D. Tension Between the Judicial and Executive Branches

The core function of the judicial branch is to decide cases and controversies between adverse parties. At a minimum, this involves exercising jurisdiction over defendants: haling them into court and issuing adverse judgments against them if they lose, all against their will. The judiciary also routinely exerts authority over witnesses: ordering them to testify or to produce documents or physical evidence pursuant to subpoenas.

The cases in this section consider the separation of powers problems that arise when the judiciary asserts these traditional powers against the President. Any exercise of judicial power over the President reduces executive branch autonomy. But if the President can claim an exemption from duties the law ordinarily imposes on defendants and witnesses, it encroaches on the judiciary's autonomy. (This also section considers the related topic of subpoenas issued by Congress.)

1. The President as Defendant

At common law, monarchs enjoyed sovereign immunity. See Ch. 3.A.1. Under modern US law, some forms of sovereign immunity limit an individual's ability to sue the government itself. For suits against government officials as individuals – such as a suit for damages against a government officer for violating individual rights – some forms of personal immunity from suit exist, typically the result of statutes or the common law of torts. The text of the Constitution includes only one explicit immunity provision: The **Speech or Debate Clause** provides that members of Congress "shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place." Art. I, § 6, cl. 1.

■ HISTORY

THE SPEECH OR DEBATE CLAUSE: The Speech or Debate Clause has its roots in the English Bill of Rights of 1689, which read in part: "The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." This protection was desired to end the practice of members of Parliament being tried (often for treason) based on their political speeches. The version of this clause in the US Constitution allows for treason prosecutions based on statements on the floor of Congress, but accompanies this with stringent constitutional limits on the definition and punishment of treason in Art. III , § 3.

No similar immunity clause exists for the President. With regard to criminal charges, Art. I, § 3, cl. 7 says that once an official is removed from office upon conviction in a Senate impeachment trial, "the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law." The conventional view is that a President may only be criminally charged after leaving office; before removal, the President is not "the party convicted" by the Senate. The Supreme Court has never had to rule on the matter, since criminal charges have never been instituted against a sitting President. Questions of timing aside, it is clear that a President has no permanent immunity from prosecution for crimes committed in office.

Civil lawsuits against a President may be divided between those that sue the President in an official capacity and in an individual capacity. (This distinction is

usually studied in classes dedicated to Federal Courts or Constitutional Torts.) An official-capacity suit seeks an injunction ordering the holder of an office to act — or not act — in ways mandated by law or by the Constitution. There will be no damages awarded. Such suits occur regularly, and may involve the President as a defendant as well as other government officers. E.g., *Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015); *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974). If the defendant is a high-ranking official who implements Presidential policy, the case may be an official-capacity suit against the President in all but name. See *Marbury v. Madison* (1803) (Secretary of State James Madison sued for actions directed by President Jefferson) and *Youngstown Sheet & Tube Co. v. Sawyer* (1952) (Secretary of Commerce Charles Sawyer sued for actions directed by President Truman).

An individual-capacity suit seeks a remedy against an identified person, not against an office. Claims for money damages will be individual-capacity suits. The Supreme Court has twice ruled on the constitutionality of civil suits seeking damages against Presidents in their individual capacities.

a) Suits over Conduct in Office: *Nixon v. Fitzgerald*

A. Ernest Fitzgerald was a management analyst for the Air Force who made public allegations of allegedly wasteful spending. After he lost his job, he filed a civil damages action against President Richard Nixon and other high-ranking administration officials for violating his First Amendment free speech rights. The President argued that he should enjoy **absolute immunity** from civil suits for damages arising out of the President's actions while in office. In *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) a 5-4 majority of the US Supreme Court agreed.

> Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. As is the case with prosecutors and judges — for whom absolute immunity now is established — a President must concern himself with matters likely to arouse the most intense feelings. Yet, as our decisions have recognized, it is in precisely such cases that there exists the greatest public interest in providing an official the maximum ability to deal fearlessly and impartially with the duties of his office. This concern is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system. Nor can the sheer prominence of the President's office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently 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.

■ TERMINOLOGY

ABSOLUTE IMMUNITY: This pre-existing doctrine forbids damage actions against judges and prosecutors for on-the-job conduct. In jobs like these, where every day's work may create enemies, absolute immunity is considered necessary to ensure the independence of the office. This contrasts with *qualified immunity*, a defense available to many other government officials. Unlike an absolutely immune defendant, a qualifiedly immune defendant may be sued, but only if it was "clearly established" at the time of the alleged misconduct that the defendant's actions were illegal.

b) Suits over Conduct Out of Office: *Clinton v. Jones*

The absolute immunity of *Nixon v. Fitzgerald* protects the President against civil suits for actions taken within the scope of official duties. Acts by the President not during official duties – including acts before the President took office, or while in office but outside official duties – would not partake of that immunity. Even so, lawsuits against a sitting President can be costly and burdensome distractions from the responsibilities of the office. This was the subject of *Clinton v. Jones,* 520 U.S. 681 (1997).

Paula Jones alleged that in 1991, while future President Bill Clinton was the governor of Arkansas, he sexually harassed her. She filed suit in 1994, during Clinton's first term as President. The President argued for a blanket rule of temporary immunity that would delay any civil suit until after the President left office. The Supreme Court unanimously held that Jones's lawsuit need not be delayed.

> The principal rationale for affording certain public servants immunity from suits for money damages arising out of their official acts is inapplicable to unofficial conduct. … The point of immunity for such officials is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion. …
>
> This reasoning provides no support for an immunity for unofficial conduct. … We have never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity.

The Court recognized that defending against a civil suit would involve some distraction from the President's very important official duties, but this was not justification for a baseline rule that all civil suits against a President should be postponed. Plaintiffs are entitled to seek redress for private wrongs, and delays may make it difficult to prove their case. Instead of presumptive continuances, judges hearing such cases should, on a case-by-case basis, take the President's busy schedule and heavy responsibilities into consideration on matters of scheduling and discovery. On the record presented to it, the Court saw no reason to postpone discovery and trial of the Jones lawsuit, and remanded for **further proceedings**.

■ HISTORY

FURTHER PROCEEDINGS: On remand, the President sat for a deposition by Jones's lawyers, during which he denied having a sexual relationship with a White House intern. This was false. Upon learning of the false testimony, the House of Representatives impeached the President for perjury and obstruction of justice. The Senate fell 17 votes short of the necessary two-thirds vote to convict, so the President served out his full term of office. Meanwhile, the Jones lawsuit was dismissed on summary judgment – although the trial judge also sanctioned the President for contempt of court.

2. The President as Witness

a) Executive Privilege: *United States v. Nixon*

A basic rule of evidence is that a court may command testimony from any witness. Exceptions exist for evidence protected by testimonial privileges, like those for communications between attorney and client, spouse and spouse, doctor and patient, or priest and penitent. One such testimonial privilege is the "executive privilege," which allows high-ranking executive branch officers to keep secret the internal advice and deliberations exchanged privately among the officer and close

advisors when debating decisions. The justification for executive privilege is the same as for the other privileges: to facilitate open and honest communication without fear that a party to the conversation will later be forced to reveal what was said.

