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Speaker & Gavel

Volume 41 | Issue 1

Article 2

January 2004


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Recommended Citation

Medsker, R.S., & McDorman, T. (2004). Maintaining Institutional Power and Constitutional Principles: A Rhetorical Analysis of United States v. Nixon. *Speaker & Gavel*, 41, 1-19.

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Maintaining Institutional Power and Constitutional Principles: A Rhetorical Analysis of *United States v. Nixon*

R. Scott Medsker and Todd F. McDorman

While president, Richard Milhouse Nixon was almost obsessive in his desire to control the flow of information. One example of Nixon's pre-occupation is demonstrated in the lengths he went to identify who was leaking national security information contained in the Pentagon Papers. Angered by FBI Director J. Edgar Hoover's refusal to investigate the source of these leaks, Nixon created a group to do the task himself (Kutler 112). These henchmen, known as "the Plumbers," were subsequently used by Nixon to spy on both his own administration and his opponents in the Democratic Party; and whether one deems it fitting or ironic, eventually contributed to his loss of the presidency.

On June 17, 1972, seven Nixon neophytes broke into the Democratic National Headquarters in the Watergate complex to wiretap phones and obtain campaign information. While the seven men were arrested and eventually convicted for their crime, who orchestrated the break-in remained a mystery, although some quickly suggested that the orders came from within the White House (Apple 1). In January 1973, after the general election, enough concern remained to justify the formation of a Congressional committee to investigate allegations of White House misconduct. However, the initial witness testimony, which was identical from all involved, failed to implicate President Nixon or his administration.

During the third week of March, two members of Nixon's team broke rank and gave critical information that did in fact implicate the president. On March 19, James McCord, a former Nixon security advisor and one of the convicted Watergate burglars, wrote to Judge Sirca, who presided over his trial, and informed Sirca that White House officials had worked to keep the seven intruders silent. On March 22, FBI Director Patrick Gray further fueled speculation by telling a Senate committee that White House counsel had "probably lied" during the investigation. Subsequently, on March 26, 1973 the Watergate grand jury convened for the first time (Apple 2-3).

As the investigation proceeded, a Special Prosecutor was appointed. He was granted sweeping power and charged to "investigate, subpoena, [and] bring suit in court against anyone suspected of criminal wrongdoing in the campaign of 1972, up to and through the White House to the President himself" (White 250). The Special Prosecutor subsequently asked the District Court to issue a subpoena *duces tecum*¹ to compel President Nixon to supply critical information. Nixon's resistance to the subpoena eventually brought *United States v. Nixon* before the Supreme Court—and provides the starting point for this analysis.

Watergate is an event that influenced a generation and their beliefs in American government. Likewise, rhetorical scholars have been fascinated with the scandal, spending considerable energy addressing the issue from multiple perspectives. These analyses have examined the apologia of Nixon (Harrell, Ware, and Linkugel; King), his resignation (Rosenfeld; Wilson), the general course of events that contributed to the cover up (Gouran; Schuetz), and the aftermath of the scandal (Blair; Klumpp and Lukehart). Noticeably absent, however, is a detailed analysis of the rhetoric that most influenced the trajectory of the crisis—the Supreme Court's decision in *United States v. Nixon*. A ruling rife with social and legal implications, it has influenced political decision making for nearly thirty years. Immediately, it prompted the first resignation of a President of the United States. In terms of legal repercussions, it has been suggested that the decision "will probably become one of the most important expansions of judicial authority in the history of the Republic" (Westin xxi).

In examining these implications we argue that the Court's Nixon decision was a uniquely strategic response to a complex rhetorical situation. In fact, the elements of the situation were so fundamental to the tenor of the Court's response that this essay's framework is drawn from Lloyd F. Bitzer's construction of the rhetorical situation. The use of this system will allow for deeper consideration of the context of *United States v. Nixon* as well as assessment of the legal text as responsive to that context.

The analysis reveals that in resolving the case the Court was faced with concerns on two fronts. First, on an institutional front, the Court sought to maintain their ability to perform their duties against encroaching claims from the executive branch. Simultaneously, the Court worked to balance the sacred doctrine of American jurisprudence that "no man is above the law" with the status of the President as "first among equals." Utilizing Bitzer's rhetorical situation we examine how the Court responded to the constraints, exigencies, and audiences present in this extraordinary situation, ultimately arguing that the Court skillfully assessed a complex situation and offered a rhetorical response that not only maintained their institutional power in a tenuous time but also preserved the basic tenets of American judicial theory.

The Rhetorical Situation as an Approach to Legal Rhetoric

Perhaps in response to Lucaites' challenge to rhetorical scholars, attention to the rhetorical dimensions of legal decision-making has grown in recent years. In the past decade scholars of legal rhetoric, possessing varied goals, have offered important observations about the intermingling of law and society (Hasian; Hasian, Condit, and Lucaites; Sullivan and Goldzwig; Rountree). In bringing social considerations to the reading of judicial opinions such work has reinforced Prentice's claim that "judicial rhetoric is a form of argument that seeks to persuade listeners of the legitimacy of particular uses of power" (87). For instance, Critical Legal Studies scholars have addressed contradictions and deep-level incoherence within texts that legitimize unjust systems of power and distribution of wealth. One investigation in this tradition undertaken by Hasian examined the functions of law as sword, shield, and menace within *Buck v. Bell* Speaker and Gavel, Vol 41 (2004) www.dsr-tka.org/

and the eugenics controversy. Others, such as Rountree's pentadic analysis of *Korematsu v. United States*, have sought to understand the relationships of actors, actions, and motives in the expression of judicial rhetorical power. Finally, numerous scholars have explored the moral implications of ideologically charged decisions (Srader; Sullivan and Goldzwig). Regardless of the approach used, it is clear that in briefs, oral arguments, and judicial opinions rhetorical expressions of power are central to understanding the meaning and implications of law.

