

Topic: Imagining Reversal of *Marbury v. Madison* & *United States v. Nixon* What? No Judicial Review or Limits on Executive Privilege?

Time:
1 - 2 class periods

Historical Period:

Core:
US I 6120 - 0603
US II 6250 - 0102
Gov. 6210 - 0201

Objectives: Students will:

1. Hypothesize possible legal and social difficulties that could have arisen if either *Marbury v. Madison* or *United States v. Nixon* had been ruled on differently by the Justices.
2. Analyze and evaluate the historical significance of the decision *Marbury v. Madison*.
3. Analyze and evaluate the historical significance of the decision *United States v. Nixon*.
4. Work cooperatively as group members.

Procedure

1. Give students two minutes to list as many possible answers as they can think of to the question: “How would your life be different if the minimum driving age in the U. S. were 21?”
2. Ask the students to share their ideas. List answers on the board. Repeat the process with the question: “How would life in America be different if school were not compulsory?”
3. Then ask students, “By looking at the changes that would occur in America if the driving age were raised or school were not compulsory, what can we say about their significance to our lives as citizens?” Now share the lesson’s objectives with the class.

Instructional Input and Check for Prior Learning

1. Review *Marbury v. Madison* with students by asking them to share what they recall of the historical background and legal issues of the case. See Handouts 1 and 2.
2. Ask the students to explain what the most significant element of the Court’s decision was. (NOTE: Be sure that Marshall’s decision giving the Court the power of judicial review is defined and discussed.) See Handouts 3 and 4.
3. Review *U. S. v. Nixon* with students by asking them to share what they remember of the historical background of executive privilege and legal issues of the case. See Handout 5.

Additional Resources:

1. Handout 1: The Case of *Marbury v. Madison*
2. Handout 2: Issues of the *Marbury v. Madison* Case
3. Handout 3: John Marshall’s Decision in *Marbury v. Madison*
4. Handout 4: Section 13 of the Judiciary Act of 1789 and Article III, Section 2, of the U. S. Constitution
5. Handout 5: A Brief History of Executive Privilege, From George Washington Through Dick Cheney
6. Handout 6: Group Work for *Marbury v. Madison*
7. Handout 7: Group Work for *United States v. Nixon*
8. Handout 8: Evaluating the Case

Arthur:
Natalie Huggins

Procedure continued

4. Ask students who the Court ruled in favor of and what the Court's justification was for their decision. (NOTE: Be sure students understand that the ruling allowed the Supreme Court to examine the validity of a President's claim to "executive privilege" when there was a question of possible criminal conduct.)
5. Divide the class into four groups. Two groups will receive the background information about *Marbury v. Madison*, and the other two groups will receive the background information about *U. S. v. Nixon*. As a group, they will complete either Handout 6 or 7. After answering the questions, they will prepare a presentation for the class that demonstrates a possible difficulty that could have arisen in America if their case had been decided differently by the Supreme Court. Students should be encouraged to be creative. Possible forms for the presentation could be a skit, news broadcast, song, or rap tune. Props, costumes, and sound effects often enhance presentations.

Student Activity/Guided Practice

1. As soon as members of each of the four groups have gathered in separate areas of the room, they should begin to complete either Handout 6 or 7 together, including developing, outlining, writing, and rehearsing their presentations.
2. After the students make their presentations, conduct a debriefing session. The two groups who had the reversal of the *Marbury v. Madison* decision should go first followed by the two groups who had the reversal of *U. S. v. Nixon*. Suggested questions for the debriefing follow. However, questions can be modified or added depending upon the unique issues raised in the students' presentations.

Debriefing of *Marbury v. Madison*

1. Ask members of the class who were not in the *Marbury v. Madison* groups:
 - a. What problem was portrayed by group 1?
 - b. What problem was portrayed by group 2?
 - c. Do those seem like realistic situations that could have arisen if the Court did not have the power of judicial review? Why or why not?
2. Ask members of each of the *Marbury v. Madison* groups:
 - a. Was it easy or difficult to think of a problem (or situation) that could have arisen in America if the Court did not have the power of judicial review?
 - b. Were there elements of your presentation that you think the rest of the class might have not understood fully? Explain.
 - c. Why do you think the actual Court's ruling is considered to be a "landmark" decision by many scholars of the Constitution?
 - d. Allow the students to ask members of other groups questions.

