

United States v. Nixon / Analyzing Oral Argument Questions—Answer Key

Teaching Note: Consider playing excerpts from the audio recordings of oral arguments available [here](https://www.oyez.org/cases/1973/73-1766) (<https://www.oyez.org/cases/1973/73-1766>)

Directions:

1. Read the **Background** section.
 2. Complete the **Analyzing Oral Argument Questions** activity (page 3).
 3. Complete the **You be the Justice** activity (page 7).
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Background

In appellate arguments, lawyers do not call witnesses or present new evidence. Rather, they advocate for a specific position. Lawyers for the petitioner challenge the ruling of a lower court while lawyers for the respondent advocate for the ruling of the lower court. The lawyers face a panel of judges who ask them questions. Those questions often fall into the following five categories.

1. **Questions that apply precedent:** Cases that make their way from the lower courts to the Supreme Court of the United States almost always rely on precedent. Precedent cases deal with similar issues that the Supreme Court has already decided. The justices typically rely on precedent in making their decision. This is called *stare decisis* and it ensures that cases presenting the same legal question are decided the same way. This reliance on precedent builds stability and reliability into the legal system—people can typically predict how a dispute will be resolved by looking to past decisions on the same legal question. On rare occasions the Supreme Court overturns an existing precedent when the existing precedent is no longer workable or when the original decision was wrongly decided.
2. **Questions that deal with the limitations of the Court:** The court system plays an integral role in separation of powers. Judges may ask questions as to whether the court would be overstepping its boundaries by making a ruling in a certain case. Judges in federal courts may be wary of infringing on matters reserved to the states or to a co-equal branch of the federal government.
3. **Hypothetical questions:** Judges focus not just on the dispute between the two parties in front of them, but with the broader legal rule that will be established. In order to see how a

new rule would work in a variety of circumstances, they often present alternate factual situations and ask the advocates to apply their proposed solution to the current case to the hypothetical case or cases.

4. **Questions that deal with a “slippery slope”:** What comes next? This is at the heart of any slippery slope question. The case at hand may deal with a seemingly minor issue but may have far-reaching implications for future cases. Lawyers have to be prepared to address the judges’ concerns that they are not upending the American justice system without knowing it.
5. **Questions that focus on the facts/procedural history/record:** Judges frequently want to know exactly what issues are in dispute based on the record that has been developed. They often ask factual questions or questions about the basis of a lower court’s opinion to clarify the nature of the issues in dispute. The record refers to statements made by witnesses in the trial court or decisions made by judges in lower courts. Judges may want the record clarified to arrive at a decision that is consistent with the original facts in the case.

Vocabulary

- **confidential:** information that is regarded as private and protected.
- **evidentiary privilege:** a person cannot be compelled to disclose protected information.
- **Fifth Amendment:** In this matter, the Fifth Amendment contains a protection from Congress making policy that would require an individual to incriminate or give evidence against themselves.
- **impeachment:** the process in the Constitution by which the president or other official is accused of a crime by the House of Representatives.
- **landmark decision:** Supreme Court case that changes the law or substantially impacts public policy.
- **reaffirmed:** a word typically used by lawyer to assert that the court has always supported a prior decision.
- **subpoena:** a court order, an instruction from a judicial agency requiring an individual to do something specific.
- **tangentially related:** a subject that might be indirectly affected.
- **unindicted co-conspirator:** an individual who may have been involved in planning a crime, but the government has chosen not to charge them with a crime.

Constitutional Amendment

- **Fifth Amendment to the U.S. Constitution**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Precedent

– *Marbury v. Madison* (1803)

Supreme Court case that established the process of judicial review. Chief Justice John Marshall is noted saying, “It is emphatically the province of the judicial department to what the law is.”

Analyzing Oral Argument Questions

On the following pages you will find excerpts from the oral arguments conducted at the U.S. Supreme Court for *United States v. Nixon*. Read the excerpts and answer the questions that follow. As you read, look for the types of questions the justices ask. Assess whether the lawyers are effective in their responses.

