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CAN A STATE CRIMINAL SUBPOENA TO A SITTING PRESIDENT BE TRUMPED: EXPLORING *TRUMP V. VANCE*[1]

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* J.D., UIC School of Law, 2022; I would like to thank my parents who have constantly supported me with everything I have pursued. I would also like to thank my constitutional law professor who ultimately gave me the inspiration to write this Note.

1. For a similar title for which I took in part for this Note, *See* Steve Vladeck, Benjamin Wittes, *Can a President's Absolute Immunity be Trumped?*, LAWFARE (May 9, 2017, 5:17 PM), www.lawfareblog.com/can-presidents-absolute-immunity-be-trumped [perma.cc/3ZTF-6QBY].

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I. INTRODUCTION

It is no secret President Trump has been involved in an incredible number of lawsuits, even before taking office.[2] Since he took office, that did not necessarily stop.[3] Many of the suits have led to the President asserting a number of legal arguments regarding his entitlement to absolute immunity.[4] His time as President created, and will continue to create, an outstanding amount of new issues in the realm of constitutional law.[5] This is evident by *Trump v. Vance*, as the Supreme Court has never addressed the issuance of a subpoena to a sitting President "by a local grand jury operating under the supervision of a state court."[6] The Court has only ever

2. *See Donald Trump: Three decades 4,095 lawsuits*, USA TODAY, www.usatoday.com/pages/interactives/trump-lawsuits/ [perma.cc/AK6M-LUTL] (last visited Nov. 1, 2020) (showing that President Trump has been a part of 4,095 lawsuits at the time he ran for President in 2016).

3. *See* Chimène Keitner & Steve Vladeck, *All the President's Lawsuits: Fraud, Defamation, and the Westfall Act*, JUST SEC. (Sep. 25, 2020), www.justsecurity.org/72565/all-the-presidents-lawsuits-fraud-defamation-and-the-westfall-act-jean-carroll-mary-trump [perma.cc/H6YS-EHTU] (stating that "President Trump has been rather litigious during his time in office, leading one author to dub him 'Plaintiff in Chief'").

4. *Id.* ("This, in turn, has prompted Trump to deploy a raft of new legal arguments about a sitting president's immunity from personal capacity suits.").

5. *See* Peter Baker, *Trump is Fighting So Many Legal Battles, It's Hard to Keep Track*, N.Y. TIMES (Nov. 6, 2019), www.nytimes.com/2019/11/06/us/politics/donald-trump-lawsuits-investigations.html [perma.cc/QY4E-WDHQ] (stating that "[t]he legacy will live on long after Mr. Trump has left office[,]" and "[w]hatever rulings survive his administration will govern those that follow").

6. Trump v. Vance, 140 S. Ct. 2412, 2424-25 (2020) (emphasis in original).

addressed the issuance of subpoenas to presidents that have "involved federal criminal proceedings."[7] In the case of *Trump*, the Court finally addressed that state subpoena issue.[8] On one hand, *Trump* is a victory for state and local government authorities.[9] However, as this Note will demonstrate, that 'victory' must have limitations in order to afford more protection for the President of the United States.[10]

In *Trump*, the Court decided whether "Article II and the Supremacy Clause categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting President."[11] Part II of this Note will begin with a background of situations where the Court has found that the president may be entitled to absolute immunity. It will discuss former presidents that have been subject to federal criminal subpoenas and the Court's continued recognition of former Justice John Marshall's holding that presidents are unequivocally subject to federal subpoenas.[12] Because the instant case is a matter involving the issuance of a state subpoena to the President, I will discuss the concept of federalism and the Supremacy Clause. Finally, Part II will conclude with a discussion of grand jury rules regarding secrecy and harassment. Part III of this Note will explore the present case's procedural history and the Court's analysis. This includes Chief Justice Robert's majority opinion, Justice Kavanaugh's concurring opinion, and the dissenting opinions of both Justice Thomas and Justice Alito. This Note will particularly focus on Justice Alito's proposed three-step heightened standard that would be required for a state prosecutor to establish before a state criminal subpoena could be enforced.[13] Finally, Part IV will elaborate on that three-step heightened standard and argue it should be adopted by the Court to afford more protection for the President of the United States.

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7. *Id.* at 2424 (emphasis in original).

8. *Id.* at 2424-25.

9. Lisa Soronen, *SCOTUS Holds a Sitting President May Be Issued a State Criminal Subpoena*, NCSL BLOG (July 9, 2020), www.ncsl.org/blog/2020/07/09-scotus-holds-a-sitting-president-may-be-issued-a-state-criminal-subpoena.aspx [perma.cc/9H46-AQTJ].

10. *See Trump*, 140 S. Ct. at 2452 (Alito, J., dissenting) (stating that "[t]he 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. . .").

11. *Id.* at 2420 (majority opinion).

12. *See* Clinton v. Jones, 520 U.S. 681, 702-03 (1997) (holding that federal criminal subpoenas do not "rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions").

13. *Trump*, 140 S. Ct. at 2449 (Alito, J., dissenting).

II. BACKGROUND

A. Absolute Immunity and the President

The Supreme Court has addressed the issue of whether the President is entitled to absolute immunity.[14] Former United States Presidents have encountered possible criminal prosecutions and have faced civil suits.[15]

1. Criminal Prosecutions and Presidential Absolute Immunity

There has yet to be a single case addressing whether a sitting President can be criminally prosecuted.[16] On June 17, 1972, there was a burglary at the "Democratic National Headquarters in the Watergate Building in Washington, D.C."[17] It was found that the burglars were connected to then-President Nixon and that "high-level White House officials were involved in a cover-up."[18] During a Senate committee hearing that followed, it was revealed "that there was a secret taping system in the Oval Office and that presidential conversations were routinely recorded."[19] A federal grand jury tinkered with the idea of indicting President Nixon, but decided not to because it was unsure if it could.[20] The suit that followed, *United States v. Nixon*, involved a federal subpoena for various tapes and documents relating to meetings in which President Nixon was a participant.[21] President Nixon claimed absolute privilege and filed a motion to quash the third-party subpoena duces tecum[22] that was

14. *See generally Clinton*, 520 U.S. at 692-99 (addressing President Clinton's claim of immunity); Nixon v. Fitzgerald, 457 U.S. 731, 733 (1982) (addressing that the main issue before the Court was the scope of the immunity possessed by the President of the United States); United States v. Nixon, 418 U.S. 683, 703-16 (1974) (addressing President Nixon's claim of absolute privilege).

15. *Compare Nixon*, 418 U.S. at 687 (explaining that President Nixon was named as an unindicted co-conspirator in a federal grand jury indictment), *with Fitzgerald*, 457 U.S. at 733 (explaining that the plaintiff sought relief in civil damages from former President Nixon), *and Clinton*, 520 U.S. at 684 (explaining that a private citizen sought to recover civil damages from President Clinton).

16. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 392 (New York: Wolters Kluwer, 6th ed. 2019).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* ("In March 1974, a federal grand jury considered indicting then-President Richard Nixon and decided instead to make him an unindicted co-conspirator because it was unsure whether it could indict a sitting president.").

21. *Nixon*, 418 U.S. at 686 ("The subpoena directed the President to produce certain tape recordings and documents relating to his conversations with aides and advisors.").

22. *Subpoena Duces Tecum*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A subpoena ordering the witness to appear in court and to bring specified

issued by the United States District Court for the District of Columbia.[23] He based this absolute privilege assertion on the grounds of confidentiality.[24] The Court held that there was no absolute, unqualified presidential privilege.[25] The Court reasoned that a generalized claim of presidential privilege based on a claim of confidentiality could not overcome the interest of the fairness of justice and that such a claim could not be upheld in a criminal proceeding.[26] The significance of *Nixon* is that the Court did recognize the existence of executive privilege, but refused to make it absolute.[27]

2. Civil Cases and Presidential Absolute Immunity

Eight years later, former President Nixon was involved in another Supreme Court case revolving around the issue of a president's absolute immunity.[28] In *Nixon v. Fitzgerald*, the Court recognized a President's "absolute immunity from damages liability predicated on his official acts."[29] The Court reasoned that the prospect of damages liability could "distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve."[30] *Fitzgerald* held that a president or former president cannot be sued for money damages for acts that happened during the

documents, records, or things"); *see subpoena duces tecum*, CORNELL LAW SCH. LEGAL INFO. INST., www.law.cornell.edu/wex/subpoena_duces_tecum [perma.cc/Q72A-ZTC3] (last visited June 19, 2022) (reporting that a "subpoena *duces tecum* is a type of subpoena that requires the witness to produce a document or documents pertinent to a proceeding").

23. *Nixon*, 418 U.S. at 688.

24. *See id.* at 703 (explaining the President's absolute privilege claim was "that the subpoena should be quashed because it demands confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to product") (internal quotations omitted).

25. *See id.* at 706 (explaining that "the need for confidentiality of high-level communications, without more, can[not] sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances").

26. *See id*. at 713 (concluding that "when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice").

27. CHEMERINSKY, *supra* note 16, at 390.

28. *Fitzgerald*, 457 U.S. at 733.

29. *See id.* at 749 (explaining that this type of immunity is a "functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history"); *see also* CHEMERINSKY, *supra* note 16, at 393 (explaining that the Court "directly faced the issue of money damages and held that a president, or ex-president, may not be sued for money damages for conduct in office").

30. *Fitzgerald*, 457 U.S. at 753.

president's actual term in office.[31]

The issue of whether a president could be sued for conduct prior to taking office came before the Court in 1997, when the Court established in *Clinton v. Jones* that a sitting President has no immunity in civil cases for acts occurring prior to the President taking office and unrelated to the office.[32] In that case, President Clinton argued that the risk of being preoccupied by the need to partake in litigation entitled a sitting President to absolute immunity from civil liability for private conduct.[33] The Court disagreed with President Clinton but recognized that a president's attention is constantly faced with demands.[34] The Court concluded that "while such distractions may be vexing to those subjected to them, they do not ordinarily implicate constitutional separation of powers concerns."[35] The significance of this part of *Clinton* is that sitting presidents may be sued for acts that occurred prior to taking office.[36]

B. Presidential Criminal Subpoenas in Federal Criminal Proceedings

Although *Trump* does not involve a federally issued criminal subpoena,[37] a background on presidents that have been subpoenaed in federal criminal proceedings will be beneficial. Additionally, the United States Department of Justice's Office of Legal Counsel has taken a stance on such subpoenas.[38]

One of the earliest cases of a President being involved with a

31. *See* CHEMERINSKY, *supra* note 16, at 394 (explaining that the holding in *Nixon v. Fitzgerald* did not "resolve whether a president may be sued for conduct prior to taking office").

32. *See Clinton*, 520 U.S. at 692-93 (stating that "[t]he principal rationale for affording certain public servants immunity from suits for money damages arising out of their official acts is inapplicable to unofficial conduct").

33. *See id.* at 697 (explaining that President Clinton "contends that he occupies a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties").

34. *See id.* at 705, n. 40 (stating that presidents are faced with various demands that are "some private, some political, and some as a result of official duty. . .").

35. *Id.* at 705.

36. *See* CHEMERINSKY, *supra* note 16, at 395 (explaining that the Court "unanimously and unequivocally held that presidents may be sued for acts that allegedly occurred prior to taking office").

37. *See Trump*, 140 S. Ct. at 2420 (explaining that this is a "*state* criminal subpoena directed to a President") (emphasis in original).

38. *See* Salvador Rizzo, *Can the President be Indicted or Subpoenaed?*, WASH. POST: THE FACT CHECKER (May 22, 2018, 2:00 AM), www.washingtonpost.com/news/fact-checker/wp/2018/05/22/can-the-president-be-indicted-or-subpoenaed/ [perma.cc/Q3EF-8SJQ] (explaining the Office of Legal Counsel's memorandums regarding the criminal prosecution of a sitting president).

subpoena at the federal level was in 1807 with President Jefferson.[39] At that time, former Vice President Aaron Burr was on trial for treason.[40] Burr filed a motion *duces tecum* to obtain copies of certain orders made for his arrest.[41] The motion made was also for a letter sent from General Wilkinson to President Jefferson regarding Burr, that Burr believed would help defend him.[42] This subpoena *duces tecum* was directed at President Jefferson to produce the letter from General Wilkinson.[43] Burr sought to subpoena President Jefferson for documents that Burr thought were important for his defense to the treason charge.[44] The prosecution team charging Burr opposed the motion by arguing that a President could not be subjected to that type of subpoena.[45]

Chief Justice John Marshall, presiding as Circuit Justice for the State of Virginia, stated the President did not "stand exempt from the general provisions of the [C]onstitution[.]"[46] Justice Marshall compared the common law of the King of England and the reservation of the duty to testify in response to a subpoena, and recognized that the King's "dignity" was "incompatible" with appearing "under the process of the court."[47] Marshall stated that the only way the President could possibly be exempt from testimonial obligations, and thus, the general provisions of the Constitution, was if the President could show that his "duties as chief magistrate demand his whole time for national objects."[48] However, Marshall explained that the President's demands were not constant and that if it were the case that the President's duties prevented him from being present, the court could work that out on the return of the subpoena.[49] In regard to the documents that Burr sought from President Jefferson, Justice Marshall realized that those papers could contain information "the disclosure of which would endanger the public safety," but that those concerns would be determined with "due consideration" upon the return of the

39. United States v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d).

40. For more background on Aaron Burr, *see generally* NANCY ISENBERG, FALLEN FOUNDER: THE LIFE OF AARON BURR 1-557 (2007).

