# Tax & Financial Records Case

# Manhattan DA-Mazars Case
# Key Excerpts from 2020 Supreme Court Opinion

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On July 9, 2020, in a 7-2 decision, the Supreme Court dismissed the argument that presidents are immune to grand jury subpoenas from state prosecutors and that courts should apply a heightened standard of review when evaluating such subpoenas. The Supreme Court affirmed the Second Circuit's judgment in Trump v. Vance and remanded the case to the district court for further proceedings. *Trump v. Vance*, 591 U.S. __ (2020). Here are key excerpts from the panel's 68-page opinion, including one concurrence and two dissents; each excerpt consists of a direct quotation taken from the text of the opinion, concurrence, or dissent, with no changes in punctuation but with footnotes omitted.

**Public has a right to everyone's evidence**
In our judicial system, "the public has a right to every man'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

**Novel issue presented**
This case involves—so far as we and the parties can tell—the first state criminal subpoena directed to a President.

**Burr precedent-president is subject to the law**
In the lead-up to trial, Burr, taking aim at his accusers, moved for a subpoena *duces tecum* directed at Jefferson. The draft subpoena required the President to produce an October 21, 1806 letter from Wilkinson and accompanying documents, which Jefferson had referenced in his message to Congress. The prosecution opposed the request, arguing that a President could

not be subjected to such a subpoena and that the letter might contain state secrets. Following four days of argument, Marshall announced his ruling to a packed chamber. 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*, 25 F. Cas. 30, 33–34 (No. 14,692d) (CC 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." *Id.*, at 34. But, as Marshall explained, a king is born to power and can "do no wrong." *Ibid.* The President, by contrast, is "of the people" and subject to the law.

**Burr precedent-presidential duties are not unremitting**
According to Marshall, the sole argument for exempting the President from testimonial obligations was that his "duties as chief magistrate demand his whole time for national objects." *Ibid.* But, in Marshall's assessment, those demands were "not unremitting." *Ibid.* And should the President's duties preclude his attendance at a particular time and place, a court could work that out upon return of the subpoena.

**Burr precedent-no presidential immunity**
Marshall also rejected the prosecution's argument that the President was immune from a subpoena *duces tecum* because executive papers might contain state secrets. "A subpoena duces tecum," he said, "may issue to any person to whom an ordinary subpoena may issue." *Ibid.* As he explained, no "fair construction" of the Constitution supported the conclusion that the right "to compel the attendance of witnesses[ ] does not extend" to requiring those witnesses to "bring[] with them such papers as may be material in the defence." *Id.*, at 35. And, as a matter of basic fairness, permitting such information to be withheld would "tarnish the reputation of the court." *Id.*, at 37. As for "the propriety of introducing any papers," that would "depend on the character of the paper, not on the character of the person who holds it." *Id*., at 34. Marshall acknowledged that the papers sought by Burr could contain information "the disclosure of which would endanger the public safety," but stated that, again, such concerns would have "due consideration" upon the return of the subpoena.

**Burr precedent-president must provide reasons for withholding subpoenaed document**
Acknowledging that the President may withhold information to protect public safety, Marshall instructed that Jefferson should "state the particular reasons" for withholding the letter. *United States v. Burr*, 25 F. Cas. 187, 192 (No. 14,694) (CC Va. 1807). The court, paying "all proper respect" to those reasons, would then decide whether to compel disclosure.

**History of acceptance of Marshall ruling that president is subject to subpoena**
In the two centuries since the Burr trial, successive Presidents have accepted Marshall's ruling that the Chief Executive is subject to subpoena.

**Nixon precedent-prosecutor can subpoena official documents over president's objection**
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. … [T]he Special Prosecutor secured a subpoena *duces tecum* directing Nixon to produce, among other things, tape recordings of Oval Office meetings. Nixon moved to quash the subpoena, claiming that the Constitution provides an absolute privilege of confidentiality to all presidential communications. This Court rejected that argument in *United States v. Nixon*, 418 U. S. 683 (1974), a decision we later described as "unequivocally and emphatically endors[ing] Marshall's" holding that Presidents are subject to subpoena. *Clinton v. Jones*, 520 U. S. 681, 704 (1997).