Procedure continued

Debriefing *U. S. v. Nixon*

1. Ask students who were not in either of the *U. S. v. Nixon* groups:
 - a. What situation was portrayed by group 1?
 - b. What situation was portrayed by group 2?
 - c. If the President had unlimited use of executive privilege, who might be adversely affected? Why?
 - d. If the President had unlimited use of executive privilege, would anyone benefit? Explain.
 - e. If a President appeared to abuse his right to executive privilege, would he ultimately be answerable to anyone? Who? (Hint: How did he get his job? In four years, what must he do to keep his job?)
2. Ask students who were in each of the *U. S. v. Nixon* groups:
 - a. Was it easy or difficult to develop a situation that might occur if the Supreme Court had ruled that to maintain separation of powers, the President had an absolute right to the claim of executive privilege? Explain.
 - b. Do you think the Court's actual decision in *U. S. v. Nixon* denied necessary power to the President? Why or why not?
 - c. Do you think the actual decision maintained or weakened the balance of power between the three branches? Explain.
3. Allow members of different groups to ask one another questions.

Closure/Evaluation

Provide each student with Handout 8. Students are to complete the questions independently and submit their answers to the instructor.

THE CASE OF *MARBURY v. MADISON*

Historically, and even today in many parts of the world, a change in the political or ideological direction of a government is preceded by a revolution or assassination. The election of 1800 in America brought about a peaceful exchange of power from a defeated, outgoing leader to the victorious opposition. John Adams had lost the presidential election to his political rival, Thomas Jefferson. In Congress, the party in majority changed from the Federalists to the Jeffersonian Republicans.

The two parties' views on the future of the nation were very different. Adams' presidency favored the interests of bankers, large commercial interests, and large shipping businesses. Jefferson, on the other hand, was the champion of the common people and the farmer. Adams had supported the Alien and Sedition Act of 1798 which had sent men to prison for criticizing the government. Jefferson had long been a proponent of open public scrutiny of the government. In foreign affairs, Adams encouraged closer ties with Great Britain. Jefferson felt the United States should retain and strengthen its ties with France, our oldest ally and Britain's primary enemy.

Adams and his fellow Federalists were concerned that all their past accomplishments in developing a strong national government would be lost in the Jefferson administration. Back then, the time between the election in November and the inauguration in March was five months. This gave Adams plenty of time to insure that Jefferson would not undo all his work. In January, Adams took his first step by appointing John Marshall the Chief Justice of the Supreme Court. Then in February, Federalist Congressmen created new offices in the federal judiciary. Adams was able to appoint people from his own party and obtain Senate confirmation for them before he left office on March 4, 1801. All of this was done within the constitutional authority of his office. Adams believed Federalist judges would favorably interpret the laws passed by his party, thus preserving the work they had done. During the hurried race to appoint, confirm, and sign the commissions, some went undelivered. One of these positions was to go to William Marbury, as justice of the peace in the new national capital of Washington, D. C.

On March 4, 1801, Jefferson became President, and his political party became the majority in Congress. William Marbury requested his commission from the new Secretary of State, James Madison. Jefferson, having learned of Adam's plan to flood the judiciary with political allies, refused to honor the commission and ordered Madison not to deliver it. Marbury then went to the Supreme Court for help.

Marbury petitioned the Court to issue a *writ of mandamus*, which is a court order directing a government official to perform a specific duty. Section 13 of the Judiciary Act of 1789 gave the Supreme Court the power to issue such a writ to persons holding public office and granted the Supreme Court original jurisdiction (or the authority to hear the case first).

This set of circumstances posed a difficult dilemma for John Marshall. On the one hand, Marshall felt Marbury clearly had a legal right to his commission. An act of Congress had created the position of justice of the peace. A President had appointed him, and the Senate had approved that appointment, as prescribed in the Constitution. Since the commission was legally signed and sealed, Marshall believed it was Madison's duty to deliver it. Thus, if Marshall refused to order Madison to give Marbury his commission, he would be admitting that he, and the Supreme Court, lacked the power to uphold the law.

However, if the Court issued the writ, Madison and Jefferson could ignore it. The Court had no ability to enforce its decisions except through the executive branch, and that, obviously, was not an option here. Such a display of weakness by the Court might give its already low prestige a fatal blow. In addition, many in Jefferson's party were privately threatening impeachment of justices if Marshall issued the writ.

Class Discussion Questions

1. What did Adams hope to accomplish by appointing so many Federalists to the Federal Judiciary?
2. What authority in the Constitution allowed him to do this?
3. Why do you think Jefferson refused to give Marbury his commission?
4. What did Marbury want the Supreme Court to do and by what authority could they do it?

