July 2012


Anne Y. Shields

Follow this and additional works at: http://scholarship.law.stjohns.edu/lawreview

Recommended Citation
Available at: http://scholarship.law.stjohns.edu/lawreview/vol57/iss4/5

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized administrator of St. John's Law Scholarship Repository. For more information, please contact cerjanm@stjohns.edu.
NOTES

THE SUPREME COURT UNDER PRESSURE: A COMPARATIVE ANALYSIS OF UNITED STATES V. NIXON AND NIXON V. FITZGERALD

In 1974, Richard M. Nixon became the first President of the United States to lose a case in which he was a party before the Supreme Court. The Court, in *United States v. Nixon*, unanimously ordered Nixon's compliance with a subpoena calling for the production of the Watergate tapes. Eight years later, Nixon reappeared as a litigant before the Supreme Court in *Nixon v. Fitzgerald*. The outcome of this 1982 case, however, was considerably dif-

---

3 *Id.* at 686; see *infra* notes 54-61.
4 102 S.Ct. 2690 (1982). In addition to *United States v. Nixon* and *Nixon v. Fitzgerald*, Nixon appeared as a litigant before the Court in *Nixon v. Warner Communications*, Inc., 435 U.S. 589 (1978), and *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977). In *General Services*, Nixon challenged the validity of the Presidential Recording and Materials Preservation Act (the Act), 44 U.S.C. § 2107 (1976), which vested custody of Nixon's presidential papers and tapes in the Administrator of General Services and directed him to provide specific guidelines for future access to these materials. *See* 433 U.S. at 429. The Court upheld the validity of the Act against challenges to its constitutionality. *Id.* at 484. A considerable amount of criticism of the *General Services* decision, *see*, e.g., Schwartz, *supra* note 1, at 33-38; *Recent Cases, Constitutional Law*, Nixon v. Administrator of General Services, 47 S.Ct. 2777 (1977), 11 Akron L. Rev. 373, 385-86 (1977), has centered upon the Court's determination that although "the Act impose[d] burdensome consequences" on Nixon, and he was specifically named in the legislation, it was not violative of the bill of attainder clause of the Constitution. 433 U.S. at 472-73. It has been suggested that the decision was "influenced more by the need to ensure that Nixon would not secure custody of his presidential materials than by settled law on the subject." Schwartz, *supra* note 1, at 35.

In 1978, the Watergate tapes were again at issue in *Nixon v. Warner Communications*, Inc., 435 U.S. 589 (1978), in which Warner Communications and the three major television networks, among others, sought the right to copy tapes admitted into evidence in the trial of John Mitchell. *Id.* at 591. The Court refused that request, basing its decision on the Presidential Recordings and Materials Preservation Act. *Id.* at 603-07. The Court noted that through this Act, Congress had already prescribed the procedure for public access to the tapes, *id.* at 603, such procedural limitations overriding Warner's claim of a common-law
ferent than that of the 1974 decision. Although the constitutional
issues were similar, the 1982 Supreme Court ruled in favor of
Nixon, recognizing an absolute presidential immunity from lia-

Concomitant with the disparity in the two Supreme Court de-
cisions is a sharp contrast in Nixon's public image. Although
Nixon's public esteem was at its nadir in 1974, public sentiment in
1982 was sympathetic, sometimes quite positive, toward the former
President. It appears that this later climate was more conducive
to a well-reasoned and deliberative disposition of the issue
presented. It is indeed submitted that the Court's disposition of
the civil immunity question in Fitzgerald lends credence to the arg-
iments criticizing the 1974 decision as one of compromise. Hence,
given similarities between the issues in Nixon and Fitzgerald, the
reappearance of Nixon as litigant, and the lack of observable exter-
nal pressure on the Fitzgerald Court, an evaluation of the impact

At the outset, this Note will examine public opinion of Rich-
and Nixon throughout the Watergate crisis and analyze the opinion
of the Court in United States v. Nixon. After contrasting the ra-
tionale employed by the Court in United States v. Nixon with that
of the 1982 Fitzgerald opinion, it will become evident that in 1974
the Court sacrificed clarity and reasoning in favor of unanimity.
Finally, the Note will illustrate the consequences of this concern
for unanimity through an examination of the United States v.
Nixon precedent as it has been interpreted by the state courts.

**Richard Nixon and Public Opinion**

In January of 1973, public opinion of Richard Nixon was at its
highest point in his administration. By November of that year,
however, as the debacle of Watergate began to unfold, Nixon's popularity dwindled to a point that was one of the lowest of any American president.

Watergate, "the biggest political scandal in the history of the United States," began with the early morning arrest of five men at the Watergate hotel complex in Washington, D.C. on June 17, 1972. The incident, including the arrest of two men close to the Nixon Reelection Committee, had no immediate impact on Nixon's popularity; he won the 1972 Presidential election by a landslide. The potential for far-reaching consequences manifested itself, however, when a Senate committee was formed to investigate the matter and an inquiry by the Justice Department was initiated. By early May of 1973, Nixon's approval ratings, as

---

1. See infra notes 12-44 and accompanying text.
2. See 111 GALLUP, supra note 9, Sept. 1974, at 4, 10. The lowest Gallup approval rating was 23% for Harry Truman in 1951; Nixon's lowest level was 24%. Id.
4. 1 CONGRESSIONAL QUARTERLY, INC., WATERGATE: CHRONOLOGY OF A CRISIS 3 (1974) [hereinafter cited as 1 CHRONOLOGY]. According to assertions made by Democratic National Committee Chairman Lawrence F. O'Brien, telephones at the Committee's headquarters had been tapped for several weeks prior to the break-in. Id. at 4. Additionally, a break-in was attempted at McGovern Headquarters on Capitol Hill on May 27, 1972. The men allegedly were thwarted by the presence of campaign workers. Id. The five men arrested on June 17, 1972 included Bernard L. Barker, a former Central Intelligence Agency (CIA) employee, Frank A. Sturgis, an associate of Barker with ties to the CIA, and James W. McCord, Jr., security coordinator for both the Republican National Committee and the Committee for the Reelection of the President. Id. Barker reportedly had ties with Nixon as well. Id. at 5.
5. Id. at 9-11. G. Gordon Liddy and James W. McCord, Jr. were convicted in the aftermath of the Watergate burglary. Id. at 11. Although Liddy was not arrested at the time of the break-in, the grand jury that indicted the five men arrested also indicted Liddy and E. Howard Hunt, Jr., a former White House consultant. Id. at 9. At the time of the indictments, Liddy was counsel to the Finance Committee to Reelect the President. Id. at 4. During the opening days of the trial all of the defendants except Liddy and McCord pleaded guilty to all of the charges. Id. at 10.
6. See id. at 23. In the latter part of 1972, Watergate was not a particularly salient issue to the American public. Id. Fifty-two percent of those surveyed by Gallup in October 1972 indicated that they had heard or read about Watergate. See id. Although reports of misconduct appeared in the news media as early as the fall of 1972, id. at 8, the Watergate issue was not addressed by the Gallup poll in terms of Nixon's popularity until May of 1973. See 95 GALLUP, supra note 9, May 1973, at 1-11.
7. See id. at 23. In the latter part of 1972, Watergate was not a particularly salient issue to the American public. Id. Fifty-two percent of those surveyed by Gallup in October 1972 indicated that they had heard or read about Watergate. See id. Although reports of misconduct appeared in the news media as early as the fall of 1972, id. at 8, the Watergate issue was not addressed by the Gallup poll in terms of Nixon's popularity until May of 1973. See 95 GALLUP, supra note 9, May 1973, at 1-11.
measured by a Gallup poll, had plummeted from a high of sixty-eight percent in January to forty-five percent. This drop and the corresponding rise in the saliency of the Watergate issue in the minds of the American public apparently was influenced by the resignation of two of Nixon's closest aides and the Attorney General. While anti-Nixon sentiment at this time continued to grow, Americans still displayed a desire to settle the issues rather than to remove Nixon from office.