41. *Burr*, 25 F. Cas. at 32.

42. *Id.*

43. *See id.* at 32, 35 (explaining that a subpoena *duces tecum* is when a "witness is summoned for the purpose of bringing with him a paper in his custody").

44. Julia Solomon-Strauss, *Summary: The Supreme Court Rules in Trump v. Vance*, LAWFARE (July 10, 2020, 8:21 PM), www.lawfareblog.com/summary-supreme-court-rules-trump-v-vance [perma.cc/6ZYN-XSPE].

45. *Burr*, 25 F. Cas. at 32.

46. *Id.* at 34.

47. *See id.* (stating that the difference between the King and the President is that the King can do no wrong, versus the President who is "of the people" and elected by the people and subject to the law and the Constitution).

48. *Id.*

49. *Id.*

subpoena.[50] Marshall noted how complying with a subpoena *duces tecum* is similar to complying with a normal subpoena to testify.[51] Marshall held that President Jefferson was not immune from either testifying or responding to the subpoena.[52] Marshall's ruling thereby established the now long-standing precedent that the President is subject to subpoena *duces tecum*.[53]

In 1818, President Monroe received a subpoena to testify against one of his appointees, and in 1875, President Grant participated in a three-hour deposition in a criminal prosecution of a political appointee.[54]

In 1974, President Nixon, during the Watergate scandal, was summoned by the special prosecutor, who secured a subpoena directing President Nixon to produce tape recordings of Oval Office Meetings.[55] The Court computed a balancing act and recognized the importance of preserving the confidentiality of communications between government officials, because confidentiality promotes "the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making."[56] The Court stated it was necessary that "compulsory process be available for the production of evidence needed either by the prosecution or the defense."[57] It concluded that President Nixon's "generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial."[58] This case reaffirmed Justice Marshall's holding in *United States v. Burr*[59] that a president is required to comply with a subpoena.[60]

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50. *Id.* at 37.

51. *See id.* at 34 (reasoning that "[t]he propriety of introducing any paper into a case, as testimony, must depend on the character of the paper, not on the character of the person who holds it[,]" and thus, a "subpoena duces tecum, then, may issue to any person to whom an ordinary subpoena may issue").

52. Solomon-Strauss, *supra* note 44.

53. *See Burr*, 25 F. Cas. at 38 (holding that "such a subpoena, as is asked, ought to issue, if there exist any reason for supposing that the testimony may be material, and ought to be admitted").

54. Ronald D. Rotunda, *Presidents and Ex-Presidents as Witnesses: A Brief Historical Footnote*, 1975 U. ILL. L. F. 1, 3, 5 (1975).

55. *See* CHEMERINSKY, *supra* note 16, at 388 (reporting that "[o]n April 18, 1974, a subpoena *duces tecum* was issued, at the request of the special prosecutor, for the president to turn over tapes and other materials to sue as possible evidence in the upcoming criminal trial").

56. *See Nixon*, 418 U.S. at 705, 708-09 (explaining that the other side of the coin was the countervailing interests and that "the public has a right to every man's evidence").

57. *Id.* at 709.

58. *See id.* at 713 (noting that this standard also means that a federal prosecutor is required to establish a "demonstrated, specific need" for the President's information).

59. *Burr*, 25 F. Cas at 38.

60. *See Clinton*, 520 U.S. at 704 (stating that the Court "unequivocally and emphatically endorsed Marshall's position [that a subpoena *duces tecum* could be directed to the President] when [the Court] held that President Nixon was obligated to comply with a subpoena commanding him to produce certain tape

Just one year later, in 1975, President Ford was involved with a subpoena when his attempted assassin subpoenaed President Ford to testify in her defense.[61] The Eastern District of California held that President Ford had to comply with the subpoena.[62] President Ford did comply and his testimony became the first videotaped deposition of a sitting President.[63] President Carter also gave videotaped testimony to a federal grand jury.[64] President Clinton testified three times while in office, as well.[65]

In addition to precedent, the Department of Justice ("DOJ"), through various memorandums and briefs, has addressed criminal subpoenas and the President's immunity from the criminal process.[66] Most of the documents state that the "President enjoys immunity from indictment and criminal prosecution while in office," but some state otherwise.[67] Today, the DOJ stands on the ground that its prior memoranda and briefs do not support a finding that the President is immune from the criminal process as a whole.[68]

C. Supremacy Clause and Federalism

The case of *Trump* is a matter involving the issuance of a state

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recordings of his conversations with his aides") (citing Nixon, 418 U.S. 683).

61. United States v. Fromme, 405 F. Supp. 578, 580 (E.D. Cal. 1975).

62. *See id.* at 582 (holding that "no person, even a President, is above the law and . . . documents and other tangible evidence within the very office of the President may be obtained for use in [appropriate] judicial proceedings [and] where the President himself is a percipient witness to an alleged criminal act, [he] must be amenable to subpoena as any other person would be").

63. *See id*. at 583 (recognizing "the high office of the President and being mindful of the inconvenience and burden the subpoena will impose upon him, the court will not require the President to come to court to present his testimony, but rather, will 'bring' the court to the President").

64. RONALD ROTUNDA & JOHN E. NOWAK, CONSTITUTIONAL LAW § 7.1(b)(vi) 997 (5th ed. 2012).

65. *See Trump*, 140 S. Ct. at 2424 (explaining that President Clinton has testified "twice via deposition pursuant to subpoenas in federal criminal trials of associates implicated during the Whitewater investigation, and once by video for a grand jury investigating possible perjury") (citing ROTUNDA & NOWAK, *supra* note 64, § 7.1(c)(viii), at 1007-08).

66. *See* Brief of Former Department of Justice Officials as *Amici Curiae* in Support of Respondents at 6, Trump v. Vance, 140 S. Ct. 659 (2019) (No. 19-635) (addressing a June 25, 1973 Memorandum; a September 24, 1973 Memorandum; an October 5, 1973 Memorandum; a July 1974 Brief; and a January 2000 Memorandum).

67. *Id.* at 6-7 (recognizing that although most documents state that the "President enjoys immunity from indictment and criminal prosecution while in office… a number of those documents specifically explained that the President is amenable to judicial subpoenas more generally, and that the President can be subject to a grand jury investigation while in office").

68. *Id.* at 7 (stating that "the President's unprecedented assertion of an absolute immunity from all criminal process finds no support in the DOJ memoranda and briefs upon which the President seeks to rely").

subpoena to the President.[69] This requires a discussion on federalism and the Supremacy Clause, respectively.

The United States Constitution has a system of dual sovereignty.[70] In *McCulloch v. Maryland*,[71] the Court held that "states have no power . . . to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress."[72] Further, the Court has recognized a principle that "the activities of the Federal Government are free from regulation by any State[,] [and] [n]o other adjustment of competing enactments or legal principles is possible."[73]

Article VI, Paragraph 2, of the United States Constitution is commonly known as the Supremacy Clause.[74] In general, the Supremacy Clause establishes that federal law and the federal Constitution have priority over state laws.[75] The Supreme Court has held that "[n]o State government can . . . obstruct [the] authorized officers" of the Federal Government.[76] The Clause can also act as a constraint on federal power.[77] Relating to the instant case, and the acts of state prosecutors, the Court has stated that it will "assume[] that state courts and prosecutors will observe

69. *Trump*, 140 S. Ct. at 2420 ("This case involves . . . the first *state* criminal subpoena directed to a President.") (emphasis in original).

70. *Federalism*, CORNELL LAW SCH. LEGAL INFO. INST., www.law.cornell.edu/wex/federalism [perma.cc/53FZ-94D9] (last visited June, 18, 2022) ("In the United States, the Constitution has established a system of dual sovereignty, under which the States have surrendered many of their powers to the Federal Government, but also retained some sovereignty.") (internal quotations omitted).

71. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

72. *Id.* at 436; *see* Akhil Reed Amar & Brian C. Kalt, *Feature: The Presidential Privilege Against Prosecution*, 2 NEXUS J. OP. 11 (1997) (stating that "state officials are not allowed to obstruct 'the measures of a government created by others as well as themselves, for the benefit of others in common with themselves'") (quoting McCulloch, 17 U.S. (4 Wheat.) at 435-36).

73. Mayo v. United States, 319 U.S. 441, 445 (1943).

74. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

75. See *Supremacy Clause*, CORNELL LAW SCH. LEGAL INFO. INST., www.law.cornell.edu/wex/supremacy_clause [perma.cc/WTS5-HBJU] (last visited June 19, 2022) (reporting that the Supremacy Clause "establishes that the federal constitution, and federal law generally, take precedence over state laws, and even state constitutions"); *see also* CHEMERINSKY, *supra* note 16, at 430 (stating that "[i]f there is a conflict between federal and state law, the federal law controls and the state law is invalidated because federal law is supreme").

76. Tennessee v. Davis, 100 U.S. 257, 263 (1880).

77. *See* Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 100 (2003) (discussing that the Supremacy Clause has two goals: "to secure the supremacy of federal law and to prevent Congress from exceeding the scope of its enumerated powers").

constitutional limitations."[78] If state officials and prosecutors fail to adhere to federal law, the Clause fosters the idea that federal law will protect the President. This is because the Court has also held that federal courts may enjoin state officials to conform their conduct to federal law.[79]

D. Grand Juries

Finally, part of the President's argument in *Trump* relates to the burdens of stigma and harassment resulting from state criminal subpoenas.[80] Because the Court's holding discusses the various protections that grand jury rules may or may not provide as to stigma and harassment,[81] the two issues will be discussed in turn.

1. Stigma and Grand Jury Secrecy Rules

On one hand, grand jury secrecy rules may protect any stigma that a president may face.[82] At the federal level, the Federal Rules of Criminal Procedure do not allow certain individuals to disclose the matter that is before the grand jury.[83] Further, "[t]he federal system and most states have adopted statutes or court rules [that] impose sharp restrictions on the extent to which matters occurring before a grand jury may be divulged" to individuals not included.[84] Federal rules and state law also reinforce the notion for individuals not to improperly disclose grand jury matters.[85]

On the other hand, these restrictions are not flawless due to the media and the federal rules not imposing disclosure restrictions on everyone.[86] For instance, "witnesses who testify before a grand

78. Dombrowski v. Pfister, 380 U.S. 479, 484 (1965).

79. Ex Parte Young, 209 U.S. 123, 155-56 (1908).

80. *Trump*, 140 S. Ct. at 2427-29.

81. *Id.*

82. *See generally* S. BEALE ET AL., GRAND JURY LAW AND PRACTICE § 5:1, p. 5-3 (2d ed. 2018).

83. *See* FED. R. CRIM. P. 6(e)(2)(B) (stating that "(i) a grand juror; (ii) an interpreter; (iii) a court reporter; (iv) an operator of a recording device; (v) a person who transcribes recorded testimony; (vi) an attorney for the government; or (vii) a person to whom disclosure is made . . . must not disclose a matter occurring before the grand jury"); *see also* Sara Kropf, *What Is Grand Jury Secrecy?*, GRAND JURY TARGET (Nov. 18, 2015), www.grandjurytarget.com/2015/11/18/what-is-grand-jury-secrecy/ [perma.cc/W3UV-EAR9] (stating that "the prosecutor, the jurors and the court reporter may not disclose what happens in a grand jury") [hereinafter Kropf].

84. Beale, *supra* note 82.

85. *See* FED. R. CRIM P. 6(e)(7) (stating that "[a] knowing violation of Rule 6… may be punished as a contempt of court"); *see also* N.Y. Unlawful Grand Jury Disclosure Law § 215.70 (Consol. 2020) (stating that "[u]nlawful grand jury disclosure is a class E felony").

86. *See Nixon*, 418 U.S. at 687, n. 4 (recognizing that President Nixon requested that the District Court lift the protective order that safeguarded him

jury . . . are under no obligation of secrecy[,]" and witnesses "can tell anyone about what [they] said and what [they] heard during the grand jury, including the target."[87] In New York, the decision as to whether to disclose grand jury evidence falls under the discretion of the judge who uses a balancing test upon the need for secrecy against "the public interest."[88] As such, grand jury secrecy rules may or may not protect the President from any stigma that may result from the issuance of a subpoena.[89]

2. Harassment Relating to Grand Juries

The President may be protected from any potential harassment.[90] This is because federal grand juries are barred from engaging in "arbitrary fishing expeditions" and initiating investigations "out of malice or an intent to harass."[91] Further, grand jury subpoenas can be challenged as "overly broad" or "unreasonably burdensome."[92] However, "all that is required under the State [of New York] and Federal Constitutions is that the subpoenaed materials be relevant to the investigation being conducted."[93] Additionally, the State of New York does not require a grand jury subpoena to be supported by probable cause.[94] There are also a number of local prosecutors across the country that may have political motivations to harass the President with state criminal subpoenas.[95] Thus, the President may or may not be protected from harassment, but this issue and the issue of stigma

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from being named as an unindicted coconspirator in the grand jury proceeding based on the ground "that the disclosures to the news media made the reasons for continuance of the protective order no longer meaningful").

