

United States v. Nixon (1974)

" . . . Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the . . . [absolute] confidentiality of presidential communications."

— Chief Justice Warren Burger

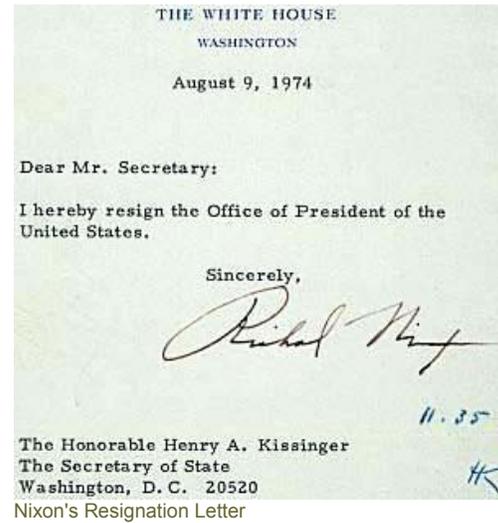


TABLE OF CONTENTS

Resources

- 2 [About landmarkcases.org](#)
- 3 [Teaching Recommendations Based on Your Time](#)
- 4 Background Summary and Questions
 - [Reading Level](#)
 - [Reading Level](#)
 - [Reading Level](#)
- 11 [Diagram of How the Case Moved Through the Court System](#)
[Listen to the Oral Arguments](#)
(online only)
- 13 [Key Excerpts from the Opinion](#)
[Full Text of the Opinion](#)
(online only)

Activities

The Case

- 16 [What Secrets Are Protected Under Executive Privilege?](#)
[National Archives Lesson: Should the Special Prosecutor Indict Former President Nixon?](#) (online only)

After The Case

- 18 [Nixon's Views on Presidential Power: Excerpts from a 1977 Interview with David Frost](#)
- 21 [Through the Years: Comparing Impeachments in U.S. History](#)
- 28 [President Clinton: The President as Defendant](#)
- 29 [The Legacy of Watergate: Rethinking Legal Ethics](#)

Additional Web Resources

(online only)

About [landmarkcases.org](http://www.landmarkcases.org)

This site was developed to provide teachers with a full range of resources and activities to support the teaching of landmark Supreme Court cases, helping students explore the key issues of each case. The "Resources" section features basic building blocks such as background summaries and excerpts of opinions that can be used in multiple ways. The "Activities" section contains a range of short activities and in-depth lessons that can be completed with students. While these activities are online, many of them can be adapted for use in a one-computer classroom or a classroom with no computer.

Depending upon the amount of time you have to teach the case, you may want to use one or more of the "Resources" or "Activities" in conjunction with one or more of the general teaching strategies. These general teaching strategies include moot court activities, political cartoon analysis, continuum exercises, and Web site evaluation.

If you have time constraints, look at the Teaching Recommendations on page 3.

Feel free to experiment with these materials!

Teaching Recommendations Based on Your Time

If you have one day . . .

- Have students complete the appropriate "Background" and discuss.
- For homework, have them read the excerpts from the opinion and answer the related questions.

If you have two days . . .

- Complete the activities for the first day.
- On the second day, discuss the Court's opinion and have students complete the activity titled "[What Secrets are Protected under Executive Privilege](#)"?
- For homework on the second day, have students complete the activity titled "Nixon's Views on Presidential Power: Excerpts from a 1977 Interview with David Frost."

If you have three days . . .

- Complete the activities for the first and second days.
- On the third day, have students complete the activity titled "[Through the Years: Comparing Impeachments in U.S. History](#)", which is divided into Parts I and II. Part I deals with the impeachment process itself and Part II addresses specific historical examples. If you are short on time or if your students have difficulty with the concepts, have students only complete Part I.
- Alternatively, have students examine the issues of executive privilege that were raised in the case of Clinton v. Jones in [President Clinton: The President as Defendant](#).

If you have four days . . .

- Complete the activities for the first, second, and third days.
- On the fourth day, have students complete the online [National Archives Lesson: "Should the Special Prosecutor Indict Former President Nixon"?](#)
- Alternatively, you may have students learn more about the effect of the Watergate scandal on legal ethics using [Watergate Legacy: Rethinking Legal Ethics or explore the scandal in-depth using Watergate Lesson Plan](#).

The "Web Resources" that appear on this page are some of the most comprehensive sites dealing with the Watergate Scandal. They have been included primarily for your information. Use them as you see fit. The activity, "The History of the Watergate Scandal: An Internet Scavenger Hunt" may be useful to students if you choose to have them peruse the sites on their own.

Background Summary and Questions • • •

In 1972, five burglars were caught breaking into the Democratic National Committee Headquarters at the Watergate Hotel and office complex in Washington, D.C. Media and government investigation of the break-in revealed that the burglars were associated with the campaign to re-elect Nixon. The inquiries also revealed that the president and his aides had probably abused their power in other ways as well.

During the congressional hearings on the break-in scandal, it was revealed that President Nixon had installed a tape-recording device in the Oval Office. The special prosecutor in charge of the case wanted to get tapes of the Oval Office discussions to help prove that President Nixon and his aides had abused their power and broken the law.

President Nixon tried to stop the special prosecutor from obtaining the tapes and even had him removed from his job. However, a new special prosecutor, supported by the ruling of a federal district court judge, again requested the tapes. The president responded to this demand by releasing edited transcripts and shortened versions of the tapes. His incomplete compliance with the special prosecutor's demands was challenged in another federal district court case. The court ordered the president to respond to all of the special prosecutor's requests. When the president appealed this decision to the U.S. Circuit Court of Appeals, the special prosecutor asked the Supreme Court of the United States to hear the case instead.



