

Sec. 2—Powers, Duties of the President Cl. 2—Treaties and Appointment of Officers

privileged, are to be made available. Thus, although the President's claim of privilege is entitled to deference, the courts must balance two sets of interests when the claim depends solely on a broad, undifferentiated claim of confidentiality.

"In this case we must weigh the importance of the general privilege of confidentiality of presidential communications in performance of his responsibilities against the inroads of such a privilege on the fair administration of criminal justice. The interest in preserving confidentiality is weighty indeed and entitled to great respect. However we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution."

"On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. . . ."

"We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice."⁶⁰⁴

Obviously, *United States v. Nixon* left much unresolved. It did recognize the constitutional status of executive privilege as a doctrine. It did affirm the power of the courts to resolve disputes over claims of the privilege. But it left unsettled just how much power the courts have to review claims of privilege to protect what are claimed to be military, diplomatic, or sensitive national security secrets. It did not indicate what the status of the claim of confidentiality of conversations is when it is raised in civil cases, nor did it touch upon denial of information to Congress, or public disclosure of information.

⁶⁰⁴ 418 U.S. 683, 711–13. Essentially the same decision had been arrived at in the context of subpoenas of tapes and documentary evidence for use before a grand jury in *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973).