AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Separation of Powers/Immunity from Judicial Process

**Trump v. Vance, \_\_\_ U.S. \_\_\_** (2020)

*Breaking from modern tradition, Donald Trump did not release his tax returns to the public when he was running for president. Once he assumed office, the lack of transparency into his personal finances took on additional importance as critics questioned whether he was running afoul of the emoluments clause of the Constitution by continuing to run a profitable hotel business that sometimes catered to foreign government officials. Additional scrutiny of Trump also raised questions about whether his charitable foundation was complying with tax laws. As Democrats were poised to take over the U.S. House of Representatives in the 2018 midterm elections and special counsel Robert Mueller’s federal investigations were coming to a conclusion, the New York County district attorney Cyrus Vance Jr. announced that his office was pursuing criminal investigations of Trump associates. In 2019, Vance issued a subpoena to Mazars USA, LLP, the personal accounting firm of President Trump, seeking various financial records relating to the president and his business organizations.*

*Trump, in his personal capacity, filed a lawsuit in federal district court seeking an injunction against the New York district attorney blocking enforcement of the subpoena on the grounds that a sitting president enjoyed absolute immunity from state criminal proceedings. The district court dismissed the suit on both procedural and substantive grounds, and the circuit court affirmed the trial court on the substantive grounds. In a 7-2 decision, the U.S. Supreme Court affirmed the circuit court. The Court unanimously rejected Trump’s argument that the president should enjoy absolute immunity from subpoenas for documents from state prosecutors. The justices disagreed over what standard the trial courts should use in evaluating whether an individual subpoena should be issued. The majority concluded that a prosecutor would not have to meet a heightened need standard when seeking documents from a sitting president, but that courts should be open to hearing particularized objections that a president might make to specific subpoenas. With months remaining before the 2020 presidential election, the Court returned the case to the trial court for further proceedings.*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In our judicial system, “the public has a right to everyman’s evidence.” Since the earliest days of the Republic, “every man” has included the President of the United States. Beginning with Jefferson and carrying on through Clinton, Presidents have uniformly testified or produced documents in criminal proceedings when called upon by federal courts. This case involves—so far as we and the parties can tell—the first state criminal subpoena directed to a President. . . .

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The President, Marshall declared, does not “stand exempt from the general provisions of the constitution” or, in particular, the Sixth Amendment’s guarantee that those accused have compulsory process for obtaining witnesses for their defense. *United States v. Burr* (C.C. Va. 1807). At common law the “single reservation” to the duty to testify in response to a subpoena was “the case of the king,” whose “dignity” was seen as “incompatible” with appearing “under the process of the court.” But, as Marshall explained, a king is born to power and can “do no wrong.” The President, by contrast, is “of the people” and subject to the law. . . .

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In the two centuries since the Burr trial, successive Presidents have accepted Marshall’s ruling that the Chief Executive is subject to subpoena. In 1818, President Monroe received a subpoena to testify in a court-martial against one of his appointees. His Attorney General, William Wirt—who had served as a prosecutor during Burr’s trial—advised Monroe that, per Marshall’s ruling, a subpoena to testify may “be properly awarded to the President.” Monroe offered to sit for a deposition and ultimately submitted answers to written interrogatories.

Following Monroe’s lead, his successors have uniformly agreed to testify when called in criminal proceedings, provided they could do so at a time and place of their choosing. . . .

The bookend to Marshall’s ruling came in 1974 when the question he never had to decide—whether to compel the disclosure of official communications over the objection of the President—came to a head. . . .

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The Court thus concluded that the President’s “generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.” *United States v. Nixon* (1974). Two weeks later, President Nixon dutifully released the tapes.

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. . . . No one doubts that Article II guarantees the independence of the Executive Branch. As the head of that branch, the President “occupies a unique position in the constitutional scheme.” *Nixon v. Fitzgerald* (1982). His duties, which range from faithfully executing the laws to commanding the Armed Forces, are of unrivaled gravity and breadth. Quite appropriately, those duties come with protections that safeguard the President’s ability to perform his vital functions. . . .

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The President’s primary contention, which the Solicitor General supports, is that complying with state criminal subpoenas would necessarily divert the Chief Executive from his duties. He grounds that concern in *Nixon v. Fitzgerald*, which recognized a President’s “absolute immunity from damages liability predicated on his official acts.” . . .

