

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

The Court's decision in *Nixon v. Administrator of General Services*⁶⁰⁵ did not elucidate any of these questions to any great degree. In upholding the Presidential Recordings and Materials Preservation Act, which directed the government to take custody of former President Nixon's records so that they could be screened, catalogued, and processed by professional archivists in GSA, the Court viewed the assertion of privilege as directed only to the facial validity of the requirement of screening by executive branch professionals, and not at all related to the possible public disclosure of some of the records. The decision did recognize "adequate justifications" for enactment of the law, and termed them cumulatively "comparable" to those held to justify in camera inspection in *United States v. Nixon*.⁶⁰⁶ Congress's purposes cited by the Court included the preservation of the materials for legitimate historical and governmental purposes, the rationalization of preservation and access to public needs as well as each President's wishes, the preservation of the materials as a source for facilitating a full airing of the events leading to the former President's resignation for public and congressional understanding, and preservation for the light shed upon issues in civil or criminal litigation. Although interestingly instructive, the decision may be so attuned to the narrow factual circumstances that led to the Act's passage as to leave the case of little precedential value.

Public disclosure was at issue in 2004 when the Court weighed a claim of executive privilege asserted as a bar to discovery orders for information disclosing the identities of individuals who served on an energy task force chaired by the Vice President.⁶⁰⁷ Although the case was remanded on narrow technical grounds, the Court distinguished *United States v. Nixon*,⁶⁰⁸ and, in instructing the ap-

⁶⁰⁵ 433 U.S. 425, 446–55 (1977). *See id.* at 504, 545 (Chief Justice Burger and Justice Rehnquist dissenting). The decision does resolve one outstanding question: assertion of the privilege is not limited to incumbent Presidents. *Id.* at 447–49. Subsequently, a court held that former-President Nixon had had such a property expectancy in his papers that he was entitled to compensation for their seizure under the Act. *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992).

⁶⁰⁶ 433 U.S. at 452.

⁶⁰⁷ *Cheney v. United States District Court*, 542 U.S. 367 (2004).

⁶⁰⁸ Although the information sought in *Nixon* was important to "the constitutional need for production of relevant evidence in a criminal proceeding," the suit against the Vice President was civil, and withholding the information "does not hamper another branch's ability to perform its 'essential functions.'" 542 U.S. at 383, 384.