HANDOUT 2

ISSUES OF THE CASE

- Is Marbury entitled to his commission?
- What could Marbury do about his undelivered commission?
- Does the Supreme Court have the authority to help Marbury receive his commission?

Here are the options Marshall faced in this case. Review each with your group and determine the possible consequences. (Refer to Section 13 of the Judiciary Act and Article III, Section of the Constitution in Handout 4.)

1. Issue the writ of mandamus to force Madison to deliver the commission.
2. Issue the writ to Marbury.
3. Appeal to Congress for more judicial power.
4. Determine whether the authority given to the Court by Section 13 of the Judiciary Act was in line with the Constitutional powers granted to the Supreme Court.

Option 4 Questions:

1. In what cases does the Supreme Court have original jurisdiction?
2. Do you think the phrase “other public ministers” refers only to foreign diplomatic officials or any public officials including justices of the peace?
3. Though the Judiciary Act of 1789 gives the Court the power to hear a case involving a *writ of mandamus*, does the Constitution grant original jurisdiction to the Court to hear such a case?
4. If a conflict exists between this Congressional law and the Constitution, how would you resolve it?

**JOHN MARSHALL'S DECISION
IN *MARBURY v. MADISON***

As stated earlier, this set of circumstances posed a difficult dilemma for Marshall and the Court. Since the commission was legally signed and sealed, Madison should deliver the commission to Marbury. But what could the Court do if it issued the *writ of mandamus* and Jefferson and Madison (political rivals of Marshall and the Federalist dominated judiciary) chose to ignore it? The Court had no enforcement powers. Yet, if Marshall refused to order Madison to give Marbury his commission, he would be admitting the Supreme Court lacked the power to uphold the law. Such a display of weakness by the Court might give its already low prestige a fatal blow and would place the Executive Branch above the law.

John Marshall agreed that Marbury had the right to the commission he demanded, since his appointment followed proper procedure according to the Constitution and the Judiciary Act of 1789. However, Marshall also decided that the Supreme Court had no right, under the Constitution, to issue a *writ of mandamus* forcing Madison to deliver the commission to Marbury. In doing so, Marshall established a precedent for judicial review of Congressional Acts.

To arrive at this decision, Marshall examined Article III of the Constitution to determine in which types of cases the Supreme Court had original jurisdiction. As described in the Constitution, the Supreme Court is primarily an appellate court, with power to hear appeals from lower courts. Its powers of original jurisdiction are limited and clearly described. Article III did not include issuing *writs of mandamus* within the Supreme Court's original jurisdiction. Thus, part of the Judiciary Act of 1789 violated the Constitution.

By declaring one small portion of the Judiciary Act of 1789 unconstitutional, Marshall was able to establish for the Supreme Court an enormous power of judicial review over acts of the Legislative Branch and, by implication, the Executive Branch establishing a precedent for the development of a main principle of checks and balances in constitutional law in the United States.

HANDOUT 4

SECTION 13 OF THE JUDICIARY ACT OF 1789

The Supreme Court . . . shall have the power to issue . . . writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.

ARTICLE III, SECTION 2, OF THE U. S. CONSTITUTION

In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

**A BRIEF HISTORY OF EXECUTIVE PRIVILEGE,
FROM GEORGE WASHINGTON THROUGH DICK CHENEY**

By MICHAEL C. DORF

In a letter dated January 30, 2002, Comptroller General David Walker, the head of the non-partisan Government Accounting Office, announced that he would sue Vice President Cheney, in order to obtain information about the National Energy Policy Development Group that Cheney chaired last year. The unprecedented lawsuit was made necessary, Walker's statement argued, by Cheney's refusal to cooperate voluntarily.

Walker's letter states that President Bush has not claimed an "executive privilege" in connection with the GAO's information requests. However, signs indicate that the Administration likely will assert such a privilege as the case proceeds. Certainly that is the tenor of public statements by the Vice President and the White House. The GAO is an arm of Congress and accordingly, the Administration contends, its efforts to uncover the inner workings of the Executive Branch violate the constitutional principle of separation of powers.

Who's right?

Although claims of executive privilege have been made since the administration of George Washington, the law remains remarkably unclear, partly because the relevant actors have usually tried to avoid a direct confrontation if possible. Thus, who prevails in the current controversy may turn out to be less a matter of what the law is, than of who blinks first: Congress (acting through Comptroller General Walker), the Administration, or the courts.