One approach for reading rhetorical dimensions of the law that has received little attention is Bitzer's conception of the rhetorical situation. While the idea is often dismissed as a pre-critical descriptive tool, Bitzer's concept has a cozy fit with the operation of the law. For instance, Bitzer argues that the function of rhetoric is "ultimately to produce action or change in the world" (250). Such a function is nearly identical to that of the law in its efforts to control, regulate, or promote certain actions and behaviors. In this sense, Bitzer's treatment of rhetoric within the rhetorical situation could be used to provide perspective on the workings of any Court ruling. However, other approaches to judicial rhetoric will often provide more nuanced analyses due to unique factors found in each decision.

Still, the mapping of the rhetorical situation in terms of exigence, audience, and constraints is also an accurate mapping of the judicial decision making process from the acceptance of a case for oral argument to the rendering of an opinion. Bitzer defines exigence as "an imperfection marked by urgency . . . a defect, an obstacle, something waiting to be done, a thing which is other than it should be" (252). Some type of exigence or "something waiting to be done" marks every Supreme Court case and each judicial decision is written in response to a specific obstacle, defect, or situation that is not as one party feels it should be (Prentice 94). Bitzer's point that every rhetorical utterance is controlled by situational factors such as an exigence mirrors the petitioners' presentation of a legal claim. In *United States v. Nixon* the exigencies include both a need to fulfill a subpoena and a threat to the Court's status.

Attention to audience is required according to Bitzer because "rhetorical discourse produces change by influencing the decision and action of persons who function as mediators of change" (253). The practice of this principle might be observed in the opinions written by Supreme Court justices who must consider a number of separate and distinct constituencies, interests, and reactions (Prentice 95). These groups, to note only a few, may include the public, the litigants, or the other justices. What makes *United States v. Nixon* unique and gives special emphasis to audience is that the key constituency is the most powerful person in the political hierarchy—the president. Thus rather than a generic concern for audience, this controversy presents a particularized audience that makes the lens of the rhetorical situation particularly profound.

The final element of the rhetorical situation concerns the relevant constraints. In a judicial context, the constraints consist of "persons, events, objects, and relations" that the Court must consider when writing an opinion because "they have the power to constrain decision and action needed to modify exi-

gence" (Prentice 98). While traditional legal constraints such as the Constitution, a lack of fiat while needing to compel compliance, and American ideology are relevant to *United States v. Nixon*, unique claims concerning jurisdiction and justiciability present special obstacles in the controversy. In issuing its judgment the Court must, to the best of its ability, circumvent, consider, or preferably utilize these constraints to create the most effective opinion possible (Prentice 98).

The use of the rhetorical situation as an approach to legal rhetoric has been explored previously by Robert Prentice in the *Arizona Law Review*. For his analysis Prentice selected *Brown v. Board of Education* because "more is known about the decision-making process in *Brown* than in any other case" (102). In *Brown*, the inflammatory nature of the issues forced the Court to realize that the manner in which they presented their "ruling would be no less important than the substantive content of the opinion" (Prentice 103). The result of Prentice's investigation is a quality analysis by a legal scholar that at times underestimates the importance or impact of rhetorical subtleties. In contrast, in this analysis rhetorical scholars address a legal controversy in hopes of providing a more nuanced treatment of rhetoric (while no doubt opening ourselves up to similar charges concerning legal subtleties). While the subject matter of the analyses is vastly different, the resolution of a sensitive subject with a high probability of provoking disobedience represents a parallel between *Brown* and *Nixon*. Thus for this and similar reasons this essay employs the rhetorical situation to examine *United States v. Nixon*.

The analysis proceeds by exploring with additional detail how the rhetorical situation can be an effective tool to evaluate strategic decisions in the legal sphere. That is rather than serving only a descriptive or pre-critical function, evaluation of complex situations can be fundamental to successful legal decision making, as the Supreme Court's decision in *United States v. Nixon* demonstrates.

Negotiating the Constraints: Determining Jurisdiction and Justiciability in *United States v. Nixon*

In any given legal dispute there are likely to be numerous constraints operating in conflict with one another. Most importantly, each constraint has "the power to constrain decision and action needed" to address an exigence before the Supreme Court (Bitzer 254). These constraints may consist of social norms, statutes, criminal law, past precedent, or the Constitution. While constraints such as past precedent, the Constitution, and institutional rules are typical in nearly every case, in *United States v. Nixon* the Court effectively juggled more difficult challenges to their jurisdiction and the justiciability of the issue. These constraints initially presented barriers to the Court's ability to review the issue and thereby resolve the exigence.

Before addressing the legal merit of claims proffered by Nixon and the Special Prosecutor, the Supreme Court had to first determine if it had jurisdiction over the case. In most respects this is a fairly generic constraint. In every case, whether it is a criminal case in a District Court or a case of national importance

in the Supreme Court, the question of whether the implicated court has authority to adjudicate the controversy must be decided. In *Nixon*, the Court acknowledged the a priori nature of this issue by calling it the “threshold question” (690) in the case.

