

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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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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12
13 Washington, D.C.
14 Tuesday, May 12, 2020
15

16 The above-entitled matter came on for
17 oral argument before the Supreme Court of the
18 United States at 11:40 a.m.
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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. It subjects the President to
4 local prejudice that can influence prosecutorial
5 decisions and to state grand juries, who can
6 then be utilized to issue compulsory criminal
7 process in the form of subpoenas targeting the
8 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
6 understand -- I don't understand -- your theory
7 in terms of distraction and all that would seem
8 to go much farther than resisting the subpoena.
9 I don't know why you don't resist the
10 investigation in its entirety or why your theory
11 wouldn't lead to 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
8 in 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, they've -- the Respondents have
15 either forfeited or waived it. They have
16 conceded in their brief that they -- they are
17 seeking the President's documents. These are
18 the President's documents. He is the real party
19 in 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.

25 Justice Ginsburg, it's not that it

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

6 CHIEF JUSTICE ROBERTS: Justice --

7 MR. SEKULOW: -- by the Constitution.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Breyer?

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

18 MR. SEKULOW: Well --

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

1 and similarly for the President. All the
2 factors you raise could come in under the title
3 unduly burdensome.

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

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

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

23 But to require the President to have
24 to respond to each and every state district
25 attorney that would like to --

1 JUSTICE BREYER: No, he would hire you
2 and he'd hire a lawyer to list what the burdens
3 are. That wouldn't take a lot of time. And
4 then he wouldn't be burdened because you'd go in
5 and say what the burdens are. And if you're
6 right, you win that case. They're saying, the
7 other side, there are no burdens here.

8 MR. SEKULOW: Well, I would point the
9 Court --

10 JUSTICE BREYER: You say there are.

11 MR. SEKULOW: I --

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

14 MR. SEKULOW: I think doing that
15 establishes the problem with an analysis, a
16 case-by-case analysis.

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

21 You would have to meet with the
22 President of the United States -- I mean, could
23 you imagine just for a moment, Justice Breyer,
24 that I -- and you said he -- let's assume the
25 President were to hire me -- that I'm going to

1 call the President of the United States today
2 and say, I know you're handling a pandemic right
3 now for the United States, but I need to spend a
4 couple, two to three hours with you going over a
5 subpoena of documents that are wanted by, here,
6 the New York County District Attorney. I know
7 you're busy --

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 MR. SEKULOW: -- but you -- can you
11 carve me out two hours.

12 CHIEF JUSTICE ROBERTS: Justice --
13 Justice -- Justice Alito?

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

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

1 difficult.

2 Would you say that at least in that
3 circumstance it would be permissible for the
4 grand jury subpoena to be enforced?

5 MR. SEKULOW: In a -- in a state court
6 proceeding, the -- the issues of time and burden
7 are still there.

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

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

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

25 MR. SEKULOW: Well, it wouldn't mean

1 that it's constitutionally permissible; it would
2 raise different issues for the President to
3 consider. But, constitutionally, I think that
4 we have to be -- I have to be very clear here.

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

11 JUSTICE ALITO: Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Justice Sotomayor?

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

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

24 And yet I -- I find it odd that you
25 want us to rule that there's essentially an

1 absolute immunity from investigative powers, the
2 height of a state's subpoena -- police powers,
3 and that we would permit a civil damages case by
4 a private litigant, which we did in Clinton.

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

9 Don't we usually presume that state
10 courts and state prosecutors act as they should
11 and in good faith?

12 MR. SEKULOW: Even if you were to
13 assume that --

14 JUSTICE SOTOMAYOR: And doesn't -- if
15 you let me finish.

16 MR. SEKULOW: Yes, please.

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

24 I -- I -- I'm not sure why he's
25 entitled to more immunity for private acts than

1 he should be for public acts.

2 MR. SEKULOW: Well, he's the President
3 of the United States. He is a branch of the
4 federal government. He's the --

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

12 So my question still comes, you're
13 asking for a broader immunity than anyone else
14 gets.

15 MR. SEKULOW: Well, we're asking for a
16 temporary --

17 CHIEF JUSTICE ROBERTS: You have time
18 for -- you have time for a brief answer,
19 counsel.

20 MR. SEKULOW: I will. We're asking
21 for temporary presidential immunity. I would
22 point out that under New York state law,
23 witnesses before a grand jury are not sworn to
24 secrecy. They can state that they testified and
25 what the nature of their testimony was. I'd

1 also like to point out that there are hundreds
2 of members of the United States Congress and 100
3 members of the United State -- States Senate,
4 there is one President.

5 Thank you.

6 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

1 in reviewing those, of course, should take
2 seriously the President's objections and treat
3 those with a certain kind of sensitivity and
4 respect due to somebody who is a branch of
5 government.

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

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

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

23 CHIEF JUSTICE ROBERTS: Justice
24 Gorsuch?

25 JUSTICE GORSUCH: Counsel, I -- I'd

1 like to return to the question of Clinton versus
2 Jones and how you would have us distinguish it.
3 Yes, it took place in federal court, but it was
4 a civil case, and as has been pointed out,
5 others -- there could have been multiple
6 versions of that in multiple different districts
7 across the country.