87. Kropf, *supra* note 83.

88. In re District Attorney of Suffolk Cnty., 58 N.Y.2d 436, 444 (N.Y. 1983).

89. *Compare* Trump, 140 S. Ct. at 2427 (stating that "longstanding rules of grand jury secrecy aim to prevent the very stigma the President anticipates"), *with* Trump, 140 S. Ct. at 2450 (Alito, J., dissenting) (stating that "grand jury secrecy rules are of limited value as safeguards[,]" and that "[s]tate laws on grand jury secrecy vary and often do not set out disclosure restrictions with the same specificity as federal law").

90. United States v. R. Enterprises, Inc., 498 U.S. 292, 299 (1991).

91. *Id.*

92. In re Grand Jury Subpoenas for Locals 17, 135, 257 & 608 of United Bhd. Of Carpenters & Joiners, 72 N.Y.2d 307, 315-16 (1988).

93. *Id.*

94. In re Nassau Cnty. Grand Jury Subpoena Duces Tecum Dated June 24, 2003, 4 N.Y.3d 665, 677-78 (N.Y. 2005).

95. *See Trump*, 140 S. Ct. at 2447 (Alito, J., dissenting) (explaining that "[i]f 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"); *see also* DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS, 2007 – STATISTICAL TABLES 1 (Dec 28, 2011), www.bjs.ojp.gov/content/pub/pdf/psc07st.pdf [perma.cc/W44J-8XJH] (stating that there are "2,330 chief prosecutors' offices in the United States") [hereinafter BUREAU OF JUSTICE STATISTICS].

relate to the Court's holding in *Trump*.[96]

III. CASE & COURT'S ANALYSIS

A. Facts and Procedural Posture

In 2018, New York County District Attorney, Cyrus Vance Jr., and his office, reportedly began investigating the President for what it "opaquely describes as 'business transactions involving multiple individuals whose conduct may have violated state law.'"[97] One of the issues involved illegal hush money payments that Michael Cohen made on the President's behalf.[98] Since then, prosecutors have also indicated they are looking into bank and insurance fraud by the President and his companies.[99]

In 2019, the New York District Attorney's Office, acting on behalf of a grand jury, "served a subpoena *duces tecum*… on Mazars USA, LLP, the personal accounting firm of President Donald J. Trump."[100] District Attorney Vance issued a grand jury subpoena to Mazars, who possesses financial and tax records, because it performed accounting services for President Trump and his organizations.[101] The subpoena ordered Mazars to produce financial records relating to the President and businesses affiliated with him, including tax returns.[102]

The President, in his personal capacity, sued the District Attorney and Mazars in the United States District Court for the Southern District of New York to enjoin the enforcement of the subpoena.[103] The President argued that under Article II and the Supremacy Clause, he, as sitting United States President, has

96. *Trump*, 140 S. Ct. at 2427-29 (majority opinion).

97. *Trump*, 140 S. Ct. at 2420 (quoting Brief of Respondent at 2, Trump v. Vance, 140 S. Ct. 2412 (2020) (No. 19-635)).

98. *See* Mark Joseph Stern, *Donald Trump's Fight to Hide His Tax Returns Has Failed*, SLATE (Aug. 20, 2020, 12:07 PM), www.slate.com/news-and-politics/2020/08/donald-trump-john-roberts-tax-returns-vance.html [perma.cc/L58D-KARA] (stating that "Cy Vance reportedly began investigating [the President] in 2018 for the illegal hush money payments that Michael Cohen made on his behalf") [hereinafter Stern]; *see also* Darren Sameulsohn, *Guiliani: Cohen is not Trump's lawyer anymore 'as far as we know'*, POLITICO (May 11, 2018, 2:01 PM), www.politico.com/story/2018/05/11/michael-cohen-not-trump-attorney-583902 [perma.cc/AM8K-LL3W] (explaining that Michael Cohen was the "longtime personal attorney to President Donald Trump" and represented the President in regard to the illegal hush money payments that "Cohen [apparently] had made to the adult film star Stormy Daniels just weeks before the 2016 presidential election").

99. Stern, *supra* note 98.

100. *Trump*, 140 S. Ct. at 2420.

101. Trump v. Vance, 941 F.3d 631, 634 (2nd Cir. 2019).

102. *Trump*, 140 S. Ct. at 2420.

103. *Id.*

absolute immunity from the state criminal process.[104] He sought declaratory judgment to make the subpoena invalid and unenforceable while he was in office and also to permanently enjoin District Attorney Vance from being able to take any action in enforcing the subpoena.[105] The district court did not exercise jurisdiction based on the abstention doctrine set forth in *Younger v. Harris*[106] and dismissed the case.[107] The district court alternatively held that the President was not entitled to injunctive relief.[108]

In an appeal to the Second Circuit, the President argued that the district court erred in dismissing his complaint based on the *Younger* abstention, and that it erred in denying the preliminary injunction on the question of absolute immunity.[109] The Second Circuit vacated the district court's dismissal of the complaint regarding the *Younger* abstention issue.[110] Nonetheless, the Second Circuit agreed with the district court's alternative holding that denied the preliminary injunction as to the immunity issue.[111] Further, it addressed and rejected the Solicitor General's argument, on behalf of the United States as *amicus curiae*, that a state grand jury subpoena needed to satisfy a heightened standard of need.[112]

The Supreme Court granted certiorari.[113] On July 9, 2020, the Supreme Court issued its decision in *Trump*.[114] Chief Justice Roberts announced the decision of the Court, in which Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan

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104. *Id.*

105. *Id.*

106. *See generally* Younger v. Harris, 401 U.S. 37 (1971) (setting forth an abstention doctrine, which, in part, established that federal courts are required to not exercise jurisdiction when a plaintiff sought to enjoin a state criminal prosecution that was still ongoing).

107. Trump v. Vance, 395 F. Supp. 3d 283, 290 (S.D.N.Y. 2019) (abstaining from exercising jurisdiction because of Younger).

108. *Id.* at 290.

109. *Trump*, 941 F.3d at 634.

110. *See id.* (holding that "Younger abstention does not extend to the circumstances of this case").

111. *See id.* at 634, 640 (holding "that the President has not shown a likelihood of success on the merits of his claims sufficient to warrant injunctive relief[,]" because "presidential immunity does not bar the enforcement of a state grand jury subpoena directing a third party to produce non-privileged material, even when the subject matter under investigation pertains to the President").

112. *See id.* at 645-46 (reasoning that the heightened need test, which is taken from precedent addressing communications within the Executive Branch "has little bearing on a subpoena that, as here, does not seek any information subject to executive privilege . . . in his private capacity and disconnected from the discharge of his constitutional obligations").

113. Trump v. Vance, 140 S. Ct. 659 (2019) ("The petition for a writ of certiorari is granted."); *Trump*, 140 S. Ct. 2412, 2420 ("We granted certiorari to decide whether Article II and the Supremacy Clause categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting President.").

114. *Trump*, 140 S. Ct. at 2412.

joined.[115] Justice Kavanaugh wrote a concurring opinion joined by Justice Gorsuch.[116] Both Justice Thomas and Justice Alito separately dissented to the Court's judgment.[117] The Court addressed two issues: (1) the President's absolute immunity argument; and (2) the Solicitor General's argument that this type of state subpoena must meet a heightened standard of need.[118] The majority rejected both arguments.[119] All nine Justices agreed that the President was not absolutely immune from the issuance of a state criminal subpoena for his personal financial records.[120] As to the Solicitor General's heightened standard of need argument, Justice Thomas, in his dissent, joined the majority's holding that the subpoena was not required to meet such a standard.[121]

B. Chief Justice Roberts' Majority Opinion

In writing for the Court's majority, Chief Justice Roberts makes two big holdings: (1) that the President is not entitled to absolute immunity under Article II and the Supremacy Clause; and (2) that a heightened standard of need is not required for the issuance of a state criminal subpoena to a sitting President.[122] Chief Justice Roberts first addresses the President's argument of absolute immunity, and then confronts the Solicitor General's argument of a heightened standard of need.[123]

Before diving into the issues, Chief Justice Roberts opens his opinion by emphasizing the long-standing principle in our country's judicial system that "the public has a right to every man's evidence[,]" including "the President of the United States."[124] He

115. *Id.* at 2420-31.

116. *Id.* at 2431-33 (Kavanaugh, J., concurring).

117. *Id.* at 2433-39 (Thomas, J., dissenting); *Id.* at 2439-52 (Alito, J., dissenting).

118. Soronen, *supra* note 9.

119. *See* Solomon-Strauss, *supra* note 44 (stating that the Court "reject[ed] both the [P]resident's position that he was absolutely immune from a subpoena from the New York County District Attorney's Office and the [S]olicitor [G]eneral's position that the subpoena should be subject to a heightened need standard").

120. *Id.* ("Writing in four separate opinions, the Justices were unanimous that President Trump was not absolutely immune from a state court criminal subpoena to a third party for his financial records.").

121. *Id.* ("And the five Justices in the majority, along with [Justice Thomas] in his dissent, agreed that the subpoena did not have to be subject to a heightened need standard.").

122. *See Trump*, 140 S. Ct. at 2429 (holding that the Court "cannot conclude that absolute immunity is necessary or appropriate under Article II or the Supremacy Clause" and that it "disagree[s]" with the Solicitor General's argument that "a state grand jury subpoena seeking a President's private papers must satisfy a heightened need standard").

123. *Id.* at 2425-29, 2429-31.

124. *Id.* at 2420 ("In our judicial system, the public has a right to every man's

then recognizes the notable part of this case – this being the first time the Court has ever been confronted with a "*state* criminal subpoena directed to a President."[125]

1. Article II and the Supremacy Clause do not Categorically Preclude the Issuance of a State Criminal Subpoena

Chief Justice Roberts begins with a history lesson on the background of the 1807 trial of Aaron Burr.[126] That case, explained in more detail in Part II(B)(1) of this Note, involved Burr, the former Vice-President, attempting to subpoena President Jefferson for documents that he thought would be beneficial for his defense.[127] Chief Justice John Marshall held that President Jefferson was not immune to Burr's subpoena nor immune from responding to the subpoena since the President did not "stand exempt from the general provisions of the [C]onstitution[.]"[128] Chief Justice Roberts presumably lays out this background to emphasize *Burr*'s holding that presidents are subject to subpoena, even when called to testify.[129] Chief Justice Roberts then sets out the precedent of former Presidents Monroe, Grant, Ford, Carter and Clinton who accepted the *Burr* ruling of being subject to subpoenas and to testify.[130]

He finishes his discussion of precedent that has reaffirmed Marshall's holding in *Burr* by referring to President Nixon in the 1974 Watergate scandal.[131] As Chief Justice Roberts explains,

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evidence" and "[s]ince the earliest days of the Republic, every man has included the President of the United States.") (internal quotations omitted); Solomon-Strauss, *supra* note 44 ("The majority opinion emphasizes the common law heritage of the principle that the public has a right to every man's evidence – including the president's.") (internal quotations omitted).

125. *Trump*, 140 S. Ct. at 2420 ("This case involves – so far as [the Court] and the parties can tell – the first *state* criminal subpoena directed to a President.") (emphasis in original).

126. Solomon-Strauss, *supra* note 44 ("Roberts opens with an extended description of the history and background of the prosecution of Aaron Burr for treason in 1807.").

127. *Id.* ("In that case, Burr sought to subpoena President Thomas Jefferson for documents that he believed were important for his defense.").

128. *Burr*, 25 F. Cas. at 32.

129. *See Trump*, 140 S. Ct. at 2423 (stating that "[i]n the two centuries since the Burr trial, successive Presidents have accepted Marshall's ruling that the Chief Executive is subject to subpoena"); *see also* Solomon-Strauss, *supra* note 44 (stating that "Roberts identifies the Burr case as the foundation of a consensus that has emerged in the case law in the 200 years since the [Burr] ruling[,]… including when they are called to testify in a criminal proceeding").

130. *Trump*, 140 S. Ct. at 2423-24 ("In 1818, President Monroe received a subpoena to testify . . . [and] offered to sit for a deposition and ultimately submitted answers to written interrogatories" and "[f]ollowing 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.").

131. *Id.* at 2424 ("The bookend to Marshall's ruling came in 1974 when the question he never had to decide – whether to compel the disclosure of official

President Nixon "moved to quash" a subpoena *duces tecum* secured by the appointed Special Prosecutor that "direct[ed] Nixon to produce, among other things, tape recordings of Oval Office meetings" relating to the break-in at the Watergate Complex.[132] The Court rejected Nixon's argument that "the Constitution provides an absolute privilege of confidentiality to all presidential communications."[133] Chief Justice Roberts references *Nixon* to reiterate that Presidents are subject to subpoena, even when it comes to official, privileged communications.[134]

Chief Justice Roberts addresses the President's absolute immunity argument in this case, the argument being that the distinction between a federal subpoena and a state subpoena makes all the difference.[135] The President's contention is that having to comply with a state subpoena would "pose a unique threat of impairment" that would "categorically impair a President's performance of his Article II functions."[136] In a footnote, Chief Justice Roberts makes it clear that although the subpoena in this case was issued to a third-party, for purposes of immunity, it is effectively issued to the President.[137] President Trump argues that under the Supremacy Clause and because of his obligations as the Chief Executive under Article II, "he has absolute immunity from *state* criminal subpoenas."[138] Chief Justice Roberts explains how the Solicitor General does not necessarily argue the President is entitled to absolute immunity, but instead asserts the subpoena should meet a heightened need standard, and that it was not met.[139] The heightened need standard would "require a threshold showing" that the sought after evidence is necessary and needed while the

communications over the objection of [President Nixon] – came to a head.").