But *Fitzgerald* did not hold that distraction was sufficient to confer absolute immunity. We instead drew a careful analogy to the common law absolute immunity of judges and prosecutors, concluding that a President, like those officials, must “deal fearlessly and impartially with the duties of his office”—not be made “unduly cautious in the discharge of [those] duties” by the prospect of civil liability for official acts. Indeed, we expressly rejected immunity based on distraction alone 15 years later in *Clinton v. Jones* (1997). . . .

The same is true of criminal subpoenas. Just as a “properly managed” civil suit is generally “unlikely to occupy any substantial amount of” a President’s time or attention, two centuries of experience confirm that a properly tailored criminal subpoena will not normally hamper the performance of the President’s constitutional duties. If anything, we expect that in the mine run of cases, where a President is subpoenaed during a proceeding targeting someone else, as Jefferson was, the burden on a President will ordinarily be lighter than the burden of defending against a civil suit.

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The President next claims that the stigma of being subpoenaed will undermine his leadership at home and abroad. Notably, the Solicitor General does not endorse this argument, perhaps because we have twice denied absolute immunity claims by Presidents in cases involving allegations of serious misconduct. But even if a tarnished reputation were a cognizable impairment, there is nothing inherently stigmatizing about a President performing “the citizen’s normal duty of . . . furnishing information relevant” to a criminal investigation. . . .

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Finally, the President and the Solicitor General warn that subjecting Presidents to state criminal subpoenas will make them “easily identifiable target[s]” for harassment. But we rejected a nearly identical argument in *Clinton*, where then-President Clinton argued that permitting civil liability for unofficial acts would “generate a large volume of politically motivated harassing and frivolous litigation.” . . .

We recognize, as does the district attorney, that harassing subpoenas could, under certain circumstances, threaten the independence or effectiveness of the Executive. Even so, in *Clinton* we found that the risk of harassment was not “serious” because federal courts have the tools to deter and, where necessary, dismiss vexatious civil suits. And, while we cannot ignore the possibility that state prosecutors may have political motivations, here again the law already seeks to protect against the predicted abuse.

. . . . The policy against federal interference in state criminal proceedings, while strong, allows “intervention in those cases where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith.”

. . . . We generally “assume[] that state courts and prosecutors will observe constitutional limitations.” Failing that, federal law allows a President to challenge any allegedly unconstitutional influence in a federal forum, as the President has done here.

Given these safeguards and the Court’s precedents, we cannot conclude that absolute immunity is necessary or appropriate under Article II or the Supremacy Clause. . . . On that point the Court is unanimous.

We next consider whether a state grand jury subpoena seeking a President’s private papers must satisfy a heightened need standard. . . .

We disagree, for three reasons. First, such a heightened standard would extend protection designed for official documents to the President’s private papers. . . . But this argument does not account for the relevant passage from *Burr*: “If there be a paper in the possession of the executive, which is *not of an official nature*, he must stand, as respects that paper, in nearly the same situation with any other individual.” And it is only “nearly”—and not “entirely”—because the President retains the right to assert privilege over documents that, while ostensibly private, “partake of the character of an official paper.”

. . . . [I]f the state subpoena is not issued to manipulate, the documents themselves are not protected, and the Executive is not impaired, then nothing in Article II or the Supremacy Clause supports holding state subpoenas to a higher standard than their federal counterparts.

Finally, in the absence of a need to protect the Executive, the public interest in fair and effective law enforcement cuts in favor of comprehensive access to evidence. Requiring a state grand jury to meet a heightened standard of need would hobble the grand jury’s ability to acquire “all information that might possibly bear on its investigation.” And, even assuming the evidence withheld under that standard were preserved until the conclusion of a President’s term, in the interim the State would be deprived of investigative leads that the evidence might yield, allowing memories to fade and documents to disappear. This could frustrate the identification, investigation, and indictment of third parties (for whom applicable statutes of limitations might lapse). More troubling, it could prejudice the innocent by depriving the grand jury of *exculpatory* evidence.

Rejecting a heightened need standard does not leave Presidents with “no real protection.” To start, a President may avail himself of the same protections available to every other citizen. . . .

. . . . A President can raise subpoena-specific constitutional challenges, in either a state or federal forum. As previously noted, he can challenge the subpoena as an attempt to influence the performance of his official duties, in violation of the Supremacy Clause. . . .

In addition, the Executive can—as the district attorney concedes—argue that compliance with a particular subpoena would impede his constitutional duties. . . .

The arguments presented here and in the Court of Appeals were limited to absolute immunity and heightened need. The Court of Appeals, however, has directed that the case be returned to the District Court, where the President may raise further arguments as appropriate.

