TRUMP V. VANCE: THE DISTRACTION ARGUMENT AND ABSOLUTE PRESIDENTIAL IMMUNITY

ABSTRACT

In 2018, Cyrus Vance Jr., the New York County District Attorney for Manhattan, opened a criminal investigation into then-President Donald J. Trump on suspicion that he violated state law. Vance served a subpoena *duces tecum* on Mazars USA, the financial accounting firm for then-President Trump, directing it to produce then-President Trump's personal and business-related financial information. In response, then-President Trump asserted that his status as President of the United States entitled him to categorical, absolute immunity from the subpoena because compliance with said subpoena would unduly distract him from his constitutional duties. Although this was not the first time that a president had been subject to a subpoena *duces tecum*, the unique action of a state prosecutor serving a sitting president through a third-party accounting firm raised novel constitutional issues for the U.S. Supreme Court in *Trump v. Vance*, which was a case of first impression for the Court. The case involved two legal issues: (1) whether a sitting president is entitled to absolute immunity from state criminal process; and (2) whether a subpoena *duces tecum* served by a state prosecutor must satisfy a heightened showing when served on a sitting president.

The U.S. Constitution's Framers recognized the danger of granting broad immunity for a sitting president because of their experiences with the English monarchy's abuse of unilateral and largely unchecked authority. The Constitution does not permit the criminal indictment of a sitting president, mainly to ensure that the executive is not unduly distracted from executing the vital functions of the presidency. However, the Framers sought to limit the President's ability to evade judicial compliance by directing the executive to comply with judicial process as any ordinary citizen would. Since the birth of our Nation, the Court has consistently upheld this intent in their presidential immunity jurisprudence by compelling a president's compliance with criminal process as necessary for the needs of justice. In yet another affirmation of the Framers' intent, the *Vance* Court came to the unanimous and resounding conclusion that a sitting president is not categorically nor absolutely immune from complying with a state criminal subpoena *duces tecum*. Moreover, the Court held that such a subpoena does not require a heightened showing for service on a sitting president. The Court came to these conclusions from an analysis of two cases that most closely resemble the facts of *Vance*: *United States v. Burr* and *United States v. Nixon*. In all three cases, the Court ruled that a sitting president must comply with judicial process as any citizen would be

required to do and that distraction is not a viable argument for a sitting president seeking to avoid such compliance.

Accordingly, this Comment argues that the *Vance* Court properly adhered to its presidential immunity precedents in a manner consistent with the Framers' intent of the presidency. This Comment then argues that then-President Trump's distraction argument failed because New York's interest in criminal investigations outweighed then-President Trump's Article II interest in executing his duties without undue interference. Next, this Comment argues that the Court should have applied the "demonstrated, specific need" standard from *Nixon* to solidify a standard for serving a subpoena *duces tecum* on a sitting president even though its choice to not apply such standard did not affect the outcome of *Vance*. Finally, this Comment concludes with an update on the case's subject matter as then-President Trump lost the 2020 presidential election, changing his status from President to U.S. citizen and therefore, negating any constitutional protections he had with respect to criminal due process.

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"Presidents are not kings, and Plaintiff is not President."

–Judge Tanya S. Chutkan[1]

INTRODUCTION

America's constitutional form of government recognizes that the President of the United States is not a monarch and ought to be subject to the rule of law as justice requires.[2] Donald J. Trump was a president of first impression in a many ways.[3] Although past presidents have had careers or occupations outside of the political arena, former President Trump was the first billionaire president in U.S. history.[4] However, his business history included declaring bankruptcy six times[5] and numerous allegations

1. Trump v. Thompson, No. 21-cv-2769 (TSC), 2021 U.S. Dist. LEXIS 216812, at *26 (D.D.C. Nov. 9, 2021).

2. *See* Michael McConnell, *The President Who Would Not Be King: Executive Power and the Constitution*, STANFORD LAW. (June 26, 2019), https://law.stanford.edu/stanford-lawyer/articles/the-president-who-would-not-be-king-executive-power-and-the-constitution/.

3. *See Tracking President Trump's Unprecedented Conflicts of Interest*, CITIZENS FOR RESP. & ETHICS IN WASH. (Oct. 21, 2019), https://www.citizensforethics.org/reports-investigations/crew-reports/tracking-president-trumps-unprecedented-conflicts-of-interest/.

4. *The World's Real-Time Billionaires: #1299 Donald Trump*, FORBES, https://www.forbes.com/profile/donald-trump/?sh=2ae3cc847bdb (last updated Oct. 2, 2021).

5. Tom Murse, *Why Donald Trump's Companies Went Bankrupt*, THOUGHTCO., https://www.thoughtco.com/donald-trump-business-bankruptcies-4152019 (Dec. 31, 2020).

of failing to pay independent contractors.[6] During the 2016 election cycle, various media outlets asked then-candidate Trump if he would release his tax returns and any pertinent financial records to the public should he be elected, to which he answered affirmatively.[7] However, former President Trump did not release his recent tax returns, as a candidate or as president,[8] making it difficult to ascertain whether he was worth as much as he claimed.

More importantly, members of Congress who believed that he was involved in conflicts of interest and improper, even criminal, activity inquired into his personal and business-related financial information.[9] Then-President Trump opted to evade these requests by asserting presidential immunity from subpoenas demanding his personal financial information, leaving many to speculate over what those records would reveal.[10] In *Trump v. Vance*,[11] the New York District Attorney for Manhattan, Cyrus Vance Jr., sought then-President Trump's personal financial records by serving a criminal subpoena *duces tecum* on his accounting firm, Mazars USA (Mazars).[12] In response, then-President Trump asserted that the presidency entitled him to absolute immunity from the state subpoena because compliance with the subpoena would unduly distract him from executing his presidential responsibilities.[13] Although the U.S. Supreme Court disagreed over whether the service of a subpoena *duces tecum* required a higher showing, the *Vance* Court unanimously held that then-President Trump was not absolutely immune from the subpoena *duces tecum* under Article II and the Supremacy Clause of the U.S. Constitution.[14]

In contrast to a subpoena compelling a witness to testify in court, a subpoena *duces tecum* is a demand for information that "requires [a] witness to produce a document or documents pertinent to a proceeding."[15] This accords with the long-standing principle that "the public has a right to every man's evidence[,]" subject to procedural and constitutional

6. Steve Reilly, *Hundreds Allege Donald Trump Doesn't Pay His Bills*, USA TODAY (Apr. 25, 2018, 1:42 PM), https://www.usatoday.com/story/news/politics/elections/2016/06/09/donald-trump-unpaid-bills-republican-president-laswuits/85297274/.

7. *See* Colin Wilhelm, *Trump Vows to Release His Tax Returns*, POLITICO (Jan. 24, 2016, 12:19 PM), https://www.politico.com/story/2016/01/donald-trump-tax-returns-218160.

8. Katie Rogers, *Trump on Releasing His Tax Returns: From 'Absolutely' to 'Political Prosecution,'* N.Y. TIMES (Sept. 27, 2020), https://www.nytimes.com/2020/07/09/us/politics/trump-taxes.html.

9. Katherine Sullivan, *Trump's Lawyers Argue for "Temporary Presidential Immunity,"* PROPUBLICA (May 13, 2020, 2:45 PM), https://www.propublica.org/article/trumps-lawyers-argue-for-temporary-presidential-immunity.

10. *See, e.g.*, *id.*

11. 140 S. Ct. 2412 (2020).

12. *Id.* at 2420.

13. *Id.* at 2425.

14. *Id.* at 2429.

15. *Subpoena Duces Tecum*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/subpoena_duces_tecum (last visited Oct. 2, 2021).

limitations.[16] Federal government employees, like every other citizen, are required to comply when subjected to a subpoena *duces tecum* under Department of Justice policy.[17] However, *Vance* addresses the issue of whether a subpoena *duces tecum* may be served on a sitting president, an area of law that is limited and lacks relevant precedent. The Court has only addressed presidential immunity issues in a few circumstances relevant to the issues in *Vance*, which will be discussed later in this Comment.[18]

From these cases, only *United States v. Burr*[19] and *United States v. Nixon*[20] have addressed the issue of presidential immunity from subpoenas *duces tecum* being served on a president in a federal context.[21] Therefore, the legal issue in *Vance*—whether a sitting president must comply with a state grand jury criminal subpoena *duces tecum* that seeks access to their personal financial information through a third-party accounting firm—was one of first impression for the Court.[22] The answer depends on one's broader perspective of the executive's role and scope of power within the federal government. On one side, some argue that a president should be immune from criminal litigation processes while in office to ensure that unduly burdensome distractions do not impair a president while executing their Article II duties.[23] Conversely, others argue that the Framers designed the presidency so that the President is a civilian and, therefore, ought to be subject to the rule of law like every other U.S. citizen.[24] These competing viewpoints are not mutually exclusive because there can be harmony

16. *See What to Know When Served With a Subpoena Duces Tecum*, LAW OFFS. OF HORWITZ & CITRO, P.A. (Oct. 16, 2018), https://www.horwitzcitrolaw.com/blog/2018/october/what-to-know-when-served-with-a-subpoena-duces-t/.

17. *See* U.S Dep't of Just., U.S. Att'ys' Manual 3-19.400, https://www.justice.gov/archives/usam/archives/usam-3-19000-witnesses#3-19.400 (last updated Dec. 7, 2018).

18. United States v. Burr, 25 F.Cas. 30, 32 (C.C.D. Va. 1807) (No. 14,692d) (the sitting president being subpoenaed for the treason trial of a third-party defendant); United States v. Nixon, 418 U.S. 683, 686 (1974) (the sitting president being subpoenaed for his personal communications); Nixon v. Fitzgerald, 457 U.S. 731, 733 (1982) (civil damages liability for the president's acts committed in his official capacity); Clinton v. Jones, 520 U.S. 681, 684 (1997) (civil liability for a sitting president's acts committed outside his official capacity); *see also* Presidential Immunity Case Law chart *infra* Section I.C.

19. 25 F. Cas. 30.

20. 418 U.S. 683.