**Nixon precedent-president's generalized assertion of privilege must yield to a demonstrated, specific need for evidence in a pending criminal trial**

Invoking the common law maxim that "the public has a right to every man's evidence," the Court observed that the public interest in fair and accurate judicial proceedings is at its height in the criminal setting, where our common commitment to justice demands that "guilt shall not escape" nor "innocence suffer." *Id*., at 709 (internal quotation marks and alteration omitted). Because these dual aims would be "defeated if judgments" were "founded on a partial or speculative presentation of the facts," the *Nixon* Court recognized that it was "imperative" that "compulsory process be available for the production of evidence needed either by the prosecution or the defense." *Ibid.* 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." *Id.*, at 713. Two weeks later, President Nixon dutifully released the tapes.

**Local grand jury subpoena**

The history surveyed above all involved *federal* criminal proceedings. Here we are confronted for the first time with a subpoena issued to the President by a local grand jury operating under the supervision of a *state* court.

**President occupies unique position**

[T]he President "occupies a unique position in the constitutional scheme." *Nixon v. Fitzgerald*, 457 U. S. 731, 749 (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. See, *e.g., ibid.* (concluding that the President enjoys "absolute immunity from damages liability predicated on his official acts"); *Nixon*, 418 U. S., at 708 (recognizing that presidential communications are presumptively privileged).

**Federal government is free from control by any state**

[T]he Constitution guarantees "the entire independence of the General Government from any control by the respective States." *Farmers and Mechanics Sav. Bank of Minneapolis v. Minnesota*, 232 U. S. 516, 521 (1914). As we have often repeated, "States have no power . . . to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress." *McCulloch v. Maryland*, 4 Wheat. 316, 436 (1819). It follows that States also lack the power to impede the President's execution of those laws.

**President makes a categorical argument**
To be clear, the President does not contend here that this subpoena, in particular, is impermissibly burdensome. Instead he makes a categorical argument about the burdens generally associated with state criminal subpoenas, focusing on three: diversion, stigma, and harassment. We address each in turn.

**Properly tailored criminal subpoena will not normally hamper president's performance**
Just as a "properly managed" civil suit is generally "unlikely to occupy any substantial amount of" a President's time or attention, *id.*, at 702, 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.

**Prospect of presidential liability insufficient to overcome Burr and Nixon precedents**
[T]he President is not seeking immunity from the diversion occasioned by the prospect of future criminal *liability*. Instead he concedes—consistent with the position of the Department of Justice—that state grand juries are free to investigate a sitting President with an eye toward charging him after the completion of his term. … The President's objection therefore must be limited to the *additional* distraction caused by the subpoena itself. But that argument runs up against the 200 years of precedent establishing that Presidents, and their official communications, are subject to judicial process, see *Burr*, 25 F. Cas., at 34, even when the President is under investigation, see *Nixon*, 418 U. S., at 706.

**Furnishing information in criminal investigation not inherently stigmatizing**
[E]ven 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. *Branzburg v. Hayes*, 408 U. S. 665, 691 (1972). Nor can we accept that the risk of association with persons or activities under criminal investigation can absolve a President of such an important public duty. Prior Presidents have weathered these associations in federal cases, *supra*, at 6–10, and there is no reason to think any attendant notoriety is necessarily greater in state court proceedings. … Additionally … longstanding rules of grand jury secrecy aim to prevent the very stigma the President anticipates. … [T]hose who make unauthorized disclosures regarding a grand jury subpoena do so at their peril.

**Risk of harassment**
The President and the Solicitor General … caution that, while federal prosecutors are accountable to and removable by the President, the 2,300 district attorneys in this country are responsive to local constituencies, local interests, and local prejudices, and might "use criminal process to register their dissatisfaction with" the President. Brief for Petitioner 16. What is more, we are told, the state courts supervising local grand juries may not exhibit the same respect that federal courts show to the President as a coordinate branch of Government.

**Grand juries prohibited from acting with intent to harass**

First, grand juries are prohibited from engaging in "arbitrary fishing expeditions" and initiating investigations "out of malice or an intent to harass." *United States v. R. Enterprises, Inc.*, 498 U. S. 292, 299 (1991). See also, *e.g., Virag v. Hynes*, 54 N. Y. 2d 437, 442–443, 430 N. E. 2d 1249, 1252 (1981) (recognizing that grand jury subpoenas can be "challenged by an affirmative showing of impropriety," including "bad faith" (internal quotation marks omitted)). These protections, as the district attorney himself puts it, "apply with special force to a President, in light of the office's unique position as the head of the Executive Branch." Brief for Respondent Vance 43. And, in the event of such harassment, a President would be entitled to the protection of federal courts. 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." *Huffman v. Pursue, Ltd*., 420 U. S. 592, 611 (1975).

