

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -
DONALD J. TRUMP,)
)
Petitioner,)
)
v.) No. 19-635
CYRUS R. VANCE, JR., IN HIS)
)
OFFICIAL CAPACITY AS DISTRICT)
)
ATTORNEY OF THE COUNTY OF)
)
NEW YORK, ET AL.,)
)
Respondents.)
- - - - -

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P R O C E E D I N G S

(11:40 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 19-635, Donald Trump versus Cyrus Vance.

Mr. Sekulow.

ORAL ARGUMENT OF JAY A. SEKULOW

ON BEHALF OF THE PETITIONER

MR. SEKULOW: Thank you, Mr. Chief Justice, and may it please the Court:

No county district attorney in our nation's history has issued criminal process against a sitting President of the United States, and for good reason. The Constitution does not allow it.

Temporary presidential immunity is constitutionally required by Article II, and, accordingly, the Supremacy Clause defeats any authority the DA has under state law as to the President. The Second Circuit is wrong and should be reversed.

If not reversed, the decision weaponizes 2300 local DAs. An overwhelming number of them are elected to office and are thereby accountable to their local

1 constituencies. The decision would allow any DA
2 to harass, distract, and interfere with the
3 sitting President. Its subjects the President
4 to local prejudice that can influence
5 prosecutorial decisions and to state grand
6 juries, who can then be utilized to issue
7 compulsory criminal process in the form of
8 subpoenas targeting the President.

9 This is not mere speculation. It is
10 precisely what has taken place in this case and
11 with the subpoena we challenge. In the argument
12 just concluded, we asserted that the subpoenas
13 did not serve a legitimate legislative purpose
14 and they were burdensome. Yet, the DA copied
15 almost verbatim the House Oversight Committee's
16 subpoena, with an additional 13 words, which
17 seek the President's tax returns.

18 How revealing. The exact same
19 language utilized by two congressional
20 committees would subsequently be copied by the
21 New York County district attorney covering the
22 exact same documents and sent to the exact same
23 recipients yet purportedly for two completely
24 different reasons.

25 Under Article II or the heightened

1 scrutiny standard under Nixon, the subpoena we
2 challenge today cannot survive. As the Second
3 Circuit concluded and the DA represents, the
4 President's being investigated for potential
5 criminal violations in a state grand jury
6 proceeding with a local DA issuing coercive
7 criminal process against the President. This,
8 he cannot do.

9 Thank you, Mr. Chief Justice.

10 CHIEF JUSTICE ROBERTS: Counsel, for
11 all that, you don't argue that the grand jury
12 cannot investigate the President, do you?

13 MR. SEKULOW: We did not seek to have
14 an injunction, as was the case involving Vice
15 President Agnew, in enjoining the grand jury.
16 We have targeted the utilization of the
17 temporary immunity here to the subpoena. That's
18 correct.

19 CHIEF JUSTICE ROBERTS: Well, in other
20 words, it's okay for the grand jury to
21 investigate, except it can't use the traditional
22 and most effective device that grand juries have
23 typically used, which is the subpoena.

24 MR. SEKULOW: It can't use a subpoena
25 targeting the President. And under his Article

1 II responsibilities and the Supremacy Clause,
2 that, is our view, would be inappropriate and
3 unconstitutional.

4 So we have not challenged the --

5 CHIEF JUSTICE ROBERTS: I don't -- I
6 don't understand -- your theory in terms of
7 distraction and all that would seem to go much
8 farther than resisting the subpoena. I don't
9 know why you don't resist the investigation in
10 its entirety or why your theory wouldn't lead to
11 that.

12 MR. SEKULOW: Well, our -- our
13 position is that criminal process against the
14 President -- and that's what we're talking
15 about, that's what's before the Court --
16 criminal process targeting the President is a
17 violation of the Constitution.

18 We did not seek to enforce an
19 injunction or seek an injunction against the
20 grand jury investigating the situation with the
21 President. It was targeted --

22 CHIEF JUSTICE ROBERTS: You focused --
23 you focused on --

24 MR. SEKULOW: Yes.

25 CHIEF JUSTICE ROBERTS: -- you focused

1 on the distraction to the President, but --

2 MR. SEKULOW: Yes.

3 CHIEF JUSTICE ROBERTS: -- I don't
4 know why -- in -- in Clinton versus Jones, we
5 were not persuaded that the distraction in that
6 case meant that discovery could not proceed.
7 And, you know, there are different things that
8 distract different people, but I would have
9 thought the discovery in a case like Clinton
10 versus Jones, even though civil, would be
11 distracting as you argue the grand jury
12 proceedings are here.

13 MR. SEKULOW: Well, Clinton versus
14 Jones, of course, was in federal court. This is
15 in state court.

16 Clinton versus Jones was a civil case.
17 This is a criminal case. And as this Court
18 noted on page 691 of its opinion, if, in fact,
19 the Clinton versus Jones case had originated in
20 a state court proceeding, it would raise
21 different issues than separation of powers,
22 concerns over local prejudice, and in Footnote
23 13, this Court said that any direct control by a
24 state court over the President may implicate
25 concerns that are different than either branch

1 disputes under separation of powers. So it
2 would be a --

3 CHIEF JUSTICE ROBERTS: Justice
4 Thomas?

5 JUSTICE THOMAS: Yes, counsel, just a
6 couple of questions. I'm interested in whether
7 or not you can point us to some express language
8 at the founding or during the ratification
9 process that provides for this immunity.

10 MR. SEKULOW: Well, there -- there's a
11 couple. There was a colloquy between Vice
12 President -- well, ultimately, Vice President
13 Adams and Senator Ellsworth where they talked
14 about process against the President and they
15 took the position that any process against the
16 President would be constitutionally problematic.

17 Thomas Jefferson, of course, wrote in
18 the letters he had regarding subpoenas that were
19 issued in the Burr trial that allowing local
20 magistrates to banter about a sitting President
21 from north to south and east to west would
22 interfere with the President's responsibilities.

23 And as this Court just -- in the
24 previous argument just stated, the burdensome
25 nature of this is categorical. It's not -- you

1 can't just look at the one subpoena. It is the
2 potential for 2300 DAs or just 1 percent of
3 them, 23 DAs, issuing process against a
4 president.

5 But the concern over interference from
6 our founding with the President's
7 responsibilities was discussed and that's why in
8 the Constitution there's process to deal with
9 it.

10 JUSTICE THOMAS: Does it make a
11 difference when a subpoena goes to a
12 third-party?

13 MR. SEKULOW: Certainly not here.
14 Number one, the -- the Respondents have either
15 forfeited or waived it. They have conceded in
16 their brief that they -- they are seeking the
17 President's documents. These are the
18 President's documents. He is the real party in
19 interest, and he has the burden, including
20 review with his counsel, over any existing
21 privileges and what these documents might
22 entail.

23 JUSTICE THOMAS: Thank you.

24 MR. SEKULOW: Thank you, Justice
25 Thomas.

1 CHIEF JUSTICE ROBERTS: Justice
2 Ginsburg?

3 JUSTICE GINSBURG: We have said in the
4 grand jury context that the public has a right
5 to every man's evidence. Is it your position
6 that that is, save for the President, every
7 man's evidence, save for persons protected by
8 privilege, and there is no privilege involved
9 here, these are non-privileged, non-confidential
10 papers, so is the -- the grand jury right to
11 every man's evidence, exclusive of the
12 President, every man except the President?
13 That's one question.

14 And then I wanted you to answer
15 specifically, Paula Jones held that the
16 President was not immune from civil suits for
17 conduct occurring before he took office. If
18 Paula Jones had sued in state court rather than
19 federal court, would Clinton have had absolute
20 immunity?

21 MR. SEKULOW: Well, this -- to the
22 second question first, if I might, Justice
23 Ginsburg, this Court in Clinton against Jones
24 said that if the case was brought in state court
25 it would raise different issues of concerns over

1 local prejudice. It was different than the
2 separation of powers issues at play. It was
3 issues involving the Article II and the
4 Supremacy Clause. So the Court said that on
5 pages 691 and Footnote 13.

6 With regard to everyone -- every man's
7 evidence, this Court has long recognized that
8 the President is not to be treated as an
9 ordinary citizen. He has responsibilities. He
10 is himself a branch of government. He is the
11 only individual that is a branch of government
12 in our federal system.

13 So, too, our position is that the
14 Constitution itself, both in structure and text,
15 supports the position that the President would
16 be temporarily immune from this activity from a
17 state proceeding while he is the President of
18 the United States.

19 CHIEF JUSTICE ROBERTS: Justice
20 Breyer?

21 JUSTICE GINSBURG: Every -- every
22 man's evidence excludes the President?

23 MR. SEKULOW: If I may, Mr. Chief
24 Justice. Justice Ginsburg, it's not that it
25 excludes every -- the President. The President

1 is not to be treated as an ordinary citizen.
2 And this is a temporary immunity. This is for
3 while the President's in office. And we think
4 that is required by the Constitution. Thank
5 you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Breyer?

8 JUSTICE BREYER: Well, you make a
9 point of the 2300 district attorneys. But, of
10 course, in Clinton v. Jones, there might be a
11 million, I don't know, tens of thousands of
12 people who might bring lawsuits. Perhaps all of
13 them were unfounded, but they could file the
14 paper.

15 MR. SEKULOW: Well --

16 JUSTICE BREYER: Why isn't it
17 sufficient just to apply ordinary standards? I
18 gather ordinarily any person who gets a subpoena
19 can come in and say it's unduly burdensome. And
20 what counts as unduly burdensome for a doctor
21 who is in the middle of an operation might be
22 very different from a person who's a salesman,
23 and similarly for the President. All the
24 factors you raise could come in under the title
25 unduly burdensome.

1 So why not just go back, let the
2 President say, I'll show you precisely how this
3 is burdensome. I'm going to spend time, effort,
4 working all these things out, figuring out what
5 they mean, et cetera. And if he shows undue
6 burden and lack of connection, he wins, and
7 otherwise not. That's true of every person.
8 That's Clinton v. Jones. Why not the same here?

9 MR. SEKULOW: Justice Breyer, the
10 hypothetical you just gave, I think, proves the
11 point. By the time you were to prepare, review,
12 analyze the various requests just in these two
13 -- three cases that we have today shows the
14 burdensome nature.

15 And then to require the President of
16 the United States, who, as you raised in your
17 opinion, in a concurring opinion in Clinton
18 versus Jones, that burden is being met just by
19 us being here.

20 But to require the President to have
21 to respond to each and every state district
22 attorney that would like to --

23 JUSTICE BREYER: No, he would hire you
24 and he'd hire a lawyer to list what the burdens
25 are. That wouldn't take a lot of time. And

1 then he wouldn't be burdened because you'd go in
2 and say what the burdens are. And if you're
3 right, you win that case. They're saying, the
4 other side, there are no burdens here.

5 MR. SEKULOW: Well, I would point the
6 Court --

7 JUSTICE BREYER: You say there are.

8 MR. SEKULOW: I --

9 JUSTICE BREYER: So send it back and
10 let them figure out what they are.

11 MR. SEKULOW: I think doing that
12 establishes the problem with an analysis of a
13 case-by-case analysis.

14 For instance, in this very case in
15 this subpoena found on page 118a and 19 of the
16 Petition Appendix, there's a list of documents
17 that are extensive.

18 You would have to meet with the
19 President of the United States -- I mean, could
20 you imagine just for a moment, Justice Breyer,
21 that I -- and you said let's assume the
22 President were to hire me -- that I'm going to
23 call the President of the United States today
24 and say, I know you're handling a pandemic right
25 now for the United States, but I need to spend a

1 couple, two to three hours with you going over a
2 subpoena of documents that are wanted by, here,
3 the New York County District Attorney. I know
4 you're busy --

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 MR. SEKULOW: -- but you -- can you
8 carve me out two hours.

9 CHIEF JUSTICE ROBERTS: Justice --
10 Justice -- Justice Alito?

11 JUSTICE ALITO: Aren't there at least
12 some circumstances in which the U.S.
13 Constitution would permit a local prosecutor to
14 subpoena records containing information about a
15 sitting president? So think of this situation.