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

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

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

1 So the idea that we would wait until
2 there's more of these, we're already here on
3 four subpoenas or three subpoenas, three cases
4 involving multiple subpoenas, much of which
5 covers the same documentation. So I think it --
6 it, in fact, Justice Gorsuch, proves the point.

7 We're here because the House has asked
8 for documents that now the district attorney is
9 asking for. So we are seeing that in real time
10 --

11 JUSTICE GORSUCH: How --

12 MR. SEKULOW: -- the burdensome nature
13 of what's happening here.

14 JUSTICE GORSUCH: -- how is -- how is
15 this more burdensome, though, than what took
16 place in Clinton versus Jones? I -- I guess I'm
17 -- I'm not sure I understand that.

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

22 JUSTICE GORSUCH: Let me stop you
23 there.

24 MR. SEKULOW: Yes.

25 JUSTICE GORSUCH: Yes, there --

1 there -- there, they sought the deposition of
2 the President while he was serving. Here,
3 they're seeking records from third-parties.

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

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

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh?

24 JUSTICE KAVANAUGH: Thank you,
25 Mr. Chief Justice.

1 And good afternoon, Mr. Sekulow.

2 MR. SEKULOW: Good afternoon.

3 JUSTICE KAVANAUGH: Just following up
4 on Justice Gorsuch, just explain, if you can,
5 the rationale for having one rule for criminal
6 and another rule for civil. Just assume there's
7 one criminal investigation. That's it.

8 MR. SEKULOW: Well --

9 JUSTICE KAVANAUGH: And just explain
10 the rationale for a different rule there.

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

21 JUSTICE KAVANAUGH: Why -- why is
22 that?

23 MR. SEKULOW: Well, the idea that you
24 are the subject or a target of a criminal case
25 being brought against you is very different than

1 a civil suit, where, at the end of the day, it
2 results in monetary damages, not -- not a loss
3 of liberty.

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

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

24 What do you think about how we should
25 assess that --

1 MR. SEKULOW: Well, I think that civil
2 discovery --

3 JUSTICE KAVANAUGH: -- that part of
4 Clinton versus Jones?

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

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

21 JUSTICE KAVANAUGH: How do you deal --

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

23 JUSTICE KAVANAUGH: Sorry to
24 interrupt.

25 MR. SEKULOW: No, please,

1 JUSTICE KAVANAUGH: How do you deal
2 with statute of limitations issues?

3 MR. SEKULOW: Well, statute of
4 limitations issues, of course, are decided under
5 New York state law, and under New York state
6 law, there would be procedures that could be
7 utilized if, in fact, the DA were to elect to --
8 to start a process like that or if there were to
9 eventually be action.

10 But I -- I need to say something.

11 CHIEF JUSTICE ROBERTS: Thank you.
12 Thank you, counsel.

13 MR. SEKULOW: Yes, thank you. Thank
14 you, Mr. Chief Justice.

15 CHIEF JUSTICE ROBERTS: General
16 Francisco.

17 ORAL ARGUMENT OF GEN. NOEL J. FRANCISCO
18 FOR THE UNITED STATES, AS AMICUS CURIAE,
19 SUPPORTING THE PETITIONER

20 GENERAL FRANCISCO: Mr. Chief Justice,
21 and may it please the Court:

22 At a minimum, a local prosecutor
23 should have to show he really needs the
24 President's personal records to subpoena them
25 for two reasons.

1 First, as the Court suggested in
2 Clinton against Jones, state proceedings can
3 pose a greater threat to the presidency. The
4 2300 prosecutors across the country necessarily
5 place more emphasis on local interests than
6 national ones. A special needs standard ensures
7 that federal courts balance the prosecutor's
8 local need for information against national
9 interests, including the President's need to do
10 his job.

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

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

24 CHIEF JUSTICE ROBERTS: General
25 Francisco, we -- we just heard Mr. Sekulow argue

1 in favor of an absolute standard, no
2 circumstances, no how. Your position is that,
3 as you say, at a minimum, the special needs test
4 must be met.

5 Of course, Mr. Sekulow is representing
6 Mr. Trump. You're representing the United
7 States. You're arguing for a more flexible
8 standard. So what was wrong with Mr. Trump's
9 position?

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

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

1 CHIEF JUSTICE ROBERTS: Well, in a --
2 in a typical case, with adequate allegations to
3 say that the standard's implicated, you would
4 say that it goes before a court and the court
5 will examine whether or not the criteria you --
6 you talk about, which I gather is the test under
7 Nixon, are met, and, under Mr. Sekulow's
8 standard, the -- would not immediately go before
9 the court. He was looking for a ruling from us
10 saying that he's absolutely immune, so the Court
11 would have no business addressing such a case.

12 That's a very significant difference.

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

22 If it did find that the special --
23 that the district attorney met the special needs
24 standard, it would have to then address the
25 broader immunity question. And all we are

1 saying is that, unless and until the special
2 need issue is addressed at the threshold,
3 there's no need to address the broader immunity
4 question in this case.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas?

8 JUSTICE THOMAS: Yes. General
9 Francisco, the -- you mentioned the level of
10 threat to the President or burden on the
11 President. How do we determine that, when it's
12 too much?

13 GENERAL FRANCISCO: Well, Your Honor,
14 here, I think there are a couple of things that
15 you can take into account.

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

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

25 So, there, you've already got this

1 risk of local prejudice. And so what the
2 special needs standard does is -- is that it
3 ensures that there's a federal court that's
4 available to balance the local interests against
5 the national ones, including the President's
6 need to do his job.