132. *Id.*

133. *Id.* (citing *Nixon*, 418 U.S. 683).

134. *See id*. (stating that the Court's decision in *Nixon* was "a decision [the Court] later described as 'unequivocally and emphatically endors[ing] Marshall's' holding that Presidents are subject to subpoena") (quoting *Clinton*, 520 U.S. at 704).

135. *Id.* at 2425 ("In the President's view, that distinction makes all the difference.").

136. *Id.*

137. *Id.* at 2425, n. 5 ("While the subpoena was directed to the President's accounting firm, the parties agree that the papers at issue belong to the President and that Mazars is merely the custodian[,]" and therefore, "for purposes of immunity, it is functionally a subpoena issued to the President. . .").

138. Solomon-Strauss, *supra* note 44 (emphasis in original).

139. *Trump*, 140 S. Ct. at 2425 ("The Solicitor General, arguing on behalf of the United States, agrees with much of the President's reasoning but does not commit to his bottom line [and] [i]nstead . . . urges [the Court] to resolve this case by holding that a state grand jury subpoena for a sitting President's personal records must, at the very least, 'satisfy a heightened standard of need,' which the Solicitor General contends was not met here.") (quoting Brief for the United States as *Amicus Curiae* Supporting Petitioner at 26, 29, Trump v. Vance, 140 S. Ct. 2412 (2020) (No. 19-635)).

President is still in office.[140]

In terms of absolute immunity, Chief Justice Roberts briefly explains how Article II gives protection to the President.[141] Because "Article II guarantees the independence of the Executive Branch[,]" and because that role gives the President a wide range of duties, such as "faithfully executing the laws to commanding the Armed Forces," the Court has given the President "protections that safeguard the President's ability to perform his vital functions."[142] He explains that this protection is enhanced by the Constitution and the concept of federalism.[143] Chief Justice Roberts circles back to Chief Justice John Marshall's holding in *Burr* and the cases that followed which established that "*federal* criminal subpoenas do not 'rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions.'"[144] In other words, based on precedent, criminal subpoenas issued by "*federal* authorities do not interfere with the president's constitutional functions."[145]

However, the President's claim is that "*state* criminal subpoenas pose a unique threat of impairment and thus demand greater protection."[146] Notably, Chief Justice Roberts makes it clear that the President makes a "*categorical* argument" and does not argue specifically about "*this* subpoena[.]"[147] The President argues that diversion, stigma, and harassment are three reasons why he should be entitled to absolute immunity.[148] Chief Justice Roberts

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140. *Id.* at 2429 ("The Solicitor General would require a threshold showing that the evidence sought is 'critical' for 'specific charging decisions' and that the subpoena is a 'last resort,' meaning the evidence is 'not available from any other source' and is needed 'now, rather than at the end of the President's term.'") (quoting Brief for the United States as *Amicus Curiae* Supporting Petitioner at 29, 32, Trump v. Vance, 140 S. Ct. 2412 (2020) (No. 19-635)).

141. *See id.* at 2425 (stating that "Article II guarantees the independence of the Executive Branch" and the President's duties under Article II "are of unrivaled gravity and breadth[,]" which "safeguard the President's ability to perform his vital functions").

142. *Id.* (citing *Fitzgerald*, 457 U.S. at 749) (The President "is entitled to absolute immunity from damages liability predicated on his official acts"); *Nixon*, 418 U.S. at 708 (Presidential communications are privileged).

143. *Id.* ("In addition, the Constitution guarantees 'the entire independence of the General Government from any control by the respective States[,]'" which means "that States also lack the power to impede the President's execution of those laws.") (quoting Farmers and Mechanics Sav. Bank of Minneapolis v. Minnesota, 232 U.S. 516, 521 (1914)).

144. *Id.* (emphasis in original) (quoting Clinton, 520 U.S. at 702-03).

145. Solomon-Strauss, *supra* note 44 (emphasis in original).

146. *Trump*, 140 S. Ct. at 2425 (emphasis in original).

147. *Id.* ("To be clear, the President does not contend here that *this* subpoena, in particular, is impermissibly burdensome[,] [and] [i]nstead he makes a *categorical* argument about the burdens generally associated with state criminal subpoenas[.]") (emphasis in original).

148. Soronen, *supra* note 9 ("Regarding absolute immunity, Trump pointed to diversion, stigma and harassment as the reasons he should be immune from state subpoenas.").

rejects each reason either because of existing precedent or because of protections that are already in place for grand jury investigations.[149]

a. The diversion argument is rejected based on precedent

Chief Justice Roberts first looks at the President's claim that complying with the state criminal subpoena would distract him from his duties as the Chief Executive.[150] Chief Justice Roberts notes that in *Clinton*, President Clinton argued that he should be immune from civil liability for private conduct,[151] and that the Court "expressly rejected immunity based on distraction alone[.]"[152] Because President Trump's main argument regarding distraction is based on the Court's holding in *Fitzgerald*, Chief Justice Roberts then clarifies what the Court's primary concern was in that case – that the President "might carry out his duties differently if he was subject to potential civil liability, not that he would be distracted by ongoing litigation."[153] Chief Justice Roberts states that the "same is true of criminal subpoenas[,]" because a "properly tailored criminal subpoena" will not distract a President from his constitutional duties.[154] Interestingly, although Chief Justice Roberts states in an earlier footnote that the subpoena at issue was "functionally a subpoena issued to the President[,]" he asserts that when a subpoena is targeted at someone else, that the burden will be even lighter.[155]

Chief Justice Roberts writes that "the President is not seeking immunity from the diversion occasioned by the prospect of future

149. *Id.* ("The majority opinion rejected these arguments as foreclosed by precedent or, in the case of harassment, manageable due to protections already in place to limit grand jury investigations.").

150. *Trump*, 140 S. Ct. at 2425-26 ("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.").

151. *Clinton*, 520 U.S. at 692.

152. *Trump*, 140 S. Ct. at 2426; Solomon-Strauss, *supra* note 44 ("First [Chief Justice Roberts] notes that Clinton v. Jones, in which President Clinton argued that he should be immune from civil liability for private conduct, expressly rejected immunity based on distraction alone.") (internal quotations omitted).

153. Solomon-Strauss, *supra* note 44.

154. *Trump*, 140 S. Ct. at 2426 ("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.") (quoting *Clinton*, 520 U.S. at 702).

155. *Id.* at 2425, n. 5, 2426 ("If anything, we expect that in the mine run of cases, where a President is subpoenaed during a proceeding targeting someone else . . . the burden on a President will ordinarily be lighter than the burden of defending against a civil suit.").

criminal *liability*."[156] Because the President "concedes that prosecutors may investigate the [P]resident so that they may possibly charge him after he steps down from office, he cannot assert that the distraction of the investigation *itself* is impermissible."[157] Instead, Chief Justice Roberts explains the President must assert that "the *additional* distraction caused by the subpoena" interferes with his constitutional duties.[158] However, Chief Justice Roberts states that this argument would fail as it would conflict with the previous "200 years of precedent establishing that Presidents, and their official communications, are subject to judicial process, even when the President is under investigation[.]"[159] As such, Chief Justice Roberts rejects the President's diversion argument based on the Court's precedent.[160]

b. The stigma argument is rejected based on precedent and grand jury protections

Chief Justice Roberts next addresses the President's stigma argument that "being subpoenaed will undermine his leadership at home and abroad[,]" and also notes that the Solicitor General does not join the President in this argument.[161] Chief Justice Roberts writes that even if the President's "tarnished reputation" is a legitimate argument, there is "nothing inherently stigmatizing about a President" having to do what every other citizen has to do in complying with an investigation.[162] He then reasons that because prior presidents have dealt with reputational issues in federal cases, the same should be true in state court cases, and as such, the President must comply with the duties of an investigation.[163]

156. *Id.* at 2426 (emphasis in original).

157. Solomon-Strauss, *supra* note 44 (emphasis in original).

158. *Trump*, 140 S. Ct. at 2427 (emphasis in original); Solomon-Strauss, *supra* note 44.

159. *Trump*, 140 S. Ct. at 2427 (citing *Burr*, 25 F. Cas. at 34; *Nixon*, 418 U.S. at 706).

160. Soronen, *supra* note 9 ("The majority opinion rejected [this] argument as foreclosed by precedent…").

161. *See Trump*, 140 S. Ct. at 2427 (stating that "the Solicitor General does not endorse this argument, perhaps because [the Court] [has] twice denied absolute immunity claims by Presidents in cases involving allegations of serious misconduct") (citing *Clinton*, 520 U.S. at 685; *Nixon*, 418 U.S. at 687).

162. *Id.* at 2427 ("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.") (quoting Branzburg v. Hayes, 408 U.S. 665, 691 (1972)).

163. *See id.* (stating that the Court cannot "accept that the risk of association with persons or activities under criminal investigation can absolve a President of such an important public duty[,]" because "[p]rior Presidents have weathered these associations in federal cases, and there is no reason to think any attendant notoriety is necessarily greater in state court proceedings"); *see also* Solomon-Strauss, *supra* note 44 (stating that "Roberts states that there is no

Chief Justice Roberts also recognizes that "longstanding rules of grand jury secrecy would "prevent the very stigma the President anticipates."[164] These rules would protect the President even though "the current suit has cast the Mazars subpoena into the spotlight."[165] Chief Justice Roberts recognizes that these rules are obviously not perfect, but that disclosure penalties would still protect the President from any potential stigma.[166] Thus, Chief Justice Roberts rejects this claim on the bases of precedent and grand jury protections that are in place.[167]

c. The harassment argument is rejected based on precedent, grand jury protections, and the Supremacy Clause

Chief Justice Roberts rejects the President's final claim, in which the Solicitor General joins, that the President will be subject to harassment by state criminal subpoenas.[168] The President's argument is based on the grounds that local and state prosecutors are more inclined than their federal counterparts to be politically motivated and harass the President.[169] The President reasons that local and state prosecutors respond to their localities and their interests, and "might 'use criminal process to register their dissatisfaction with' the President."[170] The President claims state criminal subpoenas would not allow the President to properly deal with the States and would "threaten the independence" of the office.[171]

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difference between the reputational costs of such process in federal cases and in state court").

164. *Trump*, 140 S. Ct. at 2427.

165. *Id.*

166. *See id.* (stating that "[o]f course, disclosure restrictions are not perfect[,]" but that "those who make unauthorized disclosures regarding a grand jury subpoena do so at their peril"); *see also* Solomon-Strauss, *supra* note 44 (stating that Roberts writes that there "are disclosure rules and penalties to protect the [P]resident from any stigma that could result from the revelation that his information was subpoenaed").

167. Soronen, *supra* note 9.

168. *Trump*, 140 S. Ct. at 2427 ("Finally, the President and the Solicitor General warn that subjecting Presidents to state criminal subpoenas will make them 'easily identifiable target[s]' for harassment.") (quoting *Fitzgerald*, 457 U.S. at 753); Solomon-Strauss, *supra* note 44 ("Finally, the chief justice rejects the claim that the [P]resident will be subject to harassment by state criminal subpoenas.").

169. Solomon-Strauss, *supra* note 44 ("Trump had warned that local prosecutors are more likely than federal prosecutors to play politics and fail to respect the office of the presidency.").

170. *Trump*, 140 S. Ct. at 2428 (quoting Brief for Petitioner at 16, Trump v. Vance, 140 S. Ct. 2412 (2020) (No. 19-635)).

171. *Id.* at 2427-28 ("The President and the Solicitor General . . . argue that state criminal subpoenas pose a heightened risk and could undermine the President's ability to 'deal fearlessly and impartially' with the States.") (quoting

Chief Justice Roberts recognizes subpoenas could potentially be harassing in "certain circumstances," and that there is the potential for local or state prosecutors to have political implications.[172] But, Chief Justice Roberts explains and cites the Court's precedent regarding grand juries and investigations and how the law protects any potential harassment the President might face.[173] Chief Justice Roberts gives two explanations of these protections: (1) grand jury rules; and (2) the Supremacy Clause.[174] In regards to grand jury rules, Chief Justice Roberts explains that "grand juries are prohibited from engaging in 'arbitrary fishing expeditions' and initiating investigations 'out of malice or an intent to harass.'"[175] He explains that even if harassment did occur in state courts, the President would have protection in federal court since federal courts can interfere when it is found "that the state proceeding is motivated by a desire to harass or is conducted in bad faith."[176] In terms of the Supremacy Clause protections, Chief Justice Roberts states the Clause "prohibits state judges and prosecutors from interfering with a President's official duties."[177] Further, courts "generally 'assume[] that state courts and prosecutors will observe constitutional limitations'" provided by the Supremacy Clause.[178] This is because the Clause fosters the notion that state governments cannot interfere with the "authorized officers" of the Federal Government.[179] Even if these protections fail, Chief Justice Roberts explains that federal law allows presidents to make challenges in federal court, which is precisely what the President had done in this case.[180]

Chief Justice Roberts concludes this part of his opinion by stating that the grand jury safeguards in place and precedent do not entitle the President to absolute immunity under Article II or the Supremacy Clause, and that the entire Court agrees as to this

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Fitzgerald, 457 U.S. at 752).