21. *See Burr*, 25 F. Cas. at 34; *Nixon*, 418 U.S. at 706–07.

22. Trump v. Vance, 140 S. Ct. 2412, 2420 (2020).

23. *See* Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 713 (1995) ("The President must be ready . . . to do whatever it takes to preserve, protect, and defend the Constitution and the American people . . . . We should hesitate before arming each citizen with a kind of legal assault weapon enabling him or her to commandeer the President's time . . . .").

24. R.J. Gray, *Private Wrongs of Public Servants*, 47 CALIF. L. REV. 303, 305 (1959) ("The ancient maxim that 'the King can do no wrong' was and is the keystone of the doctrine of sovereign immunity. . . . [T]he concept was transformed to read that the crown or state can do no wrong nor, for that matter, authorize others to do wrong. . . . However, the corollary of this proposition is that the servants of the state are each personally liable for their wrongful acts, as any other citizens would be. [The] claim that 'every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen' . . . still . . . appears to stand the test of time in most jurisdictions throughout the common law world today.").

between a president executing presidential duties unencumbered and a president being subject to the needs of justice.[25]

Thus, this Comment argues that the *Vance* Court came to the correct conclusion in holding that a sitting president is not absolutely and categorically immune from a state criminal subpoena *duces tecum* because the Framers' intent in forming the presidency and the Court's presidential immunity jurisprudence undermines the "distraction argument."[26] The distraction argument refers to then-President Trump's assertion that compliance with the subpoena *duces tecum* would unnecessarily distract, stigmatize, and harass him, thus impeding the execution of his constitutional duties.[27] Next, this Comment argues that the state's interest in criminal investigation outweighed then-President Trump's interest in executing his Article II duties without undue interference. In this regard, federalism concerns do not support the distraction argument as the subpoena *duces tecum* was not politically motivated and was not being served directly on then-President Trump. Finally, this Comment argues that the Court should have applied the "demonstrated, specific need" standard from *Nixon* to solidify a presidential immunity standard in the criminal context, particularly as it applies to sitting presidents. Although the Court's failure to apply this standard did not affect the subpoena at issue in *Vance*, this Comment argues that the Court improperly altered the standard of review for a subpoena *duces tecum* being served on a sitting president which will create uncertainty and confusion in future cases. This Comment concludes with a brief update on the subject matter at issue in *Vance* as the 2020 presidential election altered then-President Trump's status from President to civilian, which significantly limits his constitutional protections from criminal process.

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25. *See* Jennifer L. Long, *How to Sue the President: A Proposal for Legislation Establishing the Extent of Presidential Immunity*, 30 VAL. U. L. REV. 283, 287 (1995) (asserting a solution to reconcile the interests of private citizens in the litigation process and the national interest in having an undistracted president).

26. The phrase "distraction argument" was synthesized for the purposes of this Comment to describe President Trump's argument asserted in *Vance*, which tends to follow past president's assertions of immunity. As relevant here, the distraction argument can be generally described as follows: A sitting president is absolutely and categorically immune from state criminal process because compliance with a state criminal subpoena *duces tecum* would unduly interfere, via distraction, stigmatization, and harassment, with executing Article II duties [hereinafter distraction argument].

27. *See* Brief for Petitioner at 16–17, Trump v. Vance, 140 S. Ct. 2412 (2020) (No. 19-635) ("Local officials thus cannot exercise their power to hinder the Chief Executive in the performance of the duties that he owes to the undivided nation. The risk that politics will lead state and local prosecutors to relentlessly *harass* the President is simply too great to tolerate. The President must be allowed to execute his official functions without fear that a State or locality will use criminal process to register their dissatisfaction with his performance. A prosecutor crosses a constitutional line when . . . he initiates compulsory criminal process upon the President as part of a grand jury proceeding that targets him. Like indictment itself, criminal process of this kind will inevitably *distract* the President from his unique responsibilities and burden his ability to act confidently and decisively while in office. It also *stigmatizes* the President in ways that will frustrate his ability to effectively represent the United States in both domestic and foreign affairs.") (emphasis added).

I. BACKGROUND

To understand the presidential immunity issues in *Vance*, it is necessary to discuss the responsibilities of the President within America's constitutional government. The unique duties, relative to other federal officials, vested exclusively in the President by Article II of the Constitution[28] create a necessity to shield a sitting president from certain civil and criminal processes and thereby prevent undue interference with the execution of these duties.[29] Furthermore, because the subpoena *duces tecum* in *Vance* comes from a state prosecutor, it is also necessary to discuss the Constitution's Supremacy Clause and the concept of federalism. Finally, the Court's precedent on presidential immunity requires further discussion to ascertain the scope of absolute immunity for sitting presidents subject to judicial process.

A. The President's Unique Position and Role Within the United States' Constitutional Structure

The President of the United States occupies a unique position within the federal government because the Constitution solely vests the President with the "executive Power" of the United States.[30] Article II's vesting power constitutionally obligates the President to carry out a variety of specific duties.[31] These duties include the responsibility to "take Care that the Laws be faithfully executed,"[32] serve as Commander in Chief of the Armed Forces,[33] make treaties "with the Advice and Consent of the Senate,"[34] and "appoint ambassadors,"[35] among other duties.[36] These duties were the result of intense debates at the Constitutional Convention regarding the scope of the President's powers.[37] The American colonists were justifiably apprehensive in granting too much power to the President. Their dealings with the English monarchy—specifically King George III's exercise of broad, unilateral authority—provided good reason to use caution, particularly in discerning the scope of the President's immunity and subjugation to criminal process.[38] Accordingly, in the aftermath of the American Revolution, the colonists drafted and ratified the Articles of

28. U.S. CONST. art. II.
29. Trump v. Vance, 140 S. Ct. 2412, 2431 (2020) (Kavanaugh, J., concurring).
30. U.S. CONST. art. II, § 1, cl. 1.
31. *See id.* §§ 1–3.
32. *Id.* § 3, cl. 4.
33. *Id.* § 2, cl. 1.
34. *Id.* § 2, cl. 2.
35. *Id.*
36. *Id.* §§ 2–3.
37. *See* THE FEDERALIST NO. 67 (Alexander Hamilton) ("There is hardly any part of the system which could have been attended with greater difficulty in the arrangement of it than [the office of the president]; and there is, perhaps, none which has been inveighed against with less candor or criticized with less judgment.").
38. *See generally* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 64–66 (Max Farrand ed., Yale Univ. Press, 1911) [hereinafter RECORDS] (Wilson, Morris, Mason, Franklin, Madison, Pinkney, and Gerry's comments on the necessity for an impeachment process of the chief magistrate for potential offenses against the public).

Confederation, which created the first system of governance in the novel country "with Congress serving as a last resort on appeal of disputes."[39] However, this new form of government did not provide for a strong executive or a centralized judiciary and led to the ratification of the Constitution in its place, providing for three branches of government and their separation of powers.[40]

The Constitution's Framers vested significant power in a sole executive by bestowing the President with exclusive constitutional responsibilities.[41] Although they granted a significant amount of authority to one person, the Framers were "unified in a single proposition: the President would not be King."[42] Accordingly, the Framers provided for the President's impeachment by Congress for "Treason, Bribery, or other high Crimes and Misdemeanors."[43] Justice Story's analysis from his *Commentaries on the Constitution of the United States* provides the rationale for utilizing an impeachment process instead of a criminal proceeding in light of the President's responsibilities:

> There are . . . incidental powers, belonging to the [President], which are necessarily implied from the nature of the functions, which are confided to it. Among these must necessarily be included the power to perform them . . . . The [P]resident cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of his duties of his office; and for this purpose, his person must be deemed, in civil cases at least, to possess an official inviolability.[44]

In other words, the President, being charged with these important and exclusive duties, should not be subject to criminal indictment while in office.[45] The Framers did not intend to subject a sitting president to criminal prosecution in the same manner as a normal citizen, but still thought the President ought to "pay obedience to the laws of his country, and obey the commands of its courts of justice" as any citizen would.[46] Accordingly, with the presidency established in this manner, the Framers concluded that the President "would not be above [the needs of] 'justice,'"[47] and decided that the President would be subject to impeachment while in office but that

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39. *Articles of Confederation*, HISTORY.COM, https://www.history.com/topics/early-us/articles-of-confederation (last updated Sept. 27, 2019).

40. *Id.*

41. *See* U.S. CONST. art. II, § 1, cl. 1.

42. Christopher James Sears, Clinton v. Jones*: The King Has No Clothes (Nor Absolute Immunity to Boot)*, 100 W. VA. L. REV. 493, 497–98 (1997); *see also* R. Brent Walton, *We're No Angels:* Paula Corbin Jones v. William Jefferson Clinton, 71 TUL. L. REV. 897, 904–05 (1997).

43. U.S. CONST. art. II, § 4.

44. J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563 (1833), LONANG INSTITUTE [hereinafter COMMENTARIES].

45. *Id.*

46. Sears, *supra* note 42, at 498 (quoting 1 DAVID ROBERTSON, TRIAL OF AARON BURR FOR TREASON 137 (New York, James Cockcroft & Co. 1875)).

47. *Id.* at 497–98.

criminal prosecution may follow at the conclusion of the President's term.[48]

B. The Constitution's Supremacy Clause and the Concept of Federalism

The Constitution's Supremacy Clause establishes that the Constitution and federal law is superior to any state constitution or positive law.[49] Thus, the Supremacy Clause effectively prohibits state interference with the national government's exercise of constitutional powers and prevents states from functioning in a manner exclusively reserved for the national government.[50] This concept was solidified in the seminal case *McCulloch v. Maryland*,[51] in which the State of Maryland passed legislation imposing a tax on the congressionally incorporated Bank of the United States.[52] Having concluded that Congress has the implied power to incorporate a national bank, Chief Justice Marshall held that Maryland's law was contrary to the Supremacy Clause and therefore, void.[53] Chief Justice Marshall's reasoning explains the nature of America's division of power between state sovereignties and the national government:

> [T]he government of the Union, though limited in its powers, is *supreme within its sphere of action*. . . . the people have, in express terms, decided [to bind state governments], by saying, "this constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the State legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "any thing in the constitution or laws of any state to the contrary notwithstanding."[54]

This division of power is more commonly referred to as "federalism," where the states bestow certain powers and responsibilities on the federal government and its actors that cannot be interfered with by state

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48. THE FEDERALIST NO. 69 (Alexander Hamilton) ("The President of the United States would be liable to be impeached, tried, and upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law."); *see also* THE FEDERALIST NO. 65 (Alexander Hamilton) ("The punishment which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, [the president] will still be liable to prosecution and punishment in the ordinary course of law.").