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

15 Instead, the burden is on the witness
16 to show that the subpoena can have no
17 conceivable relevance to any plausible subject
18 of an investigation.

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

1 And so he is entitled to a measure of
2 protection above and beyond the ordinary rules.
3 And the special needs standard is one of those
4 measures of protection.

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

12 JUSTICE THOMAS: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Ginsburg?

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

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

1 So I really don't get it.

2 GENERAL FRANCISCO: So, Your Honor --

3 JUSTICE GINSBURG: Yes.

4 GENERAL FRANCISCO: So, Your Honor, in
5 -- in terms of the Tenth Amendment, all we're
6 saying is that Article II vests all executive
7 power in a single President of the United
8 States. He is the sole person in whom all
9 executive power is vested.

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

20 And if you multiply that by 2300
21 prosecutors across the country, I think that the
22 risk to the presidency is quite obvious.

23 In terms of the Nixon case, we are
24 actually arguing for the same standard that the
25 Court applied in the Nixon case, the special

1 needs standard. We're just saying that a local
2 prosecutor in state court should at a minimum be
3 required to meet the same standard that the
4 federal prosecutor in Nixon had to meet and show
5 that he really does need the information that
6 he's seeking, since, again, if he doesn't, it's
7 unnecessarily burdensome --

8 JUSTICE GINSBURG: May I --

9 GENERAL FRANCISCO: Yes, Your Honor.

10 JUSTICE GINSBURG: The grand jury is
11 an investigatory body. It doesn't make at the
12 outset specific charging decisions while the
13 investigation is under way. It investigates in
14 order to determine should there be specific
15 charging decisions, but you would have them make
16 charging decisions before they investigate, and
17 that seems to be backward.

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

1 It's not -- you don't have to make a
2 charging decision, but you do have to show a
3 demonstrated specific particularized need for
4 the information pursuant to which you are
5 issuing the -- the grand jury subpoena.

6 CHIEF JUSTICE ROBERTS: Justice
7 Breyer?

8 JUSTICE BREYER: Yes, thank you.

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

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

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

24 GENERAL FRANCISCO: Your Honor --

25 JUSTICE BREYER: -- you would need a

1 decision by us that it's reviewable in federal
2 court. I understand that. But I don't see why
3 you have to go beyond that where the things
4 you're talking about would be taken into
5 account.

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

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

20 JUSTICE BREYER: Well, wasn't that in
21 the context of the assertion of executive
22 privilege?

23 GENERAL FRANCISCO: Excuse me, Your
24 Honor?

25 JUSTICE BREYER: Wasn't that in the

1 context of an assertion by the President of
2 executive privilege?

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

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

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

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

1 After all, why would a local --

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Alito?

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

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

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

22 I think that in order to have
23 meaningful judicial review, you would need --
24 the prosecutor would need to make public as much
25 as could responsibly be made public so that the

1 President would have an opportunity and the
2 President's lawyers would have an opportunity to
3 make their case on the particular facts.

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

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

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

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

1 useful?

2 GENERAL FRANCISCO: Your Honor, it's
3 probably somewhere in between those two things.
4 I think it's got to be -- I think it's got to be
5 critical to the charging decision, so it can't
6 just be marginally useful or, you know, merely
7 duplicative or -- or interesting to a tangential
8 side issue. It does have to be critical to the
9 charging decision.

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

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Sotomayor?

22 JUSTICE SOTOMAYOR: General, there's
23 always danger in taking a doctrine adopted for
24 one set of needs, and that has to do with needs
25 that are balancing what is clearly recognized in

1 law as executive privilege versus the needs for
2 the proceeding at issue, and transplanting it to
3 a situation that's totally different, where
4 we're not talking about a claim of executive
5 privilege, and we're not talking of executive
6 immunity; we're talking about private activities
7 that predated the President's tenure.

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

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

23 GENERAL FRANCISCO: For two reasons,
24 Your Honor. First, for the reasons that I think
25 Justice Breyer did persuasively explain in

1 Clinton against Jones, even litigation about
2 private conduct can be quite burdensome, and
3 that is particularly so when you're talking
4 about private conduct that's being litigated in
5 state court pursuant to state procedures. So I
6 think that's why he correct -- correctly
7 predicted that this Court would need in future
8 cases to develop special protective procedures
9 precisely in this context.

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

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

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Justice Kagan?

25 JUSTICE KAGAN: So, General, a couple

1 of times now, in response to Justice Breyer and
2 Justice Sotomayor, you've explained why we
3 should use the standard from executive privilege
4 cases by saying, well, litigation about private
5 conduct is also burdensome.

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

17 So, again, why should that standard be
18 used here?

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

1 ability to carry out his responsibilities.

2 And so -- and I think that's
3 particularly necessary when you're talking about
4 state court proceedings by the many, many, 2300
5 local prosecutors across the country, who,
6 again, are more responsive to local political
7 constituencies and local interests than national
8 ones. So I think that --

9 JUSTICE KAGAN: But, again, General --

10 GENERAL FRANCISCO: -- when you look
11 at Article II --

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

21 So why would you need this heightened
22 standard that is meant to protect confidential
23 communications about official government
24 business?