172. *Id.* at 2428.

173. *See* Solomon-Strauss, *supra* note 44 (stating that "Roberts cites the Supreme Court's precedent" that would protect a President from a subpoena that "is intended to harass…").

174. *Trump*, 140 S. Ct. at 2428.

175. *Id.* (quoting R. Enterprises, Inc., 498 U.S. at 299); Virag v. Hynes, 54 N.Y.2d 437, 442-43 (1981).

176. *Trump*, 140 S. Ct. at 2428 (stating that "in the event of such harassment, a President would be entitled to the protection of federal courts[,]" and that although "[t]he policy against federal interference in state criminal proceedings [is] strong, [it] 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'") (quoting Huffman v. Pursue, Ltd., 420 U.S. 592, 611 (1975)).

177. *Id.*

178. *Id.* (quoting *Dombrowski*, 380 U.S. at 484).

179. *Davis*, 100 U.S. at 263.

180. *Trump*, 140 S. Ct. at 2428 ("Failing that, federal law allows a President to challenge any allegedly unconstitutional influence in a federal forum, as the President has done here.").

point.[181]

2. Article II and the Supremacy Clause do not Require a Heightened Need Standard for the Issuance of a State Criminal Subpoena

Chief Justice Roberts next addresses the Solicitor General's argument for a heightened need standard.[182] The Solicitor General argues that a state grand jury subpoena for a sitting President's personal records must, at a minimum, satisfy a heightened need standard, which he claims was not met in this case.[183] This standard would require the subpoena to show that evidence is "critical" for "specific charging decisions" and must show that evidence needs to be available now, while the President is still in office.[184] Chief Justice Roberts rejects the argument and cites three reasons for why a state grand jury subpoena does not need to meet this standard.[185] He reasons that, (1) the heightened standard is "designed for official documents[,]" not personal papers, (2) the heightened standard for state subpoenas is not "necessary for the Executive to fulfill his Article II functions[,]" and (3) the public interest favors "comprehensive access to evidence."[186] In doing so, Chief Justice Roberts points out and disputes Justice Alito's dissenting arguments with each reason.[187]

a. First reason

The first reason is that "such a heightened standard would extend protection designed for official documents to the President's private papers."[188] This standard is taken from executive privilege cases, which have involved official papers, not personal papers that are present in this case.[189] Chief Justice Roberts recognizes that this

181. *See id.* at 2429 (explaining that "[g]iven these safeguards and the Court's precedents, [the Court] cannot conclude that absolute immunity is necessary or appropriate under Article II or the Supremacy Clause[,]" and that "the Court is unanimous" as to this point).

182. Solomon-Strauss, *supra* note 44.

183. *Trump*, 140 S. Ct. at 2429.

184. *See id.* (explaining that the "Solicitor General would require a threshold showing that the evidence sought is 'critical' for 'specific charging decisions' and that the subpoena is a 'last resort,' meaning the evidence is 'not available from any other source' and is needed 'now, rather than at the end of the President's term'") (quoting Brief for the United States as *Amicus Curiae* Supporting Petitioner at 29, 32, Trump v. Vance, 140 S. Ct. 2412 (2020) (No. 19-635)).

185. Soronen, *supra* note 9.

186. *Trump*, 140 S. Ct. at 2429-30.

187. *Id.* at 2429-31.

188. *Id.* at 2429.

189. Solomon-Strauss, *supra* note 44 ("This standard is imported from executive privilege cases, like United States v. Nixon, which concerned official (rather than personal) papers.").

would contradict important language set forth in *Burr*.[190] In *Burr*, Chief Justice Marshall explained "that if [President] Jefferson invoked presidential privilege over executive communications, the court would not 'proceed against the president as against an ordinary individual.'"[191] Instead, Marshall explained that the court would "require an affidavit from the defense that 'would clearly show the paper to be essential to the justice of the case.'"[192] Chief Justice Roberts states that Justice Alito joins the Solicitor General in wanting to apply this standard to the personal papers in this case, but that the two ignore an important part of *Burr*, which is that if there is not an official paper at stake, then the individual subject to the subpoena is in the same situation as everyone else.[193]

b. Second reason

The second reason for why Chief Justice Roberts disagrees is because he is "not convinced that the heightened need standard is necessary for the [P]resident to fulfill his constitutional functions in the state context, given that the standard is not applicable in the federal context."[194] He writes that the Solicitor General and Justice Alito have not "established that heightened protection against state subpoenas is necessary for the Executive to fulfill his Article II functions."[195]

c. Third reason

The third reason is that "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."[196] This public policy argument reasons that a state grand jury needs the ability to conduct an investigation in a timely manner for the interest of the public.[197] Chief Justice Roberts explains that "[r]equiring 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

190. *Id.*

191. *Trump*, 140 S. Ct. at 2429 (quoting *Burr*, 25 F. Cas. at 192).

192. *Id.* (quoting *Burr*, 25 F. Cas. at 192).

193. *Id.* ("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.'") (quoting *Burr*, 25 F. Cas. at 191).

194. Solomon-Strauss, *supra* note 44.

195. Trump, 140 S. Ct. at 2429.

196. *Id.* at 2430.

197. *See* Solomon-Strauss, *supra* note 44 (stating that the "the public has an important interest in fair and effective law enforcement – which requires the grand jury's ability to investigate and the state's ability to follow important leads in a timely fashion and potentially uncover exculpatory evidence") (internal quotations omitted).

bear on its investigation.'"[198] He rejects part of Alito's dissenting argument by stating that "[r]ejecting a heightened need standard does not leave Presidents with 'no real protection.'"[199]

Chief Justice Roberts continues to explain how a President does have protection absent this type of standard, including the ability to challenge this type of subpoena in state or federal court.[200] He writes that the Constitution would provide the President the ability to raise "subpoena-specific constitutional challenges, in either a state or federal forum."[201] The President could "argue that compliance with a particular subpoena would impede his constitutional duties."[202]

The Chief Justice finishes his opinion by noting that the arguments raised by the parties were limited to addressing "absolute immunity and heightened need."[203] He remands the case to the district court and notes the President will be able to raise other arguments directly about the subpoena, but not arguments about how he is "absolutely immune or that the subpoena must meet a heightened need standard."[204] Although Chief Justice Roberts gives the President an opportunity to raise these objections, his decision was "diplomatic[,]" in that it "confirmed that no one is above the law without immediately forcing [the President] to comply with the law."[205]

C. Justice Kavanaugh's Concurring Opinion

In a concurring opinion joined by Justice Gorsuch, Justice Kavanaugh agrees with the majority that the President does not have absolute immunity and that the case should be remanded to the district court.[206] As such, Justice Kavanaugh concurs in the

198. *Trump*, 140 S. Ct. at 2430 (quoting *R. Enterprises, Inc.*, 498 U.S. at 297).

199. *Id.* (quoting *Trump*, 140 S. Ct. at 2450 (Alito, J., dissenting)).

200. *Id.* ("To start, a President may avail himself of the same protections available to every other citizen . . . includ[ing] the right to challenge the subpoena on any grounds permitted by state law, which usually include bad faith and undue burden or breadth.").

201. *Id.*; *see also* Solomon-Strauss, *supra* note 44 ("Even though the majority held that the president is not absolutely immune and that a state grand jury subpoena for presidential information is not subject to a heightened need standard, [Chief Justice Roberts] emphasizes that the president was still protected by state law and the Constitution.").

202. Trump, 140 S. Ct. at 2430.

203. *Id.* at 2431.

204. Solomon-Strauss, *supra* note 44.

205. Stern, *supra* note 98.

206. *See Trump*, 140 S. Ct. at 2431 (Kavanaugh, J., concurring) (agreeing with the Court's conclusions that "a President does not possess absolute immunity from a state criminal subpoena . . . [and] that this case should be remanded to the District Court, where the President may raise constitutional and legal objections to the subpoena as appropriate").

judgment.[207] However, Justice Kavanaugh differs from the majority in that he would have adopted the "demonstrated, specific need" standard set forth in *Nixon*.[208]

Justice Kavanaugh begins by explaining that this case should be framed as a conflict between the State's interests in this type of criminal investigation and the President's Article II interests.[209] He recognizes the Court's precedent that has held the President is not "above the law[,]" but also recognizes the President is not "an ordinary litigant."[210] Justice Kavanaugh lays out the Court's precedent demonstrating the principle that the President is not "an ordinary litigant."[211] He states that the real question in this case is "how to balance the State's interests and the Article II interests."[212]

He addresses this question by explaining the "demonstrated, specific need" standard set forth in *Nixon*.[213] He explains that this standard has worked in the past and that it "accommodates both the interests of the criminal process and the Article II interests of the Presidency."[214] Looking at the State's interests, Justice Kavanaugh explains that this test ensures that a prosecutor has a sufficient interest that is important enough to justify subpoenaing a President.[215] This standard also balances the President's Article II interests because it ensures that a prosecutor can "obtain a President's information only in certain defined circumstances."[216]

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207. Solomon-Strauss, *supra* note 44.

208. *Trump*, 140 S. Ct. at 2432 (Kavanaugh, J., concurring) (citing *Nixon*, 418 U.S. at 713).

209. *Id.* at 2431 ("The dispute over this grand jury subpoena reflects a conflict between a State's interest in criminal investigation and a President's Article II interest in performing his or her duties without undue interference.").

210. *See id.* at 2432 (stating that the Court has held that "no one is above the law" which applies to the President, but "[a]t 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").

211. *See id.* at 2432 (citing Cheney v. United States Dist. Court for D.C., 542 U.S. 367, 381-82 (2004)) ("In no case would a court be required to proceed against the president as against an ordinary individual."); *Clinton*, 520 U.S. at 704, n. 39 ("[A] court may not 'proceed against the president as against an ordinary individual.'") (quoting *Nixon*, 418 U.S. at 715); *Nixon*, 418 U.S. at 715 ("In no case of this kind would a court be required to proceed against the president as against an ordinary individual."); United States v. Burr, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694) ("In no case of this kind would a court be required to proceed against the president as against an ordinary individual.").

212. *Id.* at 2432.

213. *Id.* ("The longstanding precedent that has applied to federal criminal subpoenas for official, privileged Executive Branch information is United States v. Nixon[,]" which "requires that a prosecutor establish a 'demonstrated, specific need' for the President's information.") (quoting *Nixon*, 418, U.S. at 713).

214. *Id.*

215. *Id.* ("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.").

216. *Id.* ("The Nixon standard also reduces the risk of subjecting a President

There are two notable differences between the *Nixon* standard and the issue in *Trump*. First, the *Nixon* standard dealt with federal criminal subpoenas, not state criminal subpoenas.[217] Second, in which Justice Kavanaugh recognizes, the *Nixon* Court used that standard in a different Article II context than what applies in this case.[218] However, Justice Kavanaugh states that he would still apply that standard to the present case.[219] He explains that a state criminal subpoena raises Article II and Supremacy Clause issues because a state prosecutor could use subpoenas to interfere with the President's duties.[220]

In applying the *Nixon* standard, Justice Kavanaugh deviates from the majority opinion, which did not apply it.[221] He reiterates that he would do so because of the need to balance the criminal process and the Article II interests.[222] In differentiating from the majority, however, he emphasizes that the majority opinion did account for the protections the Constitution provides the President in terms of state criminal subpoenas.[223] He then lists out all the ways the majority opinion explains the circumstances in which a state prosecutor cannot issue a subpoena.[224]

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to unwarranted burdens, because it provides that a prosecutor may obtain a President's information only in certain defined circumstances.").

217. *See id*. (stating that "[t]he longstanding precedent that has applied to federal criminal subpoenas for official, privileged Executive Branch information" is the Nixon standard).

218. *Id.* ("[T]he Court adopted the Nixon standard in a different Article II context – there, involving the confidentiality of official, privileged information.").

219. *See* Solomon-Strauss, *supra* note 44 (stating that Justice Kavanaugh "would have applied the heightened need standard from United States v. Nixon – which applies to executive privilege over official papers – to the personal papers in this case").

220. *See Trump*, 140 S. Ct. at 2432 (Kavanaugh, J., concurring) (explaining that "[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").

221. *See id.* (stating that "[t]he majority opinion does not apply the Nixon standard in this distinct Article II context, as I would have done").

222. *Id.* ("Because this case again entails a clash between the interests of the criminal process and the Article II interests of the Presidency, [Justice Kavanaugh] would apply the longstanding Nixon 'demonstrated, specific' standard to this case.") (quoting *Nixon*, 418 U.S. at 713).