16 Suppose that the prosecutor has good
17 reason to believe that the records contain
18 information that is not available from any other
19 source about whether a third-party committed a
20 crime, and suppose that waiting until the end of
21 the President's term would make the prosecution
22 of that crime impossible or at least very
23 difficult.

24 Would you say that at least in that
25 circumstance it would be permissible for the

1 grand jury subpoena to be enforced?

2 MR. SEKULOW: In a -- in a state court
3 proceeding, the -- the issues of time and burden
4 are still there.

5 Now, in U.S. v. Nixon, that was a case
6 where the President was a witness and the
7 documents were asked for and this Court said
8 should be handed over. But, in that case, it
9 was very clear that the President was a witness,
10 and the attorney, the independent counsel there,
11 Leon Jaworski, specifically stated to this Court
12 that the President was not a target.

13 So, if we had a pure witness
14 standpoint, while it's a different case, the
15 same constitutional principles would be at play,
16 but, here, we're talking about criminal process
17 targeting a president.

18 JUSTICE ALITO: Well, was the answer
19 that that would be permissible if the prosecutor
20 were willing to say that the President was not a
21 target, whatever that means?

22 MR. SEKULOW: Well, it wouldn't mean
23 that it's constitutionally permissible; it would
24 raise different issues for the President to
25 consider. But, constitutionally, I think that

1 we have to be -- I have to be very clear here.

2 Constitutionally, under Article II and
3 the Supremacy Clause, as to a state court
4 proceeding here, we think even as a witness it
5 raises serious issues. Obviously, a very
6 different case than this, but serious issues
7 nonetheless.

8 JUSTICE ALITO: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Sotomayor?

12 JUSTICE SOTOMAYOR: Counsel, it seems
13 that you're asking for a broadness of -- of
14 immunity that Justice Thomas pointed out is
15 nowhere in the Constitution.

16 And, in fact, the Constitution
17 protects against presidential interference with
18 state criminal proceedings. It doesn't allow
19 the President to pardon offenders for state
20 prosecutions, for state criminal convictions.

21 And yet I -- I find it odd that you
22 want us to rule that there's essentially an
23 absolute immunity from investigative powers, the
24 height of a state's subpoena -- police powers,
25 and that we would permit a civil damages case by

1 a private litigant, which we did in Clinton.

2 Prosecutors have ethical obligations
3 with respect to grand jury investigations. They
4 have to keep those investigations secret. They
5 can be prosecuted if they leak that information.

6 Don't we usually presume that state
7 courts and state prosecutors act as they should
8 and in good faith?

9 MR. SEKULOW: Even if you were to
10 assume that --

11 JUSTICE SOTOMAYOR: And doesn't -- if
12 you let me finish.

13 MR. SEKULOW: Yes, please.

14 JUSTICE SOTOMAYOR: And doesn't the
15 President always have the opportunity to show
16 that a particular subpoena, in fact, was issued
17 in bad faith? The President was given that
18 opportunity here. And a affidavit, I
19 understand, was filed under seal setting forth
20 the reasonable grounds for the investigation.

21 I -- I -- I'm not sure why he's
22 entitled to more immunity for private acts than
23 he should be for public acts.

24 MR. SEKULOW: Well, he's the President
25 of the United States. He is a branch of the

1 federal government. He's the --

2 JUSTICE SOTOMAYOR: We only give -- we
3 only give judicial officers and congressional
4 officers immunity for acts within their official
5 capacity. If they don't, if judges sexually
6 harass someone, we've said that's not within
7 judicial functions, they can be sued. If
8 congressmen do the same thing, they can be sued.

9 So my question still comes, you're
10 asking for a broader immunity than anyone else
11 gets.

12 MR. SEKULOW: Well, we're asking for a
13 temporary --

14 CHIEF JUSTICE ROBERTS: You have time
15 for -- you have time for a brief answer,
16 counsel.

17 MR. SEKULOW: I will. We're asking
18 for temporary presidential immunity. I would
19 point out that under New York state law,
20 witnesses before a grand jury are not sworn to
21 secrecy. They can state that they testified and
22 what the nature of their testimony was. I'd
23 also like to point out that there are hundreds
24 of members of the United States Congress and 100
25 members of the United State -- States Senate,

1 there is one President.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Justice Kagan?

4 JUSTICE KAGAN: So, Mr. Sekulow,
5 you've said that a number of times and made the
6 point, which we have made, that presidents can't
7 be treated just like an ordinary citizen. But
8 it's also true and, indeed, a fundamental
9 precept of our constitutional order that a
10 president isn't above the law.

11 You know, from our first days, Chief
12 Justice Marshall told Thomas Jefferson that he
13 could be subpoenaed, he could be examined as a
14 witness, he could be required to produce papers.

15 And so I guess going back to Justice
16 Breyer's question, why isn't the way to deal
17 with these two things, that the President is
18 special but that the President is like an
19 ordinary citizen in that he's subject to law, is
20 to say the President can make these usual
21 objections that a subpoena recipient can make
22 about harassment or about burden, and the courts
23 in reviewing those, of course, should take
24 seriously the President's objections and treat
25 those with a certain kind of sensitivity and

1 respect due to somebody who is a branch of
2 government.

3 Why isn't that the right way to do it?

4 MR. SEKULOW: For two reasons. First,
5 and I think the case here is the perfect
6 example, here, the district attorney copied
7 verbatim the House Oversight Committee and Ways
8 and Means Committee subpoena verbatim. So --
9 and we were just discussing in the previous case
10 the nature of that burden.

11 For counsel, the President hiring
12 counsel for each time he could be subpoenaed as
13 a witness or, in this particular case, as a
14 target, would raise a serious impact on the
15 President's Article II functions. So we think a
16 categorical approach -- and it's very specific
17 here -- state process adds to the President --
18 targeting the President's documents in a
19 criminal proceeding should be prohibited.

20 CHIEF JUSTICE ROBERTS: Justice
21 Gorsuch?

22 JUSTICE GORSUCH: Counsel, I -- I'd
23 like to return to the question of Clinton versus
24 Jones and how you would have us distinguish it.
25 Yes, it took place in federal court, but it was

1 a civil case, and as has been pointed out,
2 others -- there could have been multiple
3 versions of that in multiple different districts
4 across the country.

5 So what's -- what's different about
6 that? How do we avoid the conclusion there that
7 the President wasn't subject to some special
8 immunity but here is?

9 MR. SEKULOW: I think -- I think the
10 nature of the case that we're dealing with here
11 is not in a vacuum itself. There are other
12 cases that the President is dealing with at the
13 same time.

14 So what may have been a situation for
15 President Clinton with a lawsuit, we have
16 multiple litigation going on, including with the
17 New York attorney general. So I think the
18 Supremacy Clause issue and the Article II issue
19 here is pronounced, as this Court alluded to in
20 Clinton against Jones, for that very reason,
21 this idea that local prejudice would impact the
22 President.

23 So the idea that we would wait until
24 there's more of these, we're already here on
25 four subpoenas or three subpoenas, three cases

1 involving multiple subpoenas, much of which
2 covers the same documentation. So I think it --
3 it, in fact, Justice Gorsuch, proves the point.

4 We're here because the House has asked
5 for documents that now the district attorney is
6 asking for. So we are seeing that in real time
7 --

8 JUSTICE GORSUCH: How --

9 MR. SEKULOW: -- the burdensome nature
10 of what's happening here.

11 JUSTICE GORSUCH: -- how is -- how is
12 this more burdensome, though, than what took
13 place in Clinton versus jeans? I -- I guess I'm
14 -- I'm not sure I understand that.

15 MR. SEKULOW: Well, I mean, there's a
16 big distinction between a defendant in a civil
17 case and a principal in a criminal case, here by
18 the state district -- or the local DA.

19 JUSTICE GORSUCH: Let me stop you
20 there.

21 MR. SEKULOW: Yes.

22 JUSTICE GORSUCH: Yes, there --
23 there -- there, they sought the deposition of
24 the President while he was serving. Here,
25 they're seeking records from third-parties.

1 MR. SEKULOW: But they're his records
2 from third-parties, Justice Gorsuch. The
3 third-party is simply the agent custodian of the
4 President's tax returns, on the President's
5 statement of financial conditions. So these are
6 the President's documents that they're asking.

7 And what's to stop them from seeking a
8 deposition of the President or, for that matter,
9 asking the President to appear before a grand
10 jury? Because, if the official versus
11 unofficial was the deciding factor, and our view
12 is that the initiation of process here
13 interferes with the President's official duty,
14 but, if there was going to be this unofficial/
15 official distinction put in place, well, then
16 what stops the -- the local district attorney
17 from having the President testify, having the
18 President -- President tried?

19 CHIEF JUSTICE ROBERTS: Justice
20 Kavanaugh?

21 JUSTICE KAVANAUGH: Thank you,
22 Mr. Chief Justice.

23 And good afternoon, Mr. Sekulow.

24 MR. SEKULOW: Good afternoon.

25 JUSTICE KAVANAUGH: Just following up

1 on Justice Gorsuch, just explain, if you can,
2 the rationale for having one rule for criminal
3 and another rule for civil. Just assume there's
4 one criminal investigation. That's it.

5 MR. SEKULOW: Well --

6 JUSTICE KAVANAUGH: And just explain
7 the rationale for a different rule there.

8 MR. SEKULOW: Well, it's not that it's
9 a different rule because, in this case, because
10 it's within the context of a state proceeding,
11 you have Article II concerns and the Supremacy
12 Clause issues, as this Court alluded to in
13 Clinton against Jones, that create the issues of
14 concern about local prejudice. But the -- the
15 criminal nature of it creates a burden very
16 distinct from a civil case, to be clear.
17 Someone that is targeted --

18 JUSTICE KAVANAUGH: Why is that?

19 MR. SEKULOW: Well, the idea that you
20 are the subject or a target of a criminal case
21 being brought against you is very different than
22 a civil suit, where, at the end of the day, it
23 results in monetary damages, not -- not a loss
24 of liberty.

25 So there's a big distinction between a

1 civil case and a criminal case in that regard.
2 And I think that impacts the -- the standard
3 upon which this Court should be looking at the
4 President's temporary presidential immunity.
5 We're talking about stopping a process targeting
6 the President, this subpoena targeting the
7 President. That's what we're talking about
8 here. It is that burden that is our concern.

9 JUSTICE KAVANAUGH: I think the other
10 side says that the position you're articulating
11 is a bit more consistent with Justice Breyer's
12 concurrence in Clinton versus Jones than with
13 the majority opinion. And in his concurrence,
14 he said that judges hearing a private civil
15 damages action against a sitting president may
16 not issue orders that could significantly
17 distract a president from his official duties.
18 It's pointed out that that language was not in
19 the majority opinion.

20 What do you think about how we should
21 assess that --

22 MR. SEKULOW: Well, I think that civil
23 discovery --

24 JUSTICE KAVANAUGH: -- that part of
25 Clinton versus Jones?

1 MR. SEKULOW: -- versus criminal
2 process is -- are two very distinct processes.
3 And in a -- in a civil context, in a civil
4 proceeding, there's a -- we have the Federal
5 Rules of Civil Procedure in the federal court
6 that govern how that process goes forward, and
7 federal judges can take into various
8 considerations, especially dealing with the
9 President.

10 This is a state proceeding initiated
11 by the local district attorney against a sitting
12 President of the United States. So the -- our
13 concern here is the nature of the proceeding
14 itself is why we view categorically that a
15 subpoena targeting the President and his records
16 here --

17 JUSTICE KAVANAUGH: How do you deal --

18 MR. SEKULOW: -- would be violated --

19 JUSTICE KAVANAUGH: Sorry to
20 interrupt.

21 MR. SEKULOW: No.

22 JUSTICE KAVANAUGH: How do you deal
23 with statute of limitations issues?

24 MR. SEKULOW: Well, statute of
25 limitations issues, of course, are decided under

1 New York state law, and under New York state
2 law, there would be procedures that could be
3 utilized if, in fact, the DA were to elect to --
4 to start a process like that or if there were to
5 eventually be action.