The precise contours of executive privilege are murky; the privilege tends to be asserted and debated outside of court more than inside. But it was litigated to the Supreme Court level in *United States v. Nixon*, 418 U.S. 683 (1974), also known as the Watergate Tapes case.

President Richard Nixon ran for re-election in 1972. In June of that year, the main offices of the Democratic National Committee in the Watergate building were burglarized by five men who all worked for the President's re-election committee or a clandestine team of private detectives known as "The Plumbers" that operated directly out of the White House. In a series of Oval Office conversations recorded by a taping system first installed by President Kennedy, President Nixon discussed how to prevent the investigation into the burglary from affecting the President. Methods included paying "hush money" to witnesses and attempting to dissuade the FBI with phony claims that the CIA was already handling the burglary as a matter of national security.

Nixon was re-elected in a landslide in November 1972, but public questions about the break-in increased as the Watergate burglars went to trial in January 1973. Over the course of a year, investigations of the Nixon administration proceeded down two paths. First, a federal special prosecutor gathered evidence for a grand jury (the body that decides whether there is enough evidence to bring criminal charges; see Amendment V), and for trial of some defendants. Second, Congressional committees convened televised hearings to uncover similar information.

In April 1974, the special prosecutor issued a subpoena to the President to produce the Watergate Tapes in connection with the trial of several defendants – including a former Attorney General – charged with conspiracy to obstruct justice. (The President was not a defendant, but had been described as an "unindicted co-conspirator.") It was clear that if the tapes could be subpoenaed by the special prosecutor, they could also be obtained by Congress, which was beginning to debate impeachment.

Nixon refused to produce the tapes, arguing that private conversations among the President and staff were *per se* protected by executive privilege. The US Supreme Court unanimously disagreed.

> Neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. ...
>
> The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III. ... A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceding is specific and central to the fair adjudication of a particular

> criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. ...
>
> We conclude that when the ground for asserting [executive] 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. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

Although the Court rejected an absolute executive privilege, it also indicated that the President could withhold evidence on a claim of executive privilege if he established that disclosure of specific material would create concrete harms to the functioning of the executive branch. This would be the case, for example, for a subpoena that sought military or diplomatic secrets. The Supreme Court ordered Nixon to turn over the tapes over the trial court, which was to determine whether they met the Court's standard for executive privilege, and also to redact any portions of the tapes that were not relevant to the pending criminal trials.

■ HISTORY

TURN OVER THE TAPES: The Supreme Court issued its opinion on July 24, 1974. The House Judiciary Committee voted to recommend impeachment on July 30. President Nixon publicly released the tapes On August 5, they were widely viewed as strong evidence of obstruction of justice. With impeachment by the full House and conviction by the Senate looming, Nixon resigned the Presidency effective August 9.

b) Non-Privileged Personal Information: *The Trump Cases*

Before running for President in 2016, Donald Trump was known as a real estate developer, hotel owner, and television personality. Rumors had circulated for years that Trump and his businesses had engaged in white collar crimes including tax evasion, fraud, and laundering money from Russian oligarchs. After taking office, the President's detractors pursued investigations into two alleged instances of wrongdoing in connection with the 2016 presidential campaign itself.

- First, in the months before the election, it became known that operatives of the Russian government had hacked into email accounts of the Democratic National Committee and published the stolen files on the internet, to aid discredit Trump's Democratic opponent. A few weeks after taking office in 2017, now-President Trump fired the director of the FBI, allegedly for pursuing too vigorously the investigations into Russian election activity. (Later, a special prosecutor charged with investigating crimes related to the Russian interference concluded that the Trump campaign had met with and welcomed assistance from Russian agents, but had not conspired with them to commit crimes. Regarding obstruction of the investigation into the campaign's Russian ties, the prosecutor did not conclude that the President committed a crime, but also did not exonerate him.)

- Second, it became known in 2018 that then-candidate Trump, acting through his lawyer Michael Cohen, had secretly paid women tens of thousands of dollars shortly before the election to keep secret their

> extramarital affairs with Trump – payments that may have violated campaign finance laws. The special prosecutor's investigation led to Cohen pleading guilty in 2018 to various federal crimes including campaign finance violations, tax fraud, bank fraud, and lying to Congress. Cohen publicly stated that he violated campaign finance laws at then-candidate Trump's direction.

As with Watergate, investigations into these scandals proceeded along two tracks. In one, a state prosecutor in New York sought to investigate whether Trump or people associated with him and his businesses had violated state laws, including evasion of state taxes and violations of state campaign finance laws. In the other, Congress sought to investigate a variety of Trump's alleged financial misdeeds. In both tracks, subpoenas were issued for the President's financial records, including his tax returns.

While the President's objections to these subpoenas worked their way through the courts, another scandal erupted. In September 2019, it was revealed that the President had withheld funds appropriated for military aid to Ukraine to persuade that country to provide political ammunition against former Vice President Joe Biden, the likely Democratic nominee for President in 2020. The House of Representatives voted to impeach in late 2019, but in early 2020 the Senate acquitted, falling 19 votes short of the necessary two-thirds.

It was against this backdrop of an unsuccessful impeachment that the Supreme Court considered the propriety of the New York and Congressional subpoenas.

ITEMS TO CONSIDER WHILE READING *Trump v. Vance*:

A. *Is this case distinguishable from* US v. Nixon*? In particular:*

- *Should it make a constitutional difference if a grand jury subpoena seeks documents regarding the President's actions in office as opposed to his private actions before being elected?*
- *Should it make a constitutional difference if a grand jury subpoena involving the President's personal information issues from a state criminal proceeding as opposed to a federal one?*

B. *In practical terms, what is the difference between the results of the majority and the separate opinions?*

Trump v. Vance

2020 WL 3848062 (US 2020)

Chief Justice Roberts delivered the opinion of the Court [joined by Justices Ginsburg, Breyer, Sotomayor and Kagan].

In our judicial system, "the public has a right to every man's evidence."[FN1] Since the earliest days of the Republic, "every man" has included the President of the United States. Beginning with Jefferson and carrying on through Clinton, Presidents have uniformly testified or produced documents in criminal proceedings when called upon by federal courts. This case involves — so far as we and the parties can tell — the first state criminal subpoena directed to a President. The President contends that the subpoena is unenforceable. 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.

FN1 This maxim traces at least as far back as Lord Chancellor Hardwicke, in a 1742 parliamentary debate.

I

In the summer of 2018, the New York County District Attorney's Office [headed by Cyrus Vance, Jr.] opened an investigation into what it opaquely describes as "business transactions involving multiple individuals whose conduct may have violated state law." A year later, the office — acting on behalf of a grand jury — served a subpoena duces tecum (essentially a request to produce evidence) on Mazars USA, LLP, the personal accounting firm of President Donald J. Trump. The subpoena directed Mazars to produce financial records relating to the President and business organizations affiliated with him, including tax returns and related schedules, from 2011 to the present.

The President, acting in his personal capacity, sued the district attorney and Mazars in Federal District Court to enjoin enforcement of the subpoena. He argued that, under Article II and the Supremacy Clause, a sitting President enjoys absolute immunity from state criminal process. He asked the court to issue a declaratory judgment that the subpoena is invalid and unenforceable while the President is in office and to permanently enjoin the district attorney from taking any action to enforce the subpoena. Mazars, concluding that the dispute was between the President and the district attorney, took no position on the legal issues raised by the President. ...