What is Executive Privilege and Where Does it Come From?

The Constitution nowhere expressly mentions executive privilege. Presidents have long claimed, however, that the constitutional principle of separation of powers implies that the Executive Branch has a privilege to resist certain encroachments by Congress and the judiciary, including some requests for information.

For example, in 1796, President Washington refused to comply with a request by the House of Representatives for documents relating to the negotiation of the then-recently adopted Jay Treaty with England. The Senate alone plays a role in the ratification of treaties, Washington reasoned, and therefore the House had no legitimate claim to the material. Accordingly, Washington provided the documents to the Senate but not the House.

Eleven years later, the issue of executive privilege arose in court. Counsel for Aaron Burr, on trial for treason, asked the court to issue a *subpoena duces tecum*--an order requiring the production of documents and other tangible items--against President Thomas Jefferson, who, it was thought, had in his possession a letter exonerating Burr.

After hearing several days of argument on the issue, Chief Justice John Marshall issued the order commanding Jefferson to produce the letter. Marshall observed that the Sixth Amendment right of an accused to compulsory process contains no exception for the President, nor could such an exception be found in the law of evidence. In response to the government's suggestion that disclosure of the letter would endanger public safety, Marshall concluded that, if true, this claim could furnish a reason for withholding it, but that the court, rather than the Executive Branch alone, was entitled to make the public safety determination after examining the letter.

Jefferson complied with Marshall's order. However, Jefferson continued to deny the authority of the court to issue it, insisting that his compliance was voluntary. And that pattern persists to the present. Thus, President Clinton negotiated the terms under which he appeared before Independent Counsel Kenneth Starr's grand jury, rather than simply answering a subpoena directing him to appear.

The Scope of Executive Privilege: The *Nixon* Case

Presidents often assert executive privilege even if the information or documents sought are not matters of national security. They argue that some degree of confidentiality is necessary for the Executive Branch to function effectively. Key advisers will hesitate to speak frankly if they must worry that what they say will eventually become a matter of public record. The Supreme Court considered this argument in the 1974 case of *United States v. Nixon*. A grand jury convened by Watergate special prosecutor Leon Jaworski issued a subpoena to President Nixon requiring that he produce Oval Office tapes and various written records relevant to the criminal case against members of Nixon's Administration. Nixon resisted on grounds of executive privilege.

The Court recognized "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." It noted that "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process."

Nonetheless, the Justices concluded that the executive privilege is not absolute. Where the President asserts only a generalized need for confidentiality, the privilege must yield to the interests of the government and defendants in a criminal prosecution. Accordingly, the Court ordered President Nixon to divulge the tapes and records. Two weeks after the Court's decision, Nixon complied with the order. Four days after that, he resigned.

Can Vice President Cheney Invoke Executive Privilege?

The Comptroller General's plan to sue the Vice President raises a host of unresolved legal issues. As a threshold matter, there is a question whether the courts will permit a representative of Congress (here, the Comptroller General of the GAO) to invoke judicial process against the Executive. The courts often rely on the standing and political question doctrines to avoid adjudicating conflicts between the other branches.

Nor is it clear, even assuming the court chooses to hear the Comptroller General's case, that the *Vice* President can assert executive privilege. The Constitution vests the Executive Power in the President. So long as the President remains healthy, the Vice President has no constitutionally assigned executive function. As far as the Constitution is concerned, the Vice President's role is legislative in nature: to preside over and break ties in the Senate.

Furthermore, the Comptroller General has not, to this point, requested information about what was said to or by Vice President Cheney's National Energy Policy Development Group. Rather, the Comptroller General has thus far only asked for the names of participants in the Group's various meetings. It is not clear that executive privilege, even if it applies, extends beyond the content of discussions to cover the fact that they occurred at all. (By comparison, the attorney-client privilege generally covers the content of consultations with a lawyer, but not the fact that they occurred.)

A Precedent from the Clinton Years

Finally, no case to this point holds that executive privilege applies to conversations between Executive officials and persons *outside the government*, such as corporate officers of Enron and other companies.

The closest the courts have come to extending the privilege to such discussions was in the 1993 decision of the U. S. Court of Appeals for the D. C. Circuit in *Association of American Physicians and Surgeons, Inc. v. Hillary Clinton*. That case raised the question whether the Federal Advisory Committee Act ("FACA") applied to the health-care-reform panel chaired by then-First Lady Hillary Clinton. And that question, in turn, depended on whether the First Lady is, or is not, an officer or employee of the government.