6 But I -- I need to say something.

7 CHIEF JUSTICE ROBERTS: Thank you.

8 Thank you, counsel.

9 MR. SEKULOW: Yes, thank you. Thank
10 you, Mr. Chief Justice.

11 CHIEF JUSTICE ROBERTS: General
12 Francisco.

13 ORAL ARGUMENT OF GEN. NOEL J. FRANCISCO
14 FOR THE UNITED STATES, AS AMICUS CURIAE,
15 SUPPORTING THE PETITIONER

16 GENERAL FRANCISCO: Mr. Chief Justice,
17 and may it please the Court:

18 At a minimum, a local prosecutor
19 should have to show he really needs the
20 President's personal records to subpoena them
21 for two reasons.

22 First, as the Court suggested in
23 Clinton against Jones, state proceedings can
24 pose a greater threat to the presidency. The
25 2300 prosecutors across the country necessarily

1 place more emphasis on local interests than
2 national ones. A special needs standard ensures
3 that federal courts balance the prosecutor's
4 local need for information against national
5 interests, including the President's need to do
6 his job.

7 Second, ordinary grand jury rules are
8 not designed to protect Article II interests.
9 That's why, in Nixon, the Court held a federal
10 prosecutor had to show a demonstrated specific
11 need for the information sought. The local
12 prosecutor should at least be required to meet
13 the same standard.

14 As the Court has repeatedly said, in
15 no case of this kind would a court be required
16 to proceed against the President as against an
17 ordinary citizen. And, here, the district
18 attorney hasn't tried to meet the special needs
19 standard.

20 CHIEF JUSTICE ROBERTS: General
21 Francisco, we just heard Mr. Sekulow argue in
22 favor of an absolute standard, no circumstances,
23 no how. Your position is that, as you say, at a
24 minimum, the special needs test must be met.

25 Of course, Mr. Sekulow is representing

1 Mr. Trump. You're representing the United
2 States. You're arguing for a more flexible
3 standard. So what was wrong with Mr. Trump's
4 position?

5 GENERAL FRANCISCO: Your Honor, I
6 actually think that Mr. Sekulow makes a very
7 strong argument on the immunity issue. We just
8 don't think it's one that the Court needs to
9 address, at least until the prosecutor argues
10 and attempts to meet the special needs standard.

11 Here, since the prosecutor hasn't
12 argued and isn't arguing before this Court that
13 he meets the special needs standard, there's no
14 reason for the Court to address the broader
15 immunity question, and -- and -- and it's the
16 Court's ordinary processes to try to avoid those
17 broader and more difficult questions when
18 possible, and, here, we think that the special
19 needs standard would fully resolve this case at
20 this stage of the proceedings.

21 CHIEF JUSTICE ROBERTS: Well, in a --
22 in a typical case, with adequate allegations to
23 say that the standard's implicated, you would
24 say that it goes before a court and the court
25 will examine whether or not the criteria you --

1 you talk about, which I gather is the test under
2 Nixon, are met, and, under Mr. Sekulow's
3 standard, the -- would not immediately go before
4 the court. He was looking for a ruling from us
5 saying that he's absolutely immune, so the Court
6 would have no business addressing such a case.

7 That's a very significant difference.

8 GENERAL FRANCISCO: Well, Your Honor,
9 I think that in both instances the argument
10 would be available to an article -- you -- you
11 would be able to make that argument to an
12 Article II federal court. Under our argument,
13 if the court found that the prosecutor hadn't
14 met the Nixon special needs standard, it
15 wouldn't need to address the broader immunity
16 question.

17 If it did find that the special --
18 that the district attorney met the special needs
19 standard, it would have to then address the
20 broader immunity question. And all we are
21 saying is that, unless and until the special
22 need issue is addressed at the threshold,
23 there's no need to address the broader immunity
24 question in this case.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas?

3 JUSTICE THOMAS: Yes. General
4 Francisco, the -- you mentioned the level of
5 threat to the President or burden on the
6 President. How do we determine that, when it's
7 too much?

8 GENERAL FRANCISCO: Well, Your Honor,
9 here, I think there are a couple of things that
10 you can take into account.

11 First, the fact that we're in state
12 court, I think, is quite significant. Local
13 prosecutors are necessarily going to put more
14 emphasis on local interests than national ones.

15 It simply reflects the manner in which
16 they rise to office through elections by local,
17 relatively homogenous political communities.
18 And in New York State, I would also add, that
19 the trial court judges are elected in a similar
20 way.

21 So there you've already got this risk
22 of local prejudice. And so what the special
23 needs standard does is -- is that it ensures
24 that there is a federal court that's available
25 to balance the local interests against the

1 national ones, including the President's need to
2 do his job.

3 And then, secondly, it also has to do
4 with the ordinary grand jury rules that would
5 apply to a local prosecutor exercising his
6 authority. Those rules were not designed to and
7 they're not sufficient to protect Article II
8 interests since, under ordinary grand jury
9 rules, a district attorney never has to make a
10 particularized showing of need.

11 Instead, the burden is on the witness
12 to show that the subpoena can have no
13 conceivable relevance to any plausible subject
14 of an investigation.

15 Now that is a perfectly appropriate
16 standard in the ordinary case, but the reason
17 why Nixon applied the special needs standard
18 above and beyond the ordinary rules of criminal
19 procedure was because the Court recognized that
20 the President is the sole person in whom all
21 Article II powers are vested.

22 And so he is entitled to a measure of
23 protection above and beyond the ordinary rules.
24 And the special needs standard is one of those
25 measures of protection.

1 To put -- point back to Justice
2 Breyer's very persuasive concurrence in Clinton
3 against Jones, I think Justice Breyer correctly
4 predicted that this Court would need to develop
5 special protective procedures precisely for the
6 President in the context of litigation like
7 this.

8 JUSTICE THOMAS: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Ginsburg?

11 JUSTICE GINSBURG: You stress that the
12 states are subordinate sovereigns, so -- and so
13 they are subject to the Supremacy Clause, but
14 you don't give any credit at all to the Tenth
15 Amendment and the reserve powers of the state.
16 That's one question that I have.

17 And the -- as far as the impact of the
18 President is concerned, I think there's no case
19 more dramatic than the Nixon tapes' devastating
20 impact on the President. He resigned from
21 office. But yet that was okay.

22 So I really don't get it.

23 GENERAL FRANCISCO: So, Your Honor --

24 JUSTICE GINSBURG: Yes.

25 GENERAL FRANCISCO: So, Your Honor, in

1 -- in terms of the Tenth Amendment, all we're
2 saying is that Article II vests all executive
3 power in a single President of the United
4 States. He is the sole person in whom all
5 executive power is vested.

6 And so that necessarily implies that
7 there are limits on what others can do to unduly
8 burden him in his ability to do his job. So all
9 that the special needs standard does is ensure
10 that a prosecutor really needs the President's
11 information before he can enforce that subpoena,
12 since, if he can't even show that he really
13 needs the information, he's necessarily imposing
14 an undue burden on the President and creating a
15 serious risk of harassment.

16 And if you multiply that by 2300
17 prosecutors across the country, I think that the
18 risk to the presidency is quite obvious.

19 In terms of the Nixon case, we are
20 actually arguing for the same standard that the
21 Court applied in the Nixon case, the special
22 needs standard. We're just saying that a local
23 prosecutor in state court should at a minimum be
24 required to meet the same standard that the
25 federal prosecutor in Nixon had to meet and show

1 that he really does need the information that
2 he's seeking, since, again, if he doesn't, it's
3 unnecessarily burdensome --

4 JUSTICE GINSBURG: Can I --

5 GENERAL FRANCISCO: Yes, Your Honor.

6 JUSTICE GINSBURG: The grand jury is
7 an investigatory body. It doesn't make at the
8 outset specific charging decisions while the
9 investigation is under way.

10 It investigates in order to determine
11 could there be specific charging decisions, but
12 you would have them make charging decisions
13 before they investigate, and that seems to be
14 backward.

15 GENERAL FRANCISCO: Your Honor,
16 respectfully, no. I would simply urge that you
17 apply the same standard that Judge Wald applied
18 in the In Re Fields case, which was a grand jury
19 subpoena issued to the White House, where she
20 concluded, properly in our view, that Nixon's
21 special needs standard ought to apply to grand
22 jury subpoenas.

23 It's not -- you don't have to make a
24 charging decision, but you do have to show a
25 demonstrated specific particularized need for

1 the information pursuant to which you are
2 issuing the -- the grand jury subpoena.

3 CHIEF JUSTICE ROBERTS: Justice
4 Breyer?

5 JUSTICE BREYER: Yes, thank you.

6 General, I -- I think that the Nixon
7 tape case has one thing for you, one thing
8 against you. The thing against you, I think it
9 was a case where executive privilege was
10 asserted.

11 But what's for you and I think might
12 be more relevant is -- is, in that case, the
13 Court said, well, there has been first a
14 weighing of the burdensome nature, et cetera --
15 a lot of other things in that -- in the lower
16 courts that have decided that it is appropriate
17 to go forward.

18 Now what I don't see is why you need a
19 special standard more than that here, the
20 ordinary standard. You would need --

21 GENERAL FRANCISCO: Your Honor --

22 JUSTICE BREYER: -- you would need a
23 decision by us that it's reviewable in federal
24 court. I understand that. But I don't see why
25 you have to go beyond that where the things

1 you're talking about would be taken into
2 account.

3 GENERAL FRANCISCO: Your Honor, you
4 are absolutely correct that, at a minimum, we
5 would need federal court review. And in that
6 regard, I would note that the district attorney
7 here agrees that there are Article II limits on
8 what he can do and that those Article II limits
9 are in federal court.

10 But, respectfully, I would suggest
11 that Nixon stands for more than simply some kind
12 of weighing of interests. Nixon applied the
13 special needs standard and it said that the
14 prosecutor did, in fact, have to show a
15 particularized need for the information. That's
16 all that we are suggesting ought to apply here.

17 JUSTICE BREYER: Well, wasn't that in
18 the context of the assertion of executive
19 privilege?

20 GENERAL FRANCISCO: Excuse me, Your
21 Honor?

22 JUSTICE BREYER: Wasn't that in the
23 context of an assertion by the President of
24 executive privilege?

25 GENERAL FRANCISCO: Yes, Your Honor,

1 it was, but litigation about private conduct is
2 also burdensome. And as the Court recognized in
3 Clinton against Jones, the President might well
4 need more protection in state court than he gets
5 in federal court precisely because of the risk
6 of local prejudice. And that's why the Court
7 reserved judgment on that question.

8 So I think, when you put those two
9 things together, it does make it entirely
10 appropriate to hold a local prosecutor in state
11 court to the same standard as the federal
12 prosecutor was held to in the Nixon case.

13 And, indeed, even if you were to take
14 the district attorney's own case-specific test,
15 I think you would need the special needs
16 standard. After all, we don't typically get
17 discovery into a grand jury proceeding.

18 So the only way to assess at the front
19 end whether the prosecutor is issuing an unduly
20 burdensome subpoena or issuing a subpoena in bad
21 faith is to require some kind of showing of
22 special need.

23 After all, why would a --

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Alito?

2 JUSTICE ALITO: General, could you
3 explain in more specific terms how you think
4 this showing of special need would be carried
5 out in district court? I assume that the
6 prosecutor would have to make some kind of --
7 would have to reveal what was being investigated
8 and why this particular information was needed
9 for or essential for the investigation.

10 Now would that be done -- would that
11 be reviewed by the judge ex parte? Would it be
12 available to whoever the sitting President is to
13 object to that, to review it and object to it?

14 GENERAL FRANCISCO: Your Honor, it's
15 difficult to answer that question in a vacuum
16 because I think it would very much depend on the
17 particular case, but let me make my best stab at
18 it.

19 I think that in order to have
20 meaningful judicial review, you would need --
21 the prosecutor would need to make public as much
22 as could responsibly be made public so that the
23 President would have an opportunity and the
24 President's lawyers would have an opportunity to
25 make their case on the particular facts.

1 If there is a certain amount of
2 evidence that really cannot responsibly be made
3 public, then I think it would be appropriate to
4 consider ex parte proceedings or filings under
5 seal.

6 In all events, we think that that's
7 the type of assessment that needs to be made
8 when you're talking about subpoenas,
9 unprecedented subpoenas like this one, that are
10 from state and local prosecutors targeting the
11 President of the United States.