In front of the Supreme Court of the United States, President Nixon's lawyers argued that the case couldn't be heard in the courts because it involved a dispute within the executive branch. In case the Supreme Court disagreed, Nixon's lawyers also argued that the president's executive immunity and privilege should protect the tapes. The concept of executive privilege, though not specifically detailed in the U.S. Constitution, is based on the constitutional separation of powers. It provides a certain level of confidentiality of communication between the president and his aides, especially where defense and national security are concerned. President Nixon's lawyers argued for an absolute executive privilege based only on his discretion.

The special prosecutor, however, argued that executive privilege is not absolute and that in this case the confidentiality normally accorded a president and his aides had to give way to the demands of the legal system in a criminal case. To give the president absolute executive privilege, he claimed, would amount to an unchecked power that could undermine the rule of law.

Background Summary and Questions • • •

Questions to Consider:

1. Why might a president want to record conversations held in the Oval Office? Why do you think President Nixon taped his conversations even though he was discussing illegal activities with his aides?
2. Based on the reading, what is "executive privilege"?
3. While "executive privilege" cannot be found in the U.S. Constitution, it is derived from the separation of powers outlined there. Explain how applying the separation of power leads to the claim of executive privilege.
4. In what type of circumstance would the nation's interests allow the president to keep his communication with aides confidential?
5. Executive privilege and rule of law are both important concepts for American democracy. How should the courts determine which is more important when the exercise of executive privilege interferes with the rule of law?

Background Summary and Questions • •

In 1972, five burglars were caught breaking into the Democratic National Headquarters in the Watergate Hotel in Washington, D.C. Among other activities, the Democratic National Headquarters was responsible for raising money for and coordinating campaigns for Democratic candidates, including the presidential candidate. Media and government investigations discovered that the burglars were connected to the White House, which at the time was occupied by President Richard Nixon, a Republican. In addition, these investigations revealed that the president and his aides probably had abused their power in other ways as well.



Congress held hearings on the scandal to investigate wrongdoing by the president and his aides. During those hearings, the public discovered that President Nixon had installed a tape recorder in the Oval Office. These tape recordings probably had conversations between the president and his aides that could support some of the accusations against them. The special prosecutor in charge of the case wanted to hear these tapes, but President Nixon did not want to give them up. President Nixon even had the special prosecutor removed from his job to stop him from obtaining the tapes. However, the next special prosecutor also requested them. This time a federal court judge ruled that the president had to hand over the tape recordings.

In response, the president released edited transcripts and shortened versions of the tapes, but these were not good enough to meet the court order. The special prosecutor again challenged the president in the United States District Court. The District Court again ruled against the president and ordered him to give up the complete tapes. When the president appealed the District Court's ruling to the United States Circuit Court of Appeals, the special prosecutor asked the United States Supreme Court to step in and settle the dispute. The Supreme Court agreed to hear the case.

Before the Supreme Court, Nixon's lawyers argued that the courts could not hear the case because it was a dispute within the executive branch over which the courts had no power or jurisdiction. They also argued that the tapes should be protected by the president's executive privilege. Executive privilege means that the communication between the president and his aides has a certain level of confidentiality. While it is not a right specifically given to the president in the Constitution, it is based on the constitutional separation of powers. Executive privilege reflects the belief that those in the executive branch should be able to communicate with the president, sharing their ideas without concern that their opinions will become the knowledge of the other branches of the government or the public. Having this freedom encourages advisors to be as honest and forthcoming as possible, which helps the president to make an informed decision. This is particularly important in matters of national defense. President Nixon's lawyers argued that only the president should be able to decide when his communications with his aides can be revealed to the public or other branches of the government.

The Department of Justice, representing the people of the United States argued, however, that executive privilege was not absolute. In this case, those normally confidential communications were very important for a criminal case. If only the president had the power to decide when his communications could be revealed to the public, then he could cover up information about illegal activities and this would be dangerous for the legal system and the rule of law.

Background Summary and Questions ••

Questions to Consider:

1. Why might a president want to record conversations held in the Oval Office? Why do you think President Nixon taped his conversations even though he was discussing illegal activities with his aides?
2. Executive privilege itself cannot be found in the U.S. Constitution, but it comes from the separation of powers in the U.S. Constitution. Explain what executive privilege is and how it helps keep the executive branch independent from the other branches of government.
3. Describe a circumstance in which it would be beneficial to the nation for a president to keep communication with aides confidential.
4. Who should determine when the communications between a president and presidential aides should be revealed, the president or the courts? If the president never has to reveal conversations that are needed for a criminal trial, what effect could this have on the legal system?

Background Summary and Questions •

Vocabulary

investigators

Define:

Use in a sentence:

prosecutor (to prosecute)

Define:

Use in a sentence:

appealed (to appeal)

Define:

Use in a sentence:

executive privilege

Define:

Use in a sentence:

confidential (confidentiality)

Define:

Use in a sentence:

United States v. Nixon

In 1972, five burglars broke into the Democratic National Committee Headquarters. This is the national office of the Democratic Party. There, party members make decisions relating to political campaigns. They also decide how they will raise money to help the candidates.

The burglars were caught. Later, *investigators* discovered that President Nixon and his aides were involved in the burglary. They had hired people to break into the offices. They wanted to get information that would help Nixon get re-elected. Investigators discovered that the president and his aides had committed other illegal acts, too.