By mid-May, the Senate was conducting open hearings as part of its Watergate investigation, and the office of the Watergate Special Prosecutor was formally established. Testimony at the Senate hearings led to the issuance of congressional and grand jury subpoenas. When it became clear that Nixon would not comply voluntarily with the subpoenas, both the Senate and the grand jury sought judicial enforcement. In October of 1973, the Special

---

19 95 GALLUP, supra note 9, May 1973, at 2.
20 See id. at 1, 5. While in September 1972 only 52% of the American people had heard or read about Watergate, this figure rose to 98% by June 1973. 111 GALLUP, supra note 9, Sept. 1974, at 7.
21 1 CHRONOLOGY, supra note 13, at 56. John Ehrlichman was the Assistant to the President for Domestic Affairs, while H.R. Haldeman held the position of Nixon's Chief of Staff. Id. at 42. They had been described as "the two most powerful men in the White House after Nixon himself." Id. at 56. John Mitchell was the United States Attorney General.
22 See id. at 50. While Nixon's Gallup approval rating was only 48% in April 1973, a Harris survey indicated that a mere 13% of the American public thought that Nixon should resign from office. Id.
23 Id. at 63. The Senate committee was formed in order "to investigate . . . 'illegal, improper or unethical activities' " connected with the presidential campaign of 1972 and to consider whether new legislation was needed to " 'safeguard the electoral process . . . .' " Senate Select Committee on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 53 (D.D.C. 1973).
24 1 CHRONOLOGY, supra note 13, at 63.
25 2 CONGRESSIONAL QUARTERLY, INC., WATERGATE: CHRONOLOGY OF A CRISIS 337 (1974) [hereinafter cited as 2 CHRONOLOGY]. At Senate hearings held on July 16, 1973, Alexander P. Butterfield, head of the Federal Aviation Administration and a former White House aide, made public the fact that presidential conversations had been recorded since 1971. Id.
26 See Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 54 (D.D.C. 1973). Nixon responded to the Senate subpoenas by sending a letter to the chairman of the Committee asserting his intention not to comply with the subpoenas. Id. According to Nixon's press secretary, Ronald Ziegler, Nixon felt it would be " 'constitutionally inappropriate' and a violation of the separation of powers" to obey the Senate's order. 1 CHRONOLOGY, supra note 13, at 103.
27 See Senate Select Comm. on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521 (D.D.C.), aff'd, 498 F.2d 725 (D.C. Cir. 1974); In re Grand Jury Subpoena, 360 F. Supp. 1 (D.D.C.), modified per curiam sub nom. Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) (en banc). Prior to disposition of the suits brought by the Senate Select Committee, the district court had refused to address the merits of the claim of the Committee for lack of jurisdic-
Prosecutor, in *Nixon v. Sirica,* obtained a favorable judgment in an action brought for enforcement of a subpoena requesting the White House tapes. Foregoing his right to appeal, the President instead embarked upon a course of action that would be met with vehement public outcry.

On Friday, October 19, rather than obey the order of the circuit court in *Nixon v. Sirica,* Nixon proposed a plan whereby he would submit prepared transcripts of the tapes to the grand jury.
Additionally, Nixon ordered the special prosecutor, Archibald Cox, to cease all further attempts to obtain evidentiary material directly from the President. Faced with what was essentially noncompliance with an order of the court, the special prosecutor brought his case to the public. In a televised news conference, he announced his intention to seek full enforcement of the court's order. That night, Nixon ordered the firing of Cox from the office of Watergate special prosecutor during what came to be known as the “Saturday Night Massacre.” Public response to these events has been referred to as a “firestorm,” and it was seriously doubted whether Nixon would survive the widespread attack.

The White House attempted to regain the public trust through “Operation Candor,” which included a press conference and several meetings, both public and private, with political lead-

---

32 2 CHRONOLOGY, supra note 25, at 85-86.
33 Id. at 70. On October 20, 1973, Cox made a public television appearance because he felt it was necessary to put the question of the President's obligation to obey the court before the public, in light of the absence of a judicial enforcement mechanism. A. Cox, supra note 31, at 7-8.
34 L. JAWORSKI, THE RIGHT AND THE POWER, THE PROSECUTION OF WATERGATE 2 (1976); see E. DREW, WASHINGTON JOURNAL 51-53 (1974). Nixon directed his Attorney General, Elliot Richardson, to fire Cox. Richardson, noting the fact that he had pledged to maintain the independence of the investigation, chose to resign rather than carry out the President's order. 2 CHRONOLOGY, supra note 25, at 87-88. Next in line was Deputy Attorney General William Ruckelshaus. Stating that his conscience would not permit him to fire Cox, he too resigned. Id. at 88. Eventually, the firing of Cox was accomplished by Solicitor General Robert Bork. Id.
35 2 CHRONOLOGY, supra note 25, at 70. It was Alexander M. Haig, Jr. who first analogized public reaction to the termination of Cox to a “firestorm.” Id. This “firestorm” has been described as “the most devastating assault that any American President has endured in a century . . .” 82 NEWSWEEK, Nov. 5, 1973, at 20. Among those groups calling for Nixon's impeachment or resignation were the legal profession, the clergy, and leaders in Nixon's own political party. Id. This outpouring of public opinion was met by the introduction of impeachment-related legislation by an overwhelming number of congressmen. See 2 CHRONOLOGY, supra note 25, at 69. In addition to calls for impeachment, it was urged that a special prosecutor's office be established. Id. According to a poll conducted by the National Broadcasting Company television network, Nixon's popularity dropped to 22%. 82 NEWSWEEK, supra, at 22. It was even speculated that Nixon's focus on military matters during this period was part of a scheme to shift the Watergate issue from public attention. E. DREW, supra note 34, at 70-74. The firing of Cox caused Nixon's popularity ratings, as measured by the Gallup poll, to drop below 30% for the first time during his administration; his ratings never again surpassed this level. See 111 GALLUP, supra note 9, Sept. 1974, at 7. Despite the public reaction, it has been stated that the firing of Cox was simply a legal exercise of the power of the Executive to decide on prosecution matters. See Miller, The Presidency and Separation of Powers, 60 A.B.A. J. 195, 195 (1974).
36 82 NEWSWEEK, supra note 35, at 20.
37 2 CHRONOLOGY, supra note 25, at 148.
It was before a nationally televised meeting of the Associated Press Managing Editors that Nixon declared that he was "not a crook." Moreover, his answers to questions concerning highly sensitive issues reflected an apparent desire on Nixon's part to reveal the true facts pertaining to the Watergate affair. The press conference also enabled the President to stress his foreign policy achievements. Despite these efforts, the effect of Operation Candor on the public opinion polls was minimal, Nixon's approval rat-

38 Id.
39 Id. The President's remark was in response to a question relating to his personal finances. Id.

Due to Ellsberg's role in the Pentagon Papers affair, Nixon admitted that he had requested an official government investigation of Ellsberg. J. SIRCA, TO SET THE RECORD STRAIGHT 133-34 (1979). This investigation, however, went so far as to involve breaking into the office of Ellsberg's psychiatrist, Dr. Lewis Fielding. Id. at 45. The Fielding break-in led to the indictments of John D. Ehrlichman, Charles W. Colson, G. Gordon Liddy, Bernard L. Barker, Eugenio Martinez and Felipe DeDiego. Barker and Martinez were two of the five men apprehended at the scene of the Watergate break-in. 2 CHRONOLOGY, supra note 25, at 271. Due to these charges of governmental misconduct, the indictment of Ellsberg for espionage, theft, and conspiracy concerning the Pentagon Papers leaks ended in a mistrial on May 11, 1973. 1 CHRONOLOGY, supra note 13, at 46. At the Associated Press news conference, Nixon declared that there had been no testimony that he had ever "specifically approved or ordered the entrance into Dr. [sic] Ellsberg's psychiatrist's office." 2 CHRONOLOGY, supra note 25, at 155.