12 The other place I would point you to
13 is, again, Judge Wall's -- Wald's very good
14 opinion for the D.C. Circuit in the In Re Fields
15 case, where she does walk through in some amount
16 of detail and unpack how the special needs
17 standard applies to grand jury subpoenas.

18 JUSTICE ALITO: How essential must the
19 information be in order to meet this special
20 needs standard? Does it have to be absolutely
21 indispensable, not available from any other
22 source by any conceivable means, or simply
23 useful?

24 GENERAL FRANCISCO: Your Honor, it's
25 probably somewhere in between those two things.

1 I think it's got to be -- I think it's got to be
2 critical to the charging decision, so it can't
3 just be marginally useful or, you know, merely
4 duplicative or -- or interesting to a tangential
5 side issue. It does have to be critical to the
6 charging decision.

7 If the information is readily
8 available elsewhere, I don't see how a
9 prosecutor could meet the special needs
10 standard. And if the information he has -- he
11 currently does have is sufficient for him to
12 make a responsible charging decision, I also
13 don't think he -- how he could meet the special
14 needs standard. So I think I would put it
15 somewhere in between.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Sotomayor?

19 JUSTICE SOTOMAYOR: General, there's
20 always danger in taking a doctrine adopted for
21 one set of needs, and that has to do with needs
22 that are balancing what is clearly recognized in
23 law as executive privilege versus the needs for
24 the proceeding at issue and transplanting it to
25 a situation that's totally different, where

1 we're not talking about a claim of executive
2 privilege, and we're not talking of executive
3 immunity; we're talking about private activities
4 that predated the President's tenure.

5 So why are we using all that
6 transplanted language, and why don't we get to a
7 standard that takes care of what you're worried
8 about, which is harassment and interference, and
9 simply ask whether the investigation is based on
10 credible suspicion of criminal activity and
11 whether the subpoena is reasonably calculated to
12 advance that investigation? A standard that
13 looks to whether there is a good-faith basis for
14 the state prosecutor's actions and whether the
15 subpoena is reasonable in its scope and burdens.

16 I don't understand why that sort of
17 standard is inadequate, especially for a
18 proceeding that involves secrecy, like a grand
19 jury subpoena.

20 GENERAL FRANCISCO: For two reasons,
21 Your Honor. First, for the reasons that I think
22 Justice Breyer did persuasively explain in
23 Clinton against Jones, even litigation about
24 private conduct can be quite burdensome, and
25 that is particularly so when you're talking

1 about private conduct that's being litigated in
2 state court pursuant to state procedures. So I
3 think that's why he correct -- correctly
4 predicted that this Court would need in future
5 cases to develop special protective procedures
6 precisely in this context.

7 And, secondly, I think that the
8 special protective procedure that we are
9 proposing here is necessary even under Your
10 Honor's general approach. After all, why would
11 a prosecutor take the unprecedented step of
12 issuing a subpoena to the President of the
13 United States for personal records from a local
14 prosecutor if he can't even show that he really
15 needs the information that he's seeking?

16 If he can't make that showing, I think
17 there is a pretty good reason to be a little bit
18 suspicious. After all, very few prosecutors --

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Kagan?

22 JUSTICE KAGAN: So, General, a couple
23 of times now in response to Justice Breyer and
24 Justice Sotomayor, you've explained why we
25 should use the standard from executive privilege

1 cases by saying, well, litigation about private
2 conduct is also burdensome.

3 But the point about executive
4 privilege cases is not that it's burdensome. I
5 mean, the critical factor is the way the
6 interests that a president has in communicating
7 with advisors on official matters, often about
8 national security, often about military matters,
9 and -- and -- and the need for confidentiality
10 in that, and that's why the Nixon standard was
11 developed, not because of generalized ideas
12 about burdensomeness, which can be dealt with in
13 other ways.

14 So, again, why should that standard be
15 used here?

16 GENERAL FRANCISCO: Respectfully, Your
17 Honor, because I think that there are parallel
18 interests. Executive -- executive privilege,
19 you are right, is meant to protect the
20 confidentiality of communications, but Article
21 II, more generally, is meant to protect the
22 President from being unduly burdened in his
23 ability to carry out his responsibilities.

24 And so -- and I think that's
25 particularly necessary when you're talking about

1 state court proceedings by the many, many, 2300
2 local prosecutors across the country who, again,
3 are more responsive to local political
4 constituencies and local interests than national
5 ones. So I think that --

6 JUSTICE KAGAN: But, again, General --

7 GENERAL FRANCISCO: -- when you look
8 at Article II --

9 JUSTICE KAGAN: -- you don't need the
10 -- the -- this heightened standard in order to
11 take account of burdensomeness. Burdensomeness
12 is something that can be addressed in any
13 subpoena, and I'm sure that courts, when it gets
14 to the President and the special
15 responsibilities of the President, will address
16 those interests with respect, with sensitivity,
17 especially if we tell them so.

18 So why would you need this heightened
19 standard that is meant to protect confidential
20 communications about official government
21 business?

22 GENERAL FRANCISCO: For two reasons,
23 Your Honor. First, because, under the ordinary
24 grand jury rules, the only question as to
25 burdensomeness is whether the subpoena has any

1 conceivable relevance to any plausible subject
2 of investigation and, therefore, is unduly
3 burdensome.

4 And, secondly, I think that judgment
5 has to be made by federal courts, not state
6 courts, because state courts, like local
7 prosecutors, are going to be more responsive to
8 local interests. After all, in New York State,
9 trial court judges, like the district attorneys,
10 are elected in partisan elections.

11 So all we're saying is that this is
12 the type of assessment that needs to be made in
13 federal court, and the most appropriate and
14 easy-to-apply standard is the standard that
15 you've already been applying for 50 years under
16 the Nixon case.

17 And we think that that is an --
18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Gorsuch?

21 JUSTICE GORSUCH: Counsel, I -- I'd
22 like to just explore a little further how this
23 standard would -- that you're proposing would
24 play out in practice.

25 I -- I suppose you'd have a local

1 prosecutor saying, I'm investigating a tax
2 infraction, and the best and maybe only evidence
3 of -- of that potential infraction are the tax
4 records in the possession of the -- of the
5 potential defendant.

6 Why wouldn't that meet the special
7 heightened test that you've proposed in every
8 case? And if that -- if that -- if it does,
9 then what -- what have we achieved?

10 GENERAL FRANCISCO: Well, Your Honor,
11 I think it would depend on who the potential
12 defendant is. If the potential defendant is the
13 President of the United States, here, the
14 district attorney doesn't contest the fact that
15 he cannot indict the President of the United
16 States until after he leaves office. So he
17 wouldn't be able to show that he needs the
18 information now in order to indict the President
19 of the United States.

20 Of course, if the potential defendant
21 is somebody else, then it might start looking
22 closer to the Nixon case itself, where the
23 special counsel was investigating a third-party.
24 And I think that would, in fact, be a relevant
25 consideration under the special needs standard.

1 JUSTICE GORSUCH: I -- I guess I
2 didn't follow that last portion of it. Let's
3 say the infraction is by a corporation or some
4 entity and we need the -- the prosecutor is
5 going to say we need these materials in order to
6 determine whether there is an infraction.

7 GENERAL FRANCISCO: Right.

8 JUSTICE GORSUCH: Why wouldn't that
9 qualify under your standard?

10 GENERAL FRANCISCO: I think that would
11 certainly be a relevant thing to take into
12 account under our standard. And if he actually
13 met the special needs test with respect to the
14 information and found that it was really
15 necessary in order to bring charges against that
16 third-party, he may well meet the special needs
17 standard. And then you'd have to address the
18 broader immunity questions.

19 In this particular --

20 JUSTICE GORSUCH: How much showing of
21 special need is required under your -- under
22 your standard? A prosecutor says, I have some
23 -- some reasonable suspicion that there's a tax
24 deficiency by some entity. Is that enough, or
25 would more be required?

1 GENERAL FRANCISCO: Your Honor, I
2 think it -- I think it's more than that. I
3 think he's got to show that the information he's
4 seeking is critical to him responsibly making a
5 charging decision, that he can't get that
6 information from somewhere else, and the
7 information that he does have is insufficient.

8 It's essentially the same standard the
9 Court applied, this Court applied in Nixon, the
10 D.C. Circuit applied in the In Re Fields case.
11 You know, it's not like it's a hard and fast
12 bright-line rule, but it is an administrable
13 rule that courts have been applying for some 50
14 years now.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Kavanaugh?

18 JUSTICE KAVANAUGH: Thank you, Mr.
19 Chief Justice.

20 And good afternoon, General Francisco.

21 GENERAL FRANCISCO: Good afternoon,
22 Your Honor.

23 JUSTICE KAVANAUGH: I want to follow
24 -- I want to follow up on Justice Thomas and
25 Justice Kagan and really zero in on what the

1 Article II interest is before we talk about
2 what's standard.

3 And I think in Justice Breyer's
4 concurrence in Clinton against Jones, he
5 referred to the interest in time and energy
6 distraction, which he drew from Nixon versus
7 Fitzgerald, a different Nixon case, as an
8 independent Article II interest that is distinct
9 from distortion of official decision-making,
10 which would be more the executive privilege kind
11 of interest.

12 Is that the Article II interest you're
13 zeroing in on, or is it something else?

14 GENERAL FRANCISCO: Well, Your Honor,
15 respectfully, I think it's both of them. And as
16 I read Justice Breyer's opinion, he likewise
17 understood it to be both of them.

18 The whole idea is that Article II
19 vests all executive power in a single person.
20 And that necessarily means that others can't
21 unnecessary hobble or debilitate that person in
22 his ability to responsibly carry out his duties.

23 So the whole point of the special
24 needs standard is to ensure that others,
25 including prosecutors, can't unnecessarily

1 impede the President in carrying out his
2 responsibilities.

3 So, at a minimum, they have to show
4 that they really need the information that
5 they're seeking, since, if you have 2300
6 prosecutors that are unnecessarily hitting the
7 President with subpoenas and none of them can
8 actually show they really need that information,
9 you're necessarily going to be undermining the
10 President's ability to effectively carry out the
11 Article II duties that the Constitution entrusts
12 to him and to him alone on behalf of the entire
13 country.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Mr. Dunne.

17 ORAL ARGUMENT OF CAREY R. DUNNE

18 ON BEHALF OF THE RESPONDENTS

19 MR. DUNNE: Mr. Chief Justice, and may
20 it please the Court:

21 There are two principles at issue in
22 this case. One is the central role of the
23 President in the functioning of our national
24 government and the need to avoid interfering
25 with the President's ability to carry out those

1 important duties.

2 The other principle is that under our
3 Constitution, when a President acts as a private
4 individual, he or she has responsibilities like
5 every other citizen, including compliance with
6 legal process.

7 In particular, this Court has long
8 held that American presidents are not above
9 having to provide evidence in response to a law
10 enforcement inquiry.

11 We're mindful that as a state actor
12 our office cannot investigate a president for
13 any official acts and that we cannot prosecute a
14 president while in office.

15 But, here, we're talking about a
16 subpoena sent to a third-party concerning
17 private conduct by a variety of individuals and
18 businesses. Yes, one of them is the President,
19 but no one's been targeted or charged with
20 anything. There's no claim of any official acts
21 or any executive privilege.

22 As the courts below found, the
23 subpoena imposes no Article II burden whatsoever
24 and was not born of any political animus or
25 intent to harass. Instead, it was fronted by

1 public reports that certain business
2 transactions in our jurisdiction were possibly
3 illegal. Given those allegations, our office
4 would have been remiss not to follow up.

5 In response, the President asked the
6 Court to overturn 200 years of precedent by
7 declaring he has a blanket immunity while in
8 office from any legal inquiry, even for his
9 prior private acts, even though that could
10 result in a permanent immunity for him and the
11 other parties if the statutes of limitation
12 expire, and even though it could prevent the
13 discovery of evidence that could exonerate the
14 individuals involved.

15 Finally, his novel claim also asks the
16 Court to presume that state actors have a
17 "reckless mania" that will cause them to
18 "relentlessly harass presidents and that state
19 and federal courts will allow prosecutors to do
20 so."