The Second Circuit ... agreed with the District Court's denial of a preliminary injunction. Drawing on the 200-year history of Presidents being subject to federal judicial process, the Court of Appeals concluded that "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." It also rejected the argument raised by the United States as amicus curiae that a state grand jury subpoena must satisfy a heightened showing of need. ... We granted certiorari.

II

In the summer of 1807, all eyes were on Richmond, Virginia. Aaron Burr, the former Vice President, was on trial for treason. Fallen from political grace after his fatal duel with Alexander Hamilton [in July 1804], and with a murder charge pending in New Jersey, Burr followed the path of many down-and-out Americans of his day — he headed

West in search of new opportunity. But Burr was a man with outsized ambitions. Together with General James Wilkinson, the Governor of the Louisiana Territory, he hatched a plan to establish a new territory in Mexico, then controlled by Spain. Both men anticipated that war between the United States and Spain was imminent, and when it broke out they intended to invade Spanish territory at the head of a private army.

But while Burr was rallying allies to his cause, tensions with Spain eased and rumors began to swirl that Burr was conspiring to detach States by the Allegheny Mountains from the Union. Wary of being exposed as the principal co-conspirator, Wilkinson took steps to ensure that any blame would fall on Burr. He sent a series of letters to President Jefferson accusing Burr of plotting to attack New Orleans and revolutionize the Louisiana Territory.

Jefferson, who despised his former running mate Burr for trying to steal the 1800 presidential election from him, was predisposed to credit Wilkinson's version of events. The President sent a special message to Congress identifying Burr as the "prime mover" in a plot "against the peace and safety of the Union." According to Jefferson, Burr contemplated either the "severance of the Union" or an attack on Spanish territory. Jefferson acknowledged that his sources contained a "mixture of rumors, conjectures, and suspicions" but, citing Wilkinson's letters, he assured Congress that Burr's guilt was "beyond question."

The trial that followed was the greatest spectacle in the short history of the republic, complete with a Founder-studded cast. People flocked to Richmond to watch, massing in tents and covered wagons along the banks of the James River, nearly doubling the town's population of 5,000. Burr's defense team included Edmund Randolph and Luther Martin, both former delegates at the Constitutional Convention and renowned advocates. Chief Justice John Marshall, who had recently squared off with the Jefferson administration in *Marbury v. Madison* (1803), presided as **Circuit Justice** for Virginia. Meanwhile Jefferson, intent on conviction, orchestrated the prosecution from afar, dedicating Cabinet meetings to the case, peppering the prosecutors with directions, and spending nearly $100,000 from the Treasury on the five-month proceedings.

■ TERMINOLOGY

CIRCUIT JUSTICE: In the 18th and early 19th centuries, justices of the US Supreme Court periodically "rode the circuit," (traveled to federal judicial districts to act as additional trial court judges). If a decision of a circuit justice was appealed to the Supreme Court, that justice would recuse himself.

In the lead-up to trial, Burr, taking aim at his accusers, moved for a subpoena duces tecum directed at Jefferson. The draft subpoena required the President to produce an October 21, 1806 letter from Wilkinson and accompanying documents, which Jefferson had referenced in his message to Congress. The prosecution opposed the request, arguing that a President could not be subjected to such a subpoena and that the letter might contain state secrets. Following four days of argument, Marshall announced his ruling to a packed chamber.

The President, Marshall declared, does not "stand exempt from the general provisions of the constitution" or, in particular, the Sixth Amendment's guarantee that those accused have compulsory process for obtaining witnesses for their defense. *United States v. Burr*, 25 F. Cas. 30 (CC Va. 1807). At common law the single reservation to the duty to testify in response to a subpoena was the case of the king, whose dignity was seen as incompatible with appearing under the process of the court. But, as Marshall explained, a king is born to power and can do no wrong. The President, by contrast, is "of the people" and subject to the law. According to Marshall, the sole argument for exempting the President from testimonial obligations was that his "duties as chief magistrate demand his whole time for national objects." But, in Marshall's assessment, those demands were not unremitting. And should the President's duties

preclude his attendance at a particular time and place, a court could work that out upon return of the subpoena.

Marshall also rejected the prosecution's argument that the President was immune from a subpoena duces tecum because executive papers might contain state secrets. "A subpoena duces tecum," he said, "may issue to any person to whom an ordinary subpoena [for testimony] may issue." … As for the propriety of introducing any papers, that would depend on the character of the paper, not on the character of the person who holds it. Marshall acknowledged that the papers sought by Burr could contain information the disclosure of which would endanger the public safety, but stated that, again, such concerns would have due consideration upon the return of the subpoena.

While the arguments unfolded, Jefferson, who had received word of the motion, wrote to the prosecutor indicating that he would — subject to the prerogative to decide which executive communications should be withheld — "furnish on all occasions, whatever the purposes of justice may require." His personal attendance, however, was out of the question, for it would leave the nation without the "sole branch which the constitution requires to be always in function."

■ HISTORY

BURR WAS ACCORDINGLY ACQUITTED: The prosecution did not have two witnesses to the same overt act, as required by Art. III § 3 for any federal treason conviction.

Before Burr received the subpoenaed documents, Marshall rejected the prosecution's core legal theory for treason and **Burr was accordingly acquitted**. Jefferson, however, was not done. Committed to salvaging a conviction, he directed the prosecutors to proceed with a misdemeanor (yes, misdemeanor) charge for inciting war against Spain. Burr then renewed his request for Wilkinson's October 21 letter, which he later received a copy of, and subpoenaed a second letter, dated November 12, 1806, which the prosecutor claimed was privileged. Acknowledging that the President may withhold information to protect public safety, Marshall instructed that Jefferson should "state the particular reasons" for withholding the letter. *United States v. Burr*, 25 F. Cas. 187 (CC Va. 1807). The court, paying "all proper respect" to those reasons, would then decide whether to compel disclosure. But that decision was averted when the misdemeanor trial was cut short after it became clear that the prosecution lacked the evidence to convict.

In the two centuries since the Burr trial, successive Presidents have accepted Marshall's ruling that the Chief Executive is subject to subpoena. [While in office, Presidents Monroe, Grant, Ford, Carter, and Clinton all sat for depositions as witnesses in federal criminal matters.]

The bookend to Marshall's ruling came in 1974 when the question he never had to decide — whether to compel the disclosure of official communications over the objection of the President — came to a head. That spring, the Special Prosecutor appointed to investigate the break-in of the Democratic National Committee Headquarters at the Watergate complex filed an indictment charging seven defendants associated with President Nixon and naming Nixon as an unindicted co-conspirator. As the case moved toward trial, the Special Prosecutor secured a subpoena duces tecum directing Nixon to produce, among other things, tape recordings of Oval Office meetings. Nixon moved to quash the subpoena, claiming that the Constitution provides an absolute privilege of confidentiality to all presidential communications. This Court rejected that argument in *United States v. Nixon* (1974), a decision we later described as "unequivocally and emphatically endorsing" Marshall's holding that Presidents are subject to subpoena. *Clinton v. Jones* (1997).

