board of Education (1955)*, several southern states resisted the ruling that segregation was unconstitutional. These states felt that the Supreme Court had overstepped its powers to regulate states' right to decide how to run its schools (i.e. segregate them). Arkansas Governor Orval Faubus felt so strongly about this that he deployed the national guard of his state to prevent the integration of Central High School in

Little Rock, Arkansas. Each of these cases exemplify the type of category it falls within, and by using the criteria established by each, one can examine other crises to determine if they too reach the threshold of a constitutional crisis.

### **Public Defiance Crisis**

When the state of Ohio refused to comply with the ruling issued in *M'Culloch v Maryland* (1819), it created a public defiance constitutional crisis. In *M'Culloch v Maryland* (1819), the Supreme Court had ruled that:

The state within which a branch of the United States Bank may be established cannot constitutionally tax it, nor pass any law to control or impede its operations, or the operations of the parent bank.<sup>4</sup>

The Court asserted that States cannot tax, pass laws to tax, or prevent the running of the federally established banks. Chief Justice John Marshall based his decision on the "implied powers" doctrine.<sup>5</sup> The implied powers doctrine, when applied in this case, stated that while the Constitution did not specifically say that Congress could establish a federal bank such a power was implied by other powers it had been granted. Chief Justice Marshall's application of implied powers is considered one, if not the most, important rulings of his career. However, legal scholars Harold J. Plous and Gordon E. Baker have argued that while his use of implied powers was valid he chose the wrong case in which to apply it.

The core dispute that states, like Maryland and Ohio, had with the *M'Culloch* ruling was over their rights to collect taxes from the federal banks located in their states. Plous and Baker argue that because the issue over the banks was so contested by the states, that it would have been better for Marshall to have picked a case that was less controversial to legitimize the implied powers doctrine.<sup>6</sup> While there is some validity to their argument, that a less controversial

case might have made it easier for Marshall to lay the groundwork for establishing the constitutionality of the implied powers doctrine, it was the very fact that the case was controversial that allowed Marshall's groundwork to be so solid that it remains constitutional doctrine to this day.

The contested nature of the *M'Culloch* case forced each side to develop arguments centered around the implied powers doctrine. Albert Beveridge, Marshall's biographer, had this to say about the lawyers who argued the case, "the counsel for both sides in *M'Culloch vs. Maryland* were the most eminent and distinguished in the Republic."<sup>7</sup> These counselors included Daniel Webster and William Pickney, both of whom argued for the Bank. The skill of these men during oral arguments gave Chief Justice Marshall the foundational legal arguments he needed to write his opinion. As Professor Fairman is quoted as saying, in Plous and Baker's legal analysis of the *M'Culloch* case, "Marshall's opinion is very tightly integrated with the arguments of [the Bank's] counsel..."<sup>8</sup> Marshall's decision to choose such a contested case resulted in the foremost legal minds of the time assembling to argue the legal points of implied powers. It is because these minds were able to formulate such sound legal arguments, from which Marshall drafted his opinion, that the constitutionality of the implied powers doctrine has remained intact.

Even though the Supreme Court ruled that the establishment of federal banks was constitutional and that state right to tax them was not, Ohio State Auditor Ralph Osborn still disagreed. Osborn opposed the ruling that Congress could create a federal bank, and most importantly, he felt Ohio *could* collect taxes on the federal bank in Ohio.<sup>9</sup> Even after an injunction was issued to prevent Osborn and his agents from collecting taxes from the Bank of Chilicothe, Ohio, Osborn sent J.L Harper into the bank. Harper used force to collect the disputed taxes.<sup>10</sup> It is this public defiance against, not only the Supreme Court ruling in *M'Culloch v*

*Maryland(1819)*, but also the state's defiance of the issued federal injunction, that forced a constitutional crisis. Congress was unable to properly run the federal bank in Chilicothe, Ohio because state officials publicly refused to follow both the legislative and judicial branches. Ohio's public defiance forced a second Supreme Court ruling in *Osborn v Bank of U.S. (1824)* which stated that "A State cannot tax the Bank of The United States" it further added that if any agents of the state attempted to collect taxes against the Bank of the United States they could be "restrained by injunction from the Circuit Court."<sup>11</sup> This ruling was nearly the same as the previous ruling in *M'Culloch*, but was required in order to demonstrate to Ohio that neither Congress nor the Supreme Court would allow Ohio to act against the ruling.