49. 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, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

50. *See id.*

51. 17 U.S. 316 (1819).

52. *Id.* at 400.

53. *Id.* at 436–37.

54. *Id.* at 405–06 (emphasis added).

sovereignties or its actors.[55] As such, the states retain the remaining powers granted under the Tenth Amendment.[56] James Madison articulated this division through a perspective that emphasized the necessity in preserving a harmonious union by enumerating which powers ought to be rightly entrusted to the national government.[57] He believed that the Constitution's structure ought to permit states to have powers of their own.[58]

In short, under the Supremacy Clause, state governments and their actors must yield to the supreme power of the federal government when the federal government expressly reserves such powers or when circumstances prohibit states from interfering with the federal government's operations.[59] However, there are also instances where the federal judiciary will abstain from interfering with state matters.[60] For example, under the abstention doctrine in *Younger v. Harris*,[61] federal courts will not intervene in a state criminal prosecution absent a constitutional need to protect the defendant.[62]

C. Historical Precedent on Presidential Immunity from Subpoenas Duces Tecum *and the Scope of Absolute Immunity for Presidents*

The concept of presidential immunity is not only vital to the understanding of the executive's scope of power within the national government, but also has an interesting history dating back to the early years of the American Republic.[63] In the 1807 case *Burr*, Aaron Burr was on trial for treason and moved for the issuance of a subpoena *duces tecum* directed at then-President Thomas Jefferson for a letter in Jefferson's possession that Burr believed would aid his defense.[64] Then-President Jefferson's sole argument for why he did not need to comply with the subpoena *duces tecum* was that a president's "duties as chief magistrate demand his whole

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55. *See also Federalism*, ENCYCLOPEDIA BRITTANICA (2020) ("Federalism [is a] mode of political organization that unites separate states . . . within an overarching political system in a way that allows each to maintain its own integrity.").

56. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively . . . .").

57. *See* THE FEDERALIST NO. 44 (James Madison).

58. *See id.* ("We have now reviewed, in detail, all the articles composing the sum or quantity of power delegated by the proposed Constitution to the federal government, and are brought to this undeniable conclusion, that no part of the power is unnecessary or improper for accomplishing the necessary objects of the Union."); *see also* THE FEDERALIST NOS. 41, 45 (James Madison); U.S. CONST. art. I, § 8 (enumerated powers of the federal government); U.S. CONST. amend. X ("The powers not delegated to the [federal government], . . . are reserved to the [S]tates . . . ."). *See generally Supremacy Clause*, LEGAL DICTIONARY (Mar. 13, 2016).

59. *See* U.S. CONST. art. VI, cl. 2.

60. *See, e.g.*, 28 U.S.C. § 2283 (1948) ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.").

61. 401 U.S. 37 (1971).

62. *Id.* at 54 (denying equitable relief to Defendant Harris for failing to show "bad faith, harassment, or any other unusual circumstance[s]" requiring federal intervention).

63. *See* 63C AM. JUR. 2D *Public Officers and Employees* § 303 (2021) (summarizing immunity for the president as well as aides and advisers).

64. United States v. Burr, 25 F. Cas. 30, 33–34 (C.C.D. Va. 1807) (No. 14,692d).

time for national objects."[65] Justice Marshall, presiding over the trial as Circuit Justice for Virginia, ruled that then-President Jefferson was subject to the subpoena as he did not "stand exempt" from Burr's Sixth Amendment guarantee of due process.[66] Justice Marshall stated that the president's duties were "not unremitting" so as to exempt the president from compliance with the subpoena *duces tecum*.[67] The ruling in *Burr* became the foundational precedent on presidential immunity in judicial proceedings in the succeeding two centuries.

In 1972, then-President Richard Nixon became embroiled in what is now infamously known as the Watergate scandal.[68] In *Nixon*, then-President Nixon was charged as an unindicted coconspirator for the break-in at the Democratic National Committee headquarters and received a subpoena *duces tecum* for certain tape recordings and documents regarding his communication with his aides and advisers.[69] In response, then-President Nixon asserted a claim of immunity on the grounds that the need to maintain confidential presidential communication was of the utmost importance and that the doctrine of separation of powers immunizes him.[70] However, then-Chief Justice Burger rejected these arguments holding that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications . . . can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."[71] The Court reasoned that a president's absolute immunity claim cannot rest on a mere "generalized claim of . . . public interest" because doing so "would upset the constitutional balance of 'a workable government' . . . ."[72] In this regard, a critical legal conclusion from *Nixon* is that "the legitimate needs of the judicial process may outweigh Presidential privilege."[73]

In the 1982 case *Nixon v. Fitzgerald*,[74] A. Ernest Fitzgerald sued private citizen former President Nixon for damages for acts committed in Nixon's official capacity as President of the United States; namely, the reorganization of the Air Force, which caused Fitzgerald to lose his job.[75] The Court held that the President is "entitled to absolute immunity from [civil] damages liability predicated on his official acts" as a "functionally

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65. *Id.* at 34. President Jefferson's assertion can be reasonably described as the first instance of a president asserting an argument akin to President Trump's distraction argument.

66. *See* Trump v. Vance, 140 S. Ct. 2412, 2422 (2020) (discussing the holding from *Burr*, 25 F. Cas. at 33–34).

67. *Burr*, 25 F. Cas. at 34, 37. ("The propriety of introducing any paper . . . [would] depend on the character of the paper, not the character of the person who holds it.").

68. *See The Watergate Scandal*, HISTORY.COM, https://www.history.com/topics/1970s/watergate(June 16, 2021).

69. United States v. Nixon, 418 U.S. 683, 687–88 (1974).

70. *Id.* at 705–06.

71. *Id.* at 706.

72. *Id.* at 707.

73. *Id.*

74. 457 U.S. 731 (1982).

75. *Id.* at 733.

mandated incident of the President's unique office."[76] However, the Court later noted that "the sphere of protected action must be related closely to the immunity's justifying purposes" as "absolute immunity should extend only to acts in performance of particular functions of [an official's] office."[77] In this manner, the *Fitzgerald* holding serves as a seminal precedent for understanding the nature of a president's absolute immunity claim for acts in the president's official capacity.

Finally, in 1994, Paula Corbin Jones sued then-President Bill Clinton alleging that he sexually harassed her while he was the Governor of Arkansas in *Clinton v. Jones*.[78] In response, then-President Clinton asserted a type of temporary presidential immunity where courts would defer the issues until the conclusion of his term as president.[79] The Court rejected this argument concluding that "immunities are grounded in 'the nature of the function performed, not the identity of the actor who performed it.'"[80] Therefore, then-President Clinton's assertion of "immunity from suit for unofficial acts grounded purely in the identity of his office" did not sufficiently persuade the Court to hold him immune to Jones's civil lawsuit.[81] In this regard, *Clinton* is distinguished from *Fitzgerald* in that a president is absolutely immune for acts in their official capacity but not necessarily for acts in their unofficial capacity.[82] The following table serves as a visual aid in distinguishing these cases, and it was against this jurisprudential background that the *Vance* Court came to their legal conclusions:

TABLE 1. *Presidential Immunity Case Law Prior to* Vance[83]

Case	**Litigation**	**President's Involvement**	**Conduct Occurred**	**Matter Pursued**	**Presidential Immunity**
Burr	Criminal	Third-Party	During Presidency	During Presidency	Declined
Nixon	Criminal	Defendant	During Presidency	During Presidency	Declined
Fitzgerald	Civil	Defendant	During Presidency	After Presidency	Granted
Clinton	Civil	Defendant	Before Presidency	During Presidency	Declined

76. *Id.* at 749.

77. *Id.* at 755 (first citing Butz v. Economou, 438 U.S. 478, 508–17 (1978); and then citing Imbler v. Pachtman, 424 U.S. 409, 430–31 (1976)).

78. 520 U.S. 681, 684–85 (1997) (as an essential clarification, Jones civilly sued Clinton while Clinton was the sitting President of the United States for past actions that occurred in his unofficial capacity).

79. *Id.* at 686–87.

80. *Id.* at 695 (citing Forrester v. White, 484 U.S. 219, 229 (1988)).

81. *Id.* (Clinton's argument is similar to the distraction argument by claiming the inherent nature of the presidency endows him with exclusive duties that cannot be distracted from).

82. *Compare Fitzgerald*, 457 U.S. at 749, *with Clinton*, 520 U.S. at 693–95.