**States prohibited from interfering with president's official duties**

The Supremacy Clause prohibits state judges and prosecutors from interfering with a President's official duties. See, *e.g., Tennessee v. Davis*, 100 U. S. 257, 263 (1880) ("No State government can . . . obstruct [the] authorized officers" of the Federal Government.). Any effort to manipulate a President's policy decisions or to "retaliat[e]" against a President for official acts through issuance of a subpoena, Brief for Respondent Vance 15, 43, would thus be an unconstitutional attempt to "influence" a superior sovereign "exempt" from such obstacles, see *McCulloch,* 4 Wheat., at 427. We generally "assume[] that state courts and prosecutors will observe constitutional limitations." *Dombrowski v. Pfister*, 380 U. S. 479, 484 (1965). Failing that, federal law allows a President to challenge any allegedly unconstitutional influence in a federal forum, as the President has done here.

**Court unanimous in opposing absolute immunity to state criminal subpoenas**

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. Our dissenting colleagues agree. JUSTICE THOMAS reaches the same conclusion based on the original understanding of the Constitution reflected in Marshall's decision in *Burr*. *Post*, at 2, 5–6. And JUSTICE ALITO, also persuaded by *Burr*, "agree[s]" that "not all" state criminal subpoenas for a President's records "should be barred." *Post,* at 16. On that point the Court is unanimous.

**No heightened standard to subpoena president's records**

JUSTICE ALITO … agrees that a state criminal subpoena to a President "should not be allowed unless a heightened standard is met." *Post*, at 16–18 (asking whether the information is "critical" and "necessary . . . now"). We disagree, for three reasons.

**Heightened standard designed for official documents, not private papers**

First, such a heightened standard would extend protection designed for official documents to the President's private papers. … [T]he 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." *Id.*, at 191 (emphasis added). 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." *Id.*, at 191–192.

**No support for holding state subpoenas to a higher standard than federal subpoenas**
Beyond the risk of harassment, which we addressed above, the only justification they offer for the heightened standard is protecting Presidents from "unwarranted burdens." … In effect, they argue that even if federal subpoenas to a President are warranted whenever evidence is material, state subpoenas are warranted "only when [the] evidence is essential." Brief for United States as *Amicus Curiae* 28; see post, at 16. But that double standard has no basis in law. For if the state subpoena is not issued to manipulate, *supra*, at 16–17, the documents themselves are not protected, *supra*, at 18, and the Executive is not impaired, *supra*, at 12–15, then nothing in Article II or the Supremacy Clause supports holding state subpoenas to a higher standard than their federal counterparts.

**Heightened standard would hobble grand jury's ability to acquire information**
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." *R. Enterprises, Inc.*, 498 U. S., at 297. 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.

**President may invoke same protections available to every other citizen**
[A] President may avail himself of the same protections available to every other citizen. These include the right to challenge the subpoena on any grounds permitted by state law, which usually include bad faith and undue burden or breadth. … [A]s in federal court, "[t]he high respect that is owed to the office of the Chief Executive . . . should inform the conduct of the entire proceeding, including the timing and scope of discovery."

**President may also use challenges not available to private citizens**
[A]lthough the Constitution does not entitle the Executive to absolute immunity or a heightened standard, he is not "relegate[d]" only to the challenges available to private citizens. *Post*, at 17 (opinion of ALITO, J.). 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. See *supra*, at 17. This avenue protects against local political machinations "interposed as an obstacle to the effective operation of a federal constitutional power." *United States v. Belmont*, 301 U. S. 324, 332 (1937).
In addition, the Executive can—as the district attorney concedes—argue that compliance with a particular subpoena would impede his constitutional duties. … As a result, "once the President sets forth and explains a conflict between judicial proceeding and public duties," or shows that an order or subpoena would "significantly interfere with his efforts to carry out"

those duties, "the matter changes." *Clinton*, 520 U. S., at 710, 714 (opinion of BREYER, J.). At that point, a court should use its inherent authority to quash or modify the subpoena, if necessary to ensure that such "interference with the President's duties would not occur."

**Reaffirm no citizen is above the duty to produce evidence in a criminal proceeding**
Two hundred years ago, a great jurist of our Court established that no citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding. We reaffirm that principle today and hold that the President is neither absolutely immune from state criminal subpoenas seeking his private papers nor entitled to a heightened standard of need.