In the United States, the president has to follow the rule of law. If he breaks the law, he can be put on trial. Since President Nixon broke the law, the federal government decided to *prosecute* him. The government gathered evidence against him. They discovered that President Nixon had a tape recorder in the Oval Office. He taped most of what happened in his office. The tapes included conversations he had with his aides.

The prosecutor in the case believed that the tapes probably had information about the illegal things President Nixon and his aides had done. He asked President Nixon to turn over the tapes. Nixon said no. A federal judge told him he had to give the tapes to the prosecutor.

The president *appealed* the decision to the U.S. Circuit Court of Appeals. The prosecutor asked the Supreme Court of the United States to hear the case instead. The Court agreed to hear the case because it was so important.

President Nixon's lawyers argued that the president's tapes were protected by *executive privilege*. This is the belief that the conversations between the president and his aides are *confidential*. Sometimes, these discussions need to be private to protect the country. Other times, privacy is needed to protect the advisors. They need to be able to give the president advice without worrying about being criticized by other people. That way, they can be honest with the president. Their honest opinions help the president to make decisions.

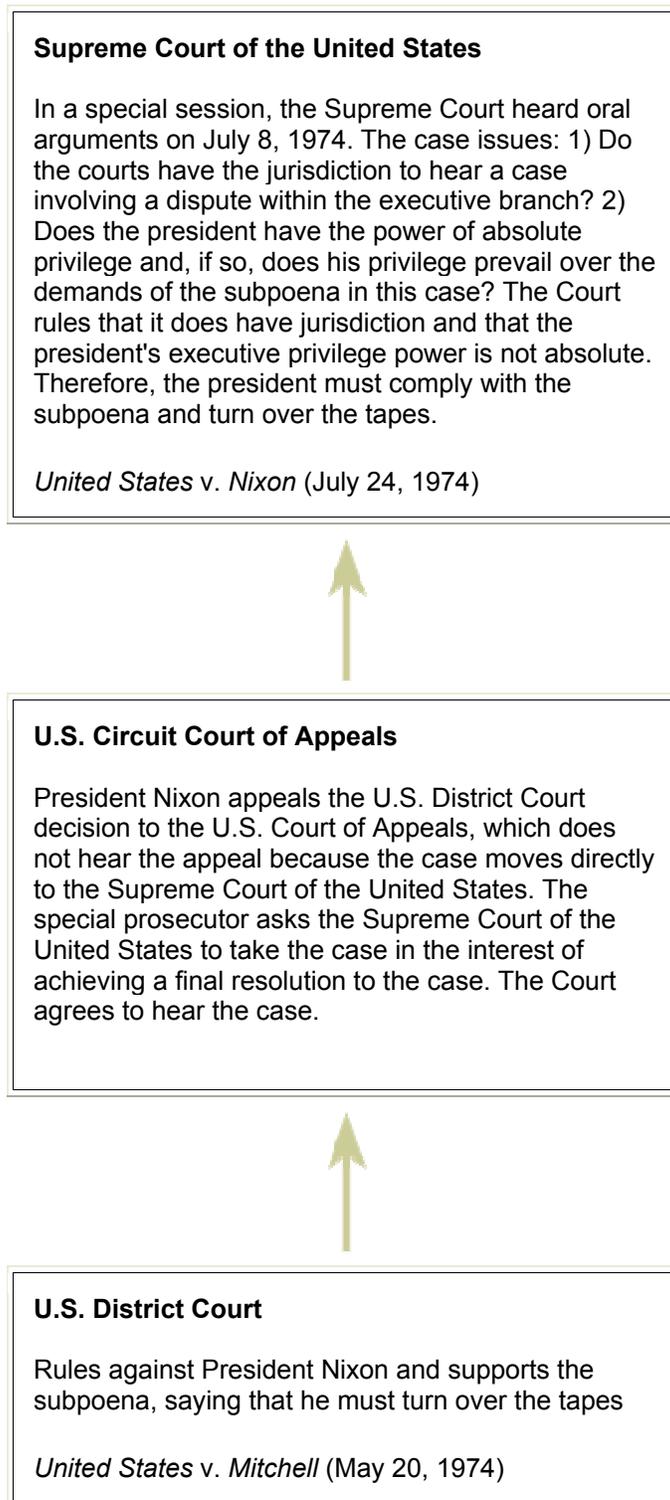
The lawyers for the United States said that the tapes were necessary to prove that the president had committed a crime. They argued that justice in this criminal case was more important than protecting the privacy of the president and his aides. Therefore, President Nixon should turn over the tapes.

Background Summary and Questions •

Questions to Consider:

1. Why did the prosecutor in the case want President Nixon's tapes?
2. Why would a president record his conversations in the Oval Office? Why do you think President Nixon taped his conversations when he was discussing illegal activities?
3. What is executive privilege? How could executive privilege help to keep the executive branch separate from the other branches of government?
4. Describe an example of a time when it would be important for a president to keep communications with aides confidential.
5. Who should decide when the communications between a president and presidential aides is made public, the president or the courts? Why?
6. Sometimes conversations the president has with his aides might be needed for a criminal trial. If the president does not have to reveal what is said in these conversations, how could this affect the legal system?

Diagram of How the Case Moved Through the Court System





President Nixon releases edited transcripts of 43 conversations, 20 of which had been subpoenaed. President Nixon refuses to release more material and tries to ignore the subpoena.