223. *See id.* at 2431-32 (stating that "the majority opinion correctly concludes based on precedent that Article II and the Supremacy Clause… supply some protection for the Presidency against state criminal subpoenas of this sort[,]" and that it "appropriately takes account of some important concerns that also animate Nixon and the Constitution's balance of powers").

224. *See id.* at 2433 (stating that "[t]he 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; as a result of prosecutorial impropriety; to seek information that is not relevant to an investigation; that is overly broad or unduly burdensome; to manipulate,

Justice Kavanaugh concludes by recognizing that lower courts will likely ask questions that could potentially taper the differences between his approach and the other opinions in this case.[225] He goes on to list those questions that lower courts will likely ask, which all entail the balancing test between the State's interests and the Article II interests on which he bases his opinion.[226]

D. Justice Thomas' Dissenting Opinion

Justice Thomas agrees with the majority that there should be no heightened standard for the issuance of a state criminal subpoena to a sitting President, but he does so for different reasons.[227] Justice Thomas also agrees with the majority that the President is not entitled to absolute immunity from the issuance of the subpoena.[228] However, he does so under a different analysis than the majority does, using an originalist approach based on the text of the Constitution.[229] Although he agrees with the majority regarding the issuance of a subpoena, he focuses his dissent on the basis that the President "may be entitled to relief against its enforcement."[230] As such, he dissents from the majority and agrees "with the President that the proper course is to vacate and remand."[231]

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influence, or retaliate against a President's official acts or policy decisions; or in a way that would impede, conflict with, or interfere with a President's official duties").

225. *See id*. (observing that "[i]n the end, much may depend on how the majority opinion's various standards are applied in the future years and decades"); *see also* Solomon-Strauss, *supra* note 44 (explaining that "Kavanaugh observes that, in practice, lower courts will likely ask questions about the subpoena that may in effect narrow the differences between his approach and the majority's").

226. *See Trump*, 140 S. Ct. at 2433 (Kavanaugh, J., concurring) (stating that lower courts will have to begin with "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").

227. *Id.* at 2439, n. 3 (Thomas, J., dissenting) ("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 . . . [and] [t]his makes little sense" and "[Thomas] would leave questions of the grand jury's need to state law.").

228. *Id.* at 2434.

229. *See id.* (stating that he reaches this conclusion "based on the text of the Constitution" rather than the majority's "primarily functionalist analysis").

230. *Id.* (emphasis in original).

231. *Id.*

1. The President has no Absolute Immunity as to the Issuance of the Subpoena

Justice Thomas argues, based on Chief Justice Marshall's interpretation under *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."[232] Justice Thomas "agree[s] with the majority that the President is not entitled to absolute immunity from issuance of the subpoena."[233] He largely relies on the text of the Constitution and *Burr* to show that the President "is not absolutely immune from the subpoena's issuance."[234]

2. The Enforcement of the Subpoena

The main section of Justice Thomas' dissent focuses on his reasoning that the President may be entitled to relief on the enforcement of the subpoena, which the majority did not accept.[235] Although he agrees with the majority regarding the issuance of the subpoena, he states that the President "may be entitled to relief against its *enforcement*[,]" and therefore disagrees with the majority's decision not to vacate and remand to address that question.[236] He argues that "[i]f the President can show that 'his duties as chief magistrate demand his whole time for national objects,' he is entitled to relief from enforcement of the subpoena."[237] In other words, "[i]f the President is unable to comply because of his official duties, then he is entitled to injunctive and declaratory relief."[238] On vacate and remand, Justice Thomas would instruct the lower courts to apply this *Burr* standard.[239] This standard, he states, would apply at both the state and federal level.[240] He then explains that the lower courts must look at two dynamics with how the *Burr* standard works.[241]

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232. *Id.* at 2436.

233. *Id.* at 2434 (emphasis in original).

234. Solomon-Strauss, *supra* note 44.

235. *Trump*, 140 S. Ct. at 2436 (Thomas, J., dissenting) ("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.").

236. *Id.* at 2434, 2436 (emphasis in original); ("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.").

237. *Id.* at 2434 (quoting *Burr*, 25 F. Cas. at 34).

238. *Id.* at 2436.

239. *Id.*

240. Solomon-Strauss, *supra* note 44 ("This standard applies whether the subpoena is issued at the state or federal level.").

241. *Id.*

a. The President has vast responsibilities

The first dynamic Justice Thomas lays out is that courts must look at how the "President has vast responsibilities both abroad and at home."[242] He references various Article II clauses, both "enumerated" and "residual," that give power to the President.[243]

The President's enumerated responsibilities abroad include protecting national security,[244] being the "Commander in Chief of the Army and Navy of the United States,"[245] making treaties with foreign countries,[246] and appointing and "receiv[ing] Ambassadors and other public Ministers."[247] Justice Thomas explains that the Constitution also grants the President residual responsibilities abroad, as well.[248]

The President's enumerated domestic powers include "grant[ing] Reprieves and Pardons for Offences against the United States,"[249] appointing "Judges of the supreme Court, and all other Officers of the United States,"[250] and giving "the Congress Information of the State of the Union."[251] Justice Thomas explains that the Vesting Clause[252] and Take Care Clause[253] of Article II implicate that the President has residual domestic powers, as well.[254]

Justice Thomas explains these enumerated and residual

242. *Trump*, 140 S. Ct. at 2437 (Thomas, J., dissenting).

243. *Id.* at 2437-38.

244. *Id.* at 2437 ("The Founders gave the President 'primary responsibility – along with the necessary power – to protect the national security and to conduct the Nation's foreign relations.'") (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 580 (2004) (Thomas, J., dissenting)).

245. U.S. CONST. art. II, § 2, cl. 1.

246. U.S. CONST. art. II, § 2, cl. 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties[.]").

247. U.S. CONST. art. II, §§ 2-3.

248. *Trump*, 140 S. Ct. at 2437 (Thomas, J., dissenting) ("[T]he Constitution 'vests the residual foreign affairs powers of the Federal Government – i.e., those not specifically enumerated in the Constitution – in the President.'") (quoting Zivotofsky v. Kerry, 576 U.S. 1, 33 (2015) (Thomas, J., concurring in judgment in part and dissenting in part).

249. U.S. CONST. art. II, § 2, cl. 1 ("[H]e shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.").

250. U.S. CONST. art. II, § 2, cl. 2 ("[He] shall appoint… Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law[.]").

251. U.S. CONST. art. II, § 3 ("He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient[.]").

252. U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

253. U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed[.]").

254. *Trump*, 140 S. Ct. at 2437-38.

powers of the President to demonstrate all the "demands on the President's time and the importance of his tasks [that] are extraordinary."[255] He also does so to help lower courts understand the Presidency "in deciding whether to enforce a subpoena for the President's documents."[256] He references that a subpoena puts various demands on a President even when he is not directly engaged in responding to them.[257] In doing so, Justice Thomas is suggesting that it is irrelevant that the subpoena was to the third-party, Mazars, and not directly to the President.[258]

b. The courts are poorly situated

The second dynamic Justice Thomas lays out is that "courts are poorly situated to conduct a searching review of the President's assertion that he is unable to comply" with a subpoena.[259] He bases this on the grounds that judges are not in the best spot to review what the President asserts in regard to withholding information.[260] He states that "[e]ven with perfect information courts lack the institutional competence to engage in a searching review of the President's reasons for not complying with a subpoena."[261] In sum, Justice Thomas explains that courts "do not have the access to the information or the expertise required to deny a president's assertion that he is unable to comply with a subpoena."[262]

Based on those two dynamics, Justice Thomas dissents and expresses that he would vacate the Second Circuit's decision and remand the case to the district court to address the issue on the enforcement of the subpoena.[263]

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255. *Id.* at 2438.

256. *Id.*

257. *See id.* (explaining that "[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").

258. *Id.*

259. *Id.* at 2437.

260. *Id.* at 2438 ("Judges 'simply lack the relevant information and expertise to second-guess determinations made by the President based on information properly withheld.") (quoting *Hamdi*, 542 U.S. at 583).

261. *Id.* at 2439.

262. Solomon-Strauss, *supra* note 44.

263. *Trump*, 140 S. Ct. at 2439 (Thomas, J., dissenting) (holding that he "would vacate and remand to allow the District Court to determine whether enforcement of this subpoena should be enjoined" which the majority "inexplicably fail[ed] to address"); Solomon-Strauss, *supra* note 44 ("Thomas would therefore have vacated the Second Circuit's decision and remanded it to determine if the *enforcement* of the subpoena should be enjoined.") (emphasis in original).

E. Justice Alito's Dissenting Opinion

In a separate dissenting opinion, Justice Alito agrees with the eight other Justices that absolute immunity is not appropriate in this case.[264] He dissents because he would have applied a heightened standard for this type of subpoena, in which he lays out a three-part test that he believes a prosecutor should be required to meet before the subpoena can be enforced.[265]

He begins by addressing how significant this case is, and how the Court's decision will affect all future Presidents.[266] He centers his opinion around "whether the Constitution imposes restrictions on a State's deployment of its criminal law enforcement powers against a sitting President."[267] If the Constitution does not set limits to this, then local prosecutors may in fact prosecute a sitting President, and thus, the subpoena may be enforced.[268] Conversely, "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."[269] As such, Justice Alito states that there are questions as to the structural features of the Constitution that must be addressed – the first being "the nature and role of the Presidency" and the second being federalism.[270]

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264. *See* Trump, 140 S. Ct. at 2429 (majority opinion) (stating that the Court's "dissenting colleagues agree" with the conclusion "that absolute immunity is [not] necessary or appropriate under Article II or the Supremacy Clause"); *see also id.* at 2448 (Alito, J., dissenting) (stating he "agree[s] with the Court that not all such subpoenas should be barred"); *see also* Solomon-Strauss, *supra* note 44 (stating that "the justices were unanimous that President Trump was not absolutely immune from a state court criminal subpoena to a third party for his financial records").

265. *See Trump*, 140 S. Ct. at 2448 (Alito, J., dissenting) (stating that "a subpoena like the one now before [the Court] 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"); *see also* Solomon-Strauss, *supra* note 44 (stating that Justice Alito "would have applied a heightened standard for the subpoena").

266. *Trump*, 140 S. Ct. at 2439 (Alito, J., dissenting) ("This case is almost certain to be portrayed as a case about the current President…, but the case has a much deeper significance… [as] 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.").

267. *Id.* at 2439-40.

268. *Id.* at 2440 ("If the Constitution sets no such limits, then a local prosecutor may prosecute a sitting President[,] [a]nd if that is allowed, it follows *a fortiori* that the subpoena at issue can be enforced.").

269. *Id.*

270. *See id.* at 2440, 2442 (stating that there "are important questions that go to the very structure of the Government created by the Constitution[,]" and "two important structural features must be taken into account[,]" those being the "nature and role of the Presidency[,]" and "the relationship between the Federal Government and the States").

1. Structural Features of the Constitution

a. Nature and role of the Presidency

The first structural feature is "the nature and role of the Presidency."[271] In many respects, Justice Alito, just like Justice Thomas, does so to establish how important the Presidency is, and to show the demands and burdens that are constantly on the President.[272] Justice Alito explains that, unlike Congress and the Court, the President is the sole person in his respective branch of the government.[273] He explains the President is the "Commander in Chief of the Armed Forces,"[274] which requires him to "be responsible for the defense of the country from the moment he enters office until the moment he leaves."[275] The President is also the leader in "foreign relations[,]" who decides "whether to recognize foreign governments[.]"[276] In addition to making treaties and "meet[ing] with foreign leaders," the President also "oversees the work of the State Department and intelligence agencies[.]"[277] Justice Alito explains that because the Vesting and Take Care Clauses make the President the sole "head of the Executive Branch," he "is ultimately responsible for everything done by all the departments and agencies of the Federal Government and a federal civil work force that includes millions of employees."[278] All of these responsibilities, Justice Alito explains, "impose enormous burdens on the time and energy of any occupant of the Presidency."[279] Justice Alito makes the point that "the country would be at risk" and the "constitutional system could not operate," unless the President "is able at all times to carry out the responsibilities of the office."[280]

b. Federalism

The second structural feature Justice Alito describes is "the relationship between the Federal Government and the States."[281]

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271. *Id.* at 2440.

272. *Compare id.* at 2441-42 (explaining that the "weighty responsibilities impose enormous burdens on the time and energy of any occupant of the Presidency" and that "the Nation cannot be safely left without a functioning President for even a brief time"), *with id.* at 2438 (Thomas, J., dissenting) (demonstrating that there are "demands on the President's time and the importance of his tasks are extraordinary").

273. *Trump*, 140 S. Ct. at 2440 (Alito, J., dissenting).

274. *Id.* (citing U.S. CONST. art. II, § 2, cl. 1).

275. *Trump*, 140 S. Ct. at 2440 (Alito, J., dissenting).

276. *Id.* (citing *Zivotofsky*, 576 U.S. 1).

277. *Id.*

278. *Id.* at 2441.

279. *Id.*

280. *Id.*

281. *Id.* at 2442.