In response to charges made by the press that Nixon had not paid a sufficient amount in income taxes, Nixon commissioned a private audit of his personal finances, and announced that the results of the audit would be made available to the public. Id.

41 2 CHRONOLOGY, supra note 25, at 154-55.
42 Id. at 156. During the press conference, Nixon spoke of his visits to China and Moscow as well as his efforts in the limitations of nuclear weapons. Id. According to Gallup, Nixon's foreign policy achievements were always highly regarded, even during the Watergate crisis, "[b]ut if foreign affairs proved his forte, domestic problems were his ultimate undoing." 111 GALLUP, supra note 9, Sept. 1974, at 4.
ings showing only a slight improvement in November, 1973.\textsuperscript{43} This was to be one of the last climbs in the opinion polls experienced by Nixon during his administration.\textsuperscript{44}

A few months later, in response to a congressional subpoena issued on April 11, 1974, Nixon released transcripts of forty-six tapes to the House Judiciary Committee.\textsuperscript{45} At the same time, a compilation of over 1,000 pages of transcripts was made available to the public.\textsuperscript{46} Despite considerable editing, the transcripts, rather than exculpating the President, destroyed his credibility with the American people.\textsuperscript{47} The same week that the transcripts were released, Nixon was served with a third-party subpoena for documents allegedly necessary for the criminal trial of former Attorney General John N. Mitchell.\textsuperscript{48} Nixon entered a special appearance and moved to quash the subpoena.\textsuperscript{49} On May 20, 1974, in a summary disposition of Nixon’s assertions,\textsuperscript{50} including the claim of executive privilege,\textsuperscript{51} Judge Sirica of the District of Columbia District Court denied Nixon’s motion.\textsuperscript{52} Pursuant to the granting of petitions for writs of certiorari before judgment, the Supreme Court set oral argument for July 8, 1974.\textsuperscript{53}

\textsuperscript{43} 103 \textsc{Gallup}, supra note 9, at 1.
\textsuperscript{44} See 111 \textsc{Gallup}, supra note 9, Sept. 1974, at 7, 12.
\textsuperscript{45} 2 \textsc{Chronology}, supra note 25, at 327.
\textsuperscript{46} Id.
\textsuperscript{47} 83 \textsc{Newsweek}, May 13, 1974, at 17. \textsc{Newsweek} reported that even as edited, the tapes “portrayed Mr. Nixon . . . as a weak, profane, cynical, isolated, inept and finally amoral leader of men.” Id. In April 1974, 46\% of Americans found Nixon’s actions serious enough to warrant removal from office. 111 \textsc{Gallup}, supra note 9, Sept. 1974, at 8.
\textsuperscript{49} 377 F. Supp. at 1328.
\textsuperscript{50} See id. at 1329-31. The \textit{Mitchell} court determined that the mandate of the Special Prosecutor overrode any claim as to the nonjusticiability of the issue as an intrabranch dispute. Id. at 1329. After a finding that the subpoena met the requirements set forth in Rule 17(c) of the Federal Rules of Criminal Procedure, 377 F. Supp. at 1329-30, the court held that the Special Prosecutor had made the prima facie showing required to rebut the executive privilege, id. at 1330.
\textsuperscript{51} 377 F. Supp. at 1329; see Nixon v. Sirica, 487 F.2d 700, 713-14 (D.C. Cir. 1973) (per curiam) (en banc).
\textsuperscript{52} 377 F. Supp. at 1331.
United States v. Nixon: UNANIMITY AT THE EXPENSE OF REASON AND CLARITY

After resolving the three threshold issues of appealability, justiciability and prosecutorial compliance with the Federal Rules of Criminal Procedure, the Supreme Court, in United States v. Nixon, addressed the existence and applicability of Nixon's claimed executive privilege. Noting the need for confidentiality between the President and his advisers, as well as the supremacy of each branch of government within its particular sphere, the Court summarily recognized the existence of an executive privilege that is "fundamental to the operation of Government and inextricably rooted in the separation of powers." Notwithstanding the constitutional basis of the privilege, the Court held that the privilege must yield to the countervailing constitutional rights of compulsory process and due process of law. Consequently, the Court ordered the President to produce the subpoenaed materials for in camera inspection by the trial judge.

While it is arguable that the Nixon Court reached the correct decision on the merits by expediting the end of the Watergate crisis, it has been recognized that the opinion is considerably lacking in sound constitutional analysis. While some criticism has dealt with the Court's determination of the threshold issues, most ad-

---

64 See United States v. Nixon, 418 U.S. 683, 690 (1974). The Court recognized that an order denying a motion to quash a subpoena generally is not directly appealable. Id. at 690-91. Nevertheless, the Court determined that such an order was appealable in the Nixon case since the "traditional contempt avenue" would be "inappropriate due to the unique setting in which the question arises." Id. at 691.

65 See id. at 694-96. The Nixon Court rejected the argument that the case represented a nonjusticiable intrabranch dispute. Noting that the Attorney General had delegated a portion of his prosecutorial powers to the Special Prosecutor, id. at 694-96, the Court determined that the case presented the kind of question that "courts traditionally resolve," id. at 696-97. Thus, the article III "case or controversy" requirement was met. Id.

66 See United States v. Nixon, 418 U.S. at 702. With respect to the third threshold issue, the Court declined to upset the trial judge's determination that the Special Prosecutor had complied with the requirements of Rule 17(c) of the Federal Rules of Criminal Procedure. 418 U.S. at 702. The Court observed that the Special Prosecutor had made a sufficient showing of relevancy, admissibility and specificity in naming the subpoenaed materials to justify their production prior to trial. Id. at 700, 702.

67 Id. at 705-06.

68 Id. at 705.

69 Id. at 708.

70 Id. at 709-13.

71 Id. at 714.

verse commentary has focused upon the Court's treatment of the executive privilege questions. First, the Nixon Court recognized the existence of a constitutionally based executive privilege without reference to available historical research on the subject. This lack of historical examination is questionable, given that the issue was one of first impression. Second, the opinion's overbroad lan-
guage presents a real danger with respect to its precedential ramifications. With veritably no discourse, the Nixon Court conclusively pronounced, “[w]hatever the nature of the privilege of confidentiality of Presidential communications in the exercise of art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties.” While the privilege was circumscribed by the recognition that it must yield to the “fair administration of criminal justice,” the nebulous boundaries of the privilege were blurred by the Court’s dictum that the privilege would be absolute if invoked in the interests of “national security.” This language has led to concerns that the Nixon decision, in the final analysis, strengthened rather than weakened the Presidency as an institution. In addition, the possibility of the Nixon rationale being analogized to well-established evidentiary privileges has been viewed as an unfortunate prospect.