April 30, 1974



U.S. District Court

Judge John Sirica issues a subpoena, ordering President Nixon to turn over certain tape recordings of specifically named advisors and aides on particular dates.

In re Subpoena to Nixon (August 29, 1973)

Key Excerpts from the Opinion

The case was decided 8 to 0. Justice Rehnquist did not participate. Chief Justice Burger delivered the opinion of the Court.

[W]e turn to the claim that the subpoena should be quashed because it demands "confidential conversations between and President and his close advisors that it would be inconsistent with the public interest to produce" . . . The first contention is a broad claim that the separation of powers doctrine precludes judicial review of a President's claim of privilege. The second contention is that if he does not prevail on the claim of absolute privilege, the court should hold as a matter of constitutional law that the privilege prevails over the subpoena. . . .

In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President's counsel as we have noted, reads the Constitution as providing an absolute privilege of confidentiality for all Presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison* . . . that "it is emphatically the province and duty of the judicial department to say what the law is".

Since this Court has consistently exercised the power to construe and delineate claims arising under express powers, it must follow that the Court has the authority to interpret claims with respect to powers alleged to derive from enumerated powers.

In support of his claim of absolute privilege, the President's counsel urges two grounds, one of which is common to all governments and one of which is peculiar to our system of separation of powers. The first ground is the valid need for protection of communications between high government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion.

The second ground asserted by the President's counsel in support of the claim of absolute privilege rests on the doctrine of separation of powers. . . . Here it is argued that the independence of the Executive Branch within its own sphere . . . insulates a president from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential presidential communications.

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.

The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III.

Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch.

United States v. Nixon

A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.

But this presumptive privilege must be considered in light of our historic commitment to the rule of law. . . . We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.

In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice.

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

Key Excerpts from the Opinion

Questions to Consider:

1. What does the Supreme Court of the United States say about President Nixon's contention that the courts have no jurisdiction in this case? What was the power of the courts established by the case of *Marbury v. Madison* cited in this case?
2. Does the Court question the need for confidential communications between the president and his advisors?
3. The Court claims that the president's confidential communications must be balanced against, or considered in light of, other values. With what values, in this case, must the president's confidentiality be balanced? According to the Court, which values take precedence in this case?
4. If the Supreme Court of the United States had allowed President Nixon to keep the tapes private, Chief Justice Burger claimed that "the very integrity of the judicial system and public confidence in the system" was at risk. Do you agree with Chief Justice Burger? Explain your answer.
5. In the case of *United States v. Burr* (1807), Chief Justice John Marshall stated that "[I]n no case of this kind would a court be required to proceed against the president as against an ordinary individual." Has the Supreme Court in *United States v. Nixon* proceeded against the president as an ordinary individual? Why or why not?
6. *Should* the president be treated as an ordinary individual? Why or why not?

What Secrets Are Protected Under a Claim of Executive Privilege?

In *United States v. Nixon*, the President's lawyers claimed that he had an absolute right of executive privilege. Since the power of executive privilege is not expressly stated in the Constitution, there was some controversy over this matter.

For years, Presidents had claimed executive privilege on the grounds that there was a need to protect military, diplomatic, or national security secrets. The prevailing thought was that a president cannot be forced to share with other branches of government certain conversations, actions, or information if sharing that information could place the United States foreign relations at risk. This "state secrets privilege" was generally accepted.

In the Supreme Court case of *United States v. Nixon*, Nixon's lawyers argued that executive privilege should extend to certain conversations between the president and his aides, even when national security is not at stake. They argued that in order for aides to give good advice and to truly explore various alternatives, they had to be able to be candid. If they were going to issue frank opinions, they had to know that what they said was going to be kept confidential.

In the opinion, the Supreme Court conceded that there is indeed a privilege for "confidential executive deliberations" about matters of policy having nothing to do with national security. This privilege is constitutionally based, deriving from the separation of powers. However, the Court held that this privilege is not absolute but can be overcome if a judge concludes that there is a compelling governmental interest in getting access to the otherwise privileged conversations, as in the case of the Nixon tapes.

Read each "secret" on the next page. In the space to the left of the "secret" write "SS" for "state secrets" or "CED" for "confidential executive deliberations." To the right, mark "P" if you think the secret should be protected under executive privilege or "NP" if you think the secret would not be protected. Explain why you think the secret would or would not be protected.

United States v. Nixon

State Secret (SS) or Confidential Executive Deliberation (CED)?	"Secret"	Protected by executive privilege (P) or not protected (NP)?
SS	The American ambassador to France has been having a secret affair with a single woman who is not his wife	NP No risk involved to United States
	Tobacco companies sued by smokers for allegedly causing cancer want to defend against the lawsuits by claiming that federal subsidies to tobacco growers show that there is a national policy to allow smoking. They want to take testimony from the Secretary of Agriculture about her conversations with the President about including such subsidies in the government's budget	
	A team of Marines is working secretly to train North Korean farmers to overthrow their government	
	Representatives from the United States and Russia have been meeting in secret to come up with a plan to reduce the spread of nuclear weapons	
	Members of the California National Guard receive secret information that terrorists are planning to attack the Golden Gate Bridge in San Francisco	
	The President's Secretary of Defense is going to give members of the Air Force's 777 Fighter Squadron secret strategic commands during a war.	
	An employee in the American embassy in Kenya has been secretly spying on the United States	
	The first lady forms a task force on health care and insists that records of all of her meetings with government officials and health care providers are kept secret.	
	The Vice-President conceals the identity of persons with whom he consulted in developing the administration's energy policy.	
	Accused of wrongdoing, the President claims that his aides can not be called to testify in grand jury proceedings	
	The House Government Reform and Oversight Committee Requests Justice Department documents that are related to campaign finance abuses.	
	After pardoning several individuals, the President refuses to allow his top staff members to testify before a House panel investigating the pardons.	