While the Supreme Court has the power to determine the constitutionality of the other branch's actions, it does not have the power to enforce these determinations. That power rests with the legislative branch. When Ohio defied the Supreme Court ruling, Congress held the power to compel Ohio to follow the ruling. The problem was, however, that while Ohio was defying the Supreme Court ruling, its real issue was with Congress' initial action of creating a federal bank and disallowing the taxation of these banks. Ohio did not agree with either branch of government and refused to abide by both. While Ohio's representatives never stood up and literally said, "We will not follow what you have ruled" their actions in forcibly collecting the taxes from the Chilicothe bank conveyed that message clearly. Ohio's action after the Supreme Court ruling in *M'Culloch* created a public defiance constitutional crisis. The Supreme Court resolved the crisis with the second ruling in *Osborn* which compelled Ohio to comply with both rulings, and it did so.

### Strict Adherence Crisis

The second category of crises is a strict adherence constitutional crisis, which occurs when constitutional actors adhere to the Constitution, however, even in doing so, the conflict cannot be resolved, forcing a constitutional crisis. Such a crisis emerged with South Carolina's secession from the Union. Initially, when South Carolina threatened secession from the Union, President James Buchanan knew he had to prevent any secession. He was aware that if South Carolina successfully left the Union it would have a domino effect taking other states with her. On December 20th, South Carolina adopted its 1860 Succession Ordinance. President Buchanan found himself in a position of figuring out how to keep South Carolina in the Union without starting a war.<sup>12</sup> He was unsure if he had the constitutional powers to do this. Buchanan wrote to Attorney General Black to answer questions as to the "extent of [his] official powers."<sup>13</sup> Historian Ticknor G. Curtis maintains that the answers Black gave Buchanan about his powers were sound. The crux of Attorney General Black's advice can be summed up with this passage included in his response to Buchanan, "He [the President] cannot accomplish a legal purpose by illegal means, or break the laws himself to prevent them from being violated by others."<sup>14</sup> It is on this point that Curtis takes issue with Buchanan's critics who have harshly judged him for the actions he took based on Black's advice. Curtis remarks that critics have failed to consider that President Buchanan had "no constitutional power to declare, no authority to prosecute, and no right to institute a war against a State."<sup>15</sup> If Buchanan were to prevent South Carolina's secession he would have had to compel them by force which, as Curtis pointed out, he had no constitutional power to do. In essence, the Constitution of the United States failed to provide President Buchanan with the powers to prevent state secession. It is this failure of the

Constitution that allowed the secession of several Southern states which led to the Civil War, the greatest constitutional crisis the United States has ever faced.

If the Constitution did not provide explicit means for Buchanan to prevent the South Carolinian secession why then did he not use his broader executive power? Article II, Section I, Clause I of the United States Constitution states, "The executive power shall be vested in a President of the United States."<sup>16</sup> The Constitution does not enumerate what exactly that power entails, and as President Woodrow Wilson aptly remarked that with executive power a president "has the right, in law and conscience, to be as big a man as he can...only his capacity will set the limit."<sup>17</sup> Buchanan was deeply troubled by the consequences of his actions were he to prevent South Carolina's secession by means not explicitly stated in the Constitution. As Buchanan saw it, the problem with using his executive privilege centered around the oath he took to execute the laws of the Constitution. However, once South Carolina seceded he believed it had removed itself from the system that enacted and enforced those constitutional laws.<sup>18</sup> Buchanan could not force South Carolina to remain in the Union without deploying armed soldiers. The predicament Buchanan found himself in is explained by his biographer Philip Shriver Klein, "Neither secession nor coercion were comprehended in the federal constitution."<sup>19</sup> According to the Constitution, Buchanan could no more force South Carolina to stay in the Union than South Carolina was allowed to leave. There were absolutely no constitutional provisions to deal with state secession from the Union. All branches of the government agreed that Buchanan was adhering to his constitutional obligations. Even still this did not resolve the matter of South Carolina seceding, for which Buchanan is still harshly judged. Buchanan's decision to stay within the confines of his constitutional obligations made him unable to prevent the conflict over state

secession from escalating to the Civil War. The North's victory ended the Civil War and this ended the constitutional crisis.