83. Other references to this chart in this paper will refer to "Presidential Immunity Case Law chart."

II. *TRUMP V. VANCE*

A. Facts

In 2018, Cyrus Vance Jr., the New York District Attorney for Manhattan, opened an investigation into "business transactions involving multiple individuals whose conduct may have violated state law."[84] One year later, Vance's office—acting on behalf of a grand jury—served a subpoena *duces tecum* on Mazars, then-President Trump's personal accounting firm.[85] The subpoena *duces tecum* sought then-President Trump's financial records "relating to the President and business organizations affiliated with him."[86] In response, then-President Trump, acting in his personal capacity, sued Vance and Mazars in federal district court seeking a declaratory judgment to prohibit enforcement of the subpoena by asserting "absolute immunity from state criminal process."[87] Mazars abstained from taking a position on the legal issues raised.[88]

B. Procedural History

The district court abstained from exercising jurisdiction, citing the abstention doctrine in *Younger*, which prevents the federal judiciary from interfering with state criminal prosecutions.[89] Accordingly, the district court dismissed the case; yet, the court found in an alternative holding that then-President Trump was "not entitled to injunctive relief."[90] On appeal, the Second Circuit held that "*Younger* abstention was inappropriate" as Vance, the state actor, and then-President Trump, the federal actor, were "already in conflict," and the doctrine is designed to "'prevent[] friction' between States and the Federal Government."[91] Furthermore, the Second Circuit affirmed the district court's alternative holding denying injunctive relief stating that "presidential immunity does not bar enforcement of a

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

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id. Compare id.* (holding President Trump is not absolutely immune from the issuance of a state criminal subpoena *duces tecum* into his personal and business-related financial records), *with* Trump v. Mazars U.S.A., L.L.P., 140 S. Ct. 2019 (2020) (holding the lower courts did not adequately take separation of powers concerns into account for congressional subpoenas for President Trump's financial information). *Mazars*, decided the same day as *Vance*, discusses a constitutional law issue stemming from Congressional subpoenas that were substantially similar to the *Vance* subpoenas being served on Mazars for President Trump's personal and business-related financial information. *Mazars*, 140 S. Ct. at 2026. The *Mazars* Court remanded the case to properly analyze separation of powers concerns between the Legislative and Executive Branches. *Id.* at 2036. *Mazars* is distinguished from *Vance* because the Court analyzed the congressional subpoenas in *Mazars* from a separation of powers perspective versus the state criminal subpoena in *Vance* from a federalism perspective. Accordingly, *Mazars* has no bearing on *Vance* and will not be discussed further in this Comment, but its discussion is important to note for contextual purposes.

89. *Vance*, 140 S. Ct. at 2420–21.

90. *Id.* at 2421.

91. *Id.*

state grand jury subpoena directing a third party to produce non-privileged material . . . ."[92] The U.S. Supreme Court granted certiorari.[93]

C. Opinion of the Court

Chief Justice Roberts delivered the majority opinion, which Justices Ginsburg, Breyer, Sotomayor, and Kagan joined in full, and Justices Kavanaugh and Gorsuch joined in judgment.[94] The legal issue before the Court asked "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."[95] Chief Justice Roberts began the Court's inquiry by analyzing the historical precedent on presidential immunity found in *Burr* and *Nixon*.[96]

Chief Justice Roberts articulated the standard in *Burr* that a president "does not 'stand exempt from the general provisions of the constitution' or . . . the Sixth Amendment's guarantee" of a criminal defendant's right to "obtain[] witnesses for their defense."[97] Chief Justice Roberts further noted from *Burr* that "[a] subpoena *duces tecum* . . . may issue to any person to whom an ordinary subpoena may issue" as the "'propriety of introducing any papers' . . . would 'depend on the character of the paper, not on the character of the person who holds it.'"[98] Lastly, Chief Justice Roberts, noting "the common law maxim that 'the public has a right to every man's evidence,'" articulated that "the public interest in fair and accurate judicial proceedings is at its height in the criminal setting."[99]

With these principles in mind, Chief Justice Roberts turned to then-President Trump's claim that he was absolutely and categorically immune from compliance with the subpoena because it would impede the execution of his Article II duties.[100] Chief Justice Roberts noted that the President "occupies a unique position in the constitutional scheme"[101] that generally prohibits states from unduly interfering with the federal government's operations.[102] Chief Justice Roberts then directed his analysis to then-President Trump's distraction argument: compliance with the subpoena *duces tecum* would unduly distract, stigmatize, and harass him.[103]

Chief Justice Roberts ultimately rejected all three of then-President Trump's contentions.[104] First, on distraction, Chief Justice Roberts stated

92. *Id.* (quoting Trump v. Vance, 941 F.3d 631, 637 (2d Cir. 2019).
93. *Id.*
94. *Id.* at 2420, 2431.
95. *Id.* at 2420.
96. *Id.* at 2421–22.
97. *Id.* at 2422 (citing United States v. Burr, 25 F. Cas. 30, 33–34 (C.C. Va. 1807) (No. 14,692d)).
98. *Id.* at 2422–23 (citing *Burr*, 25 F. Cas. at 34).
99. *Id.* at 2424 (citing United States v. Nixon, 418 U.S. 683, 709 (1974)).
100. *Id.* at 2425.
101. *Id.* (citing Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982)).
102. *Id.* (citing McCulloch v. Maryland, 17 U.S. 316, 436 (1819)).
103. *Id.*; *see also* distraction argument, *supra* note 27.
104. *Vance*, 140 S. Ct. at 2426–29.

that a distraction claim alone is not sufficient for a president to successfully assert absolute immunity so long as the criminal subpoena is properly tailored.[105] Second, on stigma, Chief Justice Roberts stated that the subpoena *duces tecum* would not inherently damage then-President Trump's reputation because compliance with the subpoena only shows the President "performing 'the citizen's normal duty of . . . furnishing information relevant' to a criminal investigation."[106] Third, on harassment, Chief Justice Roberts stated that the tools available to federal courts "to deter and . . . dismiss vexatious . . . suits" from grand juries engaged in malicious or bad faith investigations already protected the former President from undue harassment.[107] Chief Justice Roberts therefore concluded that absolute, categorical immunity was not warranted under constitutional law, a unanimous point among the Justices.[108]

Next, Chief Justice Roberts turned his analysis to then-President Trump's claim that a prosecutor serving a criminal subpoena *duces tecum* must satisfy a heightened standard of need.[109] Chief Justice Roberts rejected this claim for three reasons.[110] First, he reasoned that a heightened standard only extends protection for official documents, citing *Burr*'s standard that a president must respect a subpoena *duces tecum* so long as the documents in the president's possession are not of an official nature.[111] Second, Chief Justice Roberts stated that the Solicitor General—the office responsible for supervising and conducting government litigation in the U.S. Supreme Court[112]—did not adequately establish the need for heightened protection because the Solicitor General's argument "ha[d] no basis in law."[113] Third, Chief Justice Roberts reasoned that the "public['s] interest in fair and effective law enforcement" favors compliance with the subpoena *duces tecum*, absent a need to protect the President from undue interference.[114] In rejecting then-President Trump's argument, Chief Justice Roberts concluded that requiring such a heightened standard would impede the grand jury's function of gathering all relevant information to the investigation, which could have the effect of frustrating their purpose in the criminal context.[115]

Ultimately, Chief Justice Roberts held that under Article II and the Supremacy Clause, then-President Trump was not absolutely and categorically immune from the subpoena *duces tecum* and that its issuance does

105. *Id.* at 2426.
106. *Id.* at 2427 (quoting Branzburg v. Hayes, 408 U.S. 665, 691 (1972)).
107. *Id.* at 2428 (citing Clinton v. Jones, 520 U.S. 681, 708 (1997)).
108. *Id.* at 2429.
109. *Id.*
110. *Id.*
111. *See id.* (quoting United States v. Burr, 25 F. Cas. 187, 191 (C.C. Va. 1807) (No. 14694)).
112. *About the Office*, OFF. OF THE SOLIC. GEN. (May 24, 2021), https://www.justice.gov/osg/about-office.
113. *Vance*, 140 S. Ct. at 2429–30.
114. *Id.* at 2430.
115. *Id.*

not require a heightened standard of need.[116] However, the Court, in affirming the judgment of the Second Circuit, remanded the case to allow then-President Trump to assert legal arguments to challenge the subpoena on constitutional grounds regarding the subpoena's subject matter.[117] If then-President Trump succeeded in asserting a legal argument that the subpoena would unnecessarily obstruct or impede his Article II functions, the judiciary could utilize its "inherent authority to quash or modify the subpoena . . . ."[118]

D. Justice Kavanaugh's Concurring Opinion

Justice Kavanaugh authored an opinion concurring in the Court's judgment, which Justice Gorsuch joined.[119] Justice Kavanaugh began by reiterating the conclusion that then-President Trump was not absolutely immune from complying with the state criminal subpoena *duces tecum* but may raise legal objections to the subpoena on constitutional grounds.[120] However, Justice Kavanaugh, building off the legal issues presented before the Court, posed the question of how to balance the state's interest in criminal investigations and the President's Article II interest in performing the executive's duties without undue interference.[121] Justice Kavanaugh answered this question by asserting that he would have applied the standard from *Nixon* that requires a prosecutor to "establish a 'demonstrated, specific need' for the president's information."[122] Justice Kavanaugh asserted that this standard will accommodate both the state and president's interests, ensure the prosecutor's interest in the president's information is "sufficiently important to justify an intrusion," and reduce the risk of unwarranted burdens on the president.[123]

E. Justice Thomas's Dissenting Opinion

Justice Thomas authored a dissenting opinion through an originalist interpretation of the Constitution.[124] Justice Thomas joined in the conclusion that then-President Trump was not absolutely immune from the issuance of the subpoena *duces tecum* but asserted that he could have been immune from its enforcement.[125] From his reading of the Constitution, Justice Thomas would have applied the standard from *Burr* that the President is entitled to injunctive and declaratory relief upon an adequate showing that then-President Trump would be unable to comply with the subpoena because of interference with the executive's Article II duties.[126] Justice

116. *Id.* at 2430–31.
117. *Id.*
118. *Id.* (citing Clinton v. Jones, 520 U.S. 681, 708 (1997)).
119. *Id.* at 2431 (Kavanaugh, J., concurring).
120. *Id.*
121. *Id.* at 2432.
122. *Id.* (quoting United States v. Nixon, 418 U.S. 683, 713 (1974)).
123. *Id.*
124. *Id.* at 2433–34 (Thomas, J., dissenting).
125. *Id.* at 2434.
126. *Id.* at 2436.