While jurisdiction is a requirement for any court to hear a legal controversy, additional explanation allows full appreciation of the complicated nature of this question and the challenge it presented. In appellate courts, such as the Court of Appeals or the Supreme Court, one rarely sees argument over specific motions but instead entire decisions are appealed from lower courts. This is because in order to create a judiciary that is efficient as well as to avoid piecemeal reviews of cases, the jurisdiction of the Court of Appeals encompasses only the “final decisions of the district courts” (*United States v. Nixon* 690), thus typically excluding motions such as the subpoena duces tecum around which this case revolved.

At first glance, therefore, jurisdiction appeared to present a constraint on the Supreme Court’s ability to review and resolve *United States v. Nixon*. If the Court could not hear the case, they obviously could not hand down a decision. On the other hand, by claiming jurisdiction, it was possible that the Court would appear overly eager to settle the issue. To navigate the tension, the Court turned to the precedent set by prior cases. Specifically, the Court reasoned that *Nixon* fell within an exception to the “finality” requirement. Utilizing *United States v. Ryan*, the Court concluded that the case was properly appealable because it met the conditions of a “limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual’s claim” (*Ryan* 533; *Nixon* 691). With the case properly “in” the Court of Appeals, the case was also properly before the Supreme Court. Wisely, the Court realized that citing past precedent could not only establish jurisdiction, but also create the sense that the Court was obligated—that they had no choice—except to resolve the controversy. This allowed review of the matter while at the same time avoiding the appearance of a Court eager to delve into matters of the Executive Branch.

In explaining its reasoning the Court was also careful to pay deference to the high office *Nixon* held. For instance, in referencing *Ryan*’s determination that to risk contempt for defying a court’s order is not an undue burden for the ordinary citizen, the Court acknowledged the special standing of the president. Preserving the maxim that the president is the “first among equals,” the Court used precedent to demonstrate their desire to prevent an “unnecessary occasion for constitutional confrontation between two branches of government” (*United States v. Nixon* 692) by requiring *Nixon* to “place himself in the posture of disobeying an order of a court simply to trigger the procedural mechanism for review” (691). Such a result would not only be “unseemly” but “the issue [of] whether a President can be cited for contempt could itself engender protracted litigation, and would further delay both review . . . and the ultimate termination” of the controversy (691-92). By delicately crafting an opinion that created a clear attempt to present the image of facilitating the needs of the President, the Court maneuvered to combine the power of precedent with calculated deference

to both *Nixon* and the office of the presidency in order to navigate what could have been a barrier to resolving the exigence.

The second key constraint for the Court was the question of justiciability. In order for the Court to hear a case it must present a resolvable issue that is not a strictly political question (*Baker v. Carr*). If the issue was an intra-branch dispute, as *Nixon*’s counselors contended, the Court would have no authority to intervene. Just as they did in addressing the question of jurisdiction, the Court carefully chose its words so as to not offend the President, even going so far as to suggest that the Executive Branch could have avoided the legal controversy.

Arguing in the Court of Appeals, *Nixon*’s attorneys contended the matter was an intra-branch dispute between the President and the Special Prosecutor, who serves as an extension of the Department of Justice, a section of the Executive Branch, therefore leaving the Court without jurisdiction. After this argument was rejected by the Court of Appeals it was renewed before the Supreme Court in an alternative form, with *Nixon*’s attorneys arguing that the political nature of the matter was beyond the purview of the Court and hence not justiciable. To put it differently, since the chain of command flows through the Executive Branch from President to Attorney General to Special Prosecutor, *Nixon*’s counselors argued that the Court could not tell the President how to manage his branch, effectively barring the Court from providing any relief to the exigence.

To refute this claim and negotiate their way around the barrier of justiciability, the Court relied upon the Constitution and sections of U.S. Code which define the ability of the Attorney General to appoint subordinate officers to discharge relevant duties. The Court explains:

Acting pursuant to those statutes, the Attorney General has delegated the authority to represent the United States in these particular matters to a Special Prosecutor with unique authority and tenure. The regulation gives the Special Prosecutor explicit power to contest the invocation of executive privilege in the process of seeking evidence deemed relevant to the performance of these specially delegated duties. (*United States v. Nixon* 694-95)

Here the Court explained that while it is true that the Special Prosecutor is an agent of the Executive Branch, his duties allow him to turn to the Judicial Branch for aid should he be hindered in gathering the evidence needed to complete his function.

While this passage is certainly important as it validated the actions of the Special Prosecutor, footnote 8 registered the fatal blow to *Nixon*’s argument. In that footnote the Court cited federal register rules defining the power of the Special Prosecutor, which was given full authority “to contest the assertion of ‘Executive Privilege.’” Moreover, the footnote explained the existence of “assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers . . . to limit the independence that he [the Special Prosecutor] is hereby given” (*United States v. Nixon* 694-95). The footnote removes any ambiguity that might exist in the text of the opinion. The question of justiciability is resolved—the Special Prosecutor has the right to turn to the Judicial Branch for help in completing his task. To include this footnote in the body of the text, in plain sight if you will, might have been perceived as

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charging that either Nixon's counsel was so incompetent in their briefs that they did not know of this assurance or that they knowingly presenting the Court false information. Regardless of which was true, either would be an insult and an embarrassment to the President, making him hostile to any decision from the Court. Given that the condition was too important to omit the Court wisely placed it in the footnote, thus preserving the record while also allowing the President to keep his dignity.