While Curtis clearly explains the difficulties President Buchanan faced with South Carolina's secession, the criticisms of how Buchanan handle the situation are still entirely valid. While Buchanan did not act outside his constitutional obligations, he had an even greater obligation to keep the Union intact. If states were able to secede the Constitution would have no real power. This is mostly why there are no provisions in it to deal with state secession. The power of the Constitution rests on those acting under it, including all three branches of the government, to respect the rulings, laws, and its amendments. South Carolina's actions simply could not be allowed if the authority of the Constitution, and by extension all the states, was to remain intact. While Buchanan is correct in that the Constitution did not allow him any explicit powers to prevent secession, he seemed more at ease with continuing to believe that was his most important obligation. Curtis details all the lengths that Buchannan went to have his actual Constitutional powers explained and defined to him.<sup>20</sup> What Curtis accurately describes, intentional or not, is a scared man not wanting to be known as the president who caused a civil war. Unfortunately for Buchanan not only is he known as the president who allowed South Carolina to secede but he is known for doing so because of inaction on his part. One can certainly appreciate the difficult situation Buchanan was in, but he had an absolute and primary obligation to preserve the Union. This obligation was the one he should have given precedence in his discussions over South Carolina's secession. Instead of it being his top priority, he concerned himself more with adhering to the Constitution without realizing that in not forcing South Carolina to remain in the Union he was failing the Constitution in the most critical way possible.

### Interpretation Crisis

The final type of constitutional crisis, an interpretation crisis, occurs when constitutional actors disagree about interpretation regarding powers granted by the Constitution. These disagreements result in each side refusing to accept the other's interpretation. The crisis resolves when one side's interpretation prevails as the newly accepted constitutional "conventional wisdom" on the disputed issue.<sup>21</sup> Legal scholars Levinson and Balkin claim that in interpretation crises, "each side may accuse the other of fomenting a [public defiance] crisis, while simultaneously claiming impeccable legal pedigree for its own actions."<sup>22</sup> In interpretation crises each side believes its position to be supported by the Constitution. Levinson and Balkin emphasize the intertwining of public defiance crises with interpretation crises. This often occurs because disputes over constitutional powers are often played out in the public eye. Such a public battle over constitutional powers can be seen in the disputes that arose over the issue of integration in public schools.

The 1954 Supreme Court ruling *Brown v. Board of Education (1954)* declared the practice of "separate but equal" segregation in schools unconstitutional.<sup>23</sup> With public school segregation now unconstitutional, a battle arose over the implementation of desegregation in public school systems. Many southern states ardently opposed integration and felt that the federal government had overstepped its powers. The challenge to the Supreme Court decision focused on Chief Justice Marshall's footnote in *Brown* that mentioned psychologists' findings that black children were harmed mentally by segregation. The footnote, they claimed, proved that this was a ruling based on sociology not legal precedent.<sup>24</sup> As acts of resistance, southern states delayed or completely prevented the integration of public schools from occurring. In the 1954 *Brown* ruling it did not address the timeframe in which states had to comply with the order to

desegregate public schools. The 1955 *Brown* ruling addressed this issue and stated schools had to be desegregated "with all deliberate speed."<sup>25</sup> The inclusion of phrase, "with all deliberate speed" resulted in many Southern states attempting to find ways to "legally" circumvent the ruling.

In September of 1957 the Little Rock, Arkansas school board decided to integrate Central High School by allowing nine black students to attend the high school. On the evening of September 2, 1957, the night before Central High School was set to be integrated, Arkansas Governor Orval Faubus deployed the National Guard and state police at Central High School.<sup>26</sup> Faubus gave a speech that evening in which he explained that his deployment of the National Guard was not a sign of support nor defiance of the attempt to integrate the high school. But, he added, in order for the troops to be able to do their job of maintaining public safety, the school would need to continue its policy of segregation.<sup>27</sup> His interpretation of his duty to protect the general public from violence led him to deploy the troops. Faubus was quoted on September 3, 1957 as stating the troops "will not act as segregationists or integrationists," but on September 4, 1957 Faubus changed his orders to the National Guard.<sup>28</sup> He now explicitly ordered the state militia "prohibit the black children from entering Central High School."<sup>29</sup> His decision, and justification, that in order for his troops to prevent violence segregation needed to continue, forced a constitutional crisis. The Arkansas Governor had declared that his constitutional power to maintain order overrode the Supreme Court's ruling to integrate public schools. By deploying troops to enforce law and order he had not only publicly defied the Supreme Court's order to integrate, but he also challenged the Court's interpretation of its power to force state compliance. In response to Faubus's deployment of troops, President Eisenhower sent in federal troops to escort the students to school and to uphold *Brown*. While the conflict over integration in Arkansas continued, in the end Faubus lost his battle with the Court and schools in Arkansas