The *Nixon* Court readily acknowledged the importance of preserving the confidentiality of communications between high Government officials and those who

advise and assist them. "Human experience," the Court explained, "teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." Confidentiality thus promoted the "public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking."

But, like Marshall two centuries prior, the Court recognized the countervailing interests at stake. Invoking the common law maxim that "the public has a right to every man's evidence," the Court observed that the public interest in fair and accurate judicial proceedings is at its height in the criminal setting, where our common commitment to justice demands that guilt shall not escape nor innocence suffer. Because these dual aims would be defeated if judgments were founded on a partial or speculative presentation of the facts, the *Nixon* Court recognized that it was "imperative" that compulsory process be available for the production of evidence needed either by the prosecution or the defense.

The Court thus concluded that the President's "generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial." Two weeks later, President Nixon dutifully released the tapes.

III

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

In the President's view, that distinction makes all the difference. He argues that the Supremacy Clause gives a sitting President absolute immunity from state criminal subpoenas because compliance with those subpoenas would categorically impair a President's performance of his Article II functions. 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. Instead, the Solicitor General urges us 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.

A

We begin with the question of absolute immunity. No one doubts that Article II guarantees the independence of the Executive Branch. As the head of that branch, the President occupies a unique position in the constitutional scheme. His duties, which range from faithfully executing the laws to commanding the Armed Forces, are of unrivaled gravity and breadth. Quite appropriately, those duties come with protections that safeguard the President's ability to perform his vital functions.

In addition, the Constitution guarantees the entire independence of the General Government from any control by the respective States. As we have often repeated, "States have no power to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress." *McCulloch v. Maryland* (1819). It follows that States also lack the power to impede the President's execution of those laws.

Marshall's ruling in *Burr*, entrenched by 200 years of practice and our decision in *Nixon*, confirms 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. But the President, joined in part by the Solicitor General, argues that state criminal subpoenas pose a unique threat of impairment and thus demand greater protection. To be clear, the President does not contend here that

this subpoena, in particular, is impermissibly burdensome. Instead he makes a categorical argument about the burdens generally associated with state criminal subpoenas, focusing on three: diversion, stigma, and harassment. We address each in turn.

1

The President's primary contention, which the Solicitor General supports, is that complying with state criminal subpoenas would necessarily divert the Chief Executive from his duties. He grounds that concern in *Nixon v. Fitzgerald* (1978), which recognized a President's absolute immunity from damages liability predicated on his official acts. In explaining the basis for that immunity, this Court observed that the prospect of such 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. The President contends that the diversion occasioned by a state criminal subpoena imposes an equally intolerable burden on a President's ability to perform his Article II functions.

But *Fitzgerald* did not hold that distraction was sufficient to confer absolute immunity. We instead drew a careful analogy to the common law absolute immunity of judges and prosecutors, concluding that a President, like those officials, must deal fearlessly and impartially with the duties of his office — not be made unduly cautious in the discharge of those duties by the prospect of civil liability for official acts. Indeed, we expressly rejected immunity based on distraction alone 15 years later in *Clinton v. Jones*. There, President Clinton argued that the risk of being distracted by the need to participate in litigation entitled a sitting President to absolute immunity from civil liability, not just for official acts, as in *Fitzgerald*, but for private conduct as well. We disagreed with that rationale, explaining that the dominant concern in *Fitzgerald* was not mere distraction but the distortion of the Executive's decisionmaking process with respect to official acts that would stem from worry as to the possibility of damages. The Court recognized that Presidents constantly face myriad demands on their attention, some private, some political, and some as a result of official duty. But, the Court concluded, "while such distractions may be vexing to those subjected to them, they do not ordinarily implicate constitutional concerns."

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

The President, however, believes the district attorney is investigating him and his businesses. In such a situation, he contends, the toll that criminal process exacts from the President is even heavier than the distraction at issue in *Fitzgerald* and *Clinton*, because criminal litigation poses unique burdens on the President's time and will generate a considerable if not overwhelming degree of mental preoccupation.

But the President is not seeking immunity from the diversion occasioned by the prospect of future criminal liability. Instead he concedes — consistent with the position of the Department of Justice — that state grand juries are free to investigate a sitting President with an eye toward charging him after the completion of his term. The President's objection therefore must be limited to the additional distraction caused by the subpoena itself. But that argument runs up against the 200 years of precedent

establishing that Presidents, and their official communications, are subject to judicial process, even when the President is under investigation.

2

The President next claims that the stigma of being subpoenaed will undermine his leadership at home and abroad. Notably, the Solicitor General does not endorse this argument, perhaps because we have twice denied absolute immunity claims by Presidents in cases involving allegations of serious misconduct. See *Clinton*; *Nixon*. 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. Nor can we accept that the risk of association with persons or activities under criminal investigation can absolve a President of such an important public duty. Prior Presidents have weathered these associations in federal cases, and there is no reason to think any attendant notoriety is necessarily greater in state court proceedings. ...

Additionally, while the current suit has cast the Mazars subpoena into the spotlight, longstanding rules of grand jury secrecy aim to prevent the very stigma the President anticipates. Of course, disclosure restrictions are not perfect. But those who make unauthorized disclosures regarding a grand jury subpoena do so at their peril. See, e.g., N. Y. Penal Law Ann. § 215.70 (designating unlawful grand jury disclosure as a felony).

3

Finally, the President and the Solicitor General warn that subjecting Presidents to state criminal subpoenas will make them easily identifiable targets for harassment. But we rejected a nearly identical argument in *Clinton*, where then-President Clinton argued that permitting civil liability for unofficial acts would generate a large volume of politically motivated harassing and frivolous litigation. The President and the Solicitor General nevertheless argue that state criminal subpoenas pose a heightened risk and could undermine the President's ability to deal fearlessly and impartially with the States. They caution that, while federal prosecutors are accountable to and removable by the President, the 2,300 district attorneys in this country are responsive to local constituencies, local interests, and local prejudices, and might use criminal process to register their dissatisfaction with the President. What is more, we are told, the state courts supervising local grand juries may not exhibit the same respect that federal courts show to the President as a coordinate branch of Government.

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

First, grand juries are prohibited from engaging in arbitrary fishing expeditions and initiating investigations out of malice or an intent to harass. These protections, as the district attorney himself puts it, "apply with special force to a President, in light of the office's unique position as the head of the Executive Branch." And, in the event of such harassment, a President would be entitled to the protection of federal courts. The policy against federal interference in state criminal proceedings, while strong, allows intervention in those cases where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith.

Second, contrary to Justice Alito's characterization, our holding does not allow States to run roughshod over the functioning of the Executive Branch. The Supremacy Clause prohibits state judges and prosecutors from interfering with a President's official duties. Any effort to manipulate a President's policy decisions or to retaliate against a President for official acts through issuance of a subpoena, would thus be an unconstitutional attempt to influence a superior sovereign exempt from such obstacles. We generally assume that state courts and prosecutors will observe constitutional limitations. Failing that, federal law allows a President to challenge any allegedly unconstitutional influence in a federal forum, as the President has done here.