Nixon's Views on Presidential Power: Excerpts from an Interview with David Frost

The following is an excerpt from an interview with former President Nixon conducted by David Frost. It aired on television on May 19, 1977.

- FROST:** The wave of dissent, occasionally violent, which followed in the wake of the Cambodian incursion, prompted President Nixon to demand better intelligence about the people who were opposing him. To this end, the Deputy White House Counsel, Tom Huston, arranged a series of meetings with representatives of the CIA, the FBI, and other police and intelligence agencies.
- These meetings produced a plan, the Huston Plan, which advocated the systematic use of wiretappings, burglaries, or so-called black bag jobs, mail openings and infiltration against antiwar groups and others. Some of these activities, as Huston emphasized to Nixon, were clearly illegal. Nevertheless, the president approved the plan. Five days later, after opposition from J. Edgar Hoover, the plan was withdrawn, but the president's approval was later to be listed in the Articles of Impeachment as an alleged abuse of presidential power.
- FROST:** So what in a sense, you're saying is that there are certain situations, and the Huston Plan or that part of it was one of them, where the president can decide that it's in the best interests of the nation or something, and do something illegal.
- NIXON:** Well, when the president does it that means that it is not illegal.
- FROST:** By definition.
- NIXON:** Exactly. Exactly. If the president, for example, approves something because of the national security, or in this case because of a threat to internal peace and order of significant magnitude, then the president's decision in that instance is one that enables those who carry it out, to carry it out without violating a law. Otherwise they're in an impossible position.
- FROST:** So, that in other words, really you were saying in that answer, really, between the burglary and murder, again, there's no subtle way to say that there was murder of a dissenter in this country because I don't know any evidence to that effect at all. But, the point is: just the dividing line, is that in fact, the dividing line is the president's judgment?
- NIXON:** Yes, and the dividing line and, just so that one does not get the impression, that a president can run amok in this country and get away with it, we have to have in mind that a president has to come up before the electorate. We also have to have in mind, that a president has to get appropriations from the Congress. We have to have in mind, for example, that as far as the CIA's covert operations are concerned, as far as the FBI's covert operations are concerned, through the years, they have been disclosed on a very, very limited basis to trusted members of Congress. I don't know whether it can be done today or not.
- FROST:** Pulling some of our discussions together, as it were; speaking of the Presidency and in an interrogatory filed with the Church Committee, you stated, quote, "It's quite obvious that there are certain inherently government activities, which, if undertaken

by the sovereign in protection of the interests of the nation's security are lawful, but which if undertaken by private persons, are not." What, at root, did you have in mind there?

NIXON: Well, what I, at root I had in mind I think was perhaps much better stated by Lincoln during the War between the States. Lincoln said, and I think I can remember the quote almost exactly, he said, "Actions which otherwise would be unconstitutional, could become lawful if undertaken for the purpose of preserving the Constitution and the Nation."

Now that's the kind of action I'm referring to. Of course in Lincoln's case it was the survival of the Union in wartime, it's the defense of the nation and, who knows, perhaps the survival of the nation.

FROST: But there was no comparison was there, between the situation you faced and the situation Lincoln faced, for instance?

NIXON: This nation was torn apart in an ideological way by the war in Vietnam, as much as the Civil War tore apart the nation when Lincoln was president. Now it's true that we didn't have the North and the South—

FROST: But when you said, as you said when we were talking about the Huston Plan, you know, "If the president orders it, that makes it legal", as it were: Is the president in that sense—is there anything in the Constitution or the Bill of Rights that suggests the president is that far of a sovereign, that far above the law?

NIXON: No, there isn't. There's nothing specific that the Constitution contemplates in that respect. I haven't read every word, every jot and every tittle, but I do know this: That it has been, however, argued that as far as a president is concerned, that in war time, a president does have certain extraordinary powers which would make acts that would otherwise be unlawful, lawful if undertaken for the purpose of preserving the nation and the Constitution, which is essential for the rights we're all talking about.

© 1977 by The *New York Times* Company. Reprinted by permission.

From the third Nixon-Frost interview, *The New York Times*, May 20, 1977, p. A16.

Nixon's Views on Presidential Power: Excerpts from an Interview with David Frost

Questions to Consider:

1. Article II of the Articles of Impeachment against President Nixon stated that the president "repeatedly engaged in conduct violating the constitutional rights of citizens". If the president took action against antiwar groups, which constitutional rights did he likely violate?
2. In this interview, how does President Nixon justify these alleged violations of constitutional rights?
3. It has often been said that in the United States we have the rule of law, not men. What do you think this means? Does President Nixon's statement that "when the president does it [something illegal], that means that it is not illegal" support the idea that the United States has the rule of law, not men? Why or why not?
4. President Nixon states that there are other ways of containing a president's power besides the rule of law. What, according to Nixon, keeps a president in check? Do you think these checks are enough to prevent the abuse of power by a president?
5. President Nixon compares the situation he faced as president during the Vietnam War with the situation that Lincoln faced during the Civil War. He uses that comparison to support the idea that presidents may have to take extraordinary, even illegal, actions to hold the nation together and preserve its security. Does Nixon's comparison stand up? In other words, from your understanding of the historical period and President Nixon's actions, was he justified?