*Affirmed*.

JUSTICE KAVANAUGH, with whom JUSTICE GORSUCH joins, concurring.

The Court today unanimously concludes that a President does not possess absolute immunity from a state criminal subpoena, but also unanimously agrees that this case should be remanded to the District Court, where the President may raise constitutional and legal objections to the subpoena as appropriate. I agree with those two conclusions.

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In our system of government, as this Court has often stated, no one is above the law. That principle applies, of course, to a President. At the same time, in light of Article II of the Constitution, this Court has repeatedly declared—and the Court indicates again today—that a court may not proceed against a President as it would against an ordinary litigant. *Cheney v. United States District Court for D.C.* (2004). . . .

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The *Nixon* “demonstrated, specific need” standard is a tried-and-true test that accommodates both the interests of the criminal process and the Article II interests of the Presidency. The *Nixon* standard ensures that a prosecutor’s interest in subpoenaed information is sufficiently important to justify an intrusion on the Article II interests of the Presidency. The *Nixon* standard also reduces the risk of subjecting a President to unwarranted burdens, because it provides that a prosecutor may obtain a President’s information only in certain defined circumstances.

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In the end, much may depend on how the majority opinion’s various standards are applied in future years and decades. . . . In any event, in my view, lower courts in cases of this sort involving a President will almost invariably have to begin by delving into why the State wants the information; why and how much the State needs the information, including whether the State could obtain the information elsewhere; and whether compliance with the subpoena would unduly burden or interfere with a President’s official duties.

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JUSTICE THOMAS, dissenting.

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I agree with the majority that the President does not have absolute immunity from the issuance of a grand jury subpoena. Unlike the majority, however, I do not reach this conclusion based on a primarily functionalist analysis. Instead, I reach it based on the text of the Constitution, which, as understood by the ratifying public and incorporated into an early circuit opinion by Chief Justice Marshall, does not support the President’s claim of absolute immunity.

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Prominent defenders of the Constitution confirmed the lack of absolute Presidential immunity. James Wilson, a signer of the Constitution and future Justice of this Court, explained to his fellow Pennsylvanians that “far from being above the laws, [the President] is amenable to them in his private character as a citizen, and in his public character by *impeachment*.” . . .

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Based on the evidence of original meaning and Chief Justice Marshall’s early interpretation in *Burr*, the better reading of the text of the Constitution is that the President has no absolute immunity from the issuance of a grand jury subpoena.

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In *Burr*, after explaining that the President was not absolutely immune from issuance of a subpoena, Chief Justice Marshall proceeded to explain that the President might be excused from the enforcement of one. As he put it, “[t]he guard, furnished to this high officer, to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court *after those subpoenas have issued*; not in any circumstance which is to precede their being issued.” Chief Justice Marshall set out the pertinent standard: To avoid enforcement of the subpoena, the President must “sho[w]” that “his duties as chief magistrate demand his whole time for national objects.”

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The *Burr* standard places the burden on the President but also requires courts to take pains to respect the demands on the President’s time. The Constitution vests the President with extensive powers and responsibilities, and courts are poorly situated to conduct a searching review of the President’s assertion that he is unable to comply.

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I would vacate and remand to allow the District Court to determine whether enforcement of this subpoena should be enjoined because the President’s “duties as chief magistrate demand his whole time for national objects.” Accordingly, I respectfully dissent.

JUSTICE ALITO, dissenting.

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“Constitutionally speaking, the President never sleeps. The President must be ready, at a moment’s notice, to do whatever it takes to preserve, protect, and defend the Constitution and the American people.” Without a President who is able at all times to carry out the responsibilities of the office, our constitutional system could not operate, and the country would be at risk. That is why the Twenty-fifth Amendment created a mechanism for temporarily transferring the responsibilities of the office to the Vice President if the President is incapacitated for even a brief time. The Amendment has been explicitly invoked on only two occasions, each time for a period of about two hours. This mechanism reflects an appreciation that the Nation cannot be safely left without a functioning President for even a brief time.

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In *McCulloch v. Maryland* (1819), Maryland’s sovereign taxing power had to yield, and in a similar way, a State’s sovereign power to enforce its criminal laws must accommodate the indispensable role that the Constitution assigns to the Presidency. This must be the rule with respect to a state prosecution of a sitting President. Both the structure of the Government established by the Constitution and the Constitution’s provisions on the impeachment and removal of a President make it clear that the prosecution of a sitting President is out of the question. It has been aptly said that the President is the “sole indispensable man in government,” and subjecting a sitting President to criminal prosecution would severely hamper his ability to carry out the vital responsibilities that the Constitution puts in his hands.