1. Argument excerpt #1

Justice William O. Douglas: *We start with a Constitution that does not contain the words “executive privilege,” So, why don’t we go on from there?*

Attorney for the Government, Leon Jaworski: *Passing to the merits, we would say that if there is any one principle of law that Marbury v. Madison cites, it is that it is up to the court to say what the law is and almost to the point of redundancy but necessary because it was a landmark decision. Chief Justice Marshall reasoned, we think, with clarity and emphasis that it is emphatically the province and the duty of the Judicial Department to say what the law is.*

And this Court of course, through the years, has reaffirmed consistently applied that rule. I don’t find anything written in the Constitution and nothing has been pointed that is a writing in the Constitution that relates to the right of the exercise of executive privilege on the part of the President.

Justice William J. Brennan, Jr.: *Is the term “executive privilege” an ancient one?*

Mr. Jaworski: *It has been used over a period of time. How ancient, Mr. Justice Brennan, I’m not in position to say. But, certainly, it has been one that’s been used over the years, but it is not one that I find it a basis for in the Constitution.*

Justice Potter Stewart: *Are you now arguing that there is no such thing as executive privilege.*

Mr. Jaworski: *No, sir, but I said it had no basis for it in the Constitution...*

- a. What type of questions are Justice Brennan and Justice Douglas asking when they ask about the constitutionality of executive privilege?

Both justices are asking questions that deal with the **limitations of the court**.

- b. The government's attorney, early in his argument, invoked *Marbury v. Madison* restating Chief Justice's John Marshall's position that it is the province of the Supreme Court to say what the law is. Why was it necessary for the attorney to cite *Marbury v. Madison*?

This case is politically controversial. Students should use this question to understand the Court's position in being a neutral arbiter in a case against the president. One of the questions in this case whether the Court is able to decide cases such as these so the attorney uses *Marbury v. Madison* to establish the Court's authority to do so. Additionally, the prestige associated with the decision in *Marbury v. Madison* lends weight to the attorney's argument if he is able to properly apply it.

2. Argument excerpt #2

Justice William J. Brennan, Jr.: *In Reynolds [a previous case], the Court ended up treating the assertion of privilege there as an evidentiary privilege, but it did allude to the fact that there was a constitutional question and said the Court wasn't reaching it, as I recall.*

Attorney for the Government, Leon Jaworski: *The issue of executive privilege, I should point out here, is a very narrow one.*

And, I think it's important that we bear this in mind. It doesn't involve a very large or broad privilege rights.

What it really narrows down to is somewhat simple but very important issue in the administration of criminal justice and that is whether the President, in a pending prosecution, can withhold material evidence from the court merely on his assertion that the evidence involves confidential communications and this is what really it gets down to.

We know that sovereign prerogatives to protect the confidentiality necessary to carryout responsibilities in the fields of international relations and national defense are not, here, involved.

And, there is no claim of any state secrets or that disclosure will have dire effect on a nation or its people.

Justice William O. Douglas: *It certainly would not be true in case the Fifth Amendment was involved, but that's not present here.*

Mr. Jaworski: *Not present, Mr. Justice Douglas, and there is no question about what the Fifth Amendment has very plainly written out in the Constitution and is invoked as a clear constitutional privilege.*

- a. What type(s) of question is Justice Brennan suggestion in his statement to the government's lawyer?

Justice Brennan is about a **precedent** (*Reynolds*). He is also trying to **clarify the record** with his question.

- b. Why does Justice Douglas raise the Fifth Amendment (see Constitutional Amendment on page 3) in the case against President Nixon?

The Fifth Amendment contains a clause that protects against self-incrimination. Justice Douglas is making it clear that the tapes are being suppressed on the grounds of executive privilege not on the basis of the tapes being self-incriminatory.

3. Argument excerpt #3

Attorney for the President, James St. Clair: *Mr. Chief Justice and members of the Court.*

My learned brother [the opposing lawyer] approached this case I think in the traditional point of view, namely, this is an attempt by a Special Prosecutor to obtain what he thinks is desirable evidence in a criminal prosecution that he has a responsibility for. Not once, however, did I hear him mention what I think is really involved, at least in a significant part of the impeachment proceedings before the House of Representatives.

Justice William O. Douglas: *None of our problems, are they?*

Mr. St. Clair: *I think, sir, they really are. First, by way of factual background –*

Justice Douglas: *The sole authority to impeach this in the House –*

Mr. St. Clair: *That's correct.*

Justice Douglas: *The sole authority to try this in the Senate.*

Mr. St. Clair: *Right, and the Court shall not be used to implement or aid that process which what has happened in this case.*

- a. This entire conversation exchange might come under the heading of which type of oral argument question?