25 GENERAL FRANCISCO: For two reasons,

1 Your Honor. First, because, under the ordinary
2 grand jury rules, the only question as to
3 burdensomeness is whether the subpoena has any
4 conceivable relevance to any plausible subject
5 of investigation and, therefore, is unduly
6 burdensome.

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

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

20 And we think that that is an --

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Gorsuch?

24 JUSTICE GORSUCH: Counsel, I -- I'd
25 like to just explore a little further how this

1 standard would -- that you're proposing would
2 play out in practice.

3 I -- I suppose you'd have a local
4 prosecutor saying, I'm investigating a tax
5 infraction, and the best and maybe only evidence
6 of -- of -- of that potential infraction are the
7 tax records in the possession of the -- of the
8 potential defendant.

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

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

23 Of course, if the potential defendant
24 is somebody else, then it might start looking
25 closer to the Nixon case itself, where the

1 special counsel was investigating a third-party.
2 And I think that would, in fact, be a relevant
3 consideration under the special needs standard.

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

10 GENERAL FRANCISCO: Right.

11 JUSTICE GORSUCH: Why wouldn't that
12 qualify under your standard?

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

22 JUSTICE GORSUCH: How much --

23 GENERAL FRANCISCO: In this particular
24 --

25 JUSTICE GORSUCH: -- how much showing

1 of special need is required under your -- under
2 your standard? A prosecutor says, I have some
3 -- some reasonable suspicion that there's a tax
4 deficiency by some entity. Is that enough, or
5 would more be required?

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

13 It's essentially the same standard the
14 Court applied, this Court applied in Nixon, the
15 D.C. Circuit applied in the In Re Sealed Case.
16 You know, it's not like it's a hard and fast
17 bright-line rule, but it is an administrable
18 rule that courts have been applying for some 50
19 years now.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Justice Kavanaugh?

23 JUSTICE KAVANAUGH: Thank you, Mr.
24 Chief Justice.

25 And good afternoon, General Francisco.

1 GENERAL FRANCISCO: Good afternoon,
2 Your Honor.

3 JUSTICE KAVANAUGH: I want to follow
4 -- I want to follow up on Justice Thomas and
5 Justice Kagan and really zero in on what the
6 Article II interest is before we talk about what
7 standard.

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

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

19 GENERAL FRANCISCO: Well, Your Honor,
20 respectfully, I think it's both of them. And as
21 I read Justice Breyer's opinion, he likewise
22 understood it to be both of them.

23 The whole idea is that Article II
24 vests all executive power in a single person.
25 And that necessarily means that others can't

1 unnecessary hobble or debilitate that person in
2 his ability to responsibly carry out his duties.

3 So the whole point of the special
4 needs standard is to ensure that others,
5 including prosecutors, can't unnecessarily
6 impede the President in carrying out his
7 responsibilities.

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

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Mr. Dunne.

22 ORAL ARGUMENT OF CAREY R. DUNNE

23 ON BEHALF OF THE RESPONDENTS

24 MR. DUNNE: Mr. Chief Justice, and may
25 it please the Court:

1 There are two principles at issue in
2 this case. One is the central role of the
3 President in the functioning of our national
4 government and the need to avoid interfering
5 with the President's ability to carry out those
6 important duties.

7 The other principle is that under our
8 Constitution, when a President acts as a private
9 individual, he or she has responsibilities like
10 every other citizen, including compliance with
11 legal process.

12 In particular, this Court has long
13 held that American presidents are not above
14 having to provide evidence in response to a law
15 enforcement inquiry.

16 We're mindful that as a state actor,
17 our office cannot investigate a president for
18 any official acts and that we cannot prosecute a
19 president while in office.

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

1 or any executive privilege.

2 As the courts below found, the
3 subpoena imposes no Article II burden whatsoever
4 and was not born of any political animus or
5 intent to harass. Instead, it was prompted by
6 public reports that certain business
7 transactions in our jurisdiction were possibly
8 illegal. Given those allegations, our office
9 would have been remiss not to follow up.

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

20 Finally, his novel claim also asks the
21 Court to presume that state actors have a
22 "reckless mania" that will cause them to
23 "relentlessly harass presidents and that state
24 and federal courts will allow prosecutors to do
25 so."

1 Of course, there's no historical
2 support for this claim, which flies in the face
3 of federalism. The supposed floodgates have
4 been open for generations and there's never been
5 a flood. The only thing new here is the
6 subpoena comes from the state. But absent a
7 constitutional burden, that shouldn't leave the
8 Court to abandon its long-standing respect for
9 state criminal proceedings.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 You know, we've had the cases this
13 morning and this case and they are in many
14 respects very similar in -- on -- in the case of
15 the subpoena itself, they're identical, but I
16 think in other respects they're really quite
17 different.

18 The separation of powers case this
19 morning involved entities in an ongoing
20 relationship, the House and the President. And
21 issues of this sort, although always very
22 important, come up with some regularity.
23 There's often disputes between the White House
24 and Congress over documents, and almost always
25 they're -- they're worked out because each of

1 those branches have authorities and powers that
2 affect each other.

3 You know, if the Senate asks for
4 documents from the White House and the White
5 House doesn't give them, then the Senate says,
6 well, we're going to, you know, take our time
7 confirming your nominees and -- and back and
8 forth.