Perhaps most importantly, in an attempt to again show that they are not zealous to encroach on the Executive Branch, the Court noted that it was "theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor's authority. But he has not done so" (*United States v. Nixon* 696). The Court simultaneously reminds the reader that so long as the regulation delegating the Special Prosecutor "remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it" (696, emphasis added). By suggesting that the Executive could have avoided the problem if the Attorney General had amended the Special Prosecutor's responsibilities, the Court not only displaced some of the responsibility for the decision, but also showed the executive branch that future better management of the Special Prosecutor might avoid similar situations.²

The Court concluded their answer to the question of justiciability with a basic judicial lesson on the meaning of the concept. Of course there was the "controversy" or "conflict" over whether or not the Special Prosecutor could take his boss to court, but the Court writes "controversy means more than disagreement and conflict; rather it means the kind of controversy courts traditionally resolve" (*United States v. Nixon* 696). The use of the word "traditionally" reasserts that what the Court did was nothing radical, but rather was the continuing function of their constitutional role. The Court quotes *U.S. v. ICC*, another benchmark in legal history, when they say "Whatever the correct answer on the merits, these issues are 'of a type which are traditionally justiciable'" (430; *United States v. Nixon* 697). In doing so the Court declared that it is their role, as specified by precedent, to decide such conflicts.

Thus ultimately the Court effectively confronted issues related to its institutional authority and American jurisprudence. In preserving the institutional authority and power of the Court, they invoked their history and precedents and cited federal regulations and sections of U.S. Code to assert that their action in this case was not revolutionary. Without explicitly stating it, the Court created the perception that rather than encroaching upon the territory of the Executive Branch they were simply maintaining their institutional authority and power as granted by the Constitution. At the same time, in their effort to preserve American jurisprudence, the Court argued that to allow the subpoena to go unfulfilled "would be inconsistent with the applicable law and regulation" (*United States v. Nixon* 697). They understood that despite the unique facts of the case, precedent must be upheld because "no man is above the law," not even the Chief Executive.

From the very beginning of the opinion, the Court had to skillfully navigate the constraints, namely jurisdiction and justiciability, to put itself in a position to consider the exigence. To do so, the Court used language that was concrete and left little room for interpretation while saving Nixon from an embarrassing blow to his reputation. Further, the Court cited binding federal regulations, binding precedent, and the actions of the Executive and Legislative branch to help nullify imminent criticism that they were practicing judicial statecraft. With the constraints eliminated the Court turned its collective mind towards the exigencies of the controversy.

Resolving the Exigence:

Enforcing the Subpoena and Defining Executive Privilege

In *United States v. Nixon* the Court was required to address profound questions about the American political system. More specifically, the Court addressed questions of institutional authority and the enforcement of long held constitutional principles in determining how to treat the serving of a subpoena *duces tecum* and the meaning and extent of executive privilege. This required the Court to judge whether a subpoena *duces tecum* has the power to compel presidential compliance, assess its own power to review and limit executive action, and to confront Nixon's claim of an absolute executive privilege. These issues emerged from the exigencies in the case, which, apart from the acts that instigated the general Watergate crisis, are two in number: (1) how a subpoena issued against the president should be evaluated and (2) the immense and immediate threat to the Court's ability to perform its constitutional duty by Nixon's assertion of an absolute executive privilege.

The special prosecutor charged with investigating the Watergate scandal issued the subpoena to obtain certain tapes or documents relating to precisely identified conversations and meetings between the President and others involved in the indictment. President Nixon responded by claiming that executive privilege protected the release of these documents and tapes and thus moved to quash the motion. The conflicting stances created an institutional imperfection—an exigence—that the Supreme Court sought to relieve. The case before the Court, an appeal of the District Court's decision that had upheld the subpoena *duces tecum*, had to resolve the question of the power and validity of the subpoena in order to determine if the criminal case could proceed.

In responding to this exigence the Court methodically addressed the possible reasons for quashing a subpoena *duces tecum*, as set out in Federal Rule of Criminal Proceedings 17 (c). They refuted each possible objection to the subpoena's enforcement and explained why the reasons did not suffice in *United States v. Nixon*. First, "a subpoena for documents may be quashed if their production would be 'unreasonable or oppressive,' but not otherwise" (698). As support, previous rulings in *Bowman Dairy Co. v. United States* and *United States v. Iozia* were referenced to set out the tests that govern such situations. Second, it is noted that "the Special Prosecutor, in order to carry his burden, must clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity" (700). With much of the prior record placed under seal, the Supreme Court strategically

cally deferred to the District Court, explaining that their own review “necessarily affords a less comprehensive view of the total situation than was available to the trial judge” (700). Here the Court is careful rather than brash, a move that both bolstered the legitimacy of the subpoena and established limits to the Court’s power.

Moreover, as *United States v. Nixon* was not the first occasion the Court had to examine the power of a *duces tecum* subpoena in a case involving a president, the Court was able to rely upon past doctrine in evaluating the power of the subpoena. In *United States v. Burr*, which concerned a treason charge against former Vice President Aaron Burr, Thomas Jefferson offered excerpts of a document that would guarantee Burr’s conviction. In resolving the validity of a subpoena *duces tecum* in that case the Court ruled that the president could not release only certain items as he wished, instead demanding that he provide the whole text, or nothing (McGurn 14).