started to integrate. After it became clear to states still practicing segregation, that the federal government was not going to allow resistance to desegregation, states began the process of integrating their schools.

### **Conflict Not Crisis**

Not all conflicts over constitutional interpretation result in crisis. Further examination of Southern resistance to the *Brown* ruling demonstrates how some state's conflicts over interpretation resolved themselves before reaching a point of crisis. The actions of Georgia Governor S. Marvin Griffin and the state legislature could certainly have led to a constitutional crises, if the crisis did not resolve on its own. Governor Griffin said that the schools of Georgia would not be desegregated, "come hell or high water."<sup>30</sup> In order to keep practicing segregation, the Georgia legislature passed state laws that defied the Supreme Court's ruling. In February 1956, six bills supporting practices of segregation were signed into law by Governor Griffin.<sup>31</sup> Most of the laws that were passed dealt with the operation of private schools because the Supreme Court's ruling on integration only applied to public schools.<sup>32</sup> Georgia's state legislature and governor saw no reason that private schools should be regulated under *Brown v. Board (1954,1955)*. Thus to them, their interpretation of this constitutional ruling was valid. Their overall plan was that all the public schools in Georgia would be converted to private schools. The bill allowing this plan to go forward stated that if integration was allowed to proceed public schools would close.<sup>33</sup> In this, Georgia lawmakers thought they had found a legal way to resist the *Brown* ruling.

While Georgia lawmakers felt they were legally circumventing the Supreme Court ruling, others disagreed and began to challenge their attempt to continue practicing segregation. The NAACP challenged Georgia lawmakers' threat to close public schools to prevent integration in

U.S District Court M.D. Georgia case *Holmes v. Danner (1960)*<sup>34</sup> (which was later upheld in the U.S Supreme Court case *Danner v. Holmes (1961)* ).<sup>35</sup> This case challenged the University of Georgia (UGA) regarding its policy of segregation by demonstrating that UGA had denied two black students admission solely based on their race. *Holmes* reaffirmed *Brown*, that segregation was unconstitutional, and that UGA had to allow the two plaintiffs to enter the school.<sup>36</sup> If Georgia was to continue its "private school plan," UGA would also have to be privatized.<sup>37</sup> While many Georgia residents supported the fight against integration, the idea of closing down the University of Georgia in order to privatize it did not sit well with them. This was because UGA was the state's flagship school and many Georgians were extremely proud of it. To close it was unthinkable. In February 1961, the battle over integration in Georgia came to an end when two black students were allowed to enroll in UGA in accordance with the *Holmes* decision.<sup>38</sup> While Georgia's attempts to circumvent the Supreme Court certainly could have led to a constitutional crisis, the legislature's unwillingness to close down UGA resolved the constitutional conflict before it reached a point of crisis.

### **Watergate: A Constitutional Crisis**

The constitutional crisis that erupted in 1974 over Watergate, centered primarily around President Nixon's abuse and interpretation of executive privilege. He repeatedly claimed that national security necessitated his invoking executive privilege to withhold the Watergate tapes. In declaring executive privilege and refusing to turn over the tapes, even for in camera review, Nixon created both a public defiance and an interpretation crisis. In the case of *Environmental Protection Agency v Mink (1973)*, only a year before Watergate, is the start of serious conflict over constitutional powers between Nixon's executive office and both the legislative and judicial

branches. The conflict of interpretation was over whether Nixon could claim executive privilege to withhold documents (tape transcripts) from other branches.