---

66 See infra notes 132-46 and accompanying text.
67 See 418 U.S. at 705. Executive privilege has been referred to as a concept that “emerge[d] full blown from the head of the Court.” Mishkin, supra note 62, at 84.
68 418 U.S. at 711-12. The Court’s disposition of the executive privilege question is characterized by a pattern of first exhibiting deference to the executive and then cutting back on that deference. The Court initiated this pattern by recognizing a constitutional privilege, id. at 706, yet later stating that the doctrine of separation of powers cannot justify a privilege under all circumstances, id. at 706-07. The Court noted that “great respect” is to be afforded to a claim made by the President, id. at 712, but held that a “generalized interest in confidentiality” cannot be accorded such a “high degree of deference,” id. at 711. According to Professor Mishkin, this language represents a “[p]attern . . . of . . . gratuitous non-consequence-bearing declaration[s] favoring a position taken by the President, followed by a somewhat off-the-mark rationale supporting a holding squarely against him . . . .” Mishkin, supra note 62, at 83. In addition, Professor Ratner suggests that as a result of the Court’s reasoning, executive privilege will be upheld only when the evidence sought is “irrelevant or inadmissible,” Ratner, Executive Privilege, Self Incrimination and the Separation of Powers Illusion, 22 U.C.L.A. L. Rev. 92, 97-98 (1974), in which case “a constitutional privilege is scarcely needed,” id. at 98.
69 See 418 U.S. at 706, 707.
70 See, e.g., Owens, supra note 63, at 22 (executive privilege is “a weapon by which [the Executive] can disrupt the system of checks and balances of the three branches of government”); Schwartz, supra note 1, at 29 (United States v. Nixon dispelled the notion that executive privilege is merely a “myth”).
71 Henkin, supra note 63, at 44; Kurland, supra note 62, at 74; see infra notes 132-39 and accompanying text. It has been noted that the weighing process utilized by the Nixon Court, if applied to existing evidentiary privileges, might result in their invalidation. Hen-
The question that remains is why the Nixon opinion was so poorly drafted. The answer apparently lies in the case's factual setting, its rapid disposition, and the peculiar motive behind the Nixon Court's unanimity. It has long been speculated that the lack of debate and the use of overly broad language that is prevalent in Nixon can be attributed to the Court's perceived need to render an unanimous or definitive judgment. There is little question that the Court was cognizant of the American public's expectation that the Court would end the Watergate crisis. The granting of certiorari before judgment, the expedited appellate schedule, and the extension of the Court's term indicated a desire to reach a speedy decision. The desire for a unanimous opinion can be attributed to the Court's need for a forceful stance to overcome the inherent lack of an enforcement mechanism in the Judicial process and perceived threats to its legitimacy. Indeed, the possibility of noncompliance by Nixon, touted by the media, was alluded to at oral argument by the President's counsel. Anything less than a unanimous judgment might have invited recalcitrance, and thus further prolonged the Watergate crisis. The Court's perceived need for unanimity does much to explain the broad language of the Nixon opinion. While many Supreme Court opinions undoubtedly

---

72 See Van Alstyne, supra note 63, at 122. Professor Van Alstyne observed that "the unanimity of the opinion was exceptional in light of the divisions which have so frequently riven the Nixon/Warren Court." Id. (emphasis in original).

73 Mishkin, supra note 62, at 86-87. Nixon maintained that he would be willing to comply only with a definitive statement from the Court on the relinquishment of tapes. Id. While Nixon first asserted his intention to abide by such an answer from the Court, id., on July 10, 1973, James D. St. Clair, Nixon's chief defense counsel, stated that "the President was at least keeping open the option of defying the Court," N.Y. Times, July 10, 1974, § 1, at 1, col. 6.

74 Kurland, supra note 62, at 69; Mishkin, supra note 62, at 76 (the Court felt "a responsibility to the nation").

75 Van Alstyne, supra note 63, at 122. The Court, possessing "neither the purse nor the sword," has no enforcement mechanism and thus depends upon voluntary compliance with its orders. A. Cox, supra note 31, at 7. The judicial branch's lack of an enforcement mechanism to compel the executive branch to comply with a subpoena was noted by other courts dealing with the Watergate litigation. See Nixon v. Sirica, 487 F.2d at 712; In re Grand Jury Subpoena, 360 F. Supp. at 9. The judiciary's lack of an enforcement mechanism was succinctly described by Chief Justice Marshall when he stated that, "[j]udicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing." Osborn v. United States Bank, 22 U.S. (9 Wheat.) 738, 866 (1824).

76 See supra note 73.

77 Mishkin, supra note 62, at 87.
are a product of compromise, a unanimous opinion is perhaps the most difficult to draft since it may involve the incorporation of as many as nine divergent viewpoints. Thus, although it may achieve the goal of a clear statement from the Court concerning the case at bar, a unanimous opinion may contain several vague, possibly inconsistent statements.

It is certainly true that the Court’s desire for unanimity, and the compromise opinion that is likely to result, can be legitimate. It is submitted, however, that this legitimacy hinges upon the goal that unanimity ultimately seeks to further. If unanimity is merely a reaction to an unpopular litigant, the costs of compromise appear too high. When unanimity displays the Court’s commitment to a socially desirable policy goal, however, the breadth and vagueness of the compromise opinion seems justified. A classic example of this justifiable unanimity is exemplified by the segregation cases. In Brown v. Board of Education, the Court determined that the fourteenth amendment mandated a finding that “separate but equal” educational facilities were unconstitutional. The Court

---

78 W. Murphy, Elements of Judicial Strategy 57 (1964); G. Schubert, Constitutional Politics 125 (1960). The process of intra-Court negotiations enables the incorporation of as many ideas as possible and thereby serves to quell what might otherwise become a dissent or concurrence. The difficulties in obtaining support of co-Justices is especially pervasive when unanimity is the chosen objective.

Any Justice may demand, as the price of his not writing separately, the inclusion (or exclusion) in the single opinion of any language or ideas to which he assigns sufficient importance. And so long as the ultimate outcome of the case is not affected, the other Justices will be under strong pressure to acquiesce—leaving to another day the problems (or disagreement) which they might have with that language or idea. Mishkin, supra note 62, at 87-88.

79 See G. Schubert, supra note 78, at 123. Analyzing the Nixon opinion in light of the Court’s bargaining process, Professor Mishkin observed: “Having the Court speak with a single voice necessarily became a primary objective. . . . The single opinion which did emerge can be best understood at the outcome of a negotiation process in which each member of the Court possesses extraordinary leverage for his individual views.” Mishkin, supra note 62, at 87.

80 See infra notes 81-85 and accompanying text.


82 See id. at 495. The “separate but equal” doctrine announced by the Court in Plessy v. Ferguson, 163 U.S. 537 (1896), dictates that facilities separated on the basis of race were not inherently unequal and violative of the fourteenth amendment as long as those provided were substantially similar. See 163 U.S. at 548. The Brown Court specifically held that racially segregated schools were “inherently unequal,” and that such segregation violated the equal protection clause of the fourteenth amendment. Brown v. Board of Educ., 347 U.S. 483, 495 (1954). In so holding, the Court expressly overruled any language of the Plessy Court to the contrary. Id. at 494-95. The Brown Court recognized that the fashioning of a
thereafter rendered a decree implementing the decision. The broad language of the unanimous Brown decree may be attributed to the fact that the Court recognized the importance of retaining a united front on the segregation issue due to the radical nature of the policy objective being furthered, and the uncertainty of its acceptance by the community. It is submitted that the desired end in the segregation cases—the implementation of a broad policy goal—legitimized the vague nature of the Brown opinion, whereas the desired end in the Nixon case—the short-term goal of ending the Watergate scandal—did not justify the broad nature of the Nixon opinion.