Thomas further noted that "[a]lthough *Burr* involved a federal subpoena, the same principle [ought to] appl[y] to a state subpoena."[127] Lastly, Justice Thomas noted that courts "lack the institutional competence" to determine the President's ability to comply with the subpoena *duces tecum*.[128] Accordingly, Justice Thomas concluded that the proper course of action would have been to vacate the Second Circuit's decision and remand the case.[129]

F. Justice Alito's Dissenting Opinion

Justice Alito authored a dissenting opinion through a structuralist interpretation of the Constitution.[130] Justice Alito noted his primary concerns with the majority's ruling stemmed from the constitutional nature and role of the presidency and the intent of the Constitution's Supremacy Clause.[131] Justice Alito would have adopted a new rule that courts should take into account the potential harassment effect of subpoenas on the President's function because of political targeting concerns as state actors are beholden to their local constituencies.[132] Further, he would have adopted a heightened standard for the state subpoena, requiring the prosecutor to provide: (1) a general description of possible offenses, (2) an outline of how the records relate to those offenses, and (3) an explanation of why those records should be produced now instead of at the end of a president's term.[133] In sum, Justice Alito concluded that the Court's ruling "threatens to impair" the President's function and fails to provide protection against the nation's local prosecutors.[134]

III. ANALYSIS

Previous presidents have asserted distraction from their Article II duties to avoid compliance with criminal proceedings, making the potential for distraction the central focus of any immunity question in the context of sitting presidents.[135] For the immunity question presented in *Vance*, the Court addressed then-President Trump's distraction argument and properly limited the doctrine of absolute immunity for a sitting president by holding that then-President Trump was not absolutely and categorically immune from compliance with the state criminal subpoena *duces tecum*[136]—which is consistent with the Framers' intent of the presidency.

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127. *Id.*
128. *Id.* at 2439.
129. *Id.*
130. *Id.* at 2439–40 (Alito, J., dissenting).
131. *Id.* at 2440–42.
132. *See id.* at 2447 ("The rule should take into account both the effect of subpoenas on the functioning of the Presidency and the risk that they will be used for harassment.").
133. *Id.* at 2448–49.
134. *Id.* at 2452.
135. *See* distraction argument, *supra* note 27; *see also* United States v. Burr, 25 F. Cas. 30, 34 (C.C. Va. 1807) (No. 14,692d) (proposing the distraction argument); Nixon v. Fitzgerald, 457 U.S. 731, 751–53 (1982) (asserting the distraction argument in support of immunity against private lawsuits).
136. *Vance*, 140 S. Ct. at 2429 (majority opinion).

The Court effectively decided that New York's interest in criminal investigation outweighed then-President Trump's interest in exercising his Article II duties without undue interference.[137] However, the Court departed from its constitutional precedents when it failed to apply the "demonstrated, specific need" standard from *Nixon*.[138] Although applying the standard from *Nixon* would not have altered the holding in *Vance*, by failing to apply the *Nixon* standard, the Court created the potential for uncertainty in future presidential immunity cases.[139]

First, Section A of this Part will argue that then-President Trump's distraction argument was unsupported by the Framers' intent when forming the presidency and the Court's constitutional jurisprudence on presidential immunity. Section B of this Part will then argue that the State of New York's interest in criminal investigations outweighed then-President Trump's Article II interest in executing his duties without undue interference, further limiting his distraction argument. Federalism concerns were unwarranted as the subpoena *duces tecum* was not politically motivated and was served on a third party, rather than on then-President Trump.[140] Lastly, Section C of this Part will argue that the Court failed to apply the standard from *Nixon*, which would have solidified a standard for presidential immunity cases and accommodated the parties' competing interests. While it did not alter the outcome of *Vance*, the Court's failure to apply the *Nixon* standard creates uncertainty in applying presidential immunity standards for future litigants.

A. The Framers' Intent in Forming the Presidency and the Court's Constitutional Precedent Undermined Then-President Trump's Distraction Argument

The Constitutional Convention attendees experienced a major struggle in forming the presidency and more specifically, in articulating the degree to which the President ought to be immune from criminal process.[141] The Framers ultimately settled for an impeachment process as opposed to the ordinary criminal process.[142] Justice Story accorded this process in his analysis, stating how a president cannot "be liable to arrest, imprisonment, or detention while he is in the discharge of the duties of his office."[143] The rationale behind the impeachment process was for a president to conduct the executive's Article II duties without undue interference from criminal process, and "impeachment was understood [then as] the *only* way to reach

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137. *Id.*

138. *Id.* at 2432 (Kavanaugh, J., concurring) (citing United States v. Nixon, 418 U.S. 683, 713 (1974)).

139. *See id.* at 2432–33.

140. *See id.* at 2420 (majority opinion).

141. *See* THE FEDERALIST NO. 67, *supra* note 37 and accompanying text; *see also* RECORDS, *supra* note 37, at 64–66 and accompanying text.

142. *See* COMMENTARIES, *supra* note 44, §§ 1535, 1563; Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, 39 OCCASIONAL PAPERS L. SCH. U. CHI. 1, 4–5 (1998).

143. COMMENTARIES, *supra* note 44, § 1563; *see also* U.S. CONST. art. II, § 4.

misconduct by the President."[144] However, this understanding did not confer on the President a form of absolute immunity from compliance with all criminal processes.

By providing for the impeachment process, the Framers rejected distraction as a reason for a president to avoid compliance with criminal processes and endorsed the president's compliance with the law.[145] The Framers acknowledged that the impeachment process would operate such that the President would not be a monarch and would not be above the rule of law or the needs of justice.[146] Should a president engage in misconduct, the president must "answer to the judicial branch" as a private citizen would, but not necessarily under the same procedure.[147] More importantly, the Framers definitively rejected the argument that the "President [would be] disabled during the trial of an impeachment."[148] Although impeachment is a different type of proceeding than the one at issue in *Vance*, this demonstrates the Framers' belief that compliance with criminal due process would not be too distracting for a sitting president.[149] The Framers fiercely debated this issue but ultimately endorsed the idea of a president's obligatory compliance with a subpoena *duces tecum* such that the president must "obe[y] . . . the laws of his country, and obey the commands of its courts of justice."[150] Thus, the intent of utilizing the impeachment process lends support to the argument that the Framers would not accept distraction as a means for a president to escape criminal due process.

In providing for a president's impeachment, the Framers implied that a president cannot evade criminal due process simply because of the president's unique position in the federal government.[151] The Supreme Court has continually applied this intent in its constitutional jurisprudence by effectively ensuring that the president is "not . . . above 'justice'"[152] in its rulings in *Burr*, *Nixon*, and *Clinton*.[153] In *Burr*, then-President Jefferson's argument was the first instance of a sitting president asserting distraction as the reason for being exempt from compliance with a subpoena *duces tecum*.[154] In holding that then-President Jefferson was subject to Burr's

144. Isenbergh, *supra* note 142, at 5.

145. *See* distraction argument, *supra* note 27.

146. *See* Sears, *supra* note 42, at 497–98; *see also* Walton, *supra* note 42, at 904–05; United States v. Lee, 106 U.S. 196, 220 (1882) ("No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.").

147. George E. Danielson, *Presidential Immunity from Criminal Prosecution*, 63 GEO. L. J. 1065, 1068 (1975).

148. *Id.* (citing RECORDS, *supra* note 38, at 612–13).

149. Trump v. Vance, 140 S. Ct. 2412, 2420 (2020).

150. Walton, *supra* note 42, at 905 (quoting ROBERTSON, *supra* note 46, at 137).

151. *See* sources cited *supra* note 48 and accompanying text.

152. *See* Sears, *supra* note 42, at 497–98.

153. *See also* Presidential Immunity Case Law chart *supra* Section I.C.

154. *Compare Burr*, 25 F. Cas. at 34 (arguing that executive duties demand all the sitting president's time), *with* distraction argument, *supra* note 27 (defining then-President Trump's argument as compliance with the subpoena *duces tecum* constituting a distraction from his presidential duties under Article II).

subpoena *duces tecum*, Justice Marshall reasoned that the president is "of the people" and subject to the law because a subpoena *duces tecum* "may issue to any person to whom an ordinary subpoena may issue."[155] Accordingly, *Burr* decisively undermined the distraction prong of then-President Trump's distraction argument in *Vance*[156] because the President's unique status in the constitutional scheme does not exempt him from compliance with a subpoena *duces tecum*.[157] In this regard, a subpoena *duces tecum* may be served on a sitting president because its issuance is not precluded simply by virtue of the president occupying the office.[158]

The rulings in *Nixon* and *Clinton* solidified *Burr*'s principles, further supporting the Framers' intent of subjecting the President to the needs of criminal due process.[159] Reaffirming Justice Marshall's holding in *Burr*, the *Nixon* Court explicitly rejected then-President Nixon's assertion of immunity to subpoenas for his personal communications.[160] The *Clinton* Court later described the decision in *Nixon* as "unequivocally and emphatically endors[ing Justice] Marshall's" holding in *Burr*.[161] Although the legal issues in *Vance* were ones of first impression for the Court,[162] these immunity principles from the Court's jurisprudence were sufficiently applicable to and became controlling over then-President Trump's distraction argument in *Vance*.[163]

These cases all limit a president asserting the unique identity of the office as justification for non-compliance with a subpoena, which weakens the distraction argument in *Vance*.[164] Then-President Trump's key contention was that the President has "unparalleled [constitutional] responsibilities" that would be hindered if "every prosecutor in th[e] country may target him with criminal process."[165] Presidents asserting an immunity argument framed through the immense power and unique responsibilities of the presidency is nothing new.[166] Then-President Trump undoubtedly had constant constraints on his time because of the nature of the role in

155. *Burr*, 25 F. Cas. at 34.

156. *See* Trump v. Vance, 140 S. Ct. 2412, 2425–26 (2020) ("The President's primary contention . . . is that complying with state criminal subpoenas would necessarily divert the Chief Executive from his [Article II] duties."); *see also* distraction argument, *supra* note 27.

157. *Burr*, 25 F. Cas. at 33–34.

158. *Id.* at 34.

159. *See* United States v. Nixon, 418 U.S. 683, 707 (1974); Clinton v. Jones, 520 U.S. 681, 704 (1997); *see also* Presidential Immunity Case Law chart *supra* Section I.C.

160. *Nixon*, 418 U.S. at 707.

161. *Clinton*, 520 U.S. at 704.

162. Trump v. Vance, 140 S. Ct. 2412, 2420 (2020).

163. *See* distraction argument, *supra* note 27.