The case of *Environmental Protection Agency v Mink* (1973) resulted from a dispute over Nixon's unwillingness to release nine documents to Congress. In July 1971, Congress became aware that President Nixon had received differing recommendations in regard to the underground nuclear testing that was to be conducted in the fall of that year. Congresswomen Patsy Mink, asked Nixon for the "immediate release of recommendations and report by the inter-departmental committee..."<sup>39</sup> Nixon denied Mink's request, resulting in Mink and thirty-two other members of Congress filing a request for the documents under the Freedom of Information Act of 1966.<sup>40</sup> The Supreme Court found that because both Congress and the Executive branch agreed that the documents were, "highly sensitive matter that is vital to our national defense and foreign policy," the executive branch had "met their burden of demonstrating that the documents were entitled to protection under Exemption 1."<sup>41</sup> Exemption 1 of the Freedom of Information Act states that the executive branch could not be compelled to release documents that had been declared top secret by Executive order, to protect national security.<sup>42</sup> While the Supreme Court did rule in favor of the executive branch, one section in the *Mink* opinion stands out in regard to the later events of Watergate:

Plainly, in some situations, in camera inspection will be necessary and appropriate. But it need not be automatic...the burden is, of course, on the agency resisting disclosure, and if it fails to meet its burden without in camera inspection, the District Court may order such inspection... In short, in camera inspection of all documents is not a necessary or inevitable tool in every case.<sup>43</sup>

Even though Nixon's success at withholding the documents regarding underground atomic testing from Congress was justified by the Court, his use of the same argument for the Watergate tapes is was not as viable. Nixon claimed that this same top secret status should apply

to the Watergate tapes. He claimed that what was discussed in the Oval Office similarly and implicitly, always dealt with issues of national security.<sup>44</sup> Congress and the public strongly disagreed with that claim. The relevance of the proceeding passage of the *Mink* opinion cannot be understated due to the battle that arose over the release of the Watergate tapes.

The political arena in Washington D.C was rocked to the core when on July 16, 1973, a former White House secretary, Alexander Butterfield testified during a Senate hearing investigating the initial Watergate break-in that President Nixon had taped Oval Office conversations.<sup>45</sup> This revelation started a furious battle over the release of the tapes. Once it became known that tapes of Oval Office conversations existed, the Senate investigating committee and special prosecutor Archibald Cox immediately requested that Nixon turn over those tapes. Nixon refused.<sup>46</sup> Nixon's refusal did not occur in a closed committee session nor in a private memo. He claimed that his executive privilege allowed him to refuse such a request in order to protect national security. This refusal was public knowledge with multiple newspapers running the story as a headline. The *Washington Post's* headline the day after he refused read, "President Refuses to Turn Over Tapes; Ervin Committee, Cox Issue Subpoenas."<sup>47</sup> After Cox issued the subpoenas Nixon ordered him fired and the special prosecutor's office shut down.<sup>48</sup> It was these actions that later became known as the "Saturday Night Massacre."<sup>49</sup> Public outrage at Nixon's clear attempts to hinder the investigation into his involvement in the Watergate scandal, forced him to reopen the special prosecutor's office on October 31, 1973.<sup>50</sup> Leon Jaworski, the new special prosecutor, attempted to enforce Cox's subpoena to have Nixon release all of the Watergate tapes. Nixon again refused.<sup>51</sup> Nixon also refused to allow the tapes to be reviewed in camera.<sup>52</sup> With no other way to compel Nixon to turn over the tapes the case went before the Supreme Court in *U.S. v Nixon (1974)*. The ruling in this case affirmed the subpoena and

ordered Nixon to turn over the tapes to the special prosecutor's office.<sup>53</sup> The unanimous opinion written by Chief Justice Warren Burger stated:

neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.<sup>54</sup>

This statement addressed the very essence of the Watergate tapes controversy. Nixon attempted to withhold tapes by using a privilege he was constitutionally granted and which he had been allowed to claim in the *Mink* case. But as Burger pointed out and the *Mink* case established, such a privilege cannot be invoked all the time, particularly during a criminal investigation.