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

B

We next consider whether a state grand jury subpoena seeking a President's private papers must satisfy a heightened need standard. [Ordinarily, a subpoena for evidence in a state criminal matter may issue if it seeks to obtain relevant evidence.] 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. Justice Alito, largely embracing those criteria, agrees that a state criminal subpoena to a President should not be allowed unless a heightened standard is met.

We disagree, for three reasons. First, such a heightened standard would extend protection designed for official documents to the President's private papers. As the Solicitor General and Justice Alito acknowledge, their proposed test is derived from executive privilege cases that trace back to *Burr*. There, Marshall explained that if Jefferson invoked presidential privilege over executive communications, the court would not proceed against the president as against an ordinary individual but would instead require an affidavit from the defense that would clearly show the paper to be essential to the justice of the case. The Solicitor General and Justice Alito would have us apply a similar standard to a President's personal papers. But this argument does not account for the relevant passage from *Burr*: "If there be a paper in the possession of the executive, which is not of an official nature, he must stand, as respects that paper, in nearly the same situation with any other individual." And it is only "nearly "— and not "entirely" — because the President retains the right to assert privilege over documents that, while ostensibly private, "partake of the character of an official paper."

Second, neither the Solicitor General nor Justice Alito has established that heightened protection against state subpoenas is necessary for the Executive to fulfill his Article II functions. Beyond the risk of harassment, which we addressed above, the only justification they offer for the heightened standard is protecting Presidents from "unwarranted burdens." In effect, they argue that even if federal subpoenas to a President are warranted whenever evidence is material, state subpoenas are warranted only when the evidence is essential. But that double standard has no basis in law. For if the state subpoena is not issued to manipulate, the documents themselves are not protected, and the Executive is not impaired, then nothing in Article II or the Supremacy Clause supports holding state subpoenas to a higher standard than their federal counterparts.

Finally, in the absence of a need to protect the Executive, the public interest in fair and effective law enforcement cuts in favor of comprehensive access to evidence. Requiring a state grand jury to meet a heightened standard of need would hobble the

grand jury's ability to acquire all information that might possibly bear on its investigation. And, even assuming the evidence withheld under that standard were preserved until the conclusion of a President's term, in the interim the State would be deprived of investigative leads that the evidence might yield, allowing memories to fade and documents to disappear. This could frustrate the identification, investigation, and indictment of third parties (for whom applicable statutes of limitations might lapse). More troubling, it could prejudice the innocent by depriving the grand jury of exculpatory evidence.

Rejecting a heightened need standard does not leave Presidents with "no real protection" [as Justice Alito worries]. To start, a President may avail himself of the same protections available to every other citizen. These include the right to challenge the subpoena on any grounds permitted by state law, which usually include bad faith and undue burden or breadth. And, as in federal court, "the high respect that is owed to the office of the Chief Executive should inform the conduct of the entire proceeding, including the timing and scope of discovery." *Clinton* (Breyer, J., concurring in judgment) (stressing the need for courts presiding over suits against the President to "schedule proceedings so as to avoid significant interference with the President's ongoing discharge of his official responsibilities"); *Nixon* ("Where a subpoena is directed to a President appellate review should be particularly meticulous.").

Furthermore, although the Constitution does not entitle the Executive to absolute immunity or a heightened standard, he is not relegated only to the challenges available to private citizens. A President can raise subpoena-specific constitutional challenges, in either a state or federal forum. As previously noted, he can challenge the subpoena as an attempt to influence the performance of his official duties, in violation of the Supremacy Clause. This avenue protects against local political machinations interposed as an obstacle to the effective operation of a federal constitutional power.

In addition, the Executive can — as the district attorney concedes — argue that compliance with a particular subpoena would impede his constitutional duties. Incidental to the functions confided in Article II is the power to perform them, without obstruction or impediment. As a result, once the President sets forth and explains a conflict between judicial proceeding and public duties, or shows that an order or subpoena would significantly interfere with his efforts to carry out those duties, the matter changes. At that point, a court should use its inherent authority to quash or modify the subpoena, if necessary to ensure that such interference with the President's duties would not occur.

[CONCLUSION]

Two hundred years ago, a great jurist of our Court established that no citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding. We reaffirm that principle today and hold that the President is neither absolutely immune from state criminal subpoenas seeking his private papers nor entitled to a heightened standard of need. The guard furnished to this high officer lies where it always has — in the conduct of a court applying established legal and constitutional principles to individual subpoenas in a manner that preserves both the independence of the Executive and the integrity of the criminal justice system.

The arguments presented here and in the Court of Appeals were limited to absolute immunity and heightened need. The Court of Appeals, however, has directed that the case be returned to the District Court, where the President may raise further arguments as appropriate. We affirm the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

Justice Kavanaugh, with whom Justice Gorsuch joins, concurring in the judgment.

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

The question here, then, is how to balance the State's interests and the Article II interests. The longstanding precedent that has applied to federal criminal subpoenas for official, privileged Executive Branch information is *United States v. Nixon* (1974). That landmark case requires that a prosecutor establish a "demonstrated, specific need" for the President's information. Id., see also **In re Sealed Case**, 121 F.3d 729, (D.C. Cir. 1997). ...

■ ANALYSIS

IN RE SEALED CASE: This Court of Appeals decision involved a subpoena to White House counsel during an investigation of corruption by a former Secretary of Agriculture. The Court said: "We conclude that *Nixon*'s demonstrated, specific need standard has two components. A party seeking to overcome a claim of presidential privilege must demonstrate: first, that each discrete group of the subpoenaed materials likely contains important evidence; and second, that this evidence is not available with due diligence elsewhere."

Because this case again entails a clash between the interests of the criminal process and the Article II interests of the Presidency, I would apply the longstanding *Nixon* "demonstrated, specific need" standard to this case. ...

In the end, much may depend on how the majority opinion's various standards are applied in future years and decades. It will take future cases to determine precisely how much difference exists between (i) the various standards articulated by the majority opinion, (ii) the overarching *Nixon* "demonstrated, specific need" standard that I would adopt, and (iii) Justice Thomas's and Justice Alito's other proposed standards. In any event, in my view, lower courts in cases of this sort involving a President will almost invariably have to begin by delving into why the State wants the information; why and how much the State needs the information, including whether the State could obtain the information elsewhere; and whether compliance with the subpoena would unduly burden or interfere with a President's official duties. ...

Justice Thomas, dissenting.

... I agree with the majority that the President is not entitled to absolute immunity from issuance of the subpoena. But ... if the President can show that "his duties as chief magistrate demand his whole time for national objects," *United States v. Burr* (1807) (Marshall, C. J.), he is entitled to relief from enforcement of the subpoena. ...

Justice Alito, dissenting.

... Constitutionally speaking, the President never sleeps. The President must be ready, at a moment's notice, to do whatever it takes to preserve, protect, and defend the Constitution and the American people. Without a President who is able at all times to carry out the responsibilities of the office, our constitutional system could not operate, and the country would be at risk. ...