9 But, with respect to local
10 prosecutors, you don't have that ongoing
11 relationship. So the possibility of working
12 something out is -- is far less evident, and, if
13 you're doing that, the -- the stakes are --
14 well, it's just a little more difficult because
15 there isn't that ongoing relationship.

16 So shouldn't there be a higher
17 standard before we permit the district attorneys
18 from around the country -- there are also more
19 of them than the two Houses of Congress, 2300 of
20 them -- shouldn't there be a higher standard
21 than in the case of the separation of powers
22 dispute?

23 MR. DUNNE: Your Honor, I think our
24 answer to that is yes. And putting aside its
25 relationship or not to the separation of powers

1 analysis, I'd like to address the -- the DOJ's
2 proposed heightened showing standard because we
3 -- we see that -- let me put it this way.

4 We see that there are three reasons, I
5 think, why the DOJ's new heightened showing
6 proposal doesn't work. And a number of
7 questions in the last argument, I think, touched
8 on some of these concepts, if I might.

9 First, one problem is that the -- the
10 approach that they're suggesting really reverses
11 the Court's prior approach to fact-finding in
12 these types of cases in a way that I think would
13 harm the grand jury process, which I can
14 explain.

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

24 Here --

25 CHIEF JUSTICE ROBERTS: Would you

1 articulate for me precisely what standard you
2 think should apply in your case and in what
3 sense is it more rigorous than that would apply
4 in the dispute between the White House and
5 Congress?

6 MR. DUNNE: Yes. I -- I -- I think we
7 believe that a prosecutor, if there's been an --
8 an affirmative showing by -- by a president of
9 an Article II burden, and, of course, the courts
10 have below held that there has not been such a
11 showing here, but if in a different case there
12 was such a showing made, we believe a prosecutor
13 should be required to show, one, an objective
14 basis for the investigation and, two, a
15 reasonable probability the request would yield
16 relevant information.

17 We think language like that would be
18 more consistent with past cases of this Court
19 and with the realities of a grand jury
20 investigation.

21 And, frankly, the courts below also
22 already found that we've met that standard here.
23 The -- the problem is that the alternative of
24 requiring a state prosecutor to get permission
25 first from a federal judge for any request

1 relating to a president's business activities
2 would undermine this Court's prior rulings, like
3 the one in R Enterprises that a grand jury
4 shouldn't be burdened by procedural challenges
5 and delays because it's a confidential process
6 and not an adversarial proceeding. And the
7 DOJ's new standard just ignores that.

8 The other problem --

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

11 JUSTICE THOMAS: Thank you, Mr. Chief
12 Justice.

13 Mr. Dunne, you were about to say how
14 DOJ's approach would harm the grand jury
15 process. Would you finish that?

16 MR. DUNNE: Yes. And I think I was
17 just addressing that, Justice Thomas. That is,
18 you know, to require us in any given case to run
19 to -- across the street to federal court and
20 say, by the way, we have an investigation
21 underway, it happens to touch on a president's
22 prior business transactions in which he and
23 others were involved in, and we'd like to get
24 permission to send a subpoena for records that
25 are in either the possession of a president or

1 maybe the president's agents, like his
2 accounting firm here, again, it completely
3 upends the way that a grand jury process is
4 supposed to work.

5 If I might, the second big problem I
6 think with the DOJ's analysis is that the
7 language that they've chosen just doesn't work,
8 contrary to why as to what I just set out,
9 because it only applies in the context of a
10 trial subpoena.

11 It calls for a "stringent showing"
12 that the request is "directly relevant to
13 central issues at trial and charging decisions."
14 Again, that language just doesn't apply in the
15 context of a grand jury when no charging
16 decisions have been made.

17 So that's why the -- the formulation
18 that we've suggested, I think, would be more
19 consistent with what's needed in a grand jury
20 context. But, again, we think that is utterly
21 unnecessary here to apply in our case because,
22 A, there's already been a finding of no Article
23 II burden, and, B, we have already met the
24 standard by the -- by the district court's
25 finding that our -- our investigation is

1 well-founded and brought in good faith.

2 So I don't think this --

3 JUSTICE THOMAS: So what -- what
4 limits a grand jury process in -- in New York?
5 What are the limits?

6 MR. DUNNE: Well, the limits are, I
7 think, the same basically as they are in federal
8 court and most other states, Your Honor. I
9 mean, yes, a -- the recipient of a subpoena who
10 has a basis to argue either a privilege or a
11 burden of some sort has the right, as the
12 President did here, to go into court and make
13 those factual arguments that it's -- that's --
14 that either it should be quashed or -- or
15 constrained in some fashion. It is -- there is
16 -- there's a grand jury judge who supervises all
17 grand juries and their activities, who's always
18 available here.

19 But I think the more important point
20 perhaps, Your Honor, is that, obviously, given
21 the decision of the court of appeals below in
22 this case, and to address that concern in that
23 footnote in -- in -- in -- in Clinton, at this
24 point, it's clear that a president, in
25 particular, who has a concern about this kind of

1 impact on Article II duties now always has the
2 ability to go into federal court and not into
3 state court, which was the main concern in that
4 footnote in Clinton.