21 Of course, there's no historical
22 support for this claim, which flies in the face
23 of federalism. The supposed floodgates have
24 been open for generations and there's never been
25 a flood. The only thing new here is the

1 subpoena comes from the state. But absent a
2 constitutional burden, that shouldn't leave the
3 Court to abandon its long-standing respect for
4 state criminal proceedings.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 You know, we've had the cases this
8 morning and this case and they are in many
9 respects very similar in -- on -- in the case of
10 the subpoena itself, they're identical, but I
11 think in other respects they're really quite
12 different.

13 The separation of powers case this
14 morning involves entities in an ongoing
15 relationship, the House and the President. And
16 issues of this sort, although always very
17 important, come up with some regularity.
18 There's often disputes between the White House
19 and Congress over documents and almost always
20 they're -- they're worked out because each of
21 those branches have authorities and powers that
22 affect each other.

23 You know, if the Senate asks for
24 documents from the White House, and the White
25 House doesn't give them, then the Senate says,

1 well, we're going to, you know, take our time
2 confirming your nominees and back and forth.

3 But, with respect to local
4 prosecutors, you don't have that ongoing
5 relationship. So the possibility of working
6 something out is -- is far less evident, and, if
7 you're doing that, the -- the stakes are --
8 well, it's just a little more difficult because
9 there isn't that ongoing relationship.

10 So shouldn't there be a higher
11 standard before we permit the district attorneys
12 from around the country -- there are also more
13 of them than the two Houses of Congress, 2300 of
14 them -- shouldn't there be a higher standard
15 than in the case of the separation of powers
16 dispute?

17 MR. DUNNE: Your Honor, I think our
18 answer to that is yes. And putting aside its
19 relationship or not to the separation of powers
20 analysis, I'd like to address the -- the DOJ's
21 proposed heightened showing standard because we
22 -- we see that -- let me put it this way.

23 We see that there are three reasons, I
24 think, why the DOJ's new heightened showing
25 proposal doesn't work. And a number of

1 questions in the last argument, I think, touched
2 on some of these concepts, if I might.

3 First, one problem is that the -- the
4 approach that they're suggesting really reverses
5 the Court's prior approach to fact-finding in
6 these types of cases in a way that I think would
7 harm the grand jury process, which I can
8 explain.

9 So, again, we agree that there should
10 be a heightened showing requirement, but my
11 point is only after a president has already
12 established an actual Article II burden.
13 Otherwise, there's nothing for a court to weigh
14 in the balancing of Article II interests against
15 the need for legal process, which -- and that
16 balancing and that sequencing, frankly, was both
17 -- central in both the Nixon and Clinton cases.

18 Here --

19 CHIEF JUSTICE ROBERTS: Would you
20 articulate for me precisely what standard you
21 think should apply in your case and in what
22 sense is it more rigorous than that would apply
23 in the dispute between the White House and
24 Congress?

25 MR. DUNNE: Yes. I -- I -- I think we

1 believe that a prosecutor, if there's been an --
2 an affirmative showing by -- by a president of
3 an Article II burden, and, of course, the courts
4 have below held that there has not been such a
5 showing here, but if in a different case there
6 was such a showing made, we believe a prosecutor
7 should be required to show, one, an objective
8 basis for the investigation and, two, a
9 reasonable probability the request would yield
10 relevant information.

11 We think language like that would be
12 more consistent with past cases of this Court
13 and with the realities of a grand jury
14 investigation.

15 And, frankly, the courts below also
16 already found that we've met that standard here.
17 The -- the problem is that the alternative of
18 requiring a state prosecutor to get permission
19 first from a federal judge for any request
20 relating to a president's business activities
21 would undermine this Court's prior rulings, like
22 the one in *R Enterprises* that a grand jury
23 shouldn't be burdened by procedural challenges
24 and delays because it's a confidential process
25 and not an adversarial proceeding. And the

1 DOJ's new standard just ignores that.

2 The other problem --

3 CHIEF JUSTICE ROBERTS: Justice --

4 Justice Thomas?

5 JUSTICE THOMAS: Thank you, Mr. Chief

6 Justice.

7 Mr. Dunne, you were about to say how

8 DOJ's approach would harm the grand jury

9 process. Would you finish that?

10 MR. DUNNE: Yes. And I think I was

11 just addressing that, Justice Thomas, that is,

12 you know, to require us in any given case to run

13 across the street to federal court and say, by

14 the way, we have an investigation underway, it

15 happens to touch on a president's prior business

16 transactions in which he and others were

17 involved in, and we'd like to get permission to

18 send a subpoena for records that are in either

19 the possession of a president or maybe the

20 president's agents, like his accounting firm

21 here, again, it completely upends the way that a

22 grand jury process is supposed to work.

23 If I might, the second big problem I

24 think with the DOJ's analysis is that the

25 language that they've chosen just doesn't work,

1 contrary to why as to what I just set out,
2 because it only applies in the context of a
3 trial subpoena.

4 It calls for a "stringent showing"
5 that the request is "directly relevant to
6 central issues at trial and charging decisions."
7 Again, that language just doesn't apply in the
8 context of a grand jury when no charging
9 decisions have been made.

10 So that's why the -- the formulation
11 that we've suggested, I think, would be more
12 consistent with what's needed in a grand jury
13 context. But, again, we think that is utterly
14 unnecessary here to apply in our case because,
15 A, there's already been a finding of no Article
16 II burden, and, B, we have already met the
17 standard by the -- by the district court's
18 finding that our -- our investigation is
19 well-founded and brought in good faith.

20 So I don't think this --

21 JUSTICE THOMAS: So what -- what
22 limits a grand jury process in -- in New York?
23 What are the limits?

24 MR. DUNNE: Well, the limits are, I
25 think, the same basically as they are in federal

1 court and most other states, Your Honor. I
2 mean, yes, a -- the recipient of a subpoena who
3 has a basis to argue either a privilege or a
4 burden of some sort has the right, as the
5 President did here, to go into court and make
6 those factual arguments that it's -- that's --
7 that either it should be quashed or -- or
8 constrained in some fashion. It is -- there is
9 -- there's a grand jury judge who supervises all
10 grand juries and their activities, who's always
11 available here.

12 But I think the more important point
13 perhaps, Your Honor, is that, obviously, given
14 the decision of the court of appeals below in
15 this case, and to address that concern in that
16 footnote in -- in -- in Clinton, at this point,
17 it's clear that a president, in particular, who
18 has a concern about this kind of impact on
19 Article II duties now always has the ability to
20 go into federal court and not into state court,
21 which was the main concern in that footnote in
22 Clinton.

23 JUSTICE THOMAS: What if you thought
24 it was -- the President said it was impossible
25 for him to do his job, as opposed to just being

1 burdened? Would that -- would we have a role to
2 limit or somehow end the grand jury process?

3 MR. DUNNE: Absolutely, Your Honor. I
4 mean, I think that's -- that's the point of the
5 case-specific analysis, is -- is that it gives a
6 court, and here a federal court, to hear a
7 concern like that expressed, and if the concern
8 is -- you know, if somehow this shuts my office
9 down or is -- is a real burden, it's not just a
10 speculative mental distraction claim, then, yes,
11 the courts are empowered to impose a wide
12 variety of limitations, including, if necessary,
13 to shut an investigation down or to shut a
14 subpoena or a litigation down.

15 That's the beauty of this Court's
16 prior decisions in Nixon and Clinton and others,
17 which have decided consistently to apply the
18 case-specific analysis and -- and -- and have
19 rejected the notion that this is best treated
20 with a categorical prophylactic rule.

21 I just think that that's not
22 appropriate here when it's all so case-specific.

23 JUSTICE THOMAS: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Ginsburg?

1 JUSTICE GINSBURG: The principal
2 objections that have been raised is that when
3 you're dealing with federal prosecutions, it's
4 all controlled by the attorney general. But,
5 here, you have 2300 district attorneys, each
6 armed with grand jury subpoena power. So the
7 control exists in -- in federal courts with the
8 attorney general at the helm and no one
9 controlling all of the state district attorneys.

10 MR. DUNNE: I understand, Your Honor,
11 and I think really what that gets centrally to
12 is the consistent argument here about the parade
13 of horrors, if you will. And if I could
14 address that, I think there's several answers to
15 that concern.

16 First of all, there's really no
17 empirical basis in -- in history for this --
18 this apocalyptic prediction. The same claim was
19 made and rejected by this Court in Nixon and
20 then in Clinton. That, of course, was decades
21 ago, and there's not been a flood of subpoenas
22 or litigations or prosecutions of -- of
23 presidents by -- by states or federal
24 prosecutors.

25 Second, as a practical matter, you

1 know, this notion that there are 2300
2 prosecutors out there writing with their
3 subpoena pads open, there's just no basis to
4 think that an army of local prosecutors like
5 that would even have jurisdiction over a
6 president, especially for private conduct, in
7 the first place.

8 Here, New York City, of course, has a
9 particular connection to the Trump Organization
10 and its financial transactions because it's
11 headquartered here. It's not likely that --
12 that more than one or many states, much less two
13 -- 2300 counties, would ever have that kind of
14 connection to a president's private conduct.

15 Third, I -- I think, as -- as -- as,
16 Justice Ginsburg, you mentioned in the last
17 argument, this view that people -- that the --
18 there's a reckless mania by local prosecutors
19 contradicts this Court's long-standing
20 presumption in favor of regularity and deference
21 to state proceedings.

22 And so, to finish off, the limitation,
23 I think, that you're asking about really comes
24 in the -- in the form of the case-specific
25 showing that past cases from this Court have

1 established, because, if there is a concern
2 about the behavior of a local prosecutor, any
3 president, when necessary, but it's been few and
4 far between over the decades, can run now not
5 just into state court, which Clinton thought
6 could be problematic, but can run into federal
7 court and raise exactly the kind of claim that
8 the President has raised here. That's the
9 limitation.

10 JUSTICE GINSBURG: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Breyer?

13 JUSTICE BREYER: Well, thank you.

14 What -- what -- I agree with you that
15 the two basic principles you said at the outcome
16 are there: every man's evidence versus the
17 constitutional statement that the President is
18 the executive, Article II. And they conflict,
19 just as in the first place -- the first case,
20 the power of Congress, Article I and Article II
21 conflict. All right.

22 MR. DUNNE: I -- I think that I would
23 say they don't conflict, but, yes, they're in
24 tension in our view.

25 JUSTICE BREYER: They're in tension.

1 Fine. All right. Now a possible solution is to
2 say no absolute rule but just send it to the
3 ordinary system for weighing the needs versus
4 the burdens, and the different sides have to say
5 what they are, and then have that reviewable in
6 federal court. And because of the nature of it,
7 and we could list in an opinion the kinds of
8 things that might not be or might be relevant,
9 depending on the case. And eventually, with the
10 President, we might review it.

11 All right. Now all that would take
12 time. The time itself would discourage
13 prosecutors from doing this, which might be
14 good. And time itself would encourage House,
15 Congress, President to work things out in a
16 non-judicial way. All right?

17 I don't put that as being wedded to
18 it. I want to know your reaction.

19 MR. DUNNE: Well, Your Honor, I think
20 what you're describing is exactly what this
21 Court held in -- in Clinton, and it's exactly,
22 frankly, what has happened now in this case,
23 which is, yes, in this case, the -- the
24 President decided to pursue his -- his claim of
25 immunity in federal court versus state court,

1 which is fine and now available, I think, in the
2 future to all presidents.

3 But I think the -- the fact that that
4 is, you know, what happened -- should happen in
5 the ordinary course and which can happen in the
6 ordinary course is, again, the solution and the
7 limiting principle here, because it does --
8 it'll make it clear that there is a remedy and
9 discourages, I would have thought, bad-faith
10 impulses by any state or local prosecutor who
11 might harbor such an impulse and provides an
12 outlet that makes sure that it -- it can't get
13 out of control.

14 But, again, that's the beauty of the
15 case-specific analysis. I don't think these
16 things lend themselves to categorical
17 prophylactic rules. And that's been the
18 approach from this Court from day one.

19 JUSTICE BREYER: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice Alito?

21 JUSTICE ALITO: As I understand your
22 proposed standard, there would be available
23 review in federal court, and the prosecutor
24 would have to show an objective basis for the
25 subpoena and the relevance of the subpoena to

1 the investigation. Is that correct?