**Case remanded**
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. 941 F. 3d, at 646, n. 19.6 We affirm the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

## Kavanaugh Concurrence

**Unanimous agreement that president has no absolute immunity from state criminal subpoena and case should be remanded to district court**
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. See *ante*, at 21–22, and n. 6; *post*, at 11–12 (THOMAS, J., dissenting); *post*, at 16–19 (ALITO, J., dissenting). I agree with those two conclusions.

**Some presidential protections against state criminal subpoenas**
Although this case involves personal information of the President and is therefore not an executive privilege case, the majority opinion correctly concludes based on precedent that Article II and the Supremacy Clause of the Constitution supply some protection for the Presidency against state criminal subpoenas of this sort.

**No one is above the law, but president is not an ordinary litigant**
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. See *Cheney v. United States Dist. Court for D. C.*, 542 U. S. 367, 381–382 (2004) ("In no case would a court be required to proceed against the president as against an ordinary individual" (internal quotation marks and alterations omitted)); *Clinton v. Jones*, 520 U. S. 681, 704, n. 39 (1997) (a court may not "proceed against the president as against an ordinary individual" (internal quotation marks omitted)); *United States v. Nixon*, 418 U. S. 683, 715 (1974) ("In no case of this kind would a court be required to proceed against the president as against an ordinary individual" (internal quotation marks and alterations omitted)); *United States v.*

*Burr*, 25 F. Cas. 187, 192 (No. 14,694) (CC Va. 1807) (Marshall, C. J.) ("In no case of this kind would a court be required to proceed against the president as against an ordinary individual"). The question here, then, is how to balance the State's interests and the Article II interests.

**Nixon standard should apply to this case**

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. … A state criminal subpoena to a President raises Article II and Supremacy Clause issues because of the potential for a state prosecutor to use the criminal process and issue subpoenas in a way that interferes with the President's duties, through harassment or diversion. Cf. *Nixon v. Fitzgerald*, 457 U. S. 731, 751–753 (1982). Because this case again entails a clash between the interests of the criminal process and the Article II interests of the Presidency, I would apply the longstanding *Nixon* "demonstrated, specific need" standard to this case.

**Majority opinion takes account of some important concerns**

The majority opinion does not apply the *Nixon* standard in this distinct Article II context, as I would have done. That said, the majority opinion appropriately takes account of some important concerns that also animate *Nixon* and the Constitution's balance of powers. The majority opinion explains that a state prosecutor may not issue a subpoena for a President's personal information out of bad faith, malice, or an intent to harass a President, *ante*, at 16; as a result of prosecutorial impropriety, *ibid.*; to seek information that is not relevant to an investigation, *ante*, at 16, 19–20; that is overly broad or unduly burdensome, *ante*, at 19–20; to manipulate, influence, or retaliate against a President's official acts or policy decisions, *ante*, at 17, 20; or in a way that would impede, conflict with, or interfere with a President's official duties, *ante*, at 20–21. All nine Members of the Court agree, moreover, that a President may raise objections to a state criminal subpoena not just in state court but also in federal court. And the majority opinion indicates that, in light of the "high respect that is owed to the office of the Chief Executive," courts "should be particularly meticulous" in assessing a subpoena for a President's personal records.

**Application of standards**

In the end, much may depend on how the majority opinion's various standards are applied in future years and decades. It will take future cases to determine precisely how much difference exists between (i) the various standards articulated by the majority opinion, (ii) the overarching *Nixon* "demonstrated, specific need" standard that I would adopt, and (iii) JUSTICE THOMAS's and JUSTICE ALITO's other proposed standards. 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.

## Thomas Dissent

**Agreement that president has no absolute immunity from state criminal subpoena and case should be remanded to district court**
I agree with the majority that the President is not entitled to absolute immunity from *issuance* of the subpoena. But he may be entitled to relief against its *enforcement*. I therefore agree with the President that the proper course is to vacate and remand.

**Showing that duties demand his whole time entitles president to relief from subpoena**
If the President can show that "his duties as chief magistrate demand his whole time for national objects," *United States v. Burr*, 25 F. Cas. 30, 34 (No. 14,692d) (CC Va. 1807) (Marshall, C. J.), he is entitled to relief from enforcement of the subpoena.