In resolving *Nixon*, the Court references *Burr* a total of seven times in order to serve numerous functions. First, the decision is cited to demonstrate that the Court was meticulous in its review of the subpoena (702). Second, and more importantly, *Burr* is used to assert that it is the Court’s “right and indeed duty to resolve” the issue (707, 708). Finally, and perhaps most interestingly, *United States v. Burr* is the only case relied upon in the text of the final five pages of the decision. There it is used as a guide for the execution of the subpoena *duces tecum* since the Court had a case that was similar to *United States v. Nixon* in important respects. The parallel illustrates that not only was this issue justiciable, but it was executed without incident in the past. Thus through the use of precedent the Court reaffirmed its authority, rather than the President’s, to determine what information was pertinent and necessary in the proceedings (McGurn 16). With the legitimacy of the subpoena thoroughly addressed, the question posed by the first exigence was resolved. The manner of resolution, allowing the case to continue forward, forced the justices to address the second exigence—*Nixon*’s claim of an absolute executive privilege.

Addressing the exigence of executive privilege presented a potentially explosive institutional battle between the executive and the judiciary and posed a threat to the Court’s status similar to that encountered in *Brown v. Board of Education* and *Bush v. Gore*. While the phrase “executive privilege” first appeared in 1958 in an opinion by Justice Stanley F. Reed, presidents since George Washington, who denied the House of Representatives the right to see papers related to the negotiation of the Jay Treaty, have appealed to its existence (Biskupic and Witt 217). However, *United States v. Nixon* is certainly the most important case regarding executive privilege and it was the first time the Court found a constitutional basis for it (Biskupic and Witt 219).

To accept *Nixon*’s claim of a broad and absolute executive privilege would have barred the judiciary from carrying out its duties under the Constitution (Fisher 214) and it would have granted the Executive Branch a tool to hide nearly anything from the reaches of review. At the same time, the desire to prevent an omnipotent chief executive was balanced by fears of hampering the Executive Branch too much and restricting the candor of advisors to the president.

Such concerns demanded that the Court not restrict the powers of executive privilege by too great of a magnitude. This concern is demonstrated in footnote twenty of *United States v. Nixon* where the Court suggested a parallel between the candor of a juror and the openness of a presidential advisor. The note states:

A juror (or advisor in our case) of integrity and reasonable firmness will not fear to speak his mind if the confidences of debate are barred to the ears of mere impertinence or malice. He will not expect to be shielded against the disclosure of his conduct in the event that there is evidence reflecting upon his honor. The chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice. (712)

Thus while the Court considered the candor of advisors, concerns over candor did not determine their final stance on executive privilege. After being weighed by the justices, the potential constraint posed by hampering the executive with a partial privilege was not deemed significant enough to outweigh the risks of an unfettered executive.

The exigence of executive privilege required the Court to seek a precarious balance concerning how to afford sufficient protection to the President without creating an absolute privilege that risked placing the President beyond the law. In balancing these concerns the Court was able to consider the social atmosphere of the time and the public audience. With the support of the people in compelling presidential compliance, the Court had more ability to uphold the “rule of law” and expand still further the discretionary power of the judiciary in the American constitutional system (Newport 1). That is, secure in the knowledge that the American public supported their efforts, the justices could be bold in projecting a broad sphere of influence. Public opinion at the time of *United States v. Nixon* was not only hospitable to a ruling against the President but was almost irresistibly pressing for it because of the president’s conduct in Watergate and the subsequent cover-up (Newport 1). Gallup Polls taken in August (“Watergate”) and October (“Watergate Tapes”) of 1973 showed respectively that 67% and 62% of Americans felt that *Nixon* was wrong to not volunteer the tapes to the District Court. Such support assisted the Supreme Court, in a time of public mistrust of the executive, in circumscribing the acceptable limits of executive privilege.

The decision that the courts, and not the President, would define the scope of executive privilege was of central importance (Fisher 214). With the Congress actively hostile to *Nixon*’s stance on executive privilege (Westin xx), the Court likely recognized that they could expand their power and *Nixon* would be left virtually helpless if he decided not to comply with the Court’s order. Staking a claim to this power, however, was an aggressive step for the Court, as they would—indirectly at a minimum—enhance their own power at the expense of the executive by limiting the scope of executive privilege. The gravity of this result clearly weighed upon the Court as throughout the opinion they took great pains to not only demonstrate that the Court had the authority to make this decision but also a duty to do so.

In order to demonstrate this duty the Court called upon the seminal case in American legal history—*Marbury v. Madison*. The Court used *Marbury* to establish their credibility and authority, calling upon it to explain that “it is the duty of this Court ‘to say what the law is’” (*United States v. Nixon* 703, 705, emphasis added). It is no accident that the Court used this touchstone of jurisprudence, often considered the first meaningful case decided by the Supreme Court. And as if to reiterate the importance of this central point of Supreme Court history, the Court issued this statement not once, but twice.

Ultimately the Court found a constitutional basis for the “protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties” (*United States v. Nixon* 705). Reasoning that since “certain powers and privileges flow from the nature of enumerated powers,” the Court concluded that “the protection of confidentiality of Presidential communications has similar constitutional underpinnings” (705-06). To allow for the necessity of executive privilege, however, was not to allow the absolute privilege that Nixon asserted. The Court concluded that “to read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim . . . would upset the constitutional balance of ‘a workable government’ and gravely impair the role of the courts under Art. III” (*United States v. Nixon* 707). To disrupt this balance, a system of checks whereby each branch is interdependent with the others, would be to disturb the foundation of American government. Thus ultimately the Court effectively used the Constitution to not only affirm the existence of executive privilege but also to maintain their power under Article III.