He explains the Constitution "provided for the Federal Government to be independent of and, within its allotted sphere, supreme over the States… [and] a State may not block or interfere with the lawful work of the National Government."[282] Justice Alito cites to former Chief Justice John Marshall just like Chief Justice Roberts, but cites Marshall's opinion in *McCulloch v. Maryland* to emphasize the concept of federalism.[283] He explains that case law post-*McCulloch* has built on the "principle that 'the activities of the Federal Government are free from regulation by any State [and] [n]o other adjustment of competing enactments or legal principles is possible.'"[284]

Justice Alito lays out these two structural features to "argue that 'a State's sovereign power to enforce its criminal laws must accommodate' the [P]resident's 'indispensable' constitutional role."[285] Justice Alito argues that this "must be the rule with respect to a state prosecution of a sitting President."[286]

2. State Criminal Subpoenas to the President

a. The role the Constitution has with respect to the state prosecution of a President

Justice Alito points out that the Constitution clearly sets out that a President cannot be prosecuted while in office.[287] He references that the Framers put the impeachment and removal provisions in the Constitution to "provide for the possibility that a President might be implicated in the commission of a serious offense, and they did not want the country to be forced to endure such a President for the remainder of his term in office."[288] He explains how the Framers put these powers in the hands of the House of Representatives and the Senate, and "not a single prosecutor or the members of a local grand jury."[289]

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282. *Id.*

283. *Id.* ("Marshall recognized that the States retained the 'sovereign' power to tax persons and entities within their jurisdiction, but this power, he explained, 'is subordinate to, and may be controlled by the constitution of the United States.'") (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 427, 429).

284. *Id.* at 2443 (quoting *Mayo*, 319 U.S. at 445).

285. Solomon-Strauss, *supra* note 44 (quoting Trump, 140 S. Ct. at 2444 (Alito, J., dissenting)).

286. *Trump*, 140 S. Ct. at 2444 (Alito, J., dissenting).

287. *Id.* ("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.").

288. *Id.*

289. *Id.*

b. The impossibility of a state criminal prosecution against a sitting President

Justice Alito goes on to state that it is impossible for a state criminal prosecution to be enforced against the President.[290] He brings up how neither District Attorney Vance, the district court, nor the Second Circuit were "willing to concede the fundamental point that a sitting President may not be prosecuted by a local district attorney."[291] He explains how ridiculous it would be if a sitting President was in fact prosecuted by a local grand jury, and states the principle that "legal proceedings involving a sitting President must take the responsibilities and demands of the office into account."[292]

Justice Alito attacks the majority's statements that "no man is above the law" and "the public has a right to every man's evidence."[293] He states these are true statements but argues that because of the indispensability of the President's role, "there is no question that … in some instances . . . the application of laws [must] "be adjusted at least until" the end of the President's term in office.[294]

c. The subpoena in this case

Justice Alito next addresses the exact subpoena at issue in this case.[295] He recognizes the subpoena at issue was to a third party, and how "compliance would not require much work on the President's part" since it is "just one subpoena."[296] However, he states it does not matter that it was issued to a third-party, and that deciding a case based on this line would be too confusing for the courts.[297] Instead, he states the Court should "adopt a rule to address how subpoenas could affect or potentially harass the

290. *See* Solomon-Strauss, *supra* note 44 (explaining that Justice Alito "describ[es] what he sees as the essential impossibility of a state criminal prosecution against the [P]resident").

291. *Trump*, 140 S. Ct. at 2445 (Alito, J., dissenting).

292. *Id.* at 2445-46.

293. *Id.* at 2446 (quoting *Trump*, 140 S. Ct. at 2420).

294. *Id.* ("[T]here 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.").

295. Solomon-Strauss, *supra* note 44 ("After describing what he sees as the essential impossibility of a state criminal prosecution against the [P]resident, Alito addresses the subpoena itself.").

296. *Trump*, 140 S. Ct. at 2446 (Alito, J., dissenting).

297. *Id.* ("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 v. Maryland].") (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 430).

President."[298] He first describes the "burdens imposed by the shadow of a potential criminal prosecution[.]"[299] He writes that it is "unrealistic to think that the prospect of possible criminal prosecution will not interfere with the performance of the duties of the office."[300] He next describes the "incentives for state and local prosecutors to harass the president."[301] He explains how there are "more than 2,300 local prosecutors and district attorneys in the country[,]" and that many of them "are elected and . . . have ambitions for higher elected office."[302] Because of this, the President may be a target for local prosecutors, but that this "would undermine our constitutional structure."[303] He then circles back to his federalism argument, and how the Framers "successfully opposed a proposal to vest the impeachment power in state legislatures" at the "Constitutional Convention."[304]

d. The heightened standard three-part test

As a result, Justice Alito argues that a subpoena like this one should meet a heightened test to take into account the President's duties.[305] He makes the point that the Court "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."[306] This is where Justice Alito disagrees with the majority's opinion.[307]

The "Presidency deserves greater protection[]" that is more than the "meager defenses" that the majority's opinion sets out.[308] Justice Alito's proposed test would require a prosecutor: "(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 necessary for production to occur while the President is still in office."[309]

Justice Alito then applies those three requirements to this case to demonstrate what District Attorney Vance should have done.[310] He writes that Vance "should be required to answer questions about

298. Solomon-Strauss, *supra* note 44.
299. *Id.*
300. *Trump*, 140 S. Ct. at 2447 (Alito, J., dissenting).
301. Solomon-Strauss, *supra* note 44.
302. *Trump*, 140 S. Ct. at 2447 (Alito, J., dissenting).
303. *Id.*
304. *Id.* at 2448.
305. *Id.* ("In light of the above, a subpoena like the one now before [the Court] 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.").
306. *Id.* at 2449.
307. Solomon-Strauss, *supra* note 44.
308. *Trump*, 140 S. Ct. at 2449 (Alito, J., dissenting).
309. *Id.*
310. *Id.*

the scope of the subpoena and the need for the [P]resident's records in particular."[311] As to the scope, Justice Alito states how similar it is to the subpoenas issued by the House of Representatives, and so "[i]t is appropriate to ask the district attorney to explain the need for the various items that the subpoena covers."[312] Additionally, Vance should explain why "it is important that the information in question be obtained from the President's records rather than another source."[313] And that Vance should "set out why he finds it necessary that the records be produced now as opposed to when the President leaves office."[314] Justice Alito states that "[t]here may be other good reasons why immediate enforcement is important . . . but if a prosecutor believes that immediate enforcement is needed for such a reason, the prosecutor should be required to provide a reasonably specific explanation why that is so and why alternative means . . . would not suffice."[315]

3. The Majority's Opinion Provides no Protection for the President

Justice Alito finishes his opinion by addressing the problems that will result from the majority's opinion.[316] He disagrees with the majority's opinion in terms of the protection of the Presidency and then lists out why in terms of grand jury reasons.[317] He then addresses and disagrees with the majority's use of precedent.[318]

a. Grand jury reasoning

Justice Alito "disagrees with the majority's view of what he sees as the heightened risk of harassment from state prosecutors; [and] what he worries are inadequately strong grand jury secrecy rules[.]"[319] He argues that "grand jury secrecy rules are of limited value as safeguards against harassment."[320] This is, in part, because in New York, "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.'"[321] He states that judges in New York could very

311. Solomon-Strauss, *supra* note 44.
312. *Trump*, 140 S. Ct. at 2449 (Alito, J., dissenting).
313. *Id.*
314. *Id.*
315. *Id.* at 2449-50.
316. *Id.* at 2451 ("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.").
317. *Id.* at 2450-51.
318. Solomon-Strauss, *supra* note 44.
319. *Id.*
320. *Trump*, 140 S. Ct. at 2450 (Alito, J., dissenting).
321. *Id.* (quoting *In re District Attorney of Suffolk Cnty.*, 58 N.Y.2d at 444).

possibly find that it is in the public's interest, and that subpoenaed information is highly sought after by the media.[322] He disputes the majority's statement "that 'grand juries are prohibited from engaging' in 'fishing expeditions'" by noting how a grand jury subpoena in New York does not need to be "supported by probable cause."[323] He also argues that there is "limited usefulness of the [P]resident's ability to argue that his constitutional duties would be impeded by compliance with subpoena."[324] He reasons that this is the case because the majority's opinion "makes clear that any stigma or damage to a President's reputation" cannot be made as an objection.[325] Further, he writes that the majority's reasoning that the "President [can] challenge a subpoena by 'an affirmative showing of impropriety,' including 'bad faith'" is useless, as these types of objections almost never prevail.[326] As such, Justice Alito argues that the majority's opinion does not protect the President as much as it should.[327]

b. The majority's use of precedent

To end his opinion, Justice Alito "addresses the majority's use of precedent."[328] He first distinguishes this case from *Burr*, in which the majority mistakenly relies upon with respect to important differences.[329] The first difference, Justice Alito explains, is that unlike the subpoena in *Burr*, this one is not seeking "exculpatory evidence from the very man [President Jefferson] who was orchestrating the prosecution."[330] The second difference is that in the *Burr* trial, "the nature of the criminal case meant that Burr couldn't postpone his request until [President] Jefferson was out of office."[331] The third difference is that *Burr* lacked the "federalism concerns that lie at the heart of the present case."[332]

Justice Alito writes that the majority's other examples of presidential subpoenas actually show that Presidents have been

322. *Id.*

323. *Id.* (quoting *Trump*, 140 S. Ct. at 2428 (majority opinion)); *In re Nassau Cnty. Grand Jury Subpoena Duces Tecum Dated June 24, 2003*, 4 N.Y.3d at 677-78.

324. Solomon-Strauss, *supra* note 44.

325. *Trump*, 140 S. Ct. at 2450 (Alito, J., dissenting).

326. *Id.* at 2451 (quoting *Trump*, 140 S. Ct. at 2428 (majority opinion)).

327. *See id.* (stating that "[f]or 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").

328. Solomon-Strauss, *supra* note 44.

329. *Trump*, 140 S. Ct. at 2451 (Alito, J., dissenting) ("[T]he Court relies on Marshall's ruling in the Burr trial, but the Court ignores important differences between the situation in that case and the situation here.").

330. *Id.*

331. Solomon-Strauss, *supra* note 44.

332. *Trump*, 140 S. Ct. at 2451 (Alito, J., dissenting) ("Third, because the case was prosecuted in federal court under federal law, it entirely lacked the federalism concerns that lie at the heart of the present case.").

given leeway not otherwise afforded "to an ordinary person, including not being forced to testify in person."[333] Justice Alito notes that testifying in person is "almost always required when a witness is subpoenaed to testify at a criminal trial or before a grand jury[.]"[334] The majority's examples of President Ford and President Carter, which "occurred under modern federal rules of procedure and allow[ed] them to testify by deposition, represent a sharp departure from conventional practice."[335]

He then distinguishes this case from the majority's citations to *Nixon* and *Clinton*.[336] Justice Alito writes that "both the criminal nature of the investigation" in this case and "its origin in state court distinguishes it" from those cases.[337] He states that in *Nixon*, "the trial was in federal court [and] there was no issue of federalism" and that the "Court refused to order that the subpoena be quashed because of the 'demonstrated, specific need for evidence in a pending criminal trial.'"[338] Justice Alito states this is exactly what is lacking in this case.[339] Turning to *Clinton*, Justice Alito distinguishes it from this case because *Clinton* arose in federal court and was a civil suit.[340] He argues that because this case essentially arose in state court since it was a state district attorney, this case is different than *Nixon* and *Clinton*.[341]

Justice Alito concludes by stating how important it is to address this issue since the "subpoena at issue here is unprecedented."[342] He reiterates that the majority's decision "fails to provide the President with adequate safeguards against state and local prosecutors around the country."[343] He states that "[r]espect for the structure of the Government created by the Constitution demands greater protection for an institution that is vital to the Nation's safety and well-being."[344]

IV. PERSONAL ANALYSIS

The problem with the Court's opinion does not lie in its holding that the President is not entitled to absolute immunity under Article II – all nine Justices agree that the President is not

333. Solomon-Strauss, *supra* note 44.
334. *Trump*, 140 S. Ct. at 2451 (Alito, J., dissenting).
335. *Id.*
336. *Id.* at 2452.
337. Solomon-Strauss, *supra* note 44.
338. Trump, 140 S. Ct. at 2452 (Alito, J., dissenting) (quoting Nixon, 418 U.S. at 713).
339. *Id.*
340. *Id.*
341. *Id.*
342. *Id.*
343. Solomon-Strauss, *supra* note 44.
344. *Trump*, 140 S. Ct. at 2452 (Alito, J., dissenting).

absolutely immune from the issuance of a state criminal subpoena for personal papers.[345] I do not contest this. Instead, the problem rests with the Court rejecting a heightened need standard, as this does not provide enough protection for a sitting President.[346] I contend the Court should adopt a test similar to the one Justice Alito would adopt before a state criminal subpoena can be enforced.[347] This is, in large part, because of the fact that this was the first time a state subpoena of this kind has occurred. There is a great chance it could happen again, and as such, a set test should be adopted.[348]

A. The Court Should Adopt a Set Rule That Will Provide Greater Protection to the President

The Court should adopt the three-part test that Justice Alito lays out in his dissenting opinion.[349] For a subpoena of this kind to be enforced, this test would require a state or local prosecutor "(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."[350] Although Justice Kavanaugh would "apply the longstanding *Nixon* 'demonstrated, specific need' standard[,]" that standard is not a set rule, and would leave questions for future courts in these types of situations, which have the likely potential to occur again.[351] Instead, a set rule is needed and should be adopted, because the Court's decision "will

345. Solomon-Strauss, *supra* note 44 ("Writing in four separate opinions, the justices were unanimous that President Trump was not absolutely immune from a state court criminal subpoena to a third party for his financial records.").