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The Constitution not only sets out the procedures for dealing with a President who is suspected of committing a serious offense; it also specifies the consequences of a judgment adverse to the President. After providing that the judgment cannot impose any punishment beyond removal from the Presidency and disqualification from holding any other federal office, the Constitution states that “the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.” The plain implication is that criminal prosecution, like removal from the Presidency and disqualification from other offices, is a consequence that can come about only after the Senate’s judgment, not during or prior to the Senate trial.

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The scenario apparently contemplated by the District Court is striking. If a sitting President were charged in New York County, would he be arrested and fingerprinted? He would presumably be required to appear for arraignment in criminal court, where the judge would set the conditions for his release. Could he be sent to Rikers Island or be required to post bail? Could the judge impose restrictions on his travel? . . . If the President were charged with a complicated offense requiring a long trial, would he have to put his Presidential responsibilities aside for weeks on end while sitting in a Manhattan courtroom? While the trial was in progress, would aides be able to approach him and whisper in his ear about pressing matters? Would he be able to obtain a recess whenever he needed to speak with an aide at greater length or attend to an urgent matter, such as speaking with a foreign leader? Could he effectively carry out all his essential Presidential responsibilities after the trial day ended and at the same time adequately confer with his trial attorneys regarding his defense? Or should he be expected to give up the right to attend his own trial and be tried in absentia? And if he were convicted, could he be imprisoned? Would aides be installed in a nearby cell?

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While the prosecution of a sitting President provides the most dramatic example of a clash between the indispensable work of the Presidency and a State’s exercise of its criminal law enforcement powers, other examples are easy to imagine. Suppose state officers obtained and sought to execute a search warrant for a sitting President’s private quarters in the White House. Suppose a state court authorized surveillance of a telephone that a sitting President was known to use. Or suppose that a sitting President was subpoenaed to testify before a state grand jury and, as is generally the rule, no Presidential aides, even those carrying the so-called “nuclear football,” were permitted to enter the grand jury room. What these examples illustrate is a principle that this Court has recognized: legal proceedings involving a sitting President must take the responsibilities and demands of the office into account.

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I now come to the specific investigative weapon at issue in the case before us—a subpoena for a sitting President’s records. This weapon is less intrusive in an immediate sense than those mentioned above. Since the records are held by, and the subpoena was issued to, a third party, compliance would not require much work on the President’s part. And after all, this is just one subpoena.

But we should heed the “great jurist,” who rejected a similar argument in *McCulloch*. If we say that a subpoena to a third party is insufficient to undermine a President’s performance of his duties, what about a subpoena served on the President himself? Surely in that case, the President could turn over the work of gathering the requested documents to attorneys or others recruited to perform the task. And if one subpoena is permitted, what about two? Or three? Or ten? Drawing a line based on such factors would involve the same sort of “perplexing inquiry, so unfit for the judicial department” that Marshall rejected in *McCulloch*.

. . . .

We have come to expect our Presidents to shoulder burdens that very few people could bear, but it is unrealistic to think that the prospect of possible criminal prosecution will not interfere with the performance of the duties of the office. “[C]riminal litigation uniquely requires [a] President’s personal time and energy, and will inevitably entail a considerable if not overwhelming degree of mental preoccupation.” Randolph D. Moss, “A Sitting President’s Amenability to Indictment and Criminal Prosecution,” *Op. OLC* (2000).

. . . . There are more than 2,300 local prosecutors and district attorneys in the country. Many local prosecutors are elected, and many prosecutors have ambitions for higher elected office. . . . If a sitting President is intensely unpopular in a particular district—and that is a common condition—targeting the President may be an alluring and effective electoral strategy. But it is a strategy that would undermine our constitutional structure.

The Framers understood the importance of protecting the Presidency from interference by the States. At the Constitutional Convention, James Wilson argued that the President should be “as independent as possible . . . of the States.” . . .

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In light of the above, a subpoena like the one now before us should not be enforced unless it meets a test that takes into account the need to prevent interference with a President’s discharge of the responsibilities of the office. I agree with the Court that not all such subpoenas should be barred. . . .

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The Presidency deserves greater protection. Thus, in a case like this one, a prosecutor should be required (1) to provide at least a general description of the possible offenses that are under investigation, (2) to outline how the subpoenaed records relate to those offenses, and (3) to explain why it is important that the records be produced and why it is necessary for production to occur while the President is still in office.

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