The exigence—in terms of its legal dimensions—was resolved. The subpoena would be fulfilled. The Court would maintain its power by defining executive privilege as a broad, though not absolute, protection. Executive privilege would allow the president protection in matters regarding the military, diplomacy, and national security, while the Court maintained sufficient authority to fulfill its constitutional duty. The complexity of balancing the exigencies—enforcing the subpoena while maintaining the power of the presidency—contributed to the complex language the justices used in addressing the audiences and dealing with constraints. While the constraints, as discussed, threatened to hamper what the Court could and could not do, the audiences would ultimately determine the fate of the Court’s decision by either complying with or ignoring it. Nixon’s staff had noted that he would follow a “definitive” ruling from the Court, but what Nixon considered “definitive” was unclear (McGurn 13). Unless the Court could deftly handle the executive office as an important audience, a dangerous conflict between the executive and the judiciary remained a possibility.

Writing to Audience: Pacifying the President and the Public

In commenting on the Supreme Court’s enforcement powers Justice Clark once noted, “we don’t have money at the Court for an army and we can’t take

ads in the newspaper, and we don’t want to go out on a picket line in our robes. We have to convince the nation by the force of our opinions” (qtd in Prentice 86). Thus the wise justice (and the good rhetor) resorts to those arguments that are the most persuasive and, like speechwriters, utilizes emotional appeals, symbolism, audience adaptation, and other persuasive techniques (Prentice 89). Especially when faced with a sitting president, who is charged with enforcing the laws, the Court is reminded of Andrew Jackson’s defiant attitude in response to a decision with which he disagreed: “John Marshall has made his decision; now let him enforce it” (qtd in Westin xx).

In crafting a rhetorically sensitive response, the justices preserved the historic building blocks of American legal theory, skillfully navigating a fine line in protecting and pleasing a public who wanted the President held accountable while also guarding the dignity of the office of the president and preserving a president’s ability to perform his or her job. At the same time, the Court had to quell a threatening president, guaranteeing that he would comply with their ruling while maintaining their own ability to function as a part of the national government. In addition to writing for the public and the President, members of the Court also had to consider the philosophical standing of their fellow justices to make a “definitive” ruling possible. Finally, the justices would attempt to write with sufficient clarity and specificity to guide lower courts and future justices.

While in every Supreme Court case there is an audience which is “capable of being influenced” (Bitzer 253) by the Court’s discourse, this particular controversy was largely unique in that the most important audience was a sitting president. President Nixon’s press spokesman Ron Ziegler had promised that the President would comply with a “definitive” ruling, but what would be considered “definitive” remained unclear (McGurn 13). Prior to oral arguments and the Court’s decision Nixon reportedly said, “I don’t give a shit what happens. I want you all to stonewall it. Let them plead the Fifth Amendment, cover up or anything else that will save the plan. That’s the whole plan” (Westin xi). Nixon’s desire to not cooperate was a chilling reminder to the Court concerning the limits of its powers and lack of enforcement mechanisms. Likewise, the threat showed Nixon’s frame of mind and lack of respect for the system of government he was charged to protect. It also presented the justices with a major constraint—the realization that they could not chastise the President so harshly that he would not comply. The ultimate result, from the perspective of Westin, was a judicial opinion that “sounds like the cool lecture on constitutional fundamentals that a rather pedantic school master might deliver to a pupil who has handed in a very poor paper on the constitutional fundamentals of the American system and deserved a lesson in basics” (xvii).

At the same time the Court was careful to look past the actual person occupying the office of the president, Nixon, and to the “presidency” itself. Any decision the Court made would affect the office and the function of future leaders of the United States. Respect for the office is noted by the manner in which the Justices refer to the respondent—as “the President.” This is unique in that in most every other opinion the parties are referred to as “petitioner” and “respondent,” not by name or title. The use of formal title illustrates that the Justices did

not forget the important position—President of the United States—occupied by the respondent. Moreover, twice they emphasize that a court is not “required to proceed against the president as against an ordinary individual” (United States v. Nixon 708, 715). In doing so the Court remembers and reaffirms that the president has important constitutional duties to perform. The Court protects the presidency by leaving the president a large sphere of privileged communication in protecting “military, diplomatic, or sensitive national security secrets” (706), calling such communication “presumptively privileged” (713).

The second audience that received consideration from the Court was the American public. Given the degree of public sentiment against the President and concern over Nixon’s role in Watergate and the cover-up that followed, the Justices had to reassure the American public that no one, not even the president, could evade the “due process of law and gravely impair the basic function of the courts” (United States v. Nixon 712). One way the Court did this was by reassuring the public of the stability of constitutional values and judicial doctrine.

The Court located language from previous cases indicating that while the presidency provides certain benefits during legal controversies, such as immediate review and avoidance of procedural mechanisms in the appeals process (United States v. Nixon 691), the Court also must “look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented” (693). While recognizing the special position of the president, the Court also reassured the public by drawing from Burr and reiterating that their rulings “cannot be read to mean in any sense that a President is above the law” (715).

The Court’s concern for both the president and the public is further seen in the way that the Court balanced the concerns and rights of each against the other. The opinion, which also has been described as having a back-and-forth tennis match like quality, first sides with privilege then sides with the issuance of a subpoena as it seeks to persuade both important audiences of the wisdom of its opinion (Kurland 66). For instance, while reassuring the public that no man is above the law by looking “behind names that symbolize the parties” (United States v. Nixon 693), the Court also defers to Nixon and the presidency when drawing from United States v. Burr and twice saying that “We agree with Mr. Chief Justice Marshall’s observation, therefore, that ‘in no case of this kind would a court be required to proceed against the president as against an ordinary individual’” (708). This back and forth reasoning is observed at other points in the opinion including the previously discussed examination of the validity of the issuance of a subpoena under Federal Rule 17 (c). While this style of writing may initially seem confusing, it provided a strategic and necessary balance in protecting the presidency’s power and Nixon’s dignity while also serving the public’s interests.