Nixon v. Fitzgerald: A Less Unpopular Litigant and the Clear Exposition of Viewpoints

The attitude of the American public toward Richard Nixon, since 1977, has evolved from one of hostility to one of acceptance.
This transmogrification has been attributed to both the passage of time and the public disclosure of the abuses of other administrations. Rather than continuing to condemn Nixon, there has been a tendency to accentuate the positive aspects of his administration, particularly his foreign policy achievements. By 1982, Nixon’s perceived expertise in foreign affairs qualified him to author a guest editorial for the New York Times. It thus appears that in 1982, when *Nixon v. Fitzgerald* was decided, the Supreme Court was less susceptible to external pressure than its predecessor Court in 1974. Indeed, an examination of the four opinions rendered in *Fitzgerald* reveals no trace of the external influence that pervades *United States v. Nixon*. 

In *Fitzgerald*, the plaintiff sought damages from former president Nixon for plaintiff’s termination as an Air Force employee. Fitzgerald alleged that his termination was a response to testifying before a congressional committee as to cost overruns on Air Force projects. Nixon contended that he was entitled to absolute immu-

traveled to Egypt to attend the funeral of the Shah of Iran. N.Y. Times, July 28, 1980, § 1, at 11, col. 1. Nixon later accompanied former Presidents Carter and Ford to the funeral of Egyptian President Anwar el-Sadat in 1981. *Id.*, Oct. 11, 1981, § 1, at 1, col. 6. While in Egypt, Nixon participated in discussions with Egypt’s President-designate, Hosni Mubarak. *Id.* at 20, col. 6.

87 119 TIME, June 14, 1982, at 27.
88 See supra note 86 and accompanying text.
89 Nixon, 10 Years After the Visit to China, N.Y. Times, Feb. 28, 1982, § 4, at 19, col. 1.
90 102 S. Ct. 2690 (1982).
92 See infra notes 108-17 and accompanying text.
93 102 S. Ct. 2697.
94 *Id.* at 2695. Fitzgerald formerly held the position of management analyst with the Department of the Air Force. *Id.* at 2693. During the Johnson Presidency, Fitzgerald had testified before the Subcommittee on Economy in Government of the Joint Economic Committee of the United States Congress as to massive cost overruns of Air Force projects. He alleged that his subsequent dismissal was in retaliation for this testimony. *Id.* at 2695. The Civil Services Commission conducted hearings and concluded that, while Fitzgerald’s dismissal offended civil service regulations, there was no explicit evidence of retaliatory dismissal. *Id.* at 2695-96. Following this decision, Fitzgerald filed suit against eight present and former government officials, White House aide Alexander Butterfield, and “one or More [sic] . . . White House Aides.” *Id.* at 2696; see *Fitzgerald v. Seams*, 384 F. Supp. 688, 691 (D.D.C. 1974), aff’d in part, 553 F.2d 220 (D.C. Cir. 1977). The district court dismissed the case on the ground of the statute of limitations. 384 F. Supp. at 692-93. The court of appeals affirmed the district court decision except as to Butterfield, with respect to whom
nity from civil suit since the claims arose from official acts of the President. The district court rejected Nixon's claim of immunity, and the court of appeals summarily dismissed his collateral appeal. Nixon sought review of this dismissal, and the Supreme Court agreed to hear the case in light of the "serious and unsettled" question of presidential immunity from civil suit.

Noting the "unique position" of the President under the Constitution, the Court granted the President absolute immunity from civil suits arising from official acts. Central to the Court's reasoning was the separate nature of the three branches of government and judicial unwillingness to question the Executive's official acts absent a compelling justification. The Court indicated, however, that when compelled to enter the sphere of a coordinate branch of government, it would be doing so "not in derogation of the separation of powers, but to maintain their proper balance."

Adjudicating a "mere private suit for damages" did not represent, in the Court's view, the extraordinary situation in which judicial intrusion is mandated to preserve the balance of powers. The Court concluded that other available means of policing the acts of the President, such as impeachment and constant exposure the action was remanded. 553 F.2d at 231.

---

96 102 S. Ct. at 2697.
97 Id.
98 Id.
99 Id. at 2698. A finding of a "serious and unsettled" question of law is necessary in order to comply with the standards of the "collateral order" doctrine enunciated in Cohen v. Beneficial Indus. Loan Co., 337 U.S. 541 (1949), which dictates whether such an order is immediately appealable, 337 U.S. at 547. The Fitzgerald Court determined that the issue was within this category by virtue of the alleged "breach of essential Presidential prerogatives under the separation of powers." 102 S. Ct. 2698.
100 Id. at 2702.
101 Id. at 2705.
102 Id. at 2704.
103 Id. The Court indicated that the judiciary will only interfere "[w]hen judicial action is needed to serve the broad public interests," such as those in issue in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), and United States v. Nixon, 418 U.S. 683 (1974). 102 S. Ct. at 2704. In Youngstown, the Court interfered with the acts of the Executive after determining that President Truman's order to seize steel mills amounted to a usurpation of the powers of the legislature. 343 U.S. at 587-89. According to the Fitzgerald majority, the judicial interference in Nixon was warranted to "vindicate the public interest." 102 S. Ct. at 2704. Justice White, in a dissenting opinion, reasoned that to subject the President to general rules of law actually furthers the separation of powers since it allows Congress, through a statutorily created cause of action, to place restraints on the President. Id. at 2724-25 (White, J., dissenting); see infra notes 105-07 and accompanying text.
104 102 S. Ct. at 2704.
to the public via the media, would ensure that the Fitzgerald holding would not place the President above the law.\footnote{104} Dissenting, Justice White rejected the notion that absolute immunity emanates from the Constitution.\footnote{105} Rather than defining the President’s immunity by reference to his actions as President, the dissent would apply a functional approach whereby the nature of the President’s actions would determine the scope of this immunity.\footnote{106} This qualified immunity would result in presidential liability only if it were proven that the President knew or should have known that his actions amounted to “an illegal and clear abuse of his authority and power.”\footnote{107}

In contrast to the Nixon opinion, which engendered much critical commentary for its ambiguity,\footnote{108} the opinions in Fitzgerald, including a concurrence by Chief Justice Burger and a second dissent by Justice Blackmun, render Fitzgerald a clear and complete exposition of ideas. This is significant since the issues in Nixon and Fitzgerald have much in common. While the Fitzgerald case involved the issue of presidential immunity from civil suit rather than executive privilege, both issues necessarily involve the separation of powers and thereby presented the Justices with similar constitutional considerations.\footnote{109}

It is the extensive debate on the separation of powers question that clearly contrasts the approaches of the Nixon and Fitzgerald Courts. Although no Justice dissented from the Nixon Court’s summary assertion that executive privilege is ground in the constitutional doctrine of separation of powers,\footnote{110} the members of the Fitzgerald Court were constrained to write separately given their divergent views. The majority opinion in Fitzgerald is reminiscent of the Nixon opinion in its assumption that absolute immunity for the executive is “rooted in the constitutional tradition of the sepa-

\footnote{104} Id. at 2706.
\footnote{105} Id. at 2710 (White, J., dissenting). Justice White’s dissent did not oppose absolute immunity under all circumstances, id. at 2723 (White, J., dissenting), but did not elaborate on what specific fact situations would require this immunity, id. (White, J., dissenting). The dissent suggested that absolute immunity should only apply in those cases in which the Executive’s performance would be “substantially impaired by the possibility of civil liability.” Id. (White, J., dissenting).
\footnote{106} Id. (White, J., dissenting).
\footnote{107} Id. at 2719 (White, J., dissenting).
\footnote{108} See supra notes 62-71 and accompanying text.
\footnote{109} 102 S. Ct. at 2702 n.31.
ration of powers.” Chief Justice Burger wrote separately for the specific purpose of emphasizing that absolute immunity is mandated by the separation of powers. In contrast, reasoning that “[n]o bright line can be drawn between arguments for absolute immunity based on the constitutional principle of separation of powers and arguments based on . . . ‘public policy,’” Justice White maintained that there is little support in the doctrine of separation of powers for an absolute immunity for the Chief Executive. Indeed, Justice White refers to the notion that subjecting the President to general rules of law is violative of the separation of powers doctrine as “a frivolous contention passing as legal argument.”