It is not enough to recite sayings like "no man is above the law" and "the public has a right to every man's evidence." These sayings are true — and important — but they beg the question. The law applies equally to all persons, including a person who happens for a period of time to occupy the Presidency. But there is no question that the nature of

the office demands in some instances that the application of laws be adjusted at least until the person's term in office ends. …

In light of the above, a subpoena like the one now before us should not be enforced unless it meets a test that takes into account the need to prevent interference with a President's discharge of the responsibilities of the office. … We should not treat this subpoena like an ordinary grand jury subpoena and should not relegate a President to the meager defenses that are available when an ordinary grand jury subpoena is challenged. But that, at bottom, is the effect of the Court's decision.

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

ITEMS TO CONSIDER WHILE READING *Trump v. Mazars*:

A. *What is the source of Congress's power to issue subpoenas?*

B. *Should the enforceability of a subpoena for a President's information differ if it is issued by Congress rather than a court? Consider the differences, if any, between the standards announced in* Vance *and* Mazars.

C. *Justice Thomas argues that the subpoena could be proper if the House was considering impeachment, but not if it was considering legislation. Is this distinction sensible? Enforceable?*

Trump v. Mazars USA, LLP,
2020 WL 3848061 (US 2020)

Chief Justice Roberts delivered the opinion of the Court [joined by Justices Ginsburg, Breyer, Sotomayor, Kagan, Gorsuch and Kavanaugh].

Over the course of five days in April 2019, three committees of the U. S. House of Representatives issued four subpoenas seeking information about the finances of President Donald J. Trump, his children, and affiliated businesses. We have held that the House has authority under the Constitution to issue subpoenas to assist it in carrying out its legislative responsibilities. The House asserts that the financial information sought here — encompassing a decade's worth of transactions by the President and his family — will help guide legislative reform in areas ranging from money laundering and terrorism to foreign involvement in U. S. elections. The President contends that the House lacked a valid legislative aim and instead sought these records to harass him, expose personal matters, and conduct law enforcement activities beyond its authority. The question presented is whether the subpoenas exceed the authority of the House under the Constitution.

We have never addressed a congressional subpoena for the President's information. Two hundred years ago, it was established that Presidents may be subpoenaed during a federal criminal proceeding, *United States v. Burr*, 25 F. Cas. 30 (CC Va. 1807) (Marshall, Cir. J.), and earlier today we extended that ruling to state

criminal proceedings, *Trump v. Vance* (2020). Nearly fifty years ago, we held that a federal prosecutor could obtain information from a President despite assertions of executive privilege, *United States v. Nixon*, 418 U. S. 683 (1974), and more recently we ruled that a private litigant could subject a President to a damages suit and appropriate discovery obligations in federal court, *Clinton v. Jones*, 520 U. S. 681 (1997).

This case is different. Here the President's information is sought not by prosecutors or private parties in connection with a particular judicial proceeding, but by committees of Congress that have set forth broad legislative objectives. Congress and the President — the two political branches established by the Constitution — have an ongoing relationship that the Framers intended to feature both rivalry and reciprocity. That distinctive aspect necessarily informs our analysis of the question before us.

I

A

Each of the three committees sought overlapping sets of financial documents, but each supplied different justifications for the requests. [Documents were sought from businesses that held financial records relating to the President, his children, their immediate family members, and several affiliated business entities. These included two banks – Deutsche Bank and Capital One – and the President's personal accounting firm, Mazars USA, LLP.]

... The Financial Services Committee issued these subpoenas pursuant to House Resolution 206, which called for "efforts to close loopholes that allow corruption, terrorism, and money laundering to infiltrate our country's financial system." Such loopholes, the resolution explained, had allowed "illicit money, including from Russian oligarchs," to flow into the United States through "anonymous shell companies" using investments such as "luxury high-end real estate." The House also invokes the oversight plan of the Financial Services Committee, which stated that the Committee intends to review banking regulation and "examine the implementation, effectiveness, and enforcement" of laws designed to prevent money laundering and the financing of terrorism. The plan further provided that the Committee would "consider proposals to prevent the abuse of the financial system" and "address any vulnerabilities identified" in the real estate market.

... The Intelligence Committee subpoenaed Deutsche Bank as part of an investigation into foreign efforts to undermine the U. S. political process. Committee Chairman Adam Schiff had described that investigation in a previous statement, explaining that the Committee was examining alleged attempts by Russia to influence the 2016 election; potential links between Russia and the President's campaign; and whether the President and his associates had been compromised by foreign actors or interests. Chairman Schiff added that the Committee planned "to develop legislation and policy reforms to ensure the U. S. government is better positioned to counter future efforts to undermine our political process and national security."

... [The Oversight and Reform Committee argued that] recent testimony by the President's former personal attorney Michael Cohen, along with several documents prepared by Mazars and supplied by Cohen, raised questions about whether the President had accurately represented his financial affairs. Chairman Cummings asserted that the Committee had full authority to investigate whether the President: (1) may have engaged in illegal conduct before and during his tenure in office, (2) has undisclosed conflicts of interest that may impair his ability to make impartial policy decisions, (3) is complying with the **Emoluments Clauses** of the Constitution and (4) has accurately reported his finances to the Office of Government Ethics and other federal entities. "The Committee's interest in these matters," Chairman Cummings concluded, "informs its review of multiple laws and legislative proposals under our jurisdiction."

■ TERMINOLOGY

EMOLUMENTS CLAUSES: To help ensure loyalty, the Constitution limits the ability of the President and other officers to receive "emoluments" from sources other than Congress. Art. I, § 9, cl. 8 (foreign emoluments); Art. II, § 2 (domestic emoluments). A debate during the Trump Presidency asked whether money his hotels from foreign dignitaries were forbidden emoluments.

B

Petitioners — the President in his personal capacity, along with his children and affiliated businesses — filed two suits challenging the subpoenas [in the federal district courts for the District of Columbia and the Southern District of New York]. In both cases, petitioners contended that the subpoenas lacked a legitimate legislative purpose and violated the separation of powers. The President did not, however, resist the subpoenas by arguing that any of the requested records were protected by executive privilege. For relief, petitioners asked for declaratory judgments and injunctions preventing Mazars and the banks from complying with the subpoenas. Although named as defendants, Mazars and the banks took no positions on the legal issues in these cases, and the House committees intervened to defend the subpoenas.

Petitioners' challenges failed [in the trial courts and their respective Courts of Appeal]. We granted certiorari in both cases and stayed the judgments below pending our decision.

II

A

The question presented is whether the subpoenas exceed the authority of the House under the Constitution. Historically, disputes over congressional demands for presidential documents have not ended up in court. Instead, they have been hashed out in the hurly-burly, the give-and-take of the political process between the legislative and the executive.

That practice began with George Washington and the early Congress. In 1792, a House committee requested Executive Branch documents pertaining to General St. Clair's campaign against the Indians in the Northwest Territory, which had concluded in an utter rout of federal forces when they were caught by surprise near the present-day border between Ohio and Indiana. Since this was the first such request from Congress, President Washington called a Cabinet meeting, wishing to take care that his response "be rightly conducted" because it could "become a precedent."