"Through the Years: Impeachments in U.S. History"

Directions

Read the following excerpts from the Constitution and complete the graphic organizer on the next page.

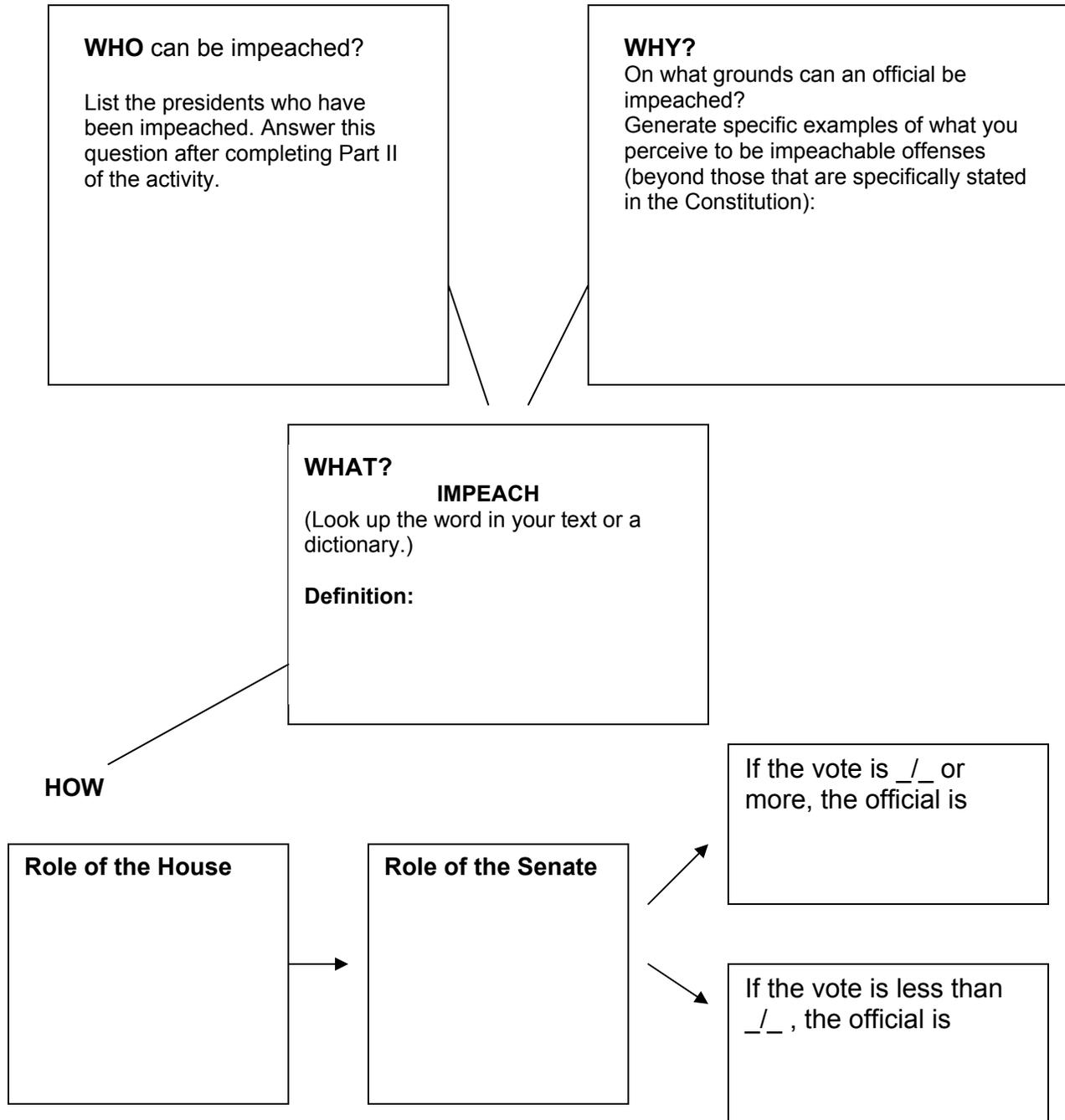
Part I. Understanding the Impeachment Process

Article I, Section 2 of the United States Constitution says, in part, *"The House of Representatives shall have the sole power of Impeachment."*

Article 1, Section 3 of the United States Constitution says, in part *"The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no person shall be convicted without the Concurrence of two thirds of the members present."*

Article II, Section 4 of the United States Constitution says, *"The President, Vice President and all civil Officers of the United States, shall be removed from office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."*

Impeachments in U.S. History Graphic Organizer



Part II

President Nixon was neither the first or last American president to be threatened with impeachment proceedings. In 1868, the United States House of Representatives issued eleven articles of impeachment against President Andrew Johnson. In 1974, the House Judiciary Committee produced three articles of impeachment against President Richard Nixon. Before the full House could vote, Nixon resigned. In 1998, the House Judiciary Committee introduced four articles of impeachment against President Bill Clinton, two of which were approved by the entire House.

Directions

1. Read the summaries from the articles of impeachment issued against each president which begin on the next page.
2. In the chart provided, summarize the most serious accusations.
3. Then, in the next column, determine if the accusations constituted "high crimes and misdemeanors" and warranted an impeachment.
4. Your teacher will divide the class into the "House" and the "Senate", with approximately 2/3 of the class in the House and the remaining 1/3 in the Senate.
5. The House will briefly debate the accusations against Johnson and decide whether or not to impeach him. If the House does impeach Johnson, then the Senate will vote on whether to convict him.
6. Repeat Procedure #5 for Presidents Nixon and Clinton.