346. *See Trump*, 140 S. Ct. at 2431 (holding that "the President is… [not] entitled to a heightened standard of need"); *see also Trump*, 140 S. Ct. at 2449 (Alito, J., dissenting) (stating that "[t]he Presidency deserves greater protection").

347. *Id.* at 2449 (Alito, J., dissenting) ("[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.").

348. *Id.* at 2424-25 (majority opinion) ("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.") (emphasis in original).

349. *Id.* at 2449 (Alito, J., dissenting).

350. *Id.*

351. *Id.* at 2432 (Kavanaugh, J., concurring) (quoting *Nixon*, 418 U.S. at 713); *Id.* at 2433 ("[L]ower 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.").

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."[352]

This rule should be adopted due to politically motivated state or local prosecutors potentially harassing the President, and the potential effect the enforcement of a subpoena could have on the functioning of the Presidency and the Nation as a whole. Without adopting a heightened set rule prior to enforcement, the Court has created a dangerous slippery slope in allowing state and local prosecutors across the Nation to issue and enforce state criminal subpoenas to future presidents without showing valid reasons. This rule "would not undermine any legitimate state interests" and would not create any additional burdens to state and local prosecutors wishing to enforce a state criminal subpoena against a sitting President.[353]

Across the United States, there are "2,330 chief prosecutors' offices[.]"[354] Many of these prosecutors are elected by their localities and in only a few states are these prosecutors appointed.[355] Indeed, District Attorney Vance, the local prosecutor at issue in this case, was elected to office and ran as a Democrat.[356] Because of this election process, district attorneys will seek "to produce the range of outcomes the public desires" and they also "presumably wish to keep their jobs, move up to higher office, or both."[357] This creates the incentive for elected district attorneys "to generate the level and distribution of prosecutions the public wants[.]"[358] It follows that "[i]f 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."[359] In other words, a "state prosecutor in a community where the President is unpopular. . . would have significant incentives to win votes by investigating the President."[360]

This is not to mean all state and local prosecutors will be politically motivated, or that they will not perform their duties in

352. *Id.* at 2439 (Alito, J., dissenting).

353. *Id.* at 2450.

354. BUREAU OF JUSTICE STATISTICS, *supra* note 95.

355. *Prosecution: History of the Public Prosecutor, The Prosecutor As An Elected Local Official*, www.law.jrank.org/pages/1859/Prosecution-History-Public-Prosecutor-prosecutor-an-elected-local-official.html [perma.cc/NN7Z-RM7Q] (last visited Nov. 21, 2020).

356. David W. Chen and John Eligon, *Vance is Winner in Primary Vote to Replace Morgenthau*, N.Y. TIMES (Sep. 15, 2009), www.nytimes.com/2009/09/16/nyregion/16election.html?hp [perma.cc/4CP8-6QFP]

357. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 533 (2001).

358. *Id.*

359. *Trump*, 140 S. Ct. at 2447 (Alito, J., dissenting).

360. Brief for the United States as *Amicus Curiae* Supporting Petitioner at 18, Trump v. Vance, 140 S. Ct. 2412 (2020) (No. 19-635)).

the utmost responsible fashion. Nor am I suggesting District Attorney Vance was ill-motivated in regard to the subpoena in this case.[361] Rather, the point is that "there is a very real risk that some [prosecutors] will not" perform their duties in a responsible manner.[362] This is especially true today, where our country is more politically divided than ever.[363] Indeed, in the 2018 New York State attorney general election, the "primary candidates practically tripped over one another promising to take [the President] to court."[364] And the idea of using this office to target the President is not limited to the state of New York.[365]

All of this boils down to the reality that, due to the state of our polarized Nation today, state and local prosecutors are going to target the President with potentially harassing investigations. If this is allowed, which the Court is unanimously agreeing to, then there needs to be a set rule adopted before these issued subpoenas can be enforced.[366] Without such a heightened set rule on enforceability, state and local prosecutors across the country will get the idea that they can go out and issue subpoenas to future presidents and subsequently get them enforced.[367] Allowing the

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361. *But see* Michael R. Sisak, *Criminal Probe, Legal Fights Await Trump after White House*, ASSOCIATED PRESS NEWS (Nov. 20, 2020), www.apnews.com/article/donald-trump-new-york-campaign-finance-cyrus-vance-jr-manhattan-f841d62dbf6d1a8ba2949bc577858f6e [perma.cc/GR83-WBS3] (explaining the viewpoint that District Attorney Vance's inquiries into the President could "be seen as political retaliation" due to the "country [being] so sharply polarized in 2020") (quoting Meena Bose, Executive Director of the Peter S. Kalikow Center for the Study of the American Presidency at Hofstra University) (internal quotations omitted).

362. *Trump*, 140 S. Ct. at 2450 (Alito, J., dissenting); *see* Brief for the United States as *Amicus Curiae* Supporting Petitioner at 22, *Trump*, 140 S. Ct. 2412 (No. 19-635)) (stating that "[t]he sheer number of district attorneys also increases the likelihood of finding at least one who is willing to target the President, or who simply gives inadequate weight to the extraordinary burdens imposed by a subpoena to the President").

363. *See* Michael Dimock and Richard Wike, *America is Exceptional in the Nature of its Political Divide*, FACTTANK (Nov. 13, 2020), www.pewresearch.org/fact-tank/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide/ [perma.cc/N6EP-BUEP] (stating that "Americans have rarely been as polarized as they are today").

364. Emma Platoff, *America's Weaponized Attorneys General*, ATLANTIC (Oct. 28, 2018), www.theatlantic.com/politics/archive/2018/10/both-republicans-and-democrats-have-weaponized-their-ags/574093/ [perma.cc/DZ26-Z8LN].

365. *See* Jeffery C. Mays, *N.Y.'s New Attorney General Is Targeting Trump. Will Judges See a 'Political Vendetta?*, N.Y. TIMES (Dec. 31, 2018), www.nytimes.com/2018/12/31/nyregion/tish-james-attorney-general-trump.html [perma.cc/4WZX-KYWM] (stating that "[d]emocratic attorney generals across the country… have repeatedly used their offices to confront [the President]").

366. *See Trump*, 140 S. Ct. at 2429 (stating that "the Court is unanimous" in concluding that the President is not absolutely immune from the issuance of a state criminal subpoena).

367. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioner at 28, *Trump*, 140 S. Ct. 2412 (No. 19-635) (stating that "[a] heightened

New York County District Attorney to proceed on enforceability without requiring a heightened standard, as the Court's majority opinion did, will create a slippery slope in allowing state and local prosecutors across the country to do the same.[368]

This rule should also be adopted due to the potential effect the enforcement of a state criminal subpoena could have on the functioning of the Presidency and the Nation as a whole. The President is placed in a unique role in the federal government and has "responsibilities that are essential to the country's safety and wellbeing."[369] These responsibilities and demands of the Presidency have grown in today's age, not just in terms of power, but also "in scope, complexity, [and] degree of difficulty."[370] Even being issued a criminal subpoena can "easily impair a President's 'energetic performance of [his] constitutional duties.'"[371] Further, "any distraction of the President from his duties . . . has a much bigger impact on the well-being of the nation and all its People."[372] This is due to the fact that "our constitutional system could not operate, and the country would be at risk" unless a President "is able at all times to carry out the responsibilities of the office."[373] The Twenty-fifth Amendment[374] "reflects an appreciation that the Nation cannot be safely left without a functioning President for even a brief time."[375] The point is not whether a sitting President can actually be criminally prosecuted while in office.[376] Instead, the point is that the "effect of [enforcing] [state grand jury] subpoenas" can vastly impact the "functioning of the Presidency[.]"[377] And because of this potential impact on the Presidency, and in effect, the Nation as a whole, a state or local prosecutor must be required to meet this

standard would mitigate the risk of harassment").

368. *See* Crandall v. Nevada, 73 U.S. (6 Wall.), 35, 46 (1868) (stating that "[i]f one State can do this, so can every other State").

369. *Trump*, 140 S. Ct. at 2440 (Alito, J., dissenting); *see Fitzgerald*, 457 U.S. at 749 (explaining the President "occupies a unique position in the constitutional scheme").

370. John Dickerson, *The Hardest Job in the World*, ATLANTIC (May 2018), www.theatlantic.com/magazine/archive/2018/05/a-broken-office/556883 [perma.cc/EN8Y-H7VB].

371. *Trump*, 140 S. Ct. at 2447 (Alito, J., dissenting) (quoting *Cheney*, 542 U.S. at 382).

372. Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 NEXUS J. OP. 11, 13 (1997).

373. *Trump*, 140 S. Ct. at 2441 (Alito, J., dissenting).

374. U.S. CONST. amend. XXV, §§ 1, 3-4.

375. *Trump*, 140 S. Ct. at 2441-42 (Alito, J., dissenting).

376. *See* Dylan Matthews, *The Suddenly Relevant Debate About Whether a President can be Prosecuted, Explained*, VOX (May 17, 2017, 2:40 PM), www.vox.com/policy-and-politics/2017/5/17/15654158/trump-prosecuted-constitution-impeachment-prosecutor [perma.cc/BC5V-HJ7B] (explaining how there is debate over whether a sitting President can be criminally prosecuted while in office, and how it "has never been tested before").

377. *Trump*, 140 S. Ct. at 2447 (Alito, J., dissenting).

proposed three-part test.

This rule "would not undermine any legitimate state interests" and would not create any additional burdens on state or local prosecutors wishing to enforce a state criminal subpoena against a sitting President.[378] Prosecutors could still theoretically be able to get these types of subpoenas enforced but would simply just have to provide answers and information to the proposed test. Looking at the first two parts of the proposed test, it "would not be unduly burdensome" for a prosecutor to "provide at least a general description of the possible offenses that are under investigation[.]"[379] Nor would it be "unduly burdensome" for a district attorney "to outline how the subpoenaed records relate to those offenses" under investigation.[380] If a district attorney truly has good reasoning as to the enforcement of a subpoena, then it should not be difficult for him or her to provide information as to these requirements.

Lastly, looking at the third part of the proposed test, it would not be "unduly burdensome" for a prosecutor "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."[381] As Justice Alito explains, if a district attorney has concerns as to the statute of limitations expiring, "there are potential solutions to that problem."[382] Even if this is a concern, there would be no additional burden for the prosecutor to address that by meeting the proposed test. Requiring this test would help protect the President from the enforcement of any unjustified harassing subpoenas issued by state or local prosecutors. A test like this would ensure "that a prosecutor may take the extraordinary step of seeking evidence from the President only when that evidence is essential."[383]

The question then might be raised as to where and at what stage of the legal proceedings should the local or state prosecutor be required to answer these questions and provide this information. The answer should be in the federal district courts. These types of cases will always be challenged by the sitting President, who will likely sue in federal district court. Indeed, in the case at bar, the President sued District Attorney Vance in federal district court.[384] Although the federal district court may insert the *Younger*

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378. *Id.* at 2450.

379. *Id.* at 2449.

380. *Id.*

381. *Id.*

382. *Id.* ("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.").

383. Brief for the United States as *Amicus Curiae* Supporting Petitioner at 28, Trump v. Vance, 140 S. Ct. 2412 (2020) (No. 19-635).

384. *Trump*, 140 S. Ct. at 2420 ("The President, acting in his personal capacity, sued the district attorney and Mazars in Federal District Court to enjoin enforcement of the subpoena.").

abstention doctrine,[385] as the district court did in this case, this should still be the time and place where the state or local prosecutor should be required to provide answers to the proposed test.[386] Having the prosecutor attempt to meet the proposed test at this stage will get these answers and information into the record for higher courts to look at in determining whether the prosecutor has met the test before potentially enforcing the subpoena.

V. CONCLUSION

In the end, much will be said about President Trump and his presidency will have an everlasting effect in our Nation's history. For many, it may be no surprise that the first time a state criminal subpoena has been issued to a sitting President came under his governance. But the impact of a subpoena of this kind is not limited to him, and it will continue to have an effect on "all future Presidents" which is "a matter of great and lasting importance to the Nation."[387] In rejecting a heightened standard of need, the Court's holding in *Trump* has left future Presidents without the protection that they may need and deserve.[388]

385. *See generally Younger*, 401 U.S. 37 (setting forth an abstention doctrine, which, in part, established that federal courts are required to not exercise jurisdiction when a plaintiff sought to enjoin a state criminal prosecution that was still ongoing).

386. *Trump*, 395 F. Supp. 3d at 290 (abstaining from exercising jurisdiction).

387. *Trump*, 140 S. Ct. at 2439 (Alito, J., dissenting).

388. *Id.* at 2452.