Echoing Justice White’s sentiments, Justice Blackmun found no support for the notion that the President’s immunity is compelled by separation of powers concerns.

The intensity of debate, prevalent in Fitzgerald but clearly lacking in Nixon, despite the similarity of the issues presented, supports the contention that debate was subordinated to a perceived need for unanimity in 1974. This conclusion seems especially compelling since six of the Fitzgerald Justices also took part in Nixon, and although they found a common ground to agree upon in 1974, the views they advocated in 1982 were quite diverse. Broad enough to accommodate these divergent viewpoints, the 1974 opinion was cited with equal force by both the Fitzgerald majority opinion and Justice White’s dissent. The majority focused upon that aspect of the Nixon opinion that established executive privilege, while Justice White cited Nixon for

---

111 See Nixon v. Fitzgerald, 102 S. Ct. 2690, 2701 (1982). Recognizing that the office of the Presidency did not exist throughout most of the development of the common law, the Fitzgerald Court considered absolute presidential immunity to be “a functionally mandated incident of the President’s unique office, rooted in the constitutional tradition of the separation of powers and supported by . . . history.” Id.

112 Id. at 2706 (Burger, C.J., concurring).

113 Id. at 2711 (White, J., dissenting).

114 Id. at 2725 (White, J., dissenting).

115 Id. (White, J., dissenting).

116 Id. at 2726-27 (Blackmun, J., dissenting).

117 Chief Justice Burger and Justices Brennan, White, Marshall, Blackmun and Powell participated in both the Nixon and Fitzgerald decisions. Although Justice Rehnquist was a member of the Court in 1974, he took no part in the Nixon decision. See Nixon, 418 U.S. at 685.

118 See 102 S. Ct. at 2704. The Fitzgerald majority referred to Nixon as representing one of the rare situations when judicial intrusion into the functions of the executive branch is warranted. Id.; see supra note 102.
the proposition that even the President is not above the law. In sum, the discourse in Fitzgerald appears to be everything that Nixon should have been. Although concededly speculative, it seems that in the absence of the Court's susceptibility to the pressures engendered by anti-Nixon sentiment in 1974, the opinion in United States v. Nixon might have displayed the thorough analysis and vigorous debate that is patent in Nixon v. Fitzgerald. Instead, there exists an opinion of forced unanimity, characterized by a paucity of debate and blurring of judicial viewpoints, with little value in guiding the lower courts and of questionable precedential utility.

THE PRECEDENTIAL IMPACT OF United States v. Nixon

The result of the compromise of the Nixon Justices was a broadly worded opinion that recognized a constitutionally based privilege in one breath and overrode it in the next based upon the needs of the criminal justice system. The Nixon holding states that this qualification of the privilege is mandated by the overriding constitutional considerations of the fifth and sixth amendments, and thereby intimates that any claim of privilege must yield to the needs of the criminal defendant. While such an ap-

---

119 102 S. Ct. at 2718 (White, J., dissenting). The dissent interpreted Nixon as establishing that the legality of the President's actions are subject to judicial determination. Id. (White, J., dissenting).

In addition, Chief Justice Burger's Fitzgerald concurrence took issue with Justice White's interpretation of the words "judicial process" as they are used in Nixon. See 102 S. Ct. at 2707 (Burger, C.J., concurring). Justice White quoted from the Nixon opinion: "[N]either the doctrine of separation of powers, nor the confidentiality . . . without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances." Id. at 2718 (White, J., dissenting) (quoting Nixon, 418 U.S. at 706). According to Justice White, this passage helped to establish that subjecting the President to civil suits for damages was not violative of the doctrine of separation of powers. 102 S.Ct. at 2718 (White, J., dissenting). Chief Justice Burger chose to afford the passage a narrower interpretation, concluding that Nixon merely established that the President is required to produce relevant evidence in a criminal proceeding. Id. at 2707 (Burger, C.J., concurring).

120 See supra notes 73-79 and accompanying text.

121 See United States v. Nixon, 418 U.S. 683, 711-12 (1974). The Court, while noting that the President's privilege of confidentiality is "constitutionally based," noted that the right to "production of all evidence at a criminal trial similarly has constitutional dimensions." Id. at 711; see supra note 68.

122 418 U.S. at 711-12. The Nixon Court, without referring to the nature of the evidence requested, simply stated: "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
application of the rights of the criminal defendant is no doubt wel-
comed by many commentators,\textsuperscript{123} it is doubtful whether such a
reading of \textit{Nixon} is mandated in light of the more limited applica-
tion the Court has given such rights in the more recent Supreme
Court cases.\textsuperscript{124}

The Court’s treatment of the sixth amendment right to comp-
ulsory process demonstrates this point.\textsuperscript{125} Although the Court had
given virtually no attention to this right prior to 1967,\textsuperscript{126} the past
15 years have witnessed much construction of this sixth amend-
ment guarantee.\textsuperscript{127} The common thread running through these
cases is that a criminal defendant’s right to obtain evidence is not
absolute.\textsuperscript{128} The Court has stressed the importance of a preli-

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{123}] See, e.g., Westen, \textit{The Compulsory Process Clause}, 73 Mich. L. Rev. 73, 161 (1974)
\item[\textsuperscript{124}] See infra notes 125-31 and accompanying text.
\item[\textsuperscript{125}] See infra note 127.
Professor Westen, in the 170 years prior to the Court’s hearing of \textit{Washington v. Texas}, 388
U.S. 14 (1967), in which the Court held that the defendant was denied his right to compul-
sory process, 388 U.S. at 23, the Court mentioned the compulsory process “clause only five
times, twice in dictum and three times” in explaining its reluctance to construe it. Westen,
\textit{supra}, at 194-95 (footnote omitted).
\item[\textsuperscript{127}] See, e.g., United States v. Valenzuela-Bernal, 102 S. Ct. 3440, 3450 (1982) (defen-
dant’s due process and compulsory process rights not violated when government deported
witnesses without giving the defendant an opportunity to interview them); Davis v. Alaska,
415 U.S. 308, 318 (1974) (state court order limiting the right of defendant to impeach wit-
ness violated sixth amendment right to confrontation at trial); Cool v. United States, 409
U.S. 100, 104 (1972) (per curiam) (trial judge’s instruction that testimony of an accomplice
must be believed beyond a reasonable doubt before being considered by jury deprived defen-
dant of his sixth amendment right to present evidence).
\item[\textsuperscript{128}] See \textit{supra} note 127. Accordingly, recent Supreme Court pronouncements in the context of due
process, like those in the sixth amendment setting, demonstrate that the criminal defen-
dant’s right to obtain evidence is not absolute. See, e.g., United States v. Agurs, 427 U.S. 97,

Professor Westen has noted that the right of the accused to present a defense through
witnesses emanates from the sixth amendment as well as the due process clause of the fifth
and fourteenth amendments. Westen, \textit{supra} note 123, at 120. While due process requires
\end{itemize}
\end{footnotesize}
nary showing by the defendant of the materiality and relevance of the requested evidence.\textsuperscript{199} That the sixth amendment is not an ab-

that the procedures relating to a criminal defendant comport with the general standard of fundamental fairness, see Gaines v. Hess, 662 F.2d 1364, 1368 (10th Cir. 1981); Westen, supra note 123, at 121, the mandates of the sixth amendment are more specific in their requirements. The sixth amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI. The sixth amendment rights of the defendant that are relevant to the production of evidence in a criminal proceeding are those which emanate from the confrontation and compulsory process clauses. Westen, supra note 123, at 182. The confrontation clause imposes upon the prosecution the requirement to make witnesses available for cross-examination by the defendant. Id. The compulsory process clause allows the defendant to avail himself of the court's process in obtaining evidence in his favor. Id.