President	Most Serious Accusations	Do these accusations constitute high crimes and misdemeanors? Is there a valid reason to impeach? Why or why not?
Andrew Johnson		
Richard Nixon		
Bill Clinton		

Articles of Impeachment against President Johnson, 1868

The full House of Representatives passed (eleven articles of impeachment. In the Senate, the vote fell short of the 2/3 majority that was required to convict Johnson and remove him from office.)

RESOLVED, That Andrew Johnson, President of the United States. . . .

Article One: . . . did unconstitutionally [without the advice and consent of the Senate, as required in the 1867 Tenure of Office Act] issue an order removing Secretary Edwin M. Stanton from his position as the head of the Department of War. . . .

Article Four: . . . did unlawfully attempt to intimidate the Secretary for the Department of War [to cause his resignation from the post]. . . .

Articles Five, Six and Seven: . . . did unlawfully conspire with another government official to prevent the execution of the Tenure of Office Act and An Act to Define and Punish Certain Conspirators. . . .

Article Ten: . . . did, designing and intending to set aside the rightful authorities of Congress, attempt to bring into ridicule, disgrace, hatred, and contempt the United States Congress...by saying things such as..."We have seen a Congress in a minority assume to exercise power which, if allowed to be consummated, would result in despotism or monarchy itself. . . . "

Article Eleven: . . . did, in disregard to the Constitution, declare in a public speech that the Thirty-Ninth Congress of the United States was not a valid Congress for all of the people in the United States . . . thereby denying its power. . . .

Articles of Impeachment against President Nixon, 1974

These articles were passed by the House Judiciary Committee but never voted upon by the full House because President Nixon resigned before a vote could occur.

RESOLVED, That Richard M. Nixon, President of the United States, is impeached for high crimes and misdemeanors. . . .

Article One: [for] making false or misleading statement to delay, cover up, or conceal evidence relating to the Watergate break-ins by:

- making false and misleading statements to the government and the people
- withholding information
- allowing/encouraging witnesses to give false or misleading statements
- attempting to interfere with FBI and other investigations into the break-ins
- allowing secret payments to influence witnesses
- attempting to misuse the CIA
- leaking information about the investigation to help the accused
- insinuating that people who refuse to testify against him or who give false testimony will receive favors

Article Two: . . . [for having] engaged in conduct violating the constitutional rights of citizens . . . and impairing the due and proper administration of justice . . . by:

- using confidential tax return information to initiate tax audits in a discriminatory manner
- misusing the FBI, Secret Service, and other government employees by allowing their information to be used for purposes other than national security or the enforcement of laws
- allowing a secret investigative unit within his office
- using campaign contributions and the CIA in an attempt to sway the fair trial process
- has failed in faithfully executing the law
- knowingly misusing the executive power by interfering with agencies within the executive branch

Article Three: . . . has willfully disobeyed the subpoenas of and failed without lawful cause or excuse to produce papers and information for the House Judiciary Committee . . . assuming to himself the functions and judgments given to the House of Representatives by the Constitution.

Articles of Impeachment against President Clinton, 1998

While four articles of impeachment were created by the House Judiciary Committee, only the two below were approved by the full House. In the Senate, the vote fell short of the 2/3 majority that was required to convict Clinton and remove him from office.

RESOLVED, That William Jefferson Clinton, President of the United States, is impeached for high crimes and misdemeanors . . .

Article One: In his conduct while President of the United States . . . in violation of his constitutional oath to faithfully execute the office of the President . . . has . . . undermined the integrity of his office . . . betrayed his trust as President . . . and acted in a manner subversive of the rule of law by:

- willfully corrupting and manipulating the judicial process of the United States for his personal gain and exoneration
- willfully committing perjury by providing false and misleading testimony to the grand jury in relation to his relationship with an employee
- willfully committing perjury by providing false and misleading testimony to the grand jury in relation to prior perjurious testimony in a civil rights action brought against him
- allowing his attorney to make false and misleading statements in the same civil rights action
- attempting to influence witness testimony and slow the discovery of evidence in that civil rights action

Article Three: . . . has [in the Paula Jones Case] prevented, obstructed, and impeded the administration of justice by:

- encouraging a witness to give a perjurious affidavit
- encouraging a witness to give false testimony if called to the stand
- allowing and/or encouraging the concealment of subpoenaed evidence
- attempting to sway a witness testimony by providing a job for that witness
- allowing his attorney to make misleading testimony
- giving false or misleading information to influence the testimony of a potential witness in a Federal civil rights action
- giving false or misleading information to influence the testimony of a witness in a grand jury investigation

For Further Thought:

1. In your opinion, what constitutes "high crimes and misdemeanors"?
2. Has Congress ever impeached a president for behavior that you do not consider being a "high crime or misdemeanor?" If so, why do you think Congress did this?
3. Does the Congressional power of impeachment assist or impede the system of checks and balances in the United States? Explain.

President Clinton: The President as Defendant

Although a sitting president has immunity from litigation arising from actions performed in his official capacity, that immunity does not extend to actions arising from his private conduct nor does it allow him to postpone litigation while he is in office.

The issue of executive privilege took front stage when President William Jefferson Clinton was sued for actions alleged to have occurred before he was president. Paula Jones filed a civil suit in 1994, alleging that President Clinton propositioned her in a Little Rock hotel room three years earlier, when he was governor of Arkansas and she was a low-level state employee. She sought damages for "willful, outrageous, and malicious conduct" arising from the allegations of sexual harassment and sexual assault.