This entire exchange deals with the limits of the Court's power.

- b. At the first moment Mr. St. Clair brings up the impeachment proceedings, Justice Douglas cuts him off saying that the impeachment is not the Court's concern. In your opinion, should the Court make a ruling while ignoring the obvious political consequences of their decision?

Student answers will vary but should recognize the apolitical role of the Court. However, it is fair to say that judges are politically influenced, live and work in a political area, and it would be naïve to believe their political opinions do not factor into their decisions.

4. Argument excerpt #4

Justice Potter Stewart: *How far does your point go?*

Let's assume that a murder took place on the streets of Washington of which the President happen to be one of the very few eyewitnesses, and somebody was indicted for that murder and the President was subpoenaed as a witness.

Would you say he cannot be subpoenaed now because there is an impeachment inquiry going on and the courts absolutely have to stop dead on their tracks of doing their ordinary judicial business?

Attorney for the President, James St. Clair: *I would not say that. I don't think he could be necessarily subpoenaed. I don't think the President is subject to the process of the court, unless he so determines he would give evidence.*

Justice Stewart: *You're saying that the courts, as I understand it, have to stop dead in their tracks from doing their ordinary business in any matter involving even, tangentially, the President of the United States if or as of when the Committee of the House of Representative is investigating impeachment.*

Mr. St. Clair: No, Justice Stewart, I'm not.

- a. What type of question is Justice Stewart asking? Explain.

Justice Stewart is proposing a **hypothetical question**. It also raises a “**slippery slope**” question jumping from President Nixon’s crimes to the more serious crime of murder.

- b. To what extent does the lawyer’s position on these questions endanger the system of checks and balances?

The lawyer’s position allows the president discretion over whether or not the courts can give him an order. A president who is guilty of a crime could simply deny permission of the court system to interview him. This would tip the balance of power notably towards the president.

5. Argument excerpt #5

Justice Thurgood Marshall: What, in any of these tapes, is involved in the impeachment proceedings?

Attorney for the President, James St. Clair: Well, if Your Honor please, the House of Representatives have subpoenaed these and more tapes.

Justice Marshall: Well, I don’t know which of the tapes. I assume you do.

Mr. St. Clair: No, I don’t.

Justice Marshall: You don’t know either. Well, how do you know that they’re subject to the greater privilege?

Mr. St. Clair: Regardless of what it is and may involve a number of subjects.

Justice Marshall: But you don’t know. ...You’re submitting the matter to this Court.

Mr. St. Clair: To this Court, under a special appearance on behalf of the President.

Justice Marshall: You still leave it up to this Court to decide it.

Mr. St. Clair: In the sense that this Court has an obligation to determine the law, alright? The President also has an obligation to carry out his constitutional functions.

Justice Marshall: You are submitting to this court for us to decide whether or not executive privilege is available in this case.

Mr. St. Clair: Well, probably, the question is even more limited than that. Is the executive privilege, which my brother [opposing counsel] concedes, absolute or is it only conditional?

Justice Marshall: I said, in this case. Can you make it any narrower than that?

Mr. St. Clair: No, sir.

- a. How might the conversation between Justice Marshall and Mr. St. Clair relate to *Marbury v. Madison*?

The conversation directed by Justice Thurgood Marshall is asserting the Court's role in saying "what the law is" – in this case Justice Marshall believes the role of the Court is determine what executive privilege is and what it is not.

- b. Do you believe that the Justices should have had access to the content of the tapes prior to making their decision?

Student answers will vary. On the one hand, if the judges heard the tapes then they would know for certain whether there were national security matters being discussed. On the other hand, the role of the Court is to decide on the principle not the facts.

- c. What might Justice Marshall's short style of questioning imply about his attitude toward the outcome of this case and Mr. St. Clair's argument?

Justice Marshall is undoubtedly hostile towards Mr. St. Clair's position. His short style of questioning shows that Marshall is trying to make a point and less likely to be persuaded otherwise.

You be the Justice

Write a question for each type that you would ask one of the attorneys if you were a justice hearing oral arguments in *United States v. Nixon*:

Student questions will vary but should reflect the descriptions of the 5 types of questions on pages 1-2.

- a. Question that applies precedent
- b. Question that deals with the limitations of the Court
- c. Hypothetical question
- d. Question that deals with a "slippery slope"
- e. Question that clarifies the facts or the record