The nine justices and their efforts to arrive at a unanimous opinion composed a third crucial audience in the controversy. Since it is believed that Nixon was considering disobeying the order if the decision was close (Nelson 197), it was important that Chief Justice Burger and seven of his colleagues worked to unite behind a single, unanimous opinion.³ While the decision making process of the justices is not precisely known, a combination of journalistic sources and

a rare discussion regarding how Chief Justice Burger led the Court in writing the opinion, provides unusual insight into how the decision was crafted:

[When] the Court gathered for its conference on July 9th, the day after oral argument had been presented, the Chief Justice urged his colleagues to try to reach a unanimous judgment and to join in a single opinion, a goal to which they assented. After a review of where each Justice stood, it became clear that the President had no support among the eight Justices for his position as to executive privilege. However, Chief Justice Burger and Justice Blackmun—the so-called Minnesota twins—were troubled about the issue of justiciability, that is, whether the Special Prosecutor had the standing to bring this suit to enforce a subpoena against his formal superior, the President of the United States. Justice Stewart stressed the clear autonomy that the Special Prosecutor had been given when this office was created by the President and confirmed by the Senate, and the discussions brought Burger and Blackmun around to that view. Four of the Court’s liberals—Douglas, Brennan, Marshall, and Stewart—favored drafting a broad opinion limiting the concept of executive privilege, while White and Powell favored the writing of a narrow opinion that would leave the Court flexibility on the issue. After about six hours of discussion, the Justices agreed on the main lines of a decision, and Chief Justice Burger assigned to himself the drafting of this opinion. The other Justices contributed memoranda for his use, and one account states that it was Justice Stewart who contributed the draft of the opinion’s treatment of the justiciability issue. (Westin xv-xvi)

Thus despite apparent differences on the Court, the justices realized the importance of unanimity and worked for a single opinion. In this regard the decision is an exemplar of judicial craftsmanship, reminiscent of *Brown v. Board of Education*, and, unfortunately, is in marked contrast to how the Court has resolved many other important issues. The ability of the Court to reach a unanimous decision is even more noteworthy considering that this was a Court that did not often agree. The day after the profound unanimous decision in Nixon, the Court issued a fractured 5-4 decision, split along ideological lines, in a case regarding a Detroit statute encouraging busing for better racial integration (Westin xv). The unanimous decision put the greatest weight of judicial authority behind the Court’s ruling, earning public support and applying the greatest pressure on the President to comply with such a “definitive ruling” (Westin xv).

A final important audience, lower and future courts, was less well served by the opinion. Since these courts look to the nation’s highest Court for guidance when faced with similar circumstances, it is incumbent upon the Court to attempt to set out clear, concise approaches to the central issues of each controversy. In this instance, the definition of executive privilege leaves other courts a mixed bag of language with which to deal.

In the opinion, consistent with previous decisions that defer to presidential responsibilities in military and diplomatic matters (Fisher 215-16), the justices reaffirmed that even more privileged than executive privilege and executive confidentiality is the President’s “need to protect military, diplomatic, or sensitive national security secrets.” While this afforded consistency and provided a touchstone for future and lower courts, there is ambiguity in the language governing

privilege. For instance on at least nine occasions the Court spoke of the relatively ambiguous “confidentiality of presidential communications” (United States v. Nixon various wordings on 697, 703, 705, 706, 708, 710, 711, 713, 714), using terms general enough to suggest a constitutional privilege of broader dimensions than the limited evidentiary privilege with which it was actually concerned. The Court might have clarified the scope of the protection had it exclusively applied executive privilege to matters which “protect military, diplomatic, or sensitive national security secrets” (Kurland 35).

Yet perhaps more important than the murky definition of privilege itself is the responsibility lower courts inherited due to the ambiguities in the language. Subsequent to *United States v. Nixon*, the federal courts have had the role of arbitrating both the general definitions and the document-by-document review of those “presidential communications” that may become central to criminal proceedings (Westin xxi). The potential difficulties stemming from the ambiguously broad “confidentiality of presidential communications” is demonstrated in later controversies involving President Clinton (*Clinton v. Jones*). Does confidentiality extend to discussions with presidential spouses, friends, or writings in personal journals? The exact types of confidential communication and its limits are relatively vague,⁴ leaving future and lower courts to resolve difficult questions. Had the Court initially been more precise in defining “presidential communications,” they may have guided subordinate courts more constructively.

Within *United States v. Nixon* we can see efforts to address four distinct audiences. Because of audiences capacity as the mediators of change (Bitzer 253), they must be satisfied that they have been addressed by the rhetor in a suitable manner. In satisfying each constituency the Court told Nixon that he had privilege in protecting “military, diplomatic, or sensitive national security secrets” (*United States v. Nixon* 706), but, to reassure the public, the Court reminded them that they have “a right to every man’s evidence” (709). The opinion’s language was tailored to the interests of each important group, eliciting from them a willingness to mediate the change and resolve the exigence.