Clinton's attorneys argued that the trial should be postponed while Clinton was in office because the litigation would distract him from his presidential duties. In December 1994, a federal district court judge ruled that a trial could not take place while Clinton was in office because of the potential interference with official duties. The United States Court of Appeals for the Eighth Circuit reversed the lower court decision.

Clinton appealed to the United States Supreme Court. The Court agreed to hear the case to decide whether civil litigation against an incumbent president must in all but exceptional cases be delayed until after he leaves office. Clinton's legal team raised two main arguments in support of its position that the case should be postponed. First, they argued that constitutional immunity for a president's official actions extends to his unofficial conduct. Second, they argued that the separation of powers doctrine, which ensures that none of the three branches of government infringes on another, forbids a trial judge to force a sitting president to defend himself in a lawsuit.

The Court rejected both of Clinton's arguments. In a 9 to 0 decision in May 1997, the Court ruled that Jones could move forward with her sexual harassment lawsuit because nothing in the Constitution allows a sitting president to postpone a private civil damages lawsuit while he is in office. The Court thought it was unlikely the case would burden Clinton's time. Without commenting on the merits of Jones case, the Court said Jones is entitled to her day in court.

A majority of the Court was un-persuaded by the concern that a failure to postpone private litigation would be an invitation to excessive litigation. They rejected the notion that "our decision will generate a large volume of politically motivated harassing and frivolous litigation." Writing for the Court, Justice Stevens said: "If the past is any indicator, it seems unlikely that a deluge of ... litigation will ever engulf the Presidency." The opinion noted that only three sitting presidents—Theodore Roosevelt, Harry Truman, and John F. Kennedy—had been defendants in civil litigation involving their actions prior to taking office and those cases were all either quickly dismissed or settled.

Only Justice Breyer wrote a separate concurring opinion to express his concerns about a president being subjected to harassing litigation. "[P]redicting the future is difficult, and I am skeptical," he said.

Questions for Consideration

Many commentators discuss the increasing litigiousness (willingness to sue) in American society. If Americans today are more likely to sue, is the Court correct in dismissing concerns that a sitting president may be tied up in litigation that interferes with his duties? (In tackling this issue, research the impact that Paula Jones' allegations had during Clinton presidency.)

The Court was in part motivated by a concern for the injured plaintiff's rights. What might be the consequence if a person whose injuries were caused by a president had to wait four or even eight years before having her day in court?

Watergate Legacy: Rethinking Legal Ethics

The Watergate scandal of the early 1970s resulted in increased attention to the regulation of the legal profession. Beyond public outrage at efforts by President Nixon to coverup the break-in at the headquarters of the Democratic National Committee, the American public was also disturbed by the number of lawyers involved in the scandal. Virtually all of the main actors in the scandal were lawyers. Some 29 lawyers were the subject of disciplinary proceedings as a result of Watergate.

Traditionally states, as opposed to the federal government, serve as the primary regulator of legal ethics in this country. The majority of states have rules patterned after the American Bar Association's (ABA) Model Rules of Professional Conduct. This is a set of guidelines that help states craft ethical rules for lawyers. The American Bar Association is a voluntary professional organization with 400,000 members that assists lawyers and judges in their work and promotes efforts to improve the legal system. Violations of a state's rules of professional conduct can result in disbarment (suspension of a lawyer's license to practice law).

One of the most important ethical rules for lawyers is the right to keep attorney-client communications confidential. Many believe it is necessary to allow clients to talk openly with their attorneys and gain advice about how to properly comply with the laws or form proper defenses and legal strategies. However, during the Watergate scandal, it seemed that many lawyers were aware of and even assisted in fraudulent activities and tried to use confidentiality and their role as attorneys to escape punishment. For example, two top attorneys involved were fully aware of the plans for the break-in. If either one had reported the misconduct, the nation likely would have been spared the Watergate scandal. But the attorneys did not reveal their knowledge of the future crimes and instead later used their status as lawyers to defend their actions. Many people were frustrated by what they viewed as lawyers using the rules of confidentiality and other rules of professional conduct to avoid responsibility to society.

The legal profession responded to Watergate in a few ways. New emphasis was placed on professional responsibility courses in the law schools. For the first time, by the late 1970s, every law school in the country offered a course on professional responsibility. Bar examiners increasingly added Professional Responsibility to those subjects tested on the bar exam, tests required for a lawyer to get licenses in a particular state. The American Bar Association, which had only a few years earlier adopted the Model Code of Professional Responsibility, also embarked on a project that would lead to the wholesale revision of the Code.

Interestingly, the federal government did not itself seek to regulate the legal profession. Rather, reforms in the legal profession in response to Watergate were led by the ABA, the state courts and the state bar associations.

Watergate Legacy: Rethinking Legal Ethics

Questions for Consideration

As discussed above confidentiality is an important part of an attorney-client relationship. Since Watergate most ethical rules allow an attorney to reveal a client's confidences if they relate to a future crime or a fraud but not a past crime. Furthermore, ethical rules generally require a lawyer to remove herself from representing any client who has tried to use the lawyer's services to assist in a crime or fraud. Why would ethical rules make a distinction between confidences based on whether they relate to future or past crime? Debate the wisdom and effectiveness of such a rule.

What are the advantages and disadvantages of leaving ethical rules to state regulation rather than federal regulation?

Talk to a local attorney or contact your state bar association to learn the applicable legal rules in your state. Refer to <http://www.abanet.org/cpr/links.html>.