5 JUSTICE THOMAS: What if you thought
6 it was -- the President said it was impossible
7 for him to do his job, as opposed to just being
8 burdened? Would that -- would we have a role to
9 limit or somehow end the grand jury process?

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

22 That's the beauty of this Court's
23 prior decisions in Nixon and Clinton and others,
24 which have decided consistently to apply the
25 case-specific analysis and -- and -- and have

1 rejected the notion that this is best treated
2 with a categorical prophylactic rule.

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

5 JUSTICE THOMAS: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Ginsburg?

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

17 MR. DUNNE: I understand, Your Honor,
18 and I think really what that gets centrally to
19 is the consistent argument here about the parade
20 of horrors, if you will. And if I could
21 address that, I think there's several answers to
22 that concern.

23 First of all, there's really no
24 empirical basis in -- in history for this --
25 this apocalyptic prediction. The same claim was

1 made and rejected by this Court in Nixon and
2 then in Clinton. That, of course, was decades
3 ago, and there's not been a flood of subpoenas
4 or litigations or prosecutions of -- of
5 presidents by -- by states or federal
6 prosecutors.

7 Second, as a practical matter, you
8 know, this notion that there are 2300
9 prosecutors out there writing with their
10 subpoena pads open, there's just no basis to
11 think that an army of local prosecutors like
12 that would even have jurisdiction over a
13 president, especially for private conduct, in
14 the first place.

15 Here, New York City, of course, has a
16 particular connection to the Trump Organization
17 and its financial transactions because it's
18 headquartered here. It's not likely that --
19 that more than one or many states, much less two
20 -- 2300 counties, would ever have that kind of
21 connection to a president's private conduct.

22 Third, I -- I think, as -- as -- as,
23 Justice Ginsburg, you mentioned in the last
24 argument, this view that people -- that the --
25 there's a reckless mania by local prosecutors

1 contradicts this Court's long-standing
2 presumption in favor of regularity and deference
3 to state proceedings.

4 And so, to finish off, the limitation,
5 I think, that you're asking about really comes
6 in the -- in the form of the case-specific
7 showing that past cases from this Court have
8 established, because, if there is a concern
9 about the behavior of a local prosecutor, any
10 president, when necessary, but it's been few and
11 far between over the decades, can run now not
12 just into state court, which Clinton thought
13 could be problematic, but can run into federal
14 court and raise exactly the kind of claim that
15 the President has raised here. That's the
16 limitation.

17 JUSTICE GINSBURG: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Breyer?

20 JUSTICE BREYER: Well, thank you.

21 What -- what -- I agree with you that
22 the two basic principles you said at the outcome
23 are there: every man's evidence versus the
24 constitutional statement that the President is
25 the executive, Article II. And they conflict,

1 just as in the first place -- the first case,
2 the power of Congress, Article I and Article II
3 conflict. All right.

4 MR. DUNNE: Your Honor, I -- I think
5 that I would say they don't conflict, but, yes,
6 they're in tension in our view.

7 JUSTICE BREYER: They're in tension.
8 Fine. All right. Now a possible solution is to
9 say no absolute rule but just send it to the
10 ordinary system for weighing the needs versus
11 the burdens, and the different sides have to say
12 what they are, and then have that reviewable in
13 federal court. And because of the nature of it,
14 and we could list in an opinion the kinds of
15 things that might not be or might be relevant,
16 depending on the case. And eventually, with the
17 President, we might review it.

18 All right. Now all that would take
19 time. The time itself would discourage
20 prosecutors from doing this, which might be
21 good. And time itself would encourage House,
22 Congress, President to work things out in a
23 non-judicial way. All right?

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

1 MR. DUNNE: Well, Your Honor, I think
2 what you're describing is exactly what this
3 Court held in -- in Clinton, and it's exactly,
4 frankly, what has happened now in this case,
5 which is, yes, in this case, the -- the
6 President decided to pursue his -- his claim of
7 immunity in federal court versus state court,
8 which is fine and now available, I think, in the
9 future to all presidents.

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

21 But, again, that's the beauty of the
22 case-specific analysis. I don't think these
23 things lend themselves to categorical
24 prophylactic rules. And that's been the
25 approach from this Court from day one.

1 JUSTICE BREYER: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice Alito?

3 JUSTICE ALITO: As I understand your
4 proposed standard, there would be available
5 review in federal court, and the prosecutor
6 would have to show an objective basis for the
7 subpoena and the relevance of the subpoena to
8 the investigation. Is that correct?

9 MR. DUNNE: Basically, Your Honor,
10 language like that. I -- I said point two was a
11 reasonable probability that will yield relevant
12 information, but, yes, that's the concept.

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

24 MR. DUNNE: Your Honor, I, frankly,
25 don't think that any of those concepts are

1 foreign to the standard that I -- I articulated.
2 And I think they are relevant, in fact, to the
3 objective basis and -- and relevance points.

4 You know, here, for example, and --
5 and -- and, again, I think the court -- the
6 court below, the district court in particular,
7 you know, heard our explanations, and including
8 the fact that, you know, the reason why we went
9 to Mazars is not to do an end run around
10 negotiations with the President's lawyers.

11 It's because Mazars, as the outside
12 accounting firm, is -- is, as far as we could
13 tell, the only repository of what might be the
14 most important documents in an investigation
15 like this, which are not just the tax returns
16 but the surrounding accounting materials and
17 work papers, et cetera, which shed light on the
18 good faith or not of the transaction.