**Constitution's text does not support absolute immunity**
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. … The text of the Constitution explicitly addresses the privileges of some federal officials, but it does not afford the President absolute immunity. … As a Federalist essayist noted during ratification, the President's "person is not so much protected as that of a member of the House of Representatives" because he is subject to the issuance of judicial process "like any other man in the ordinary course of law."

**Burr precedent found no absolute immunity**
During the grand jury proceedings, Burr moved for a *subpoena duces tecum* ordering President Jefferson to produce the correspondence concerning Burr. *Burr*, 25 F. Cas., at 30. Chief Justice Marshall pre-emptively rejected any notion of absolute immunity, despite the fact that the Government did not so much as suggest it in court. He distinguished the President from the British monarch, who did have immunity, calling it an "essentia[l] . . . difference" in our system that the President "is elected from the mass of the people, and, on the expiration of the time for which he is elected, returns to the mass of the people again." *Id*., at 34. Thus, the President was more like a state governor or a member of the British cabinet than a king. Chief Justice Marshall found no authority suggesting that these officials were immune from judicial process.

**Better reading is that President has no absolute immunity from issuance of subpoena**
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.

**Lower court judgment should be vacated and case remanded to use Burr standard**
In addition to contesting the issuance of the subpoena, the President also seeks injunctive and declaratory relief against its enforcement. The majority recognizes that the President can seek relief from enforcement, but it does not vacate and remand for the lower courts to address this question. I would do so and instruct them to apply the standard articulated by Chief Justice Marshall in *Burr:* If the President is unable to comply because of his official duties, then he is entitled to injunctive and declaratory relief.

**President's ability to discharge duties is integral to Constitution**
The ability of the President to discharge his duties until his term expires or he is removed from office by the Senate is "integral to the structure of the Constitution." *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U. S. ___, ___ (2019) (slip op., at 15). The Constitution is the "supreme Law of the Land," Art. VI, cl. 2, so a state court can no more enforce a subpoena when national concerns demand the President's entire time than a federal court can. Accordingly, a federal court may provide injunctive and declaratory relief to stay enforcement of a state subpoena when the President meets the *Burr* standard.

**Courts must respect demands on president's time**
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. … [T]he demands on the President's time and the importance of his tasks are extraordinary, and the office of the President cannot be delegated to subordinates. A subpoena imposes both demands on the President's limited time and a mental burden, even when the President is not directly engaged in complying. This understanding of the Presidency should guide courts in deciding whether to enforce a subpoena for the President's documents.

**Courts must recognize their own limitations**
Courts must also recognize their own limitations. When the President asserts that matters of foreign affairs or national defense preclude his compliance with a subpoena, the Judiciary will rarely have a basis for rejecting that assertion. Judges "simply lack the relevant information and expertise to second-guess determinations made by the President based on information properly withheld." *Hamdi*, 542 U. S., at 583 (THOMAS, J., dissenting). "[E]ven if the courts could compel the Executive to produce the necessary information" to understand the demands on his time, decisions about that information "are simply not amenable to judicial determination because '[t]hey are delicate, complex, and involve large elements of prophecy.'" *Ibid.*

**No heightened standard of need**
Footnote 3: The President and the Solicitor General argue that the grand jury must make a showing of heightened need. I agree with the majority's decision not to adopt this standard, *ante*, at 17–19, but for different reasons. The constitutional question in this case is whether the President is able to perform the duties of his office, whereas a heightened need standard addresses a logically independent issue. Under a heightened-need standard, a grand jury with only the usual need for particular information would be refused it when the President is

perfectly able to comply, while a grand jury with a heightened need would be entitled to it even if compliance would place undue obligations on the President. This result makes little sense and lacks any basis in the original understanding of the Constitution. I would leave questions of the grand jury's need to state law.

**Remand standard**
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." *Id.*, at 34. Accordingly, I respectfully dissent.

## Alito Dissent

**Case will affect the Presidency**
This case is almost certain to be portrayed as a case about the current President and the current political situation, but the case has a much deeper significance. While the decision will of course have a direct effect on President Trump, what the Court holds today will also affect all future Presidents—which is to say, it will affect the Presidency, and that is a matter of great and lasting importance to the Nation.