164. *See id.*; *see also* Presidential Immunity Case Law chart, *supra* Section I.C.

165. Brief for Petitioner, *supra* note 27, at 16; *see* distraction argument, *supra* note 27.

166. *See* Jennifer Schaller, *Executive Immunity and Impeachment: Any Precedent for President Trump's Strategy?*, 9 NAT'L L. REV. (2019) ("Executive privilege is invoked in the name of the [P]resident, but it can cover any executive officer. It is a privilege recognized by the Supreme Court. Presidential immunity purports to cover anyone who works in the White House, or the Executive Office of the [P]resident. The Theory is that Congress can no more summon a White House employee to appear than it could summon the [P]resident. . . . Every president at least since Nixon has claimed immunity . . . from even having to show up in [Congress] to answer questions . . . .").

fulfilling important constitutional obligations.[167] However, the Court's principles on presidential immunity demonstrate that the distraction argument in *Vance* is clearly insufficient.[168]

Distraction fails because *Burr*'s principle controls on the scope of immunity in the context of the President's position within the federal government, and this principle has been consistently reaffirmed by the Court's practice: "A subpoena *duces tecum* . . . may issue to any person to whom an ordinary subpoena may issue . . . ."[169] Moreover, as the subject matter of the subpoena relates to unofficial conduct, the *Clinton* Court rejected a harassment argument by stating that the reasoning in *Fitzgerald* for absolute immunity does not supply "support for an immunity for *unofficial* conduct."[170] The Court's reasoning from *Clinton* effectively concludes that a president is unlikely to be unduly distracted or harassed in a criminal context for actions related to unofficial conduct. Regarding stigma, the issuance of a subpoena *duces tecum* on a sitting president would not necessarily stigmatize a president's reputation, even if the president is under criminal investigation, because the president would be "performing 'the citizen's normal duty of . . . furnishing information relevant' to a criminal investigation."[171] Ultimately, the Framers did not intend for the President to be absolutely immune to all criminal process, and the Court—relying primarily on Justice Marshall's reasoning in *Burr*—again reaffirmed the principle that the President is not a monarch and thus, not above the law.[172] In short, "two centuries of experience confirm that a properly tailored criminal subpoena will not normally hamper the performance of the President's constitutional duties."[173]

B. The Distraction Argument Was Further Limited by New York's Interest in Criminal Investigations Outweighing Then-President Trump's Article II Interest in Executing His Duties Without Undue Interference

Vance presented federalism concerns because the New York District Attorney—a state official—attempted to serve a subpoena *duces tecum* for the personal records of then-President Trump—a federal official.[174] The federalist relationship between the states and the federal government can be viewed as a balancing of interests between the two governments because, as Justice Marshall noted in *McCulloch*, "[s]tates have no power . . . to retard, impede, burden, or in any manner control, the

167. *See* U.S. CONST. art. II.
168. *See* Presidential Immunity Case Law chart, *supra* Section I.C.
169. United States v. Burr, 25 F. Cas. 30, 34 (C.C.D, Va. 1807) (No. 14,692d).
170. Clinton v. Jones, 520 U.S. 681, 694 (1997).
171. Trump v. Vance, 140 S. Ct. 2412, 2427 (2020) (citing Branzburg v. Hayes, 408 U.S. 665, 691(1972)) ("[R]eceipt of a subpoena would not seem to categorically magnify the harm to the President's reputation.").
172. *See Burr*, 25 F. Cas. at 34.
173. *Vance*, 140 S. Ct. at 2426.
174. *Id.* at 2420.

operations of the [federal government]."[175] Then-President Trump contended that allowing state and local prosecutors to investigate him presents a "risk that politics will lead . . . to relentless[] harass[ment]."[176] Then-President Trump further contended that the criminal litigation process would exact a heavy toll[177] and would "uniquely require[] [his] personal time and energy, and . . . entail a considerable if not overwhelming degree of mental preoccupation."[178] However, these ancillary assertions to the distraction argument are misplaced because the information sought by Vance's subpoena *duces tecum* overwhelmingly favors the public interest when balanced against the potential for politically motivated distraction and harassment of then-President Trump.[179]

The public's interest in criminal investigations weighs particularly heavily in cases involving elected officials.[180] Before pursuing legal action, prosecutors are expected to weigh "whether an investigation [is] in the public interest" and what the "potential impacts of [that] criminal investigation might be on . . . [its] targets."[181] In a case where there is potential for "conflict between judicial proceedings and public duties,"[182] there must be a balance between the public's interest in criminal investigations with a president's claim that compliance with criminal due process would "significantly interfere with . . . efforts" to execute the executive's Article II duties.[183] However, then-President Trump failed to make such a showing in *Vance*. The distraction argument's strength relies on accepting that the office's responsibilities are too complex and too time intensive for a president's compliance with state criminal process, even for producing documents necessary to an investigation.[184] Not only does this argument fail to withstand constitutional precedent, as this Comment has already discussed,[185] but very little effort—if any at all—would have been required of then-President Trump because Mazars was tasked with producing the necessary records.[186] Therefore, the federalism concern at issue in *Vance* comes down to balancing then-President Trump's interest in executing his Article II duties without being unduly distracted against District Attorney Vance's interest in serving a subpoena *duces tecum* on a third party.

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175. McCulloch v. Maryland, 17 U.S. 316, 436 (1819).
176. Brief for Petitioner, *supra* note 27, at 16.
177. *Id.* at 18.
178. *Id.* at 30.
179. *See* Brief for Respondent, *supra* note 84, at 21–22.
180. *See* Allan C. Hutchinson, *In the Public Interest: The Responsibilities and Rights of Government Lawyers*, 46 OSGOODE HALL L.J. 105, 115, 117 (2008) ("[E]lected officials must be answerable to the other citizens who they represent and on whose behalf they act.").
181. Rory K. Little, *"It's Not My Problem?" Wrong: Prosecutors Have an Important Ethical Role to Play*, 7 OHIO ST. J. CRIM. L. 685, 697 (2010).
182. Clinton v. Jones, 520 U.S. 681, 710 (1997) (Breyer, J., concurring).
183. *Id.* at 714.
184. *See* distraction argument, *supra* note 27.
185. *See* discussion *supra* Section III.A.
186. *See* Trump v. Vance, 140 S. Ct. 2412, 2420 (2020).

1. The Subpoena *Duces Tecum* Was Not Politically Motivated with the Intent to Unduly Harass Then-President Trump as Federal Courts Already Have Tools to Prevent Such Intentions

As a district attorney, Vance was aware of the political implications of serving a subpoena *duces tecum* on then-President Trump.[187] These concerns are why federal courts are "particularly meticulous" when reviewing matters subjecting a president to a subpoena.[188] To prevent undue political harassment, grand juries cannot "engage in arbitrary fishing expeditions" or pursue investigations "out of malice or an intent to harass."[189] Furthermore, then-President Trump was presented an opportunity to challenge the subpoena on constitutional and legal grounds.[190]

Then-President Trump, occupying his unique role within the constitutional scheme, could have raised constitutional challenges, such as invoking executive privilege, to the subpoena *duces tecum* in a federal forum, which Vance conceded.[191] Then-President Trump also could have challenged the subpoena *duces tecum* in a state forum on the grounds that it was overbroad or unreasonably burdensome.[192] Lastly, Vance could have been enjoined from engaging in conduct contrary to federal law, which can occur in certain circumstances.[193] These avenues collectively provide federal courts with the ability to alleviate the potential for political harassment from state actors.

In his dissenting opinion, Justice Alito stated his concern of political targeting: "If a sitting [p]resident is intensely unpopular in a particular district . . . targeting the [p]resident may be an alluring and effective electoral strategy."[194] In other words, because Vance is beholden to a local electoral constituency, he may have been acting out of an intent to politically harass

187. *See* John McKay, *Trumpian Ethics and the Rule of Law*, 50 CREIGHTON L. REV. 781, 798 (2017) ("[Prosecutors] should be aware of their personal obligation to protect the integrity of criminal investigations and defend them from political considerations."); *see also* United States v. Burr, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694) ("In no case . . . would a court be required to proceed against the president as against an ordinary individual.").

188. United States v. Nixon, 418 U.S. 683, 702 (1974); *see also Clinton*, 520 U.S. at 707 (majority opinion) ("The high respect that is owed to the office of the Chief Executive, though not justifying a rule of categorical immunity, is a matter that should inform the conduct of the entire proceeding.").

189. United States v. R. Enters., Inc., 498 U.S. 292, 299 (1991) ("Grand juries are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or an intent to harass.").

190. *See* Brief for Petitioner, *supra* note 27, at 16–17.

191. Brief for Respondent, *supra* note 84, at 42 ("[I]f a [p]resident showed in a particular case that complying with a grand jury subpoena would unduly impede Article II functions, a court could narrow the subpoena, extend the time to comply, or, in extreme cases, quash it."); *see also* FED. R. CRIM. P. 17(c)(2).

192. *In re* Grand Jury Subpoenas, 528 N.E.2d 1195, 1200 (N.Y. 1988) ("Whatever the source of the constitutional right of an individual to be free from overly broad subpoenas *duces tecum*, '[all] that is required under the State and Federal Constitutions is that the subpoenaed materials be relevant to the investigation being conducted and that *the subpoena not be overbroad or unreasonably burdensome* . . . .'") (emphasis added).

193. *See, e.g.*, *Ex parte* Young, 209 U.S. 123, 155–56 (1908).

194. Trump v. Vance, 140 S. Ct. 2412, 2447 (2020) (Alito, J., dissenting).

then-President Trump. However, the Court already explicitly rejected the contention that a denial of immunity allows for politically motivated litigation against a president in *Clinton*,[195] where then-President Clinton's deposition would have demanded considerably more time to complete than compliance with Vance's subpoena.[196]

Even though there may be political implications from the service of the subpoena *duces tecum*, it does not mean that there was an intent to harass then-President Trump. Then-President Trump asserted that the service of the subpoena *duces tecum* would "lead . . . to relentless[] harass[ment of] the President" without making any specific charges against Vance's intentions for serving the subpoena other than that Vance had a constituency that was politically unfavorable to then-President Trump.[197] Such a generalized assertion, without specifying how Vance was motivated to harass then-President Trump, does not produce the level necessary for the judiciary to modify or quash the subpoena under the Federal Rules of Criminal Procedure.[198] Therefore, because then-President Trump lacked a sufficient showing of Vance's intent to harass, the subpoena *duces tecum* was not politically motivated and did not present a justified risk of increased harassment for future presidents.