19 So my short answer, I'm sorry, is that
20 I think those -- those concepts are -- are --
21 are -- would be fine and not unduly burdensome
22 in the -- in the context of the standard that I
23 set forth.

24 JUSTICE ALITO: Can I ask you one
25 other thing? Do you think that the adjudication

1 of this in all cases of a similar nature would
2 depend in any way on state law and practice
3 regarding grand jury secrecy?

4 In federal court, the rules of grand
5 jury secrecy are, of course, very strict.
6 States have different rules. Suppose a
7 particular state imposes no restriction on the
8 revelation by a member of the grand jury or
9 perhaps even by the prosecutor of the
10 information that is supplied in compliance with
11 a subpoena.

12 MR. DUNNE: Well, Your Honor, I'm not
13 aware of any other states having that kind of
14 lax or nonexistent grand jury secrecy rule. I
15 can assure the Court that in New York State our
16 grand jury secrecy laws are at least as strict
17 as under the federal system.

18 But putting that aside, if, in fact,
19 the -- the fact pattern presents to a judge the
20 prospect that the information, in fact, will
21 become public and the President were -- were to
22 persuade a judge that the -- that publication of
23 the documents at issue would themselves impose
24 some sort of Article II burden or other -- other
25 interference with his executive duties in that

1 given state, you know, I suppose that would be
2 part of the case-specific analysis that the
3 court could -- could understand and take into
4 account in deciding whether that there should be
5 some limitation or -- or even a quashing of the
6 subpoena itself.

7 I think that's part of the
8 case-specific analysis.

9 JUSTICE ALITO: I mean, we both know
10 that prosecutors have different -- that -- that
11 there are prosecutors who leak all sorts of
12 information, including grand jury information,
13 to all sorts of media sources, including
14 specifically The -- The New York Times.

15 If -- if there were a showing that
16 that was a risk, would that have a bearing on
17 this?

18 MR. DUNNE: Your Honor, it's hard for
19 me to -- I'm -- I'm -- I'm not aware of any kind
20 of real pattern or practice of leaking of actual
21 grand jury materials that are covered by grand
22 jury secrecy.

23 Yes, in all -- all different kinds of
24 offices there are at times, you know, leaks of
25 status of cases and that kind of thing, but I --

1 I am not aware, and -- and -- and our grand jury
2 secrecy rules really prevent prosecutors, I
3 believe, from, you know, actually turning over
4 confidential grand jury secrecy materials to --

5 JUSTICE ALITO: You're not aware --
6 you're not aware of this ever happening? Your
7 office is never requested by media in the New
8 York City area to disclose confidential
9 investigative information?

10 MR. DUNNE: No. Well, they ask all
11 the time, Your Honor, and the answer is
12 consistently no, at least as far as I can
13 represent.

14 But what I'm trying to draw a
15 distinction between is people commenting to
16 reporters all the time off the record, that kind
17 of thing, versus turning over actual materials,
18 like, you know, the voluminous tax returns or
19 other sensitive documents that have been
20 gathered and which are covered by grand jury
21 secrecy. That's -- that's what I just don't see
22 happening here. And I think history supports
23 that view.

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor?

1 JUSTICE ALITO: When you are making an
2 Article II burden, does that include the burden
3 of harassment, the burden of using subpoenas for
4 political purposes?

5 MR. DUNNE: Yes, Your Honor, I would
6 certainly include that there. And, again,
7 there's been an express finding below here that
8 there is a -- the investigation was well founded
9 and that there was no harassment or bad faith in
10 our bringing of these -- of the subpoena.

11 JUSTICE ALITO: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Sotomayor?

14 JUSTICE SOTOMAYOR: Counsel, did I
15 understand your answer to Justice Alito to be
16 that you are in agreement with the SG that we
17 should impose a heightened need standard, a
18 special need standard?

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

1 Again, I think that --

2 JUSTICE SOTOMAYOR: Wait. If you can,
3 counsel, because I want to be very precise, if
4 your standard includes what the heightened need
5 standard has, then why not call it what it is,
6 heightened need? There has to be a reason you
7 think we shouldn't call it that, and you -- I
8 don't know that I understand what difference
9 you're proposing.

10 MR. DUNNE: I'm -- I'm sorry, Justice
11 Sotomayor. The -- the -- the concern I have
12 with the DOJ language is, again, calling for a
13 stringent showing that a subpoena request is
14 directly relevant to central issues at trial and
15 other concepts like that.

16 What I'm trying to propose is
17 something I think which is not so strict and
18 which is not limited to charging and
19 trial-related concepts but which would be
20 workable in the context of a grand jury
21 subpoena.

22 And, again, whatever the standard is
23 that we're articulating, I -- I want to stress
24 that I believe that we are -- our office has met
25 that standard here, even under the DOJ's

1 proposal, because of the findings by the
2 district court.

3 JUSTICE SOTOMAYOR: All right. Tell
4 me why the heightened standard would interfere
5 with the grand jury process.

6 MR. DUNNE: Well, I think, Your Honor,
7 among other things, the -- the DOJ's proposed
8 application of its standard, if you read its
9 brief, would confer the same absolute immunity
10 the President is seeking here. What they say
11 is, since you can't indict while in office, you
12 don't need the documents while he's in office.