Under FACA, if a person who is not an officer or employee of the government is a member of a government group, then the group's proceedings must be open to the public. The health-care-reform panel had kept its proceedings private, so if the First Lady was not a government officer or employee, it had broken the law. Fortunately for the Clinton Administration, however, the court held that the First Lady is indeed an officer or employee of the government, and FACA thus did not apply.

The court strained the statutory language in order to reach this conclusion -- but why? The answer is that a contrary result--to be precise, a finding that the statute's requirement of public meetings applied to the health-care-reform panel--would have raised a difficult constitutional question. And, under a well-established principle of legal interpretation, courts construe statutes in order to avoid difficult constitutional questions. The D. C. Circuit applied that principle in this case.

According to the D. C. Circuit, the difficult constitutional question was this: Does executive privilege extend to conversations between Executive officials and persons outside the government? If so, then FACA unconstitutionally violates that privilege by requiring those conversations to be disclosed. Had the court ruled that the First Lady was neither a government officer nor a government employee, it would have had to decide the difficult constitutional

question--for FACA then would have required disclosure of deliberations between the (non-government) First Lady and the executive branch government officials on the commission.

Why the Hillary Clinton Case Suggests Cheney's Privilege Claim May Prevail

The relevance of this complex case to Cheney's situation is straightforward: The D. C. Circuit thought that executive privilege *might* extend to conversations between executive officials and persons outside the government. And any appeal in the Comptroller General's case against Vice President Cheney would go to the D.C. Circuit (before possibly going to the U. S. Supreme Court).

Thus, a claim of privilege by the Vice President could succeed -- particularly if GAO were to go beyond its current requests and seek not only the names of people with whom Cheney consulted, but also the content of deliberations. The D. C. Circuit's speculation as to the breadth of the executive privilege indicates that even if private industry representatives acted as members of the Energy Group, the Group's deliberations may still be privileged, and thus not subject to FACA disclosure.

Will we soon learn the answer to the question the D. C. Circuit left open and the other puzzles surrounding executive privilege? Probably not. If history is our guide, it seems more likely that at least one branch of the government will find a way to avoid deciding the question directly.

Michael C. Dorf is Vice Dean and Professor of Law at Columbia University.

HANDOUT 6

GROUP WORK ***MARBURY v. MADISON***

1. Our group is going to examine possible conflicts or significant changes that could have occurred in America if the *Marbury v. Madison* case had been ruled on differently.
2. Reflecting on today's class discussion, we can summarize the most important element of the *Marbury v. Madison* decision as
3. Imagine if John Marshall had **not** included in the *Marbury v. Madison* decision that judicial review was a constitutional function of the Court. If the Court did not have the power of judicial review, what possible conflict or situations can you imagine might have occurred in the history of the U. S. and the lives of American citizens? List as many situations as your group can envision.
4. As a group, select one (or a logical combination of two) of the situations you listed above that would illustrate an important change in the lives of Americans if the *Marbury v. Madison* decision had not included the justification for judicial review.

Develop a creative presentation in the form of a skit, newscast, set of commercials, song, rap tune, or another entertaining and informative method to communicate your ideas to the class. Use the back of this paper to sketch out the ideas for your presentation.

GROUP WORK
UNITED STATES v. NIXON

1. Our group is going to examine possible conflicts or significant changes that could have occurred in America if the *United States v. Nixon* case had been ruled on differently.
2. Reflecting on today's class discussion, we can summarize the most important element of the *United States v. Nixon* decision as

3. Imagine if the Supreme Court had ruled in the decision of *U. S. v. Nixon* that not only was executive privilege constitutional but that for the judicial branch to examine a President's claim of executive privilege would weaken the office of the Presidency and tip the balance of separation of powers. What possible conflicts or situations can you imagine might have occurred in the history of the U. S. and the lives of American citizens if the Supreme Court did not have the power to examine a President's claim to executive privilege when a possible criminal act may have been committed? List as many situations as your group can envision.

4. As a group, select one (or a logical combination of two) of the situations you listed above that would illustrate an important change in the lives of Americans if the *U. S. v. Nixon* decision had not included the justification for judicial review.

Develop a creative presentation in the form of a skit, newscast, set of commercials, song, rap tune, or another entertaining and informative method to communicate your ideas to the class. Use the back of this paper to sketch out the ideas for your presentation.