2. The Subpoena *Duces Tecum* Was Served on a Third Party, Which Weakened Then-President Trump's Distraction Claim as the Information Sought Was of an Unofficial Character

Vance served the subpoena *duces tecum* on Mazars, not on then-President Trump, seeking his personal and business-related financial information—documents of an unofficial nature.[199] In response, then-President Trump stated that compliance would distract him by causing a high "degree of mental preoccupation."[200] However, this claim is insufficient to justify immunity because "[t]he propriety of introducing any paper[s] . . . depend[s] on the character of *the paper*, not on the character of *the person* who holds it."[201] These documents were unofficial in nature because they pertained to conduct that occurred before then-President Trump was in office; thus, then-President Trump's distraction assertion could not

195. Clinton v. Jones, 520 U.S. 681, 708–09 (1997) ("[T]he availability of sanctions provides a significant deterrent to litigation directed at the [p]resident in his unofficial capacity for purposes of political gain or harassment.").

196. *See id.* at 717 ("Precedent that suggests to the contrary [of granting broad immunity]—that the Constitution does *not* offer a sitting President significant protections from potentially distracting civil litigation—consists of the following: (1) In several instances sitting Presidents have given depositions or testified at criminal trials, and (2) this Court has twice authorized the enforcement of subpoenas seeking documents from a sitting President for use in a criminal case.").

197. Brief for Petitioner at 16–17, Trump v. Vance, 140 S. Ct. 2412 (2020) (No. 19-635).

198. *See, e.g.*, FED. R. CRIM. P. 17(c)(2).

199. *Vance*, 140 S. Ct. at 2420 (majority opinion).

200. Brief for Petitioner, *supra* note 27, at 30 (citation omitted).

201. United States v. Burr, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692d) (emphasis added).

overcome this threshold as *Clinton* and *Fitzgerald* are dispositive on this issue.[202]

In holding President Nixon absolutely immune from civil liability predicated on his official acts, the *Fitzgerald* Court noted the glaring public interest in providing the President with the "'ability to deal fearlessly and impartially' with the duties of the office."[203] However, the *Fitzgerald* Court's rationale—that a president may become fearful of liability concerns from making critical decisions in an official capacity—does not extend to unofficial conduct.[204] The Court has never extended presidential immunity for actions conducted in an unofficial capacity,[205] as the Court in *Clinton* declined to extend the absolute immunity for official acts from *Fitzgerald* to unofficial conduct.[206] Therefore, because the information sought by the subpoena *duces tecum* was of an unofficial nature, then-President Trump's distraction assertion in seeking immunity in *Vance* was weakened.

C. The Court Should Have Applied the "Demonstrated, Specific Need" Standard from Nixon *to Solidify a Standard for Criminal Subpoenas* Duces Tecum *Being Served on a Sitting President*

When deciding an issue of first impression, the Court looks to established legal principles from prior cases to formulate a novel outcome.[207] Adherence to previously established principles allows for predictability and consistency in legal outcomes.[208] While the Court is not obligated to adhere to previously established legal principles in every situation, it should have in *Vance* by applying the *Nixon* standard: a "prosecutor [must] establish a 'demonstrated, specific need' for the President's information."[209] The *Nixon* standard was not controlling precedent in *Vance*

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202. *See* Brief for Respondent, *supra* note 84, at 13, 22.

203. Nixon v. Fitzgerald, 457 U.S. 731, 752 (1982) ("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.") (quoting Ferri v. Ackerman, 444 U.S. 193, 203 (1979)); *see also Fitzgerald*, 457 U.S. at 753 n.32 ("Among the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties.").

204. Clinton v. Jones, 520 U.S. 681, 694 (1997) ("[*Fitzgerald*'s] reasoning provides no support for an immunity for *unofficial* conduct.").

205. *See id.* (citing *Fitzgerald*, 457 U.S. at 759 (Burger, C. J., concurring) ("[A] President . . . [is] not immune for acts outside official duties.")); *see also* Presidential Immunity Case Law chart *supra* Section I.C.

206. *Id.* at 695 ("[President Clinton's] effort to construct an immunity from suit for unofficial acts grounded purely in the identity of his office is unsupported by precedent.").

207. *See Precedent*, LEGAL INFO. INST. (2020), https://www.law.cornell.edu/wex/precedent#:~:text=Precedent%20refers%20to%20a%20court,cases%20with%20the%20same%20facts ("Precedent refers to a court decision that is considered as authority for deciding subsequent cases involving identical or similar facts, or similar legal issues.").

208. Hon. John M. Walker, Jr., *The Role of Precedent in the United States: How Do Precedents Lose Their Binding Effect?*, STAN. L. SCH. CHINA GUIDING CASES PROJECT, Feb. 29, 2016, http://cgc.law.stanford.edu/commentaries/15-John-Walker ("[Adhering to precedent] promotes stability, [and] 'represents an element of continuity in law, . . . rooted in the psychological need to satisfy reasonable expectations.'").

209. Trump v. Vance, 140 S. Ct. 2412, 2432 (Kavanaugh, J., concurring).

because the cases are factually distinguishable, and thus, the Court did not need to comport with this established precedent.[210] Nonetheless, applying the *Nixon* standard in *Vance* would have solidified the standard for serving criminal subpoenas *duces tecum* on a sitting president, accommodated both parties' interests, and bolstered the tools available to federal courts to prevent harassment.

State prosecutors should not have to meet a heightened standard simply because the subpoena *duces tecum* pertains to a president. Rather, the "demonstrated, specific need" standard from *Nixon* should have been applied. While this would not have changed the outcome of *Vance*, the Court's failure to apply the *Nixon* standard produces legal uncertainty and confusion for future litigants.

1. While Not Necessarily Altering the Outcome of *Vance*, the Court's Decision in Not Applying the "Demonstrated, Specific Need" Standard from *Nixon* Creates Uncertainty for Future Presidential Immunity Litigants

As the Solicitor General noted in his amicus brief, there are a variety of standards for subpoenas to a sitting president and no one in particular is the ultimate benchmark.[211] Though not exhaustive, these standards include: "essential to the justice of the case";[212] "demonstrated, specific need";[213] "strict standard of need";[214] and "demonstrably critical."[215] These inconsistent standards, along with the standards articulated in *Vance*, create uncertainty regarding presidential immunity to subpoenas. In *Vance*, the Justices disagreed over which standard to apply and proposed different standards.[216] By failing to apply the *Nixon* standard in *Vance*,[217] the Court created confusion for future presidential immunity litigants.

However, even if the *Vance* Court had applied the *Nixon* standard, it would not have necessarily altered the case's outcome as then-President Trump still would have needed to make a sufficient showing of

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210. *Compare id.* at 2420–21 (majority opinion) (discussing unofficial conduct), *with* United States v. Nixon, 418 U.S. 683, 686–90 (1974) (discussing official conduct).

211. Brief for the United States as *Amicus Curiae* Supporting Petitioner at 29 Trump v. Vance, 140 S. Ct. 2412 (2020) (No. 19-635) [hereinafter Amicus Brief].

212. United States v. Burr, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694).

213. *Nixon*, 418 U.S. at 713 (emphasis added).

214. *In re* Sealed Case, 121 F.3d 729, 756 (1997).

215. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (1974).

216. *Compare* Trump v. Vance, 140 S. Ct. 2412, 2429–31 (2020) (majority opinion) (discussing the majority opinion's standard), *with id.* at 2432 (Kavanaugh, J., concurring) (Justice Kavanaugh's proposed standard), *id*. at 2436 (Thomas, J., dissenting) (Justice Thomas's proposed standard), *and id.* at 2449 (Alito, J., dissenting) (Justice Alito's proposed standard).

217. *See id.* at 2431 (majority opinion).

impediment to overcome the State of New York's need for his information.[218] Although Vance would have been compelled to meet the *Nixon* standard's required showing, then-President Trump could not have simply reasserted the distraction argument on remand. Instead, he would have had to show that the subpoena significantly impaired his ability to execute his duties.[219] Therefore, the subpoena *duces tecum* from *Vance* may not get quashed under the "demonstrated, specific need" standard. However, with *Vance*'s ruling, the varying standards for presidential immunity leaves the door open for future presidents to evade judicial process while in office because of the Court's failure to apply a consistent standard.

2. Applying the "Demonstrated, Specific Need" Standard from *Nixon* Would Have Respected Precedent and Accommodated Both New York and Then-President Trump's Dueling Interests

In *Vance*, the State of New York had a public interest in fair and effective law enforcement through criminal investigation while then-President Trump had an Article II interest in executing his duties without undue interference.[220] Justice Kavanaugh articulated in his concurring opinion that the *Nixon* standard would "accommodate[] both . . . interests" as justice so requires.[221] Because *Nixon* is the precedent that most closely resembles the situation in *Vance*, the Court should have applied the *Nixon* standard in serving criminal subpoenas *duces tecum* on a sitting president.[222] The *Vance* Court took a different approach by applying *Burr*'s principle that a president's private papers are subject to the same procedure as any other citizen.[223] While the situations in *Burr* and *Vance* are parallel regarding the level of presidential involvement needed for compliance,[224] the *Nixon* standard would have better balanced the parties' competing interests while simultaneously holding a president responsible for producing documents of an unofficial character. This is because the Court's holding in *Nixon* is better equipped than the Court's holding in *Burr* to apply to the complexities of the modern era given the amount of sociocultural and technological advancements that occurred between the two cases.

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218. *Id.* at 2430; *see* Brief for Respondent, *supra* note 84, at 42.

219. *See* Clinton v. Jones, 520 U.S. 681, 694–95 (1997).

