



# Executive Privilege



On October 8, 2021, during a White House [Press Briefing](#), Press Secretary Jen Psaki responded to a question from a reporter about whether or not the White House will authorize the [National Archives](#) to release documents related to former President Donald J. Trump's communications regarding the events on [January 6th, 2021](#).

Ms. Psaki responded to the question, in part, by saying "... the administration is cooperating with ongoing investigations, including the January 6th Select Committee to bring to light what happened. As a part of this process, the President has determined that an assertion of executive privilege is not warranted for the first set of documents from the Trump White House that have been provided to us by the National Archives."

The January 6th [Select Committee](#), tasked with investigating and reporting on the events at the Capitol on January 6, 2021, will conduct its work by adhering to their specific purpose as outlined in [HR 503](#). As part of their work, the committee is issuing subpoenas for documents and communication related to the events of that day.

President Trump has asserted, [through a letter](#) to the National Archives and Records Administration, that he has executive privilege over a few dozen of the documents sent to the Archives related to January 6th; therefore, they should not be released to the select committee. So, the question remains, what is executive privilege and why do presidents use it?

**Executive privilege** is the concept that members of the executive branch cannot legally be forced to reveal their confidential communications when it could negatively affect the operations or procedures of the executive branch. Presidents use executive privilege when national security or the public interest may be negatively impacted by the release of certain information. The term "executive privilege" is not in the U.S. Constitution. However, through the concept of separation of powers, the idea that each branch of government has separate and distinct functions and powers, executive privilege is considered part of the powers of the executive branch.

Executive privilege has been used by every president [throughout history](#), with George Washington, our very first president, citing the right to executive privilege by refusing to release documents to Congress regarding a failed military mission. Perhaps the most well-known assertion of executive privilege took place in 1974, when President Richard Nixon cited executive privilege after it was discovered that he had recorded conversations in the Oval Office. During the [Watergate](#) investigation, President Nixon and his aides were prosecuted for their involvement in the break-in at the Democratic National Committee headquarters and other illegal activities. This case, [U.S. v. Nixon](#) went all the way to the U.S. Supreme Court and addressed the question: Is the President's right to protect certain information, using his 'executive privilege' power, completely protected from judicial review?

In a unanimous decision, the Supreme Court ruled in favor of the United States and against President Nixon. In his [opinion](#), Chief Justice Warren Burger determined that presidents do have a right to executive privilege, but that the privilege was limited.

**To Think and To Do:** Read the following excerpt from Chief Justice Burger's opinion of the landmark case *U.S. v. Nixon*, what argument does he make for limiting executive privilege?

*"However, 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. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide."*



President Nixon's Oval Office Tape Recorder