**Broader question is whether Constitution restricts state criminal law enforcement powers against a sitting president**
The specific question before us—whether the subpoena may be enforced—cannot be answered adequately without considering the broader question that frames it: whether the Constitution imposes restrictions on a State's deployment of its criminal law enforcement powers against a sitting President. If the Constitution sets no such limits, then a local prosecutor may prosecute a sitting President. And if that is allowed, it follows *a fortiori* that the subpoena at issue can be enforced. On the other hand, if the Constitution does not permit a State to prosecute a sitting President, the next logical question is whether the Constitution restrains any other prosecutorial or investigative weapons.

**Treatment of person serving as president can affect institution of the presidency**
The Presidency, like Congress and the Supreme Court, is a permanent institution created by the Constitution. All three of these institutions are distinct from the human beings who serve in them at any point in time. In the case of Congress or the Supreme Court, the distinction is easy to perceive, since they have multiple Members. But because "[t]he President is the only person who alone composes a branch of government . . . , there is not always a clear line between his personal and official affairs." *Trump v. Mazars USA, LLP, post*, at 17. As a result, the law's treatment of the person who serves as President can have an important effect on the institution, and the institution of the Presidency plays an indispensable role in our constitutional system.

**President never sleeps**
As the head of the Executive Branch, the President is ultimately responsible for everything done by all the departments and agencies of the Federal Government and a federal civilian work force that includes millions of employees. These weighty responsibilities impose enormous burdens on the time and energy of any occupant of the Presidency.

"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.

**Power divided between federal government and states**

Just as our Constitution balances power against power among the branches of the Federal Government, it also divides power between the Federal Government and the States. … And it provided for the Federal Government to be independent of and, within its allotted sphere, supreme over the States. Art. VI, cl. 2. Accordingly, a State may not block or interfere with the lawful work of the National Government. … In *McCulloch*, 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.

**Prosecution of a sitting president is out of the question**

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.

**Prosecution can come about only after impeachment**

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." Art. I, §3, cl. 7. 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.

**State proceedings must take into account demands of the president's office**

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. See *Clinton v. Jones*, 520 U. S. 681, 707 (1997).

**Application of laws must be adjusted at least until term in office ends**
It is not enough to recite sayings like "no man is above the law" and "the public has a right to every man's evidence." *Ante*, at 1. These sayings are true—and important—but they beg the question. The law applies equally to all persons, including a person who happens for a period of time to occupy the Presidency. But there is no question that the nature of the office demands in some instances that the application of laws be adjusted at least until the person's term in office ends.

**Evaluating subpoenas for a sitting president's records**
I now come to the specific investigative weapon at issue in the case before us—a subpoena for a sitting President's records. … 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," *ante*, at 21, 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*, 4 Wheat., at 430.

**Criminal subpoena can easily impair a president's performance**
When the issuance of such a subpoena is part of an investigation that regards the President as a "target" or "subject," the subpoena can easily impair a President's "energetic performance of [his] constitutional duties." *Cheney v. United States Dist. Court for D. C.,* 542 U. S. 367, 382 (2004). Few individuals will simply brush off an indication that they may be within a prosecutor's crosshairs. Few will put the matter out of their minds and go about their work unaffected. For many, the prospect of prosecution will be the first and last thing on their minds every day. … "[A] President who is concerned about an ongoing criminal investigation is almost inevitably going to do a worse job as President"[.]

**Potential use of subpoenas to harass**
As for the potential use of subpoenas to harass, we need not "'exhibit a naiveté from which ordinary citizens are free.' " *Department of Commerce v. New York*, 588 U. S. ___, ___ (2019) (slip op., at 28). As we have recognized, a President is "an easily identifiable target." *Fitzgerald*, 457 U. S., at 752–753. 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.

**Not all state criminal subpoenas should be barred**
I agree with the Court that not all such subpoenas should be barred. There may be situations in which there is an urgent and critical need for the subpoenaed information. The situation in

the Burr trial, where the documents at issue were sought by a criminal defendant to defend against a charge of treason, is a good example.

**Subpoena should not be allowed unless a heightened standard is met**

But in a case like the one at hand, a subpoena should not be allowed unless a heightened standard is met. Prior cases involving Presidential subpoenas have always applied special, heightened standards. In the Burr trial, Chief Justice Marshall was careful to note that "in no case of this kind would a court be required to proceed against the president as against an ordinary individual," and he held that the subpoena to President Jefferson was permissible only because the prosecutor had shown that the materials sought were "essential to the justice of the [pending criminal] case." *United States v. Burr*, 25 F. Cas. 187, 192 (No. 14,694) (CC Va. 1807) (brackets omitted). In *United States v. Nixon*, 418 U. S. 683 (1974), where the Watergate Special Prosecutor subpoenaed tape recordings and documents under the control of President Nixon, this Court refused to quash the subpoena because there was a "demonstrated, specific need for [the] evidence in a pending criminal trial." … The important point is not that the subpoena in this case should necessarily be governed by the particular tests used in these cases, most of which involved official records that were claimed to be privileged. Rather, the point is that we should not treat this subpoena like an ordinary grand jury subpoena and should not relegate a President to the meager defenses that are available when an ordinary grand jury subpoena is challenged. But that, at bottom, is the effect of the Court's decision.