Legal scholars Levinson and Balkin have argued that Nixon's actions did not create a public defiance crisis because he himself never publicly stated that he would defy the Supreme Court nor did he disobey the final ruling in *U.S. v Nixon*. Yet, they do argue that Ohio's forcible collection of taxes was a public defiance crisis in that its actions constituted the public defiance. Nixon's action can also be viewed similarly. Nixon did not fully comply with the Supreme Court's order to hand over all the tapes. In fact, he could not. Prior to the Supreme Court case, one tape, now known as Tape 342, had over 19 minutes erased.<sup>55</sup> While it is uncertain who actually erased the tapes, at the time of the erasure they were in the possession of the executive office. Nixon's Secretary Rosemary Fields at one pointed claimed she had accidentally erased them while transcribing the contents. After a staged reenactment it was proven that this could not have occurred as she said and that the tapes had clearly been altered deliberately.<sup>56</sup> While Nixon may not have altered the tapes himself, someone in the executive office did. The tape erasure demonstrates that Nixon, and the executive office as a whole, never intended to comply with any

Supreme Court ruling. He ensured that his compliance would be on his own terms by altering the tapes. Because Nixon could not turn over all the tapes as a result of his own actions this qualifies him as publicly defying the Supreme Court. The deliberate erasure of a tape, combined with the public's awareness of the act, places Nixon's actions firmly in a public defiance crisis.

Nixon, on several occasions, publicly stated he would not release the tapes to the special prosecutor's office. When Special Prosecutor Cox refused to stop his pursuit of the tapes Nixon had the entire office shutdown. Again this was done with the public's knowledge. Nixon's claims that he was attempting to protect national security by exercising his executive privilege to withhold the tapes are completely disproven by examining the Watergate tapes themselves. In the Watergate tape of March 22, 1973 Nixon can be heard talking to his advisors John Dean, White House Counsel; John Ehrlichman, counsel and Assistant to the President for Domestic Affairs; H.R. Haldeman, White House Chief of Staff; and John Mitchell, Attorney General of the United States, about the *strategy* of claiming executive privilege to avoid testifying and/or releasing documents. Ehrlichman starts out the conversation by stating, "Our brother Mitchell brought us some wisdom on executive privilege...".<sup>57</sup> John Mitchell then explained that, as a strategy, executive privilege could be used to keep former and current White House employees from testifying before the Senate committee.<sup>58</sup> Later in the conversation Nixon referred to the strategy as, "the executive privilege thing" and a few exchanges later stated it gave them flexibility "in order to get on with the cover-up plan."<sup>59</sup> The tapes prove Nixon did not use his executive privilege in order to protect national security issues. He used his privilege instead to try to thwart an ongoing criminal investigation into his own behavior.

Nixon's interpretation of the way in which executive privilege could be used, or in his case abused, resulted in his battle with Congress and the Supreme Court. He firmly believed that

anything he discussed in the White House could be assigned the top secret label and he would then be safe from any branch of government compelling him to turn over the tapes. The Supreme Court's ruling in *Mink* most likely gave him a false belief that it would again support his claims of protecting national security. Nixon chose to disregard the aspect of the ruling that made it clear that such a claim could not be unilaterally applied. He was well aware of the limits of claiming executive privilege to withhold documents. However, he refused to accept the Supreme Court's ruling that there were, in fact, limits to his powers. His actions throughout Watergate demonstrate his belief in his unlimited power. Nixon was so convinced that his interpretation of his executive privilege was valid that he repeatedly defied Congress.

Both sides used the *Mink* ruling to support their argument regarding the release of the Watergate tapes. Nixon used the section of the ruling that allowed him to claim national security to refuse the release of the tapes. Congress used the section of the ruling that clearly said this claim could not be applied in every case of refusal. It is clear that Nixon felt executive privilege granted the President extreme latitude in explaining actions taken by the executive office. Congress felt such latitude was tantamount to the President having absolute, unchecked power to do as he pleased. The battle over the release of the Watergate tapes forced all three branches of the government to focus solely on that issue. This monopolization of each branch's time to deal with a singular issue in effect rendered the government non-functional. This inability to function directly resulted from Nixon's intentional actions. Nixon, not only publicly refused to comply with legally justifiable orders from other branches of the government, he did so with the intent of causing them to be incapable of doing their job (i.e. investigating the Watergate break-in). Nixon took the actions he did using claims of executive privilege, but did this as a strategy to cover-up

criminal wrongdoing, not because he was intending to remain faithful to the Constitution or protect national security.