The meeting, attended by the likes of Alexander Hamilton, Thomas Jefferson, Edmund Randolph, and Henry Knox, ended with the Cabinet of "one mind": The House had authority to institute inquiries and call for papers but the President could exercise a discretion over disclosures, communicating such papers as the public good would permit and refusing the rest. President Washington then dispatched Jefferson to speak

to individual congressmen and "bring them by persuasion into the right channel." The discussions were apparently fruitful, as the House later narrowed its request and the documents were supplied without recourse to the courts.

[Similar negotiations resulted in delivery some but not all requested papers by Presidents Jefferson, Reagan, and Clinton.] Congress and the President maintained this tradition of negotiation and compromise — without the involvement of this Court — until the present dispute. ...

This dispute therefore represents a significant departure from historical practice. Although the parties agree that this particular controversy is justiciable, we recognize that it is the first of its kind to reach this Court; that disputes of this sort can raise important issues concerning relations between the branches; that related disputes involving congressional efforts to seek official Executive Branch information recur on a regular basis, including in the context of deeply partisan controversy; and that Congress and the Executive have nonetheless managed for over two centuries to resolve such disputes among themselves without the benefit of guidance from us. Such longstanding practice is a consideration of great weight in cases concerning the allocation of power between the two elected branches of Government, and it imposes on us a duty of care to ensure that we not needlessly disturb the compromises and working arrangements that those branches themselves have reached. With that in mind, we turn to the question presented.

B

Congress has no enumerated constitutional power to conduct investigations or issue subpoenas, but we have held that each House has power to secure needed information in order to legislate. This power of inquiry — with process to enforce it — is an essential and appropriate auxiliary to the legislative function. Without information, Congress would be shooting in the dark, unable to legislate wisely or effectively. The congressional power to obtain information is "broad" and "indispensable." *Watkins v. United States*, 354 U. S. 178 (1957). It encompasses inquiries into the administration of existing laws, studies of proposed laws, and surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.

Because this power is justified solely as an adjunct to the legislative process, it is subject to several limitations. Most importantly, a congressional subpoena is valid only if it is "related to, and in furtherance of, a legitimate task of the Congress." *Watkins v. United States*, 354 U.S. 178 (1957). The subpoena must serve a "**valid legislative purpose,**" *Quinn v. United States*, 349 U.S. 155 (1955); it must concern a subject on which legislation could be had.

■ HISTORY

VALID LEGISLATIVE PURPOSE: The cases requiring valid legislative purpose for Congressional subpoenas arose in the 1950s, when Congressional committees convened highly-publicized hearings seeking to identify private persons as current or former members of the Communist Party. In cases challenging actions of the House Un-American Activities Committee (HUAC) or Senate committees led by Sen. Joseph McCarthy and others, the Supreme Court considered when Congress's power to gather information for its work might be abused beyond constitutional limits.

Furthermore, Congress may not issue a subpoena for the purpose of law enforcement, because those powers are assigned under our Constitution to the Executive and the Judiciary. *Id.* Thus Congress may not use subpoenas to "try" someone before a committee for any crime or wrongdoing. Congress has no general power to inquire into private affairs and compel disclosures, and there is no congressional power to expose for the sake of exposure. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible.

Finally, recipients of legislative subpoenas retain their constitutional rights throughout the course of an investigation. And recipients have long been understood to

retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications and governmental communications protected by executive privilege.

C

The President contends, as does the Solicitor General appearing on behalf of the United States, that the usual rules for congressional subpoenas do not govern here because the President's papers are at issue. They argue for a more demanding standard based in large part on cases involving the *Nixon* tapes — recordings of conversations between President Nixon and close advisers discussing the break-in at the Democratic National Committee's headquarters at the Watergate complex. The tapes were subpoenaed by a Senate committee and the Special Prosecutor investigating the break-in, prompting President Nixon to invoke executive privilege and leading to two cases addressing the showing necessary to require the President to comply with the subpoenas.

Those cases, the President and the Solicitor General now contend, establish the standard that should govern the House subpoenas here. Quoting *Nixon*, the President asserts that the House must establish a "demonstrated, specific need" for the financial information, just as the Watergate special prosecutor was required to do in order to obtain the tapes. … The President and the Solicitor General [further] argue that the House must show that the financial information is "demonstrably critical" to its legislative purpose.

We disagree that these demanding standards apply here. Unlike the cases before us, *Nixon* … involved Oval Office communications over which the President asserted executive privilege. That privilege safeguards the public interest in candid, confidential deliberations within the Executive Branch; it is fundamental to the operation of Government. As a result, information subject to executive privilege deserves the greatest protection consistent with the fair administration of justice. We decline to transplant that protection root and branch to cases involving nonprivileged, private information, which by definition does not implicate sensitive Executive Branch deliberations.

The standards proposed by the President and the Solicitor General — if applied outside the context of privileged information — would risk seriously impeding Congress in carrying out its responsibilities. The President and the Solicitor General would apply the same exacting standards to all subpoenas for the President's information, without recognizing distinctions between privileged and nonprivileged information, between official and personal information, or between various legislative objectives. Such a categorical approach would represent a significant departure from the longstanding way of doing business between the branches, giving short shrift to Congress's important interests in conducting inquiries to obtain the information it needs to legislate effectively. Confounding the legislature in that effort would be contrary to the principle that:

> It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served. *United States v. Rumely*, 345 U. S. 41 (1953)

Legislative inquiries might involve the President in appropriate cases; as noted, Congress's responsibilities extend to "every affair of government." Because the President's approach does not take adequate account of these significant congressional interests, we do not adopt it.

D

The House meanwhile would have us ignore that these suits involve the President. Invoking our precedents concerning investigations that did not target the President's papers, the House urges us to uphold its subpoenas because they "relate to a valid legislative purpose" or "concern a subject on which legislation could be had." That approach is appropriate, the House argues, because the cases before us are not "momentous separation-of-powers disputes." …

The House's approach fails to take adequate account of the significant separation of powers issues raised by congressional subpoenas for the President's information. Congress and the President have an ongoing institutional relationship as the "opposite and rival" political branches established by the Constitution. THE FEDERALIST #51. As a result, congressional subpoenas directed at the President differ markedly from congressional subpoenas we have previously reviewed, and they bear little resemblance to criminal subpoenas issued to the President in the course of a specific investigation. Unlike those subpoenas, congressional subpoenas for the President's information unavoidably pit the political branches against one another.

Far from accounting for separation of powers concerns, the House's approach aggravates them by leaving essentially no limits on the congressional power to subpoena the President's personal records. Any personal paper possessed by a President could potentially "relate to" a conceivable subject of legislation, for Congress has broad legislative powers that touch a vast number of subjects. The President's financial records could relate to economic reform, medical records to health reform, school transcripts to education reform, and so on. Indeed, at argument, the House was unable to identify any type of information that lacks some relation to potential legislation.

Without limits on its subpoena powers, Congress could "exert an imperious controul" over the Executive Branch and aggrandize itself at the President's expense, just as the Framers feared. THE FEDERALIST #71. And a limitless subpoena power would transform the established practice of the political branches. Instead of negotiating over information requests, Congress could simply walk away from the bargaining table and compel compliance in court.