Although the Court initially based its decisions granting rights to the criminal defendants on due process grounds, see, e.g., Ungar v. Sarafite, 376 U.S. 575, 589 n.9 (1964); In re Oliver, 333 U.S. 257, 273 (1948), it is currently recognized that the rights of the criminal defendant, as developed under the due process clause, would be substantially the same if decided under the sixth amendment. See Westen, supra note 123, at 129; see also Westen, supra note 126, at 221. It is doubtful, therefore, whether a different outcome would result if the defendant based his claim upon either the sixth amendment or the due process clause of the fifth amendment. Westen, supra note 123, at 127. The Court has recognized the relationship between the two amendments in noting that they have "borrowed much of [the] reasoning with respect to the Compulsory Process Clause of the Sixth Amendment from cases involving the Due Process Clause . . . ." United States v. Valenzuela-Bernal, 102 S. Ct. 3440, 3449 (1982).

In Chambers v. Mississippi, 410 U.S. 284 (1973), the Court, while recognizing the "essential and fundamental" requirement of a fair trial, was careful to note that "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." Id. at 295. In construing the case of Roviaro v. United States, 353 U.S. 53 (1957), wherein the Court held that the Government's invocation of the "informer's privilege" deprived the defendant of an opportunity to prepare a defense by preventing the disclosure of the identity of an undercover employee, id. at 64-65, the Supreme Court observed: "[w]hat Roviaro . . . makes clear is that this Court was unwilling to impose any absolute rule requiring disclosure of an informer's identity . . . ." McCray v. Illinois, 386 U.S. 300, 311 (1967); see also Dutton v. Evans, 400 U.S. 74, 80 (1970) (plurality opinion) (limiting the right of confrontation by exceptions to the hearsay rule does not necessarily amount to constitutional violation). Although the right to compulsory process rarely has been construed, see supra note 126, one court noted its limitations in the celebrated case of United States v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d). In Burr, Chief Justice Marshall commented that if the subpoenaed material contained any matter of "which [it] would be imprudent to disclose, . . . such matter . . . [would] of course be suppressed." Id. at 37.

\textsuperscript{199} See United States v. Valenzuela-Bernal, 102 S. Ct. 3440, 3446-47 (1982). The Court recently has reaffirmed the notion that a violation of constitutional rights cannot be established by a mere showing of a deprivation of testimony. See id. at 3446. A defendant is required to show that he has been deprived of testimony that would have been relevant and
solute right suggests that a claim of privilege will not, in all cases, yield to a sixth amendment challenge.\textsuperscript{130} By limiting the decisions it has rendered in this area, the Court has recognized the need for ad hoc determinations when a criminal defendant claims a deprivation of sixth amendment rights.\textsuperscript{131} It is submitted that these claims should not be assessed through such broad generalizations as those contained in the \textit{Nixon} opinion. The broad language of the \textit{Nixon} opinion, it is suggested, fosters the abandonment of a prudent and thoughtful case-by-case adjudication in favor of a balancing that arguably gives a broader reading to the sixth amendment than that generally mandated by the Court.

Seizing upon the broad language in \textit{Nixon} to resolve the conflict between privileges and a criminal defendant's constitutional claims, state courts have referred to \textit{Nixon} as both "compelling"\textsuperscript{132} and "dispositive"\textsuperscript{133} precedent. Consequently, in some instances, in-depth considerations of the competing policy concerns have been sacrificed. Rather than focusing upon the facts presented, courts have analogized cases before them to the factual setting presented in \textit{Nixon}\.\textsuperscript{134} This reasoning almost inevitably results in the denial of a claim of privilege.\textsuperscript{135} Once it is recognized that in \textit{Nixon} a constitutionally based privilege was required to yield to material to the outcome of the trial. Westen, \textit{supra} note 123, at 221. The concept of relevance refers to the tendency of evidence to prove a fact, while that of materiality refers to the relationship between the fact that the evidence tends to prove and the issue in the case. \textit{See} \textit{McCormick, Handbook of the Law of Evidence} § 185, at 434-35 (2d ed. 1972). Additionally, a defendant is required to make a formal request to the government to exercise its powers. Westen, \textit{supra} note 123, at 221.


\textsuperscript{131} \textit{See} Chambers v. Mississippi, 410 U.S. 284, 303 (1973). The \textit{Chambers} Court specifically limited its holding to the facts of the case. \textit{Id.} The Court's holding in \textit{Washington v. Texas}, 388 U.S. 14 (1967), also was limited to the facts of the case. \textit{See} \textit{id.} at 23.


\textsuperscript{135} \textit{See infra} notes 136-40 and accompanying text. \textit{But see} People v. Khan, 80 Mich. App. 605, 611-22, 264 N.W.2d 360, 363-68 (1978) (conflict between rape shield statute excluding evidence of past sexual conduct and defendant's sixth amendment rights does not require a simple balancing of interests in all factual settings).
the needs of the "fair administration of criminal justice," it is not difficult to reason that any statutory or common-law privilege must likewise yield in any criminal setting. This reasoning seems particularly troublesome given the wide range of privileges that have been subject to challenge.

For example, in determining the applicability of a statutory marriage counselor's privilege, the New Jersey Superior Court, after quoting at length from *Nixon*, reduced the conflict between the privilege and the request for information to a simple balancing test by comparing the case at bar to *Nixon*. The court concluded, "Do the policy considerations which support the statutory privilege accorded marriage counselors transcend the constitutional guarantees . . . afforded to a defendant in a criminal action? This court thinks not." Similarly, when faced with an apparent conflict between a statutory privilege protecting the confidentiality of parole records and the request of the prosecution, the same court, relying almost entirely on *Nixon*, summarily concluded that the claim of privilege must yield. The Pennsylvania Supreme Court declined the opportunity to recognize a common-law privilege protecting the confidentiality of the files of a rape crisis center, noting, "[n]o less than in *Nixon*, where a president's claim of absolute privilege was rejected in favor of the Government's effort to obtain evidence, we must reject appellant's claim of absolute privilege." To be

---


137 *State v. Roma*, 140 N.J. Super. 582, 592, 357 A.2d 45, 50-51 (Law Div. 1976). In *Roma*, both the prosecution and the defense sought to compel the testimony and records of the criminal defendant's marriage counselor. *Id.* at 584, 357 A.2d at 46. In response, the marriage counselor invoked a State statute providing for the confidentiality of communications between the counselor and his client. *Id.* at 585, 357 A.2d at 46-47. In concluding that the privilege was required to yield, *id.* at 593, 357 A.2d at 51, the *Roma* court referred to *Nixon* as "perhaps the most compelling case in which the Supreme Court had occasion to weigh the competing interests of enforcing a privilege as against . . . the fair administration of criminal justice," *id.* at 591, 357 A.2d at 50.