Once the Watergate tapes (or, what had not been erased) were turned over to Senate Investigating Committee, the American public fully understood, as did Congress, why Nixon had been trying to keep them secret. With proof that Nixon had conspired with his executive office officials to cover-up their criminal behavior, the Senate initiated impeachment proceeding against him. Before the proceedings could begin, Nixon resigned, still claiming that his actions were justified in protection of national security. The manner in which Nixon claimed executive privilege was simply an abuse of power. It is exactly this abuse of his power, and the fact he did it so publicly, that qualifies these elements of Watergate to be considered both a public defiance and interpretation constitutional crisis. Nixon's resignation ended the constitutional crisis that he had started when he refused to release the Watergate tapes.

### **Conclusion**

The founders of the Constitution of the United States drafted the document during a time of conflict. They had every expectation that conflicts would continue to arise in the governing of the newly established nation. In developing a Constitution the founders knew that if they wanted the document to have longevity it needed to be able to handle disputes. This understanding of a need for the document to malleable is why they included a provision to amend it. However, they could not prepare for all conflicts that might arise in the future. When South Carolina seceded from the Union unanticipated weaknesses of the Constitution became evident. The founders did not anticipate a time when any state would attempt leave the Union, and therefore had not included any remedies for such actions. The founders did include broader powers for each branch which attempted to give them some leeway when dealing with unanticipated conflict

and/or crisis. This need for leeway is exactly why Chief Justice Marshall defended the implied powers doctrine so strongly. He too understood why flexibility was vital in preserving not only the Constitution, but also the Union.

During Watergate, Nixon exploited the flexibility of the Constitution regarding executive power. He did this to conceal his own crimes during Watergate. Even though his abuse of power forced a constitutional crisis, the Constitution itself provided the remedies to deal with his actions. The founders included the ability to impeach a president because they realized, and worried, that one day a president might go beyond the scope of his or her power and would need to be removed. Had Nixon not resigned he certainly would have been impeached. It is also probable that had President Gerald Ford not pardoned Nixon he would have faced criminal charges for his actions. Even though Nixon resigned before being officially removed, it was the Constitutional provisions regarding impeachment that ultimately resolved the crisis. It is a fascinating conundrum that the document fails and succeeds simultaneously. In this case, the broadness of executive powers allowed Nixon enough room to abuse and misinterpret his power demonstrating a weakness/failure of the document. But, the allowance for removal of a President who abuses his power shows the success of the document. This dichotomy demonstrates the brilliance and skill that the founders possessed in creating the Constitution. Constitutional crises will continue to occur, hopefully not many, but it can also be said that when such crises do occur the document that failed to prevent the crises will surely resolve them in the end.

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<sup>1</sup> Sanford Levinson and Jack M. Balkin, "Constitutional Crises" in *University of Pennsylvania Law Review*, Vol. 157, No. 3 (Feb. 2009) 721.

<sup>2</sup> Levinson "Constitutional Crises"729.

<sup>3</sup> Levinson "Constitutional Crises"738.

<sup>4</sup> *McCulloch v. State*, 17 U.S. 316 (1819).

<sup>5</sup> Harold J. Plous and Gordon E. Baker, "*McCulloch v Maryland*: Right Principle, Wrong Case", *Sanford Law Review*, Vol. 9, No. 4 (Jul., 1957) 710.

<sup>6</sup>Plous and Baker, "*McCulloch v Maryland*: Right Principle, Wrong Case" 719.

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- <sup>7</sup> Plous and Baker, "*McCulloch v Maryland*: Right Principle, Wrong Case" 719.
- <sup>8</sup> Plous and Baker, "*McCulloch v Maryland*: Right Principle, Wrong Case" 724.
- <sup>9</sup> *Osborn v Bank of U.S.*, 22 U.S. 738 (1824).
- <sup>10</sup> *Osborn v Bank of U.S.*, 22 U.S. 738 (1824).
- <sup>11</sup> *Osborn v Bank of U.S.*, 22 U.S. 738 (1824).
- <sup>12</sup> Ticknor G. Curtis, *Life of James Buchanan: Fifteenth President Of The United State Vol. II*, (Franklin Square: New York: Harper & Brothers: 1883) 318.
- <sup>13</sup> Curtis, *Life of James Buchanan*, 319.
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