Conclusion: The Legacy of *United States v. Nixon*

Both the short and long term effects of *United States v. Nixon* make it among the most influential cases decided by the Supreme Court. In the short-term it was the immediate cause of the resignation of the President of the United States (Freidman ix) and it was the first time that the Court had recognized a constitutional basis for executive privilege (Biskupic and Witt 219). The long-range effects of the case are also significant. These effects include (1) the Court’s augmentation of its own power, (2) an attempt to set parameters for executive privilege under the enumerated powers, and (3) a reaffirmation of the American judicial system. To conclude this essay, a brief consideration of each is necessary as well as some final reflection on the utility of the rhetorical situation as an approach to judicial rhetoric.

First and perhaps most importantly, the Court augmented its own power by reaffirming its right to review other branches of government. The expansion in power is signaled in the per curiam opinion through the Court’s treatment of

potential constraints. The Court asserted its “authority to interpret claims with respect to powers alleged to derive from enumerated powers” (*United States v. Nixon* 704). Furthermore, through appeal to *Baker v. Carr*, the Court emphasized that the “delicate exercise in constitutional interpretation” to be undertaken in determining breaches by the executive branch “is a responsibility of the Court as ultimate interpreter of the Constitution” (*United States v. Nixon* 704). By making the executive branch accountable, they not only held their powers under Article III but they also increased their realm of jurisdiction. If an analogy were to be made, *United States v. Nixon* may be to the Court’s scope regarding executive review and oversight what *Marbury v. Madison* is to the Court’s ability of judicial review generally—or perhaps more ominously as *Scott v. Sandford* is to legislative review.

Second, in resolving a central exigence, the Court took the issue of executive privilege and set out parameters for what is and is not protected under the enumerated powers. The fact that the Court determined the scope of privilege is a lasting effect in that they control its definition and may read the concept as they see fit. While placing a restriction on the Executive Branch, the Court did defer in part to the presidency by recognizing a president’s right to withhold certain information, a first in the history of the Court (Lamb and Halpern 139). The longer term impact of the Court’s method of handling the Nixon exigence is seen when the Court later exercised its power to review presidential action in *Clinton v. Jones* and there noted “it is settled that the judiciary may severely burden the executive branch by reviewing the legality of the president’s conduct” (682). Later in that opinion, the Court again called upon *United States v. Nixon* to support their argument that Clinton was responsible to answer to the Court (*Clinton v. Jones* 705, 715, 718).

Lastly, while the ramifications to this point have been either political or legal, one must realize how “the people” came out in this decision. This decision reaffirmed the American principle that no one is above the law and that the American judicial system must be allowed to operate. The Court recognized this when they wrote that “the impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the judicial branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Article III” (*United States v. Nixon* 707). The American judicial system is based upon the principle that all men are equal before the law. This decision carries that maxim to the highest level by saying that even in the most extreme and unique cases the law continues to function according to principle. Perhaps most importantly to the Court, the public accepted this decision. In a poll taken in 1974, sixty-five percent of the public felt that Nixon’s actions were serious enough to force resignation (Newport 3).

By using Bitzer’s formulation of the rhetorical situation to analyze *United States v. Nixon* we have examined the rhetorical situation’s potential application as an approach to judicial rhetoric. While not a theory with contemporary popularity, examining the rhetorical situation of a judicial controversy holds the potential to provide additional understanding of the Court’s decision making. By allowing for the viewing of multiple axes simultaneously, the rhetorical situation

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puts a premium on the interaction of features. It is at once simple and nuanced in demanding attention to competing factors. The “categories” of constraints, exigence, and audience are not clean or neatly divisible—nor should they be—the fluid nature of the elements demonstrates the utility of the scheme and underscores that the approach is more than a mechanism for dry, pre-critical categorization. Bitzer wrote that “rhetorical discourse . . . obtain[s] its character-as-rhetorical from the situation which generates it” (249). And in this circumstance had the Court acted unaware of the constraints laid before them or the wants and needs of the various audiences and presented a discourse that was not “fitting” they would have surely failed, risking their institutional power and the shape of American democracy. As it was, however, the Court was effective at negotiating the constraints, resolving the exigencies, and placating the important audiences. Speaking in one voice, the Court reaffirmed its institutional authority and reassured and protected the public in upholding the principle that no man, not even the president, is above the law.

Endnotes

¹ A *duces tecum* subpoena, translated “to bring with thee,” is used to compel the production of evidence. In this particular case the subpoena sought to force the production of tapes of Nixon’s conversations.

² One might question the legitimacy of such an action as it appears to contradict the previously cited footnote in which the Special Prosecutor was described as free from restrictions unless he committed “extraordinary” (*United States v. Nixon* 695) or “gross” (696) improprieties.

³ The ninth justice, Justice Rehnquist, did not participate in the case because at one point he had worked for the Department of Justice under Attorney General Mitchell (Biskupic and Witt 234).

⁴ It is also worth noting that *United States v. Nixon* was a criminal, not civil, proceeding and the evidence requested did not contain any national secrets (Kurland 47)—a nuance the Court acknowledges in footnote 19. In *Nixon v. Fitzgerald*, which was a civil suit, the judicial branch again reviewed a claim of immunity by Nixon. It is difficult to consider this case as anything except an extension and clarification of their decision in *United States v. Nixon*. In it the Court explains presidential immunity as extending to all acts within the “outer perimeter” of the president’s responsibilities. This would appear to make *Nixon v. Fitzgerald* a continuation or counterpart to *United States v. Nixon*, albeit one that is eight years in the making given that the clarification did not come until 1982.

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