2 MR. DUNNE: Basically, Your Honor,
3 language like that. I -- I said point two was a
4 reasonable probability that will yield relevant
5 information, but, yes, that's the concept.

6 JUSTICE ALITO: Okay, reasonable
7 probability. What would be your objection to a
8 somewhat more demanding standard? So the
9 prosecutor would have to show that the
10 information can't be obtained from another
11 source or would be very -- it would be very
12 difficult to obtain it from another source, and
13 the information that -- unless the information
14 is obtained right now, as opposed to at the end
15 of the President's term, there would be some
16 serious prejudice to the investigation.

17 MR. DUNNE: Your Honor, I, frankly,
18 don't think that any of those concepts are
19 foreign to the standard that I -- I articulated.
20 And I think they are relevant, in fact, to the
21 objective basis and -- and relevance points.

22 Here, for example, and -- and -- and,
23 again, I think the court -- the court below, the
24 district court in particular, you know, heard
25 our explanations, and including the fact that,

1 you know, the reason why we went to Mazars is
2 not to do an end run around negotiations with
3 the President's lawyers.

4 It's because Mazars, as the outside
5 accounting firm, is -- is, as far as we could
6 tell, the only repository of what might be the
7 most important documents in an investigation
8 like this, which are not just the tax returns
9 but the surrounding accounting materials and
10 work papers, et cetera, which shed light on a
11 good faith or not of the transaction.

12 So my short answer, I'm sorry, is that
13 I think those -- those concepts are -- are --
14 are -- would be fine and not unduly burdensome
15 in the -- in the context of the standard that I
16 set forth.

17 JUSTICE ALITO: Can I ask you one
18 other thing? Do you think that the adjudication
19 of this in all cases of a similar nature would
20 depend in any way on state law and practice
21 regarding grand jury secrecy?

22 In federal court the rules of grand
23 jury secrecy are, of course, very strict.
24 States have different rules. Suppose a
25 particular state imposes no restriction on the

1 revelation by a member of the grand jury or
2 perhaps even by the prosecutor of the
3 information that is supplied in compliance with
4 a subpoena.

5 MR. DUNNE: Well, Your Honor, I'm not
6 aware of any other states having that kind of
7 lax or nonexistent grand jury secrecy rule. I
8 can assure the Court that in New York State our
9 grand jury secrecy laws are at least as strict
10 as under the federal system.

11 But putting that aside, if, in fact,
12 the -- the fact pattern presents to a judge the
13 prospect that the information, in fact, will
14 become public and the President were -- were to
15 persuade a judge that the -- that publication of
16 the documents at issue would themselves impose
17 some sort of Article II burden or other -- other
18 interference with his executive duties in that
19 given state, you know, I suppose that would be
20 part of the case-specific analysis that the
21 court could -- could understand and take into
22 account in deciding whether that there should be
23 some limitation or -- or even a quashing of the
24 subpoena itself.

25 I think that's part of the

1 case-specific analysis.

2 JUSTICE ALITO: We both know that
3 prosecutors have different -- that -- that there
4 are prosecutors who leak all sorts of
5 information, including grand jury information,
6 to all sorts of media sources, including
7 specifically the -- The New York Times.

8 If -- if there were a showing that
9 that was a risk, would that have a bearing on
10 this?

11 MR. DUNNE: Your Honor, it's hard for
12 me to -- I'm -- I-m -- I'm not aware of any kind
13 of real pattern or practice of leaking of actual
14 grand jury materials that are covered by grand
15 jury secrecy.

16 Yes, in all -- all different kinds of
17 offices there are at times, you know, leaks of
18 status of cases and that kind of thing, but I am
19 -- I am not aware, and -- and -- and our grand
20 jury secrecy rules really prevent prosecutors, I
21 believe, from, you know, actually turning over
22 confidential grand jury secrecy materials to --

23 JUSTICE ALITO: You're not aware --
24 you're not aware of this ever happening? Your
25 office is never requested by media in the New

1 York City area to disclose confidential
2 investigative information?

3 MR. DUNNE: No. Well, they ask all
4 the time, Your Honor, and the answer is
5 consistently no, at least as far as I can
6 represent.

7 But what I'm trying to draw a
8 distinction between is people commenting to
9 reporters all the time off the record, that kind
10 of thing, versus turning over actual materials,
11 like, you know, the voluminous tax returns or
12 other sensitive documents that have been
13 gathered and which are covered by grand jury
14 secrecy.

15 That's -- that's what I just don't see
16 happening here. And I think history supports
17 that view.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor?

20 JUSTICE ALITO: When you are making an
21 Article II burden, does that include the burden
22 of harassment, the burden of using subpoenas for
23 political purposes?

24 MR. DUNNE: Yes, Your Honor, I would
25 certainly include that there. And, again, there

1 has been an express finding below here that
2 there is a -- the investigation was well founded
3 and that there was no harassment or bad faith in
4 our bringing of these -- of the subpoena.

5 JUSTICE ALITO: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Sotomayor?

8 JUSTICE SOTOMAYOR: Counsel, did I
9 understand your answer to Justice Alito to be
10 that you are in agreement with the SG that we
11 should impose a heightened need standard, a
12 special need standard?

13 MR. DUNNE: No, Your Honor, I was -- I
14 was -- I think we're all now calling it the
15 heightened showing standard or, in the DOJ's
16 lexicon now, the heightened need standard, but I
17 think what I'm articulating is a very different
18 standard in terms of the actual language to be
19 looked at and -- and imposed.

20 Again, I think that --

21 JUSTICE SOTOMAYOR: Wait. If you can,
22 counsel, because I want to be very precise, if
23 your standard includes what the heightened need
24 standard has, then why not call it what it is,
25 heightened need? There has to be a reason you

1 think we shouldn't call it that, and you -- I
2 don't know that I understand what difference
3 you're proposing.

4 MR. DUNNE: I'm -- I'm sorry, Justice
5 Sotomayor. The -- the concern I have with the
6 DOJ language is, again, calling for a stringent
7 showing that a subpoena request is directly
8 relevant to central issues at trial and other
9 concepts like that.

10 What I'm trying to propose is
11 something I think which is not so strict and
12 which is not limited to charging and
13 trial-related concepts, but which would be
14 workable in the context of a grand jury
15 subpoena.

16 And, again, whatever the standard is
17 that we're articulating, I -- I want to stress
18 that I believe that we are -- our office has met
19 that standard here, even under the DOJ's
20 proposal, because of the findings by the
21 district court.

22 JUSTICE SOTOMAYOR: Tell me why the
23 heightened standard would interfere with the
24 grand jury process.

25 MR. DUNNE: Well, I think, Your Honor,

1 among other things, the -- the DOJ's proposed
2 application of its standard, if you read its
3 brief, would confer the same absolute immunity
4 the President is seeking here. What they say is
5 since you can't indict while in office, you
6 don't need the documents while he's in office.

7 And, frankly, that's an outcome that
8 would apply in every case. No subpoena could
9 pass that test because they basically say, you
10 know, you have to wait until he is out of office
11 before gathering information be -- be -- because
12 you don't need it in the meantime.

13 And so their definition of heightened
14 need says you don't need it while he's in
15 office. Well, that's not workable here.

16 JUSTICE SOTOMAYOR: Why not?

17 MR. DUNNE: Because -- well,
18 obviously, Your Honor, if we were to wait until
19 a President was out of office in a situation
20 like this, first, it would risk the loss of
21 evidence, the fading of memories, and
22 unavailability of witnesses, which is exactly
23 what the DOJ Moss memo, of course, specifically
24 contemplated that a President could be subject
25 to a grand jury while in office to avoid losing

1 that kind of evidence.

2 Secondly, and equally important here,
3 no one should forget that we've got an
4 investigation that -- that is, you know, looking
5 at the conduct of other people and businesses.
6 And waiting like that would benefit those other
7 participants. They could all end up above the
8 law if the limitations period expires.

9 So delay here is the same as absolute
10 immunity, and absolute permanent immunity for
11 the President and others, if -- if a statute of
12 limitations expires. That's -- that's the --
13 that's the problem with a delay.

14 JUSTICE SOTOMAYOR: Well, but the
15 other side says the statute would be tolled
16 against the President. But you're right, it
17 wouldn't be tolled against other people who may
18 or may not have committed crimes that he may or
19 may not be a part of, correct?

20 MR. DUNNE: Correct. And -- and
21 that's important, Your Honor, for the third
22 parties. But just -- just to address the -- my
23 friend on the other side's comment about the
24 tolling, I am not aware in -- in state law of
25 any doctrine of -- of implied tolling that would

1 apply here to -- to protect the state's
2 interests in -- in -- in investigating and
3 potentially prosecuting, if necessary, down the
4 road.

5 I don't know where that concept comes
6 from. But it has never been articulated by this
7 Court. There is no act of Congress which
8 permits that kind of tolling here. And so for
9 us the statute of limitations is a big concern.

10 We've -- we've, frankly, we've already
11 lost nine months of time in this investigation
12 due to this lawsuit. And, again, you know, this
13 -- to -- every minute that goes by is, you know,
14 basically without even a -- a decision on the
15 merits here, granting the same kind of temporary
16 absolute immunity that the President is seeking
17 here.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?

19 JUSTICE KAGAN: Mr. Dunne, you have
20 been talking about how to analyze these burdens
21 in a case-specific way, the burdens both in
22 terms of the President's time and in terms of
23 any possibility of harassment of the use of a
24 subpoena for political purposes.

25 Mr. Sekulow said that the burdensome

1 nature of these subpoenas is categorical. That
2 was his term. And I take him to mean that --
3 that any subpoena interferes with the
4 President's responsibilities or undermines the
5 President in his handling of the office.

6 So what's the answer to that?

7 MR. DUNNE: Your Honor, I -- I -- may
8 I make three points? I think the fact is that
9 this -- the Court addressed this question, I
10 think, in Clinton, and concluded that a
11 President can't realistically be shielded from
12 every sort of private distraction, including
13 some forms of legal process, especially in our
14 modern age.

15 So that's why it's up to a Court to
16 evaluate and protect the President, depending on
17 the circumstances, on a case-by-case basis.

18 Secondly, here the claim of, you know,
19 the possible mental distraction is extreme --
20 completely speculative really. It's based on
21 the notion that the President might be, you
22 know, worried and distracted about where an
23 investigation might lead some day.

24 It's not based on any actual Article
25 II burden or interference of the sort the -- the

1 court was asking President Clinton to
2 demonstrate in Clinton v Jones.

3 And, third, I would say, if -- if
4 that's really the concern, I think it's wrong to
5 think that even a categorical rule here would
6 provide comfort to a distractable President like
7 that.

8 So, for example, nobody suggests here
9 that we should be barred from continuing to
10 investigate his, the President's, prior
11 colleagues. So if we now gather documents from
12 them that reflect past communications with him
13 while he was CEO, are we then supposed to be
14 stopped because it could create a fear in him
15 that the investigation of others might lead him
16 to be accused of something some day?

17 Again, my point is that this
18 speculative mental distress standard is not an
19 appropriate basis to draw a constitutional
20 bright line. That's why the case-specific
21 approach is more appropriate.

22 JUSTICE KAGAN: And -- and speculative
23 mental distress -- how about if they really mean
24 political undermining?

25 MR. DUNNE: Well, I mean, if -- that

1 -- that's beyond the ken of our office, Your
2 Honor, and -- and as, again, the district court
3 found, there was no bad faith intended by virtue
4 of our -- our subpoena.

5 So I don't know -- we've -- it's
6 already been determined here there's no intent
7 to politically undermine, so I don't know how a
8 court could try to evaluate that, and I'm not
9 sure that would be appropriate, unless --
10 unless it's --

11 JUSTICE KAGAN: Mr. Sekulow -- Mr.
12 Sekulow suggests that you've shown your bad
13 faith by taking the language of the House
14 Oversight Committee's subpoena.

15 MR. DUNNE: Yes, Your Honor, and I
16 think we've -- we're tried to address that. I
17 mean, the simple fact is that, in 2018, when our
18 investigation started and -- and thereafter, as
19 we've spelled out, there were a series of public
20 disclosures in the -- in the press about
21 possibly illegal transactions involving tax and
22 other financial improprieties. And at the time
23 of the House subpoenas and then our subpoena, it
24 was clear that both our office and the House
25 committees were looking at the same public

1 allegations in that regard.