The House and the courts below suggest that these separation of powers concerns are not fully implicated by the particular subpoenas here, but we disagree. We would have to be "blind" not to see what "all others can see and understand": that the subpoenas do not represent a run-of-the-mill legislative effort but rather a clash between rival branches of government over records of intense political interest for all involved. *Rumely* (quoting *Bailey v. Drexel Furniture a/k/a The Child Labor Tax Case* (1922).

The interbranch conflict here does not vanish simply because the subpoenas seek personal papers or because the President sued in his personal capacity. The President is the only person who **alone composes a branch of government.** As a result, there is not always a clear line between his personal and official affairs. "The interest of the man" is often "connected with the constitutional rights of the place." THE FEDERALIST #51. Given the

■ ANALYSIS

ALONE COMPOSES A BRANCH OF GOVERNMENT: The Court alludes to the Vesting Clause of Art. II, § 1, which states: "The executive power shall be vested in a President of the United States of America." Compare Art. I, § 1 (vesting legislative power in "a Congress" consisting of the House and Senate) and Art. III, § 1 (vesting judicial power in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish").

close connection between the Office of the President and its occupant, congressional demands for the President's papers can implicate the relationship between the branches regardless whether those papers are personal or official. Either way, a demand may aim to harass the President or render him "complaisant to the humors of the Legislature." THE FEDERALIST #71. In fact, a subpoena for personal papers may pose a heightened risk of such impermissible purposes, precisely because of the documents' personal nature and their less evident connection to a legislative task. No one can say that the controversy here is less significant to the relationship between the branches simply because it involves personal papers. Quite the opposite. That appears to be what makes the matter of such great consequence to the President and Congress.

In addition, separation of powers concerns are no less palpable here simply because the subpoenas were issued to third parties. Congressional demands for the President's information present an interbranch conflict no matter where the information is held — it is, after all, the President's information. Were it otherwise, Congress could sidestep constitutional requirements any time a President's information is entrusted to a third party — as occurs with rapidly increasing frequency. Indeed, Congress could declare open season on the President's information held by schools, archives, internet service providers, e-mail clients, and financial institutions. The Constitution does not tolerate such ready evasion; it deals with substance, not shadows.

E

Congressional subpoenas for the President's personal information implicate weighty concerns regarding the separation of powers. Neither side, however, identifies an approach that accounts for these concerns. For more than two centuries, the political branches have resolved information disputes using the wide variety of means that the Constitution puts at their disposal. The nature of such interactions would be transformed by judicial enforcement of either of the approaches suggested by the parties, eroding a deeply embedded traditional way of conducting government.

A balanced approach is necessary, one that takes a "considerable impression" from "the practice of the government," *McCulloch v. Maryland* (1819), and resists the pressure inherent within each of the separate Branches to exceed the outer limits of its power, We therefore conclude that, in assessing whether a subpoena directed at the President's personal information is "related to, and in furtherance of, a legitimate task of the Congress," *Watkins*, courts must perform a careful analysis that takes adequate account of the separation of powers principles at stake, including both the significant legislative interests of Congress and the unique position of the President. Several special considerations inform this analysis.

First, courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers. Occasions for constitutional confrontation between the two branches should be avoided whenever possible. Congress may not rely on the President's information if other sources could reasonably provide Congress the information it needs in light of its particular legislative objective. The President's unique constitutional position means that Congress may not look to him as a case study for general legislation.

Unlike in criminal proceedings, where the very integrity of the judicial system would be undermined without full disclosure of all the facts, efforts to craft legislation involve predictive policy judgments that are not hampered in quite the same way when every scrap of potentially relevant evidence is not available, While we certainly recognize Congress's important interests in obtaining information through appropriate inquiries, those interests are not sufficiently powerful to justify access to the President's personal papers when other sources could provide Congress the information it needs.

Second, to narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective. The specificity of the subpoena's request serves as an important safeguard against unnecessary intrusion into the operation of the Office of the President.

Third, courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose. The more detailed and substantial the evidence of Congress's legislative purpose, the better. That is particularly true when Congress contemplates legislation that raises sensitive constitutional issues, such as legislation concerning the Presidency. In such cases, it is impossible to conclude that a subpoena is designed to advance a valid legislative purpose unless Congress adequately identifies its aims and explains why the President's information will advance its consideration of the possible legislation.

Fourth, courts should be careful to assess the burdens imposed on the President by a subpoena. We have held that burdens on the President's time and attention stemming from judicial process and litigation, without more, generally do not cross constitutional lines. But burdens imposed by a congressional subpoena should be carefully scrutinized, for they stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage.

Other considerations may be pertinent as well; one case every two centuries does not afford enough experience for an exhaustive list.

When Congress seeks information needed for intelligent legislative action, it unquestionably remains the duty of all citizens to cooperate. Congressional subpoenas for information from the President, however, implicate special concerns regarding the separation of powers. The courts below did not take adequate account of those concerns. The judgments of the Courts of Appeals for the D. C. Circuit and the Second Circuit are vacated, and the cases are remanded for further proceedings consistent with this opinion.

Justice Thomas, dissenting.

… The Committees do not argue that these subpoenas were issued pursuant to the House's impeachment power. Instead, they argue that the subpoenas are a valid exercise of their legislative powers. … I would hold that Congress has no power to issue a legislative subpoena for private, nonofficial documents — whether they belong to the President or not. Congress may be able to obtain these documents as part of an investigation of the President, but to do so, it must proceed under the impeachment power. Accordingly, I would reverse the judgments of the Courts of Appeals. …

Congress' legislative powers do not authorize it to engage in a nationwide inquisition with whatever resources it chooses to appropriate for itself. The majority's solution — a nonexhaustive four-factor test of uncertain origin — is better than nothing. But the power that Congress seeks to exercise here has even less basis in the Constitution than the majority supposes. …

Justice Alito, dissenting.

Justice Thomas makes a valuable argument about the constitutionality of congressional subpoenas for a President's personal documents. In these cases, however, I would assume for the sake of argument that such subpoenas are not categorically barred. Nevertheless, legislative subpoenas for a President's personal

documents are inherently suspicious. Such documents are seldom of any special value in considering potential legislation, and subpoenas for such documents can easily be used for improper non-legislative purposes. Accordingly, courts must be very sensitive to separation of powers issues when they are asked to approve the enforcement of such subpoenas. …

The Court recognizes that the decisions below did not give adequate consideration to separation of powers concerns. Therefore, after setting out a non-exhaustive list of considerations for the lower courts to take into account, the Court vacates the judgments of the Courts of Appeals and sends the cases back for reconsideration. I agree that the lower courts erred and that these cases must be remanded, but I do not think that the considerations outlined by the Court can be properly satisfied unless the House is required to show more than it has put forward to date.

Specifically, the House should provide a description of the type of legislation being considered, and while great specificity is not necessary, the description should be sufficient to permit a court to assess whether the particular records sought are of any special importance. The House should also spell out its constitutional authority to enact the type of legislation that it is contemplating, and it should justify the scope of the subpoenas in relation to the articulated legislative needs. In addition, it should explain why the subpoenaed information, as opposed to information available from other sources, is needed. Unless the House is required to make a showing along these lines, I would hold that enforcement of the subpoenas cannot be ordered. Because I find the terms of the Court's remand inadequate, I must respectfully dissent.