220. *See Vance*, 140 S. Ct. at 2420 (majority opinion).

221. *Id.* at 2432 (Kavanaugh, J., concurring).

222. *Compare Nixon*, 418 U.S. at 686–88 (Special Prosecutor issuing a subpoena *duces tecum* to Then-President Nixon for his involvement in "conspiracy to defraud the United States and to obstruct justice"), *with Vance*, 140 S. Ct. at 2420 (majority opinion) (New York County District Attorney's Office issuing a subpoena *duces tecum* to the personal accounting firm of Then-President Trump for his involvement in "business transactions . . . [for] conduct [which] may have violated state law").

223. *See Vance*, 140 S. Ct. at 2429 (quoting United States v. Burr, 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14,692)) ("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." (emphasis omitted)).

224. *See id.* at 2426 ("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.").

Furthermore, the *Nixon* standard aligns with Federal Rule of Criminal Procedure 17(c)(2), which provides the means for preventing harassment if "compliance [with the subpoena] would be unreasonable or oppressive."[225] As previously discussed in this Comment, there are tools available for federal courts to limit presidential distraction, and these tools would be aided by a prosecutor establishing a "demonstrated, specific need" for the president's information.[226] The *Nixon* standard does not impose a higher requirement for presidential documents on a state prosecutor like the ones urged by the Solicitor General during oral arguments and Justice Alito's dissent in *Vance*.[227] Both of their proposed standards are unnecessarily stringent and would have, if applied, elevated a president's immunity from criminal process, creating a detrimental effect on the state's public interest by placing a higher floor on state-initiated litigation.[228] Therefore, the Court should have applied the *Nixon* standard to provide fairness to both parties and solidify the standard for future presidential immunity cases.

IV. POST-*VANCE* UPDATE

Almost four months after *Vance*'s ruling, Joe Biden defeated then-President Trump to become the 46th President of the United States;[229] an event that catalyzed Trump's loss of fifty-nine out of sixty legal challenges to the election's legitimacy.[230] The contested election results led to a violent insurrection at the U.S. Capitol on January 6, 2021,[231] for which the House of Representatives impeached former President Trump a second

225. FED. R. CRIM. P. 17(c)(2).

226. *Nixon*, 418 U.S. at 713.

227. *Vance*, 140 S. Ct. at 2429 (quoting Amicus Brief, *supra* note 212, at 29, 32) ("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.'"); *id.* at 2449 (Alito, J., dissenting) ("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.").

228. *See* Danielson, *supra* note 147, at 1068.

229. Jonathan Martin & Alexander Burns, *Biden Wins Presidency, Ending Four Tumultuous Years Under Trump*, N.Y. TIMES, https://www.nytimes.com/2020/11/07/us/politics/biden-election.html (Apr. 26, 2021).

230. *See* Stephen Dinan, *Trump Legal Team Loses Election Challenges 59 out of 60 Times*, WASH. TIMES (Dec. 13, 2020), https://washingtontimes.com/news/2020/dec/13/trump-legal-team-loses-election-challenges-59-out-/.

231. *See* Lauren Leatherby, Arielle Ray, Anjali Singhvi, Christiaan Triebert, Derek Watkins, & Haley Willis, *How a Presidential Rally Turned Into a Capitol Rampage*, N.Y. TIMES (Jan. 12, 2021), https://www.nytimes.com/interactive/2021/01/12/us/capitol-mob-timeline.html?searchResultPosition=1 (depicting visual representations of the events in Washington D.C. on January 6, 2021).

time for "Incitement of Insurrection."[232] Thus, former President Trump cannot avail himself of the considerations afforded in *Vance* because he is no longer the President of the United States.[233] While former President Trump has less protection against criminal prosecution, Vance has a less compelling public interest in investigating former President Trump's documents.[234]

However, although the public interest and outcry for his financial information may have lessened with President Biden's victory, the case now falls squarely within Vance's authority as the District Attorney of Manhattan because a prosecutor is obligated to investigate potential financial crimes occurring within their jurisdiction.[235] Accordingly, Vance's duties as a prosecutor now compel him to investigate former President Trump's potential criminal misconduct occurring in New York, even though former President Trump has relocated to Florida.[236] Former President Trump's tax returns and other financial records were delivered to Vance and are currently under investigation after Trump's subsequent challenge to *Vance*'s ruling failed in the Supreme Court.[237] If the investigation reveals tax violations and other misconduct, former President Trump may now face the full force of the law because he no longer holds office.

CONCLUSION

The *Vance* Court resoundingly and unanimously rejected the idea that then-President Trump was categorically and absolutely immune from criminal process by reaffirming that the President is subject to the rule of

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232. *See* Aaron Blake, *4 Final Takeaways from Trump's Impeachment Trial*, WASH. POST (Feb. 13, 2021, 5:12 PM), https://www.washingtonpost.com/politics/2021/02/13/takeaways-trump-impeachment-trial-final/; Brian Naylor, *Article of Impeachment Cites Trump's 'Incitement' of Capitol Insurrection*, NPR (Feb. 9, 2021, 12:30 PM), https://www.npr.org/sections/trump-impeachment-effort-live-updates/2021/01/11/955631105/impeachment-resolution-cites-trumps-incitement-of-capitol-insurrection.

233. *See* distraction argument, *supra* note 27.

234. Alan Vinegrad, *The Role of the Prosecutor: Serving the Interests of All the People*, 28 HOFSTRA L. REV. 895, 898 (2000) ("[The] job as [a] prosecutor[] . . . is to vindicate society's right to honest and loyal public officials, and rid our government of those who breach the public trust for their own personal benefit . . . .").

235. *Id.* at 897 ("Prosecutors, quite simply, represent society—the public—in its effort to vindicate its rights and interests when those among us violate these rights by breaking the law. At the same time, prosecutors vindicate the interests of the victims of crime—the individuals, the communities, and the organizations who are harmed, either financially, physically, or in more intangible ways, by those who break the law. Prosecutors achieve these objectives by prosecuting and seeking to punish those who threaten the well-being of society and its citizens by breaking the law.").

236. *See* Adrianna Rodriguez, *Trump Lives in the White House. So, Why is He Moving to Florida?*, USA TODAY (Nov. 2, 2019, 8:55 AM), https://www.usatoday.com/story/news/politics/2019/11/01/why-president-donald-trump-moving-new-york-florida/4120843002/.

237. Tucker Higgins, *Trump Tax Returns are now in the Hands of the Manhattan District Attorney*, CNBC, https://www.cnbc.com/2021/02/25/trump-tax-returns-in-hands-of-manhattan-district-attorney.html (Feb. 25, 2021, 8:13 PM); *see* Tucker Higgins & Dan Mangan, *Supreme Court Rejects Trump Effort to Shield Tax Records from NY Prosecutors*, CNBC, https://www.cnbc.com/2021/02/22/supreme-court-rejects-trump-effort-to-shield-tax-records-from-ny-prosecutors.html (Feb. 26, 2021, 9:43 AM) ("The Supreme Court's decision . . . came in a single line: 'The application for a stay presented to Justice Breyer and referred to the Court is denied.'").

law like every other U.S. citizen.[238] The Court properly adhered to its presidential immunity jurisprudence and acknowledged that presidents are not monarchs.[239] Moreover, the Court's ruling signifies that New York had a compelling public interest in conducting an investigation into then-President Trump's personal and business-related financial records because he may be implicated in criminal activity.[240] In this regard, New York's interest outweighed the potential for presidential distraction, and thus, federalism concerns did not avail the distraction argument's ancillary assertion that politics motivated Vance's subpoena *duces tecum*.[241] However, the Court should have applied the "demonstrated, specific need" standard from *Nixon* to comport with, and solidify, its presidential immunity jurisprudence and provide consistency for matters regarding subpoenas *duces tecum* served on future presidents.[242]

As most litigation goes, *Vance* was not a story of who won and who lost. When the current president is implicated in potentially criminal conduct and asserts absolutely immunity from criminal process, the public ought to be rightfully concerned. American governance revolves around the core idea of the power of the people to not only decide their elected leaders but also hold them accountable for misconduct. No citizen is above the law, not even the president. However, Justice Alito raised an understandable concern regarding political motivation from state actors beholden to local constituencies that do not support the president.[243] Nonetheless, those concerns were misplaced in *Vance* because the aforementioned tools available to federal courts, namely Federal Rule of Criminal Procedure 17(c)(2), should deter and, in some circumstances, quash such motivations.[244] Further, the central focus for criminal process should rest on the conduct of the defendant rather than the alleged motives of the prosecutor.

As relevant to criminal matters, a sitting president is obligated to follow the law and produce documents relevant to investigations even if a state is conducting the investigation—or, more importantly, if the president is the one under investigation. Simply put, if then-President Trump had not been involved or engaged in potentially criminal activity before his term as President, he would not be subject to criminal investigations.[245] The needs of justice are no greater than where a sitting president is implicated in potentially criminal conduct because the public trust is severely and irreversibly violated if the person entrusted to uphold the law may

238. Trump v. Vance, 140 S. Ct. 2412, 2431 (2020).
239. *See* discussion *supra* Section III.A.
240. *See* discussion *supra* Section III.B.
241. *See* discussion *supra* Section III.B.1.
242. *See* discussion *supra* Section III.C.
243. *Vance*, 140 S. Ct. at 2447 (Alito, J., dissenting).
244. FED. R. CRIM. PRO. 17(c)(2).
245. *See* Jonathan H. Adler, *All the President's Papers*, 2019 CATO SUP. CT. REV. 31, 53 (2020) ("[P]residents will only be subject to potential criminal investigation when they engaged in potentially illegal activities before they were president.").

have broken it or is currently breaking it. Consider Justice Alito's words as he explains why the distraction argument in *Vance* is ultimately insufficient: "Since the records are held by, and the subpoena was issued to, a third party, compliance would not require much work on . . . President [Trump's] part [because] after all, this is just one subpoena."[246]

Mitchell Lewis Blackstone[*]

246. *Vance*, 140 S. Ct. at 2446 (Alito, J., dissenting).

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