2 In a situation like that, once the
3 House subpoena became public, it's not unusual
4 for an office like ours to model our subpoena
5 language on that which has already been made
6 public from a different source, when it's going
7 to the same recipient. It makes it easier on
8 the recipient the process.

9 There was absolutely no communication
10 between our was office and the House about this.
11 There's nothing sinister about it, Your Honor.

12 JUSTICE KAGAN: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Gorsuch?

15 JUSTICE GORSUCH: Counsel, I'd like to
16 return to your colloquy with Justices Alito and
17 Sotomayor, because I guess I'm uncertain what
18 the daylight is between the test you're
19 proposing and the test the solicitor general has
20 suggested.

21 It seems like both of you agree that
22 these questions should be resolved in federal
23 court, and you've suggested that there is --
24 prosecutors should have to be -- demonstrate an
25 objective basis for the investigation and that

1 there's at least a reasonable probability that
2 the information sought will be helpful to that
3 investigation, that it can't be obtained
4 elsewhere and that it's needed now rather than
5 at the end of -- of the President's term because
6 of some serious prejudice that might take place
7 in between.

8 As I understood your discussion with
9 Justice Sotomayor, you -- you suggested that the
10 difference is the solicitor general thinks there
11 should be an absolute immunity until the end of
12 the term. I confess I didn't read the brief
13 that way. I -- I read it as suggesting that the
14 district attorney has to show why there's a need
15 for the President's records now, rather than at
16 the end of the term.

17 And I -- I understood your discussion
18 with Justice Alito to agree that that would be a
19 relevant consideration. What am I missing?

20 MR. DUNNE: I think, Your Honor,
21 putting aside the -- the language differences,
22 which I tried to highlight, I think the most
23 important distinction is what I -- I tried to
24 note at the outset, which is the sequencing of
25 the showings that need to be made.

1 Because what the DOJ is proposing, as
2 I understand it, is that in the first instance
3 it has to be the -- the prosecutor who goes to
4 court, goes to federal court in this instance
5 now, and makes an affirmative showing that there
6 -- that the standard has been met, that there's
7 some objective basis and -- and it's -- it's --
8 it can't be obtained elsewhere, et cetera, et
9 cetera. And only after such a showing has been
10 made by the prosecutor, according to the DOJ,
11 does the burden then shift to the President to
12 show Article II burden.

13 And I think that's what's completely
14 backwards and inconsistent with Nixon and
15 Clinton. I think it's much more appropriate for
16 the -- the President, as the moving party, as
17 here, to be required to make a showing as any
18 other litigant would -- would be the case, again
19 here we're talking about purely private conduct,
20 to -- to explain why this -- this request
21 somehow impacts not just on, you know, a need to
22 gather documents, which is not the case here,
23 but on an actual Article II burden.

24 And only once that showing has been
25 made should, I think, the burden shift to the

1 prosecution, consistent with past cases by this
2 Court, to explain why, nonetheless, it's still
3 necessary to permit the court at that point to
4 conduct the -- the balancing of apples and
5 apples in terms of coming to the right
6 conclusion in a -- in a specific case.

7 To me that's --

8 JUSTICE GORSUCH: So, Mr. Dunne -- so,
9 Mr. Dunne, am I correct in thinking, then, that
10 you agree that the forum should be federal
11 court, you agree on all the relevant
12 considerations, the necessity of the
13 information, that it can't be obtained
14 elsewhere, the timing issues, all are relevant
15 considerations; it's just who -- who bears the
16 burden?

17 MR. DUNNE: Yes, Your Honor.

18 JUSTICE GORSUCH: Is that what you're
19 fighting over?

20 MR. DUNNE: Well, I'm -- maybe with
21 the DOJ there's more -- there's less daylight
22 between us -- than us and the President's
23 lawyers, but I think the important point that I
24 would want to leave the Court with is that, even
25 if one were to adopt that standard or even,

1 frankly, I think the DOJ standard, the fact is
2 we've already met that test given the findings
3 of the courts below.

4 JUSTICE GORSUCH: Well, I -- I know
5 you think you win no matter what. I'm -- I'm
6 just -- we have to write a rule that's
7 presumptively of -- of some value going forward
8 and isn't just about one President but it's
9 about the presidency.

10 And I'm just trying to understand what
11 daylight actually exists. And is it fair to say
12 that the only daylight that exists between you
13 and the solicitor general is who bears the
14 burden of proof?

15 MR. DUNNE: That's right.

16 JUSTICE GORSUCH: I don't want to put
17 words in your mouth. I'm -- I'm trying to
18 understand.

19 MR. DUNNE: No, Your Honor, I think it
20 is the burden and the difference in the language
21 which I've pointed out to Justice Sotomayor. I
22 think that language, different -- those
23 differences are important because I don't think
24 that the DOJ's language works in a grand jury
25 investigation.

1 JUSTICE GORSUCH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Kavanaugh?

4 JUSTICE KAVANAUGH: Thank you, Chief
5 Justice, and good afternoon, Mr. Dunne.

6 On that last point that you were
7 talking about with Justice Gorsuch, the
8 difference between the Nixon heightened needs
9 standard, you said it doesn't work in a grand
10 jury. What do you do with Judge Wald's opinion
11 in *In re Sealed Case*, which took Nixon and did
12 apply it in a grand jury context?

13 MR. DUNNE: Yes, well, Justice --
14 Justice Kavanaugh, as I think you mentioned in
15 the earlier argument, the fact remains that *In*
16 *re Sealed Case* was, indeed, applying the Nixon
17 standard as the Nixon Court contemplated to a
18 claim of executive privilege. And as has been
19 pointed out earlier today, I think that --
20 that's a very different analysis to be
21 undertaken for a very different purpose.

22 And I don't think one can just simply,
23 you know, import that language and apply it
24 to --

25 JUSTICE KAVANAUGH: Well, let me --

1 I'm sorry to interrupt. Let's -- let's leave
2 that for a moment. But the point on the grand
3 jury versus trial, just on that point, Judge
4 Wald's opinion did take Nixon and apply it in
5 the grand jury context.

6 MR. DUNNE: And -- and, indeed, in --
7 even in the grand jury context, when we're
8 talking about a privilege analysis, I think that
9 language is appropriate.

10 JUSTICE KAVANAUGH: Okay.

11 MR. DUNNE: Because at that point you
12 already have -- once there's been an affirmative
13 showing that established that there is a
14 privilege to be -- to be addressed, then, of
15 course, like with an attorney-client privilege,
16 for example, it's necessary for the Court then
17 to turn to the demand of the request and the
18 documents that are at issue and evaluate them
19 in -- you know, in light of --

20 JUSTICE KAVANAUGH: Let's, if we can,
21 move on to the Article II issue, then.

22 Do you acknowledge that there's an
23 Article II interest at stake here?

24 MR. DUNNE: Yes.

25 JUSTICE KAVANAUGH: And what do you

1 think it is?

2 MR. DUNNE: I think it's -- it's the
3 Article II interest to be free from unreasonable
4 burdens on the duties and obligations of the
5 presidency. And that's, you know, the same
6 analysis that was applied, you know, in Nixon
7 and in Clinton.

8 JUSTICE KAVANAUGH: But do you think
9 time -- what Justice Breyer referred to as time
10 and energy, distraction, are appropriate Article
11 II interests?

12 MR. DUNNE: Well, yes, as a matter of
13 degree. Again, that was -- that was the Court's
14 analysis in Clinton. Recall there that although
15 this Court allowed the litigation to proceed, of
16 course appropriately as I think is the case
17 here, there's a need to make sure that the --
18 the courts that are overseeing this kind of
19 objection are undertaking an analysis of what --
20 you know, what the burdens are, including at a
21 very practical level.

22 I think the Clinton Court hypothesized
23 that, perhaps, you know, a -- a request for
24 actual in-person testimony at trial by a
25 President might be inappropriate in --

1 JUSTICE KAVANAUGH: And I think the
2 other side made two distinctions with Clinton,
3 and I want to make sure you have an opportunity
4 to address them. One is the federal/state. The
5 other is the civil/criminal.

6 On the civil/criminal, I suppose one
7 thing I'd like to hear you address is in a civil
8 case, and the Court emphasized this in Clinton
9 versus Jones, there's an individual person at
10 stake who has a claim. There's not the same in
11 a criminal context. Obviously, there are
12 different and very important interests there but
13 not the individual interests.

14 Is that -- can you address that?

15 MR. DUNNE: Well, that's -- that's one
16 distinction, Your Honor. I -- I suppose on the
17 other side of the coin, there is the important
18 difference that, you know, there are, you know,
19 potentially thousands or -- or many more
20 potential private litigants out there who are
21 not bound by the kinds of ethical and
22 jurisdictional and other constraints that
23 prosecutors are bound by and to which this Court
24 has long paid deference.

25 I think that the --

1 JUSTICE KAVANAUGH: Then -- I'm sorry,
2 if I can get my last question in.

3 On the federal/state, if there is an
4 Article II interest at stake, and you said that
5 there is, it's different, of course, from the
6 executive privilege interest, but if there is
7 some Article II interest at stake, I think the
8 other side says it would be odd if the standard
9 were easier to meet for a state prosecutor than
10 for a federal prosecutor.

11 And I just want to give you an
12 opportunity to address that.

13 MR. DUNNE: Yeah. Frankly, Your
14 Honor, I don't really understand that
15 distinction. I think under the analysis that
16 this Court has applied before and the one we're
17 talking about now, the -- the same analysis
18 would apply in terms of a case-specific
19 evaluation in the context of -- of the
20 particular facts of a particular request.

21 JUSTICE KAVANAUGH: So you -- just to
22 stop you there, you're okay with whatever
23 standard applies to a federal prosecutor in a
24 case where there is an Article II interest also
25 applying to the state prosecutor?

1 MR. DUNNE: Well, I -- I'm not sure
2 exactly what you have in mind, Your Honor, but I
3 -- I think the --

4 JUSTICE KAVANAUGH: Well, I guess the
5 Nixon standard. You're -- you're not okay with
6 the Nixon standard, I don't think, but I just
7 want to explore that.

8 MR. DUNNE: No, because of the fact
9 that that was applying to claims of executive
10 privilege.

11 But I think, to get to your point, I
12 -- I -- I think what it comes down to is that,
13 you know, in the -- in the Nixon and Clinton
14 cases, we're -- we're talking about, you know,
15 Article III versus -- we're talking about
16 separation of powers analysis.

17 Here, the analogy is we're balancing
18 federalism and Tenth Amendment concerns about
19 police power of the states against the Supremacy
20 Clause. So it's a different analysis perhaps,
21 but it's very analogous.

22 JUSTICE KAVANAUGH: Thank you.

23 CHIEF JUSTICE ROBERTS: Counsel, we
24 have time for a little bit of a second round.
25 And I guess the thing that I'd like to focus on

1 first is this question of how you examine the
2 burden on the -- on the President or the
3 presidency.

4 I just don't understand how it works
5 in terms of you or -- or the President being
6 asked to devote a certain amount of time to
7 reviewing, for example, in this case, the -- the
8 -- the 10 years of documents or whatever.

9 I mean, what is it -- is -- is there
10 supposed to be a hearing where he says, here's
11 what I'm doing, I've got this pandemic thing,
12 you know, China is causing all sorts of trouble?

13 You know, most Presidents throughout
14 their term have a pretty long to-do list. And
15 I'm just wondering how it's ever going to be any
16 different in evaluating what that burden is. It
17 seems to me that it would be the same no matter
18 what. You really wouldn't need a particular
19 hearing on that.

20 MR. DUNNE: Well, I guess, Your Honor,
21 and when we're talking about, you know, in -- in
22 the context of a particular subpoena, like this
23 one, or a litigation or what have you, like in
24 -- in Clinton, again, this Court has already
25 decided that you can't shield a -- a president

1 from any sort -- every sort of private
2 distraction.

3 I just want to emphasize here, again,
4 that --

5 CHIEF JUSTICE ROBERTS: That was in
6 the -- that was in the civil context. The
7 question is whether or not a criminal
8 investigation might be a little bit more
9 distracting.