**Suggested standard**

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.

**Statute of limitations concerns**

At argument, respondent's counsel told us that his office's concern is the expiration of the statute of limitations, but there are potential solutions to that problem. Even if New York law does not automatically suspend the statute of limitations for prosecuting a President until he leaves office, it may be possible to eliminate the problem by waiver. And if the prosecutor's statute-of-limitations concerns relate to parties other than the President, he should be required to spell that out.

**Risk of harassment**

The Court discounts the risk of harassment and assumes that state prosecutors will observe constitutional limitations, *ante*, at 18, and I also assume that the great majority of state prosecutors will carry out their responsibilities responsibly. But for the reasons noted, there is a very real risk that some will not.

**Limited grand jury secrecy**

The Court emphasizes the protection afforded by "longstanding rules of grand jury secrecy," *ante*, at 15, but that is no answer to the burdens that subpoenas may inflict, and in any event,

grand jury secrecy rules are of limited value as safeguards against harassment. State laws on grand jury secrecy vary and often do not set out disclosure restrictions with the same specificity as federal law. Under New York law, the decision whether to disclose grand jury evidence is committed to the discretion of the supervising judge under a test that simply balances the need for secrecy against "the public interest." … That test provides no solid protection for the Presidency. Reported New York decisions do not deal with whether this test restricts disclosure to, among others, a congressional committee, the state legislature, or the state attorney general and her staff for the purpose of civil litigation. … [L]eaks of such information are not uncommon, and those responsible are seldom called to account.

**No probable cause protection**
In New York, a grand jury subpoena need not be supported by probable cause, … and a party seeking to quash a subpoena must show that the documents sought "can have no conceivable relevance to any legitimate object of investigation."

**Not easy to prove a subpoena would impede the president's duties**
The Court says that a President can "*argue* that compliance with a particular subpoena would impede his constitutional duties," *ante*, at 20 (emphasis added), but under the Court's opinions in this case and *Mazars*, it is not easy to see how such an argument could prevail. The Court makes clear that any stigma or damage to a President's reputation does not count, *ante,* at 14, and in *Mazars*, the Court states that "burdens on the President's time and attention" are generally not of constitutional concern, *post*, at 20. Elsewhere in its opinion in this case, the Court takes the position that when a President's non-official records are subpoenaed, his treatment should be little different from that of any other subpoena recipient.

**Showing of impropriety difficult**
[T]he Court touts the ability of a President to challenge a subpoena by "'an affirmative showing of impropriety,' including 'bad faith'" or retaliation for official acts. *Ante*, at 16–17. But "such objections are almost universally overruled." S. Beale et al., Grand Jury Law and Practice §6:23, p. 6–243 (2014). Direct evidence of impropriety is rarely obtainable, and it will be a challenge to make a circumstantial case unless the prosecutor is required to provide the sort of showing outlined above.

**Sitting president in same unenviable position as any other person**
For all practical purposes, the Court's decision places a sitting President in the same unenviable position as any other person whose records are subpoenaed by a grand jury.

**Lesson from McCulloch**
The lesson we should take from Marshall's jurisprudence is the lesson of *McCulloch*—the importance of preventing a State from undermining the lawful exercise of authority conferred by the Constitution on the Federal Government. There is considerable irony in the Court's invocation of Marshall to defend a decision allowing a State's prosecutorial power to run roughshod over the functioning of a branch of the Federal Government.

**No real protection against subpoena power by local prosecutors**

The subpoena at issue here is unprecedented. Never before has a local prosecutor subpoenaed the records of a sitting President. The Court's decision threatens to impair the functioning of the Presidency and provides no real protection against the use of the subpoena power by the Nation's 2,300+ local prosecutors. Respect for the structure of Government created by the Constitution demands greater protection for an institution that is vital to the Nation's safety and well-being. I therefore respectfully dissent.