138 *See State v. Singleton*, 137 N.J. Super 436, 439-41, 349 A.2d 139, 141-42 (Law Div. 1975), *aff'd*, 158 N.J. Super. 517, 386 A.2d 880 (App. Div. 1978). In *Singleton*, the prosecution issued a subpoena duces tecum to the New Jersey State Parole Board requesting the transcripts of the defendant's parole revocation hearing. Notwithstanding that the confidentiality of the requested evidence was ensured by statute, the court ordered production of the records. 137 N.J. Super. at 439-41, 349 A.2d at 141-42. The *Singleton* court referred to *Nixon* as announcing a balancing test that simply requires that "the general privilege of confidentiality [be] weighed against the inroads of such a privilege on the fair administration of criminal justice," *id.* at 440, 349 A.2d at 142 (quoting *Nixon*, 418 U.S. at 711).

139 *In re Pittsburgh Action Against Rape*, 494 Pa. 15, 27, 428 A.2d 126, 131 (1981). In *Pittsburgh*, the director of a rape crisis center refused to comply with a court order author-
sure, the state’s interest in furthering the policies underlying such privileges often directly clashes with a defendant’s sixth amendment rights. It is indeed unfortunate that in the search by state courts’ for precedent and guidance, the broad language of *Nixon* has proven to be an irresistible talisman.

It is suggested that a resolution of the conflict between evidentiary privileges and constitutional rights requires an approach more enlightened than simple reliance upon *Nixon*. Central to this resolution is an analysis of the underlying purpose of the privilege at issue. After identifying this purpose, a balancing of the needs of the party seeking the evidence against the importance of the objective to be furthered by the privilege is necessary. This balancing should entail consideration of several factors that will vary depending upon the factual setting presented. First, the court should consider whether it is the prosecution or the defense that is seeking the privileged material. Constitutional guarantees are expressly granted to the criminal defendant. Thus, it is argued, the claim of a prosecutor to override the privilege appears less compelling than that of the defense. The reviewing court should also con-

izing inspection of the center’s files by a criminal defendant charged with rape, urging that the court recognize a common-law privilege for documents generated as a result of communications between victims of rape and center personnel. *Id.* at 23-24, 428 A.2d at 130. After a consented-to in camera viewing of the relevant documents, the trial judge determined, as a matter of fact, that the documents would not be useful to the defendant as a cross-examination tool. The court nonetheless ordered the evidence made available to counsel for the accused. *Id.* at 23, 428 A.2d at 129. In denying the claim of privilege, the court stated, “We are guided, too, by the ‘executive privilege’ case of *United States v. Nixon* . . . where the Supreme Court of the United States unanimously refused to permit the . . . ‘generalized interest in confidentiality’ . . . to prevail over ‘fundamental demands of due process of law in the fair administration of criminal justice.’” *Id.* at 26, 428 A.2d at 131 (quoting *Nixon*, 418 U.S. at 711).

140 See, e.g., Hammarley v. Superior Court, 89 Cal. App. 3d 388, 396, 153 Cal. Rptr. 608, 612 (1979) (purpose of newsman’s statutory privilege is to facilitate the gathering of news that might not otherwise be available for public dissemination); People ex rel. Ill. Judicial Inquiry Bd. v. Hartel, 72 Ill. 2d 225, 229-30, 380 N.E.2d 801, 803 (1978) (confidentiality provision of state constitution protecting documents of the judicial disciplinary body exists to protect judges from adverse publicity and to protect and encourage testifying witnesses), *cert. denied*, 440 U.S. 915 (1979); State v. Roma, 140 N.J. Super. 582, 586, 357 A.2d 45, 47 (Law Div. 1976) (marriage counselor privilege exists to encourage parties to seek professional aid without fear of disclosure).


142 *See Farber,* 78 N.J. at 273, 394 A.2d at 337. The case of State v. Roma, 140 N.J. Super. 582, 357 A.2d 45 (Law Div. 1976), suggests that when both a criminal defendant and the prosecution seek the privileged material, a denial of privilege is more likely. *Id.* at 587, 357 A.2d at 46. *But see* State v. Singleton, 137 N.J. Super. 436, 437, 349 A.2d 139, 140 (Law
sider whether the privileged material is in the possession of the requesting party’s adversary. While the prosecution’s possession of exculpatory evidence is likely to amount to a constitutional violation,143 the nonavailability of privileged material to both the prosecution and the defense militates in favor of upholding the claim of privilege.144 In addition, the court should take into account whether the privilege has been waived. It is suggested that waiver by the party for whose benefit the privilege is primarily created militates in favor of overriding the privilege claims.145 Finally, the court may take into account the nature of the crime involved. The possibility of deprivation of life or liberty may mandate that a claim of privilege be denied, whereas the criminal accusations of a lesser nature may be adequately defended without intruding upon privileged relationships.146 It is submitted that an analysis consid-

143 See Brady v. Maryland, 373 U.S. 83, 87 (1963). In Brady, the Court held that even good-faith suppression of requested exculpatory evidence by the prosecution could amount to a due process violation. Id.
144 See In re Pittsburgh Action Against Rape, 494 Pa. 15, 62, 428 A.2d 126, 150 (1981) (Larsen, J., dissenting). In Pittsburgh, Judge Larsen noted that the withholding of evidence from only the defense amounts to "'gamesmanship' which should not play a part in the outcome of a prosecution." Id. (Larsen, J., dissenting).
145 Cf. People ex rel. Ill. Judicial Inquiry Bd. v. Hartell, 72 Ill. 2d 225, 240, 380 N.E.2d 801, 808 (1978) (Clark, J., concurring) (constitutional privilege protecting confidentiality of records of judicial disciplinary proceedings; waiver of privilege by judge rendered an upholding of privilege unnecessary), cert. denied, 440 U.S. 915 (1979). While the Illinois Judicial Inquiry Board majority agreed that the privilege protecting confidentiality of judicial records served to protect the judge, id. at 229, 380 N.E.2d at 803, protection and encouragement of testifying witnesses were also cited as justifying the privilege, id. Thus, the majority found the defendant judge’s waiver argument unpersuasive. Given that protection of judges was cited specifically in the privilege’s legislative history, id., it is suggested that protection of the charged judge from adverse publicity was the privilege’s primary purpose. Thus, the waiver of the privilege by the charged judge becomes significant to the court’s determination.

In State v. Roma, 140 N.J. Super. 582, 357 A.2d 45 (Law Div. 1976), the marriage counselor privilege was waived by the defendant client. Id. at 585, 357 A.2d at 47. Although the waiver argument was raised by both the state and the defense counsel, id. at 585-86, 357 A.2d at 47, the Roma court found their reasoning unpersuasive, setting forth the constitutional argument sua sponte. Id. at 597, 357 A.2d at 48.
146 Cf. People v. Schmidt, 56 Ill. 2d 572, 574-75, 309 N.E.2d 557, 558 (1974) (restricting application of broad statutory criminal discovery rules to cases in which a penitentiary sen-
erate of these factors is preferable to the mere incantation of Nixon's overbroad language. Use of the more simplistic approach has resulted in the potential for inequity as well as a contraction of state-created privilege beyond the degree apparently mandated by the Supreme Court.

**CONCLUSION**

Ostensibly, the Supreme Court opinion in *United States v. Nixon* was influenced by public sentiment and external pressure. The Court's apparent reaction to this pressure was the presentation of a united front, possible only through the juxtaposition of diverse viewpoints in a single opinion. This seems especially true after viewing the Fitzgerald Court's treatment of the civil immunity issue. Unfortunately, the broad language of the *Nixon* opinion has been utilized by state courts to solve a particularly delicate question of constitutional law in what is arguably an overly simplistic manner. Although most often the influence of external forces on the Court will be impossible to detect, it is clear that in *United States v. Nixon*, in which unanimity preceded reasoned debate, external influence and hence nonobjectivity was accorded its day in court.

Anne Y. Shields