10 MR. DUNNE: Well, I'm -- I'm not sure,
11 Your Honor. I mean, I'm not sure whether the
12 stigma of, you know, a -- a simple secret grand
13 jury investigation, even if it becomes publicly
14 known, is more distracting and stigmatizing
15 perhaps than being accused even civilly of
16 sexual misconduct, which was, of course, allowed
17 to proceed in the civil case involving President
18 Clinton.

19 So I'm not sure that, again, the
20 abstract concern about, you know, possible
21 mental distraction or even public stigma under
22 this Court's prior analysis is sufficient to
23 adopt a new bright-line constitutional rule that
24 forbids any kind of process like this, given the
25 -- the history.

1 CHIEF JUSTICE ROBERTS: It's a little
2 bit of a -- it's a little bit of a -- that is
3 what the President's personal lawyers advocated.
4 It's not what the Solicitor General advocated,
5 not an absolute rule.

6 MR. DUNNE: Yes, I know, Your Honor.
7 And -- and, therefore, the answer in that case
8 is what's happened here, which is a
9 case-specific analysis before a court, which, as
10 they do all the time, is able to balance and
11 listen to arguments about burdens.

12 And, as here, when the court finds
13 there is no Article II burden whatsoever, after
14 an opportunity to be heard, that should be the
15 answer. And -- and that's what's happened here.

16 CHIEF JUSTICE ROBERTS: Justice
17 Thomas, anything further?

18 JUSTICE THOMAS: One brief question,
19 Mr. Dunne. There has been much discussion about
20 burdens on the President. I would like from you
21 a couple of specific examples of what you think
22 a burden would be that actually counts in your
23 analysis on the part of the President.

24 MR. DUNNE: Well, I guess, Your Honor,
25 again, hypothetically, because our -- our

1 subpoena imposes, we say, no burden whatsoever.

2 JUSTICE THOMAS: I understand that.

3 MR. DUNNE: But I -- I -- I think I
4 would -- I would again point to this Court's
5 language in the Clinton analysis where it -- it
6 was -- you know, it was observed in passing in
7 the opinion, I think just as dicta, but it was
8 relevant, that, you know, if -- if a president
9 was asked to actually appear and testify at
10 trial someday someplace outside of the White
11 House, that might be the kind of thing that you
12 would say really shouldn't have to happen.

13 I would suggest there along those
14 lines too that if -- if there -- if a president
15 were to be -- were to be asked to produce --
16 show up for multiple days of consecutive
17 deposition testimony or something like that,
18 those -- those kinds -- those are practical
19 burdens, or if the demands were that he show up
20 at a particular time or place that is, you know,
21 where there are conflicts and that kind of
22 thing, again, since we're talking here about
23 private conduct and no executive privilege, what
24 we get to are really practical concerns about
25 impositions on -- on presidential activities.

1 And that's, I think, what we're talking about.

2 CHIEF JUSTICE ROBERTS: Thank you.

3 Justice Ginsburg, anything further?

4 JUSTICE GINSBURG: Nothing further.

5 CHIEF JUSTICE ROBERTS: Justice

6 Breyer?

7 JUSTICE BREYER: No, thank you. Go

8 ahead.

9 CHIEF JUSTICE ROBERTS: Justice Alito?

10 JUSTICE ALITO: One quick question. I

11 don't know how good this Court is about

12 predicting the consequences of some of our

13 decisions, but would you say that the -- the

14 Court's prediction in -- in Clinton versus Jones

15 that the decision wouldn't have much of an

16 impact on the Presidency has been borne out by

17 history?

18 MR. DUNNE: I guess, Your Honor, I --

19 I -- my view of the chronology in Clinton v.

20 Jones, I'll try to be brief, is that I -- I

21 think, contrary to some people's view of

22 history, I think that the -- the -- the district

23 court following this Court's decision kept a

24 rather close rein on discovery in that case and,

25 don't forget, later granted summary judgment in

1 favor of the President long before trial.

2 It was only that it came out later, of
3 course, that it turns out that in his brief
4 deposition in the case that the President
5 committed perjury, which is what led to the
6 impeachment proceedings and other travails he
7 had.

8 So I don't think it was this Court's
9 opinion or the litigation itself that led to
10 those problems. Frankly, it was his decision to
11 lie under oath.

12 So I -- I -- I don't -- I think that
13 this -- this Court's conclusion in both Nixon
14 and Clinton that they could not -- you could
15 not, you know, accept the notion there is going
16 to be a parade of horrors, either in a
17 particular case or across the board, still has
18 borne out over history.

19 CHIEF JUSTICE ROBERTS: Justice
20 Sotomayor?

21 JUSTICE SOTOMAYOR: I'm not sure that
22 I understood your statement earlier that the
23 only difference between you and the SG -- well,
24 there are two differences, one in the
25 articulation of special needs or heightened

1 standard, but you said it's the burden of proof.

2 But you've already conceded to -- to
3 one of my colleagues that there's an automatic
4 burden on an article -- on the Article II clause
5 by subpoenaing a sitting president, period.

6 MR. DUNNE: No, I have not -- I have
7 not, Your Honor. I'm sorry, but I have not -- I
8 have not conceded that.

9 JUSTICE SOTOMAYOR: All right. What
10 then are you conceding when you say there's a
11 burden?

12 MR. DUNNE: I'm -- I'm conceding --

13 JUSTICE SOTOMAYOR: And -- and what
14 kind of burden are you talking about? And,
15 number three, articulate more precisely what
16 problems you have with the heightened standard
17 that Nixon set in its grand jury subpoena.

18 MR. DUNNE: Yeah, I guess, in my
19 response, I think, to Justice Gorsuch, my
20 concern -- my -- what I acknowledged was that,
21 yes, a subpoena like this implicates Article II
22 issues and potential burdens, and it's those
23 which have to be weighed in a case-specific
24 analysis.

25 I wasn't conceding that the mere fact

1 of a subpoena imposes "an Article II burden." I
2 think that's -- that's the distinction I would
3 -- I would -- I would draw.

4 And, again, getting back to the
5 language question, I -- again, it's the DOJ's
6 language that calls for a stringent showing that
7 a request is directly relevant to central issues
8 at trial and specific charging decisions.

9 And, again, very simply, as a
10 practical matter, no court and no prosecutor
11 could meet that standard because, in a grand
12 jury, one is not thinking about charging
13 decisions or central issues at trial. And
14 that's why I think the simple language that the
15 DOJ is -- is applying in its new heightened
16 showing standard is just not workable.

17 CHIEF JUSTICE ROBERTS: Justice Kagan?

18 JUSTICE KAGAN: Mr. Dunne, on -- on
19 the question of a possible distinction between
20 state prosecutors and federal prosecutors, the
21 President's lawyers have urged that there's a
22 legal difference arising from the Supremacy
23 Clause. And I don't think we've talked about
24 that argument yet.

25 What -- what is your response to that?

1 MR. DUNNE: I think the response, Your
2 Honor, is -- I alluded to it before. But I
3 think all it means is that there is a -- a
4 balance to be struck between, in this case, the
5 state prosecutors, the Supremacy Clause
6 concerns, against the rights of states under
7 their police powers and the concepts of
8 federalism and the -- the requirements of the
9 Tenth Amendment to allow the states to exercise
10 their -- their rights, especially in the
11 criminal context, which, you know, are -- are
12 still important.

13 So I think that that's the parallel to
14 the -- the balancing in the -- in the federal
15 prosecutor context, but I think it's even more
16 important given the federalism concerns and the
17 fact that, you know, state prosecutors, of
18 course, not only do they have the reserve police
19 power of the states, but in -- in context of
20 criminal investigations, there, a large body of
21 criminal conduct is only prosecutable by the
22 states. So that's the thing that has to be
23 balanced here.

24 CHIEF JUSTICE ROBERTS: Justice
25 Gorsuch?

1 JUSTICE GORSUCH: Nothing further.

2 Thank you, Chief.

3 CHIEF JUSTICE ROBERTS: Justice

4 Kavanaugh?

5 JUSTICE KAVANAUGH: Thank you, Chief

6 Justice.

7 I just wanted to ask again, deferral
8 of the investigation until after the presidency,
9 assuming statute of limitations issues were
10 solved -- which is a big assumption, I
11 understand -- can you tick off the concerns you
12 would have about that so that we have those
13 clear?

14 MR. DUNNE: Yes. Yes, Justice
15 Kavanaugh. Again, it's -- point number one
16 would be the -- putting aside the statute of
17 limitations concern, which I don't think one can
18 discount here because I don't think it's been
19 addressed, you know, ever, obviously, by this
20 Court in -- in this context, and that's what
21 we're -- that's our paramount concern, to be
22 honest, at this point because the clock is
23 ticking.

24 But even if that were to be addressed
25 somehow, the risk of -- you know, over time by

1 waiting, of losing evidence and losing witnesses
2 and that kind of thing is a very real risk.
3 Again, I think the OLC Moss memo addressed that
4 expressly in -- in saying that a grand jury
5 proceeding should be allowed to proceed.

6 But, secondly, here -- and it's not
7 unusual -- since there are other third-parties
8 at issue in the investigation, requiring us to
9 delay because a -resident is still in office as
10 to those third-parties in -- in gathering
11 important evidence could yield them being above
12 the law if the statute of limitations runs as to
13 them.

14 JUSTICE KAVANAUGH: Thank you.

15 CHIEF JUSTICE ROBERTS: Mr. -- Mr.
16 Dunne, would you like a minute or two to wrap
17 up?

18 MR. DUNNE: Yes, Your Honor, thank
19 you.

20 Your Honors, the issue presented here
21 today is extremely narrow but extremely
22 important. We have a state investigation that's
23 well founded, implicates no official conduct or
24 executive privilege, involves a variety of
25 third-parties, faces serious time constraints,

1 and has been found to impose no Article II
2 burdens.

3 These facts put our subpoena well
4 within the scope of legal process permitted by
5 this Court for generations, indeed, back to
6 1807. Past decisions have consistently found
7 that courts already have robust tools to protect
8 presidents from abusive claims or demands.

9 There's no need here to upend
10 precedent or to write a new rule that undermines
11 federalism, especially when such a rule would
12 create a risk that American presidents, as well
13 as third-parties, could unwittingly end up above
14 the law.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Mr. Sekulow, you have two minutes for
19 rebuttal.

20 REBUTTAL ARGUMENT OF JAY A. SEKULOW

21 ON BEHALF OF THE PETITIONER

22 MR. SEKULOW: Thank you, Mr. Chief
23 Justice.

24 Let me start with this, and there's
25 some agreement. The New York district attorney,

1 New York County district attorney, acknowledges
2 that their subpoena implicates Article II issues
3 and burdens. They also agree that there is
4 harms that could arise to the presidency. We
5 say those harms have actually existed.

6 The other aspect of this is the
7 ordering, who carries the burden here. That
8 seems to be the issue that's left open. This
9 Court's decision in Cheney answered that very
10 clearly, that said that the exacting standard is
11 carried by the party requesting the information.
12 So it would be carried by the Respondent in this
13 particular case.

14 There has been no showing and no
15 findings of heightened need standards being met
16 here. That -- and I think it's again also
17 important to remember -- and I think this came
18 up in the context of earlier questioning --
19 there's a different stigma that attaches to
20 criminal process than civil litigation. And I
21 don't think that stigma should be ignored in a
22 case like this.

23 But the irony of all of this is that
24 the House of Representatives and the district
25 attorney issued essentially the same subpoenas

1 to the same custodian for the same records.

2 The House said it wants the records so
3 it can legislate, not for law enforcement
4 reasons. The district attorney says he wants
5 the same records for law enforcement reasons; he
6 has no legislative authority.

7 But what's really happening here could
8 not be clearer. The presidency is being
9 harassed and undermined with improper process
10 that was issued, in our view, for illegitimate
11 reasons. The copying of the subpoena speaks to
12 that.

13 The framers saw this coming and they
14 structured the Constitution to protect the
15 President from this encroachment.

16 Thank you, Mr. Chief Justice.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel. The case is submitted.

19 (Whereupon, at 1:22 p.m., the case was
20 submitted.)

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