13 And, frankly, that's an outcome that
14 would apply in every case. No subpoena could
15 pass that test because they basically say, you
16 know, you have to wait until he's out of office
17 before gathering information be -- be -- because
18 you don't need it in the meantime.

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

22 JUSTICE SOTOMAYOR: Why not?

23 MR. DUNNE: Because -- well,
24 obviously, Your Honor, if we were to wait until
25 a President was out of office in a situation

1 like this, first, it would risk the loss of
2 evidence, the fading of memories, and
3 unavailability of witnesses, which is exactly
4 what the DOJ Moss memo, of course, specifically
5 contemplated that a President could be subject
6 to a grand jury while in office to avoid losing
7 that kind of evidence.

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

15 So delay here is the same as absolute
16 immunity and absolute permanent immunity for the
17 President and others if -- if a statute of
18 limitations expires. That's -- that's the --
19 that's the problem with a delay.

20 JUSTICE SOTOMAYOR: Well, but the
21 other side says the statute would be tolled
22 against the President. But you're right, it
23 wouldn't be tolled against other people who may
24 or may not have committed crimes that he may or
25 may not be a part of, correct?

1 MR. DUNNE: Correct. And -- and
2 that's important, Your Honor, for the
3 third-parties. But just -- just to address the
4 -- my friend on the other side's comment about
5 the tolling, I'm not aware in -- in state law of
6 any doctrine of -- of implied tolling that would
7 apply here to -- to protect the state's
8 interests in -- in investigating and potentially
9 prosecuting, if necessary, down the road.

10 I don't know where that concept comes
11 from. But it's never been articulated by this
12 Court. There's no act of Congress which permits
13 that kind of tolling here. And so, for us, the
14 statute of limitations is a big concern.

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

23 CHIEF JUSTICE ROBERTS: Justice Kagan?

24 JUSTICE KAGAN: Mr. Dunne, you've been
25 talking about how to analyze these burdens in a

1 case-specific way, the burdens both in terms of
2 the President's time and in terms of any
3 possibility of harassment of the use of a
4 subpoena for political purposes.

5 Mr. Sekulow said that the burdensome
6 nature of these subpoenas is categorical. That
7 was his term. And I take him to mean that --
8 that any subpoena interferes with the
9 President's responsibilities or undermines the
10 President in his handling of the office.

11 So what's the answer to that?

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

19 So that's why it's up to a court to
20 evaluate and protect the President, depending on
21 the circumstances, on a case-by-case basis.

22 Secondly, here, the claim of, you
23 know, the possible mental distraction is extreme
24 -- completely speculative really. It's based on
25 the notion that the President might be, you

1 know, worried and distracted about where an
2 investigation might lead someday.

3 It's not based on any actual Article
4 II burden or interference of the sort the -- the
5 Court was asking President Clinton to
6 demonstrate in Clinton v. Jones.

7 And, third, I'd say, if -- if that's
8 really the concern, I think it's wrong to think
9 that even a categorical rule here would provide
10 comfort to a distractable President like that.

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

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

25 JUSTICE KAGAN: And -- and speculative

1 mental distress -- how about if they really mean
2 political undermining?

3 MR. DUNNE: Well, I mean, if -- that
4 -- that's beyond the ken of our office, Your
5 Honor, and -- and as, again, the district court
6 found, there was no bad faith intended by virtue
7 of our -- our subpoena.

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

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

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

1 of the House subpoenas and then our subpoena, it
2 was clear that both our office and the House
3 committees were looking at the same public
4 allegations in that regard.

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

12 There was absolutely no communication
13 between our was office and the House about this.
14 There's nothing sinister about it, Your Honor.

15 JUSTICE KAGAN: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Gorsuch?

18 JUSTICE GORSUCH: Counsel, I'd like to
19 return to your colloquy with Justices Alito and
20 Sotomayor, because I guess I'm uncertain what
21 the daylight is between the test you're
22 proposing and the test the Solicitor General has
23 suggested.

24 It seems like both of you agree that
25 these questions should be resolved in federal

1 court, and you've suggested that there is --
2 prosecutors should have to be -- demonstrate an
3 objective basis for the investigation and that
4 there's at least a reasonable probability that
5 the information sought will be helpful to that
6 investigation, that it can't be obtained
7 elsewhere and that it's needed now rather than
8 at the end of -- of the President's term because
9 of some serious prejudice that might take place
10 in between.

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

20 And I -- I understood your discussion
21 with Justice Alito to agree that that would be a
22 relevant consideration. What am I missing?

23 MR. DUNNE: I think, Your Honor,
24 putting aside the -- the language differences,
25 which I tried to highlight, I think the most

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

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

1 here, but on an actual Article II burden.

2 And only once that showing has been
3 made should, I think, the burden shift to the
4 prosecution, consistent with past cases by this
5 Court, to explain why, nonetheless, it's still
6 necessary to permit the Court at that point to
7 conduct the -- the balancing of apples and
8 apples in terms of coming to the right
9 conclusion in a -- in a specific case.

10 To me, that's --

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

20 MR. DUNNE: Yes, Your Honor.

21 JUSTICE GORSUCH: Is that what you're
22 fighting over?

23 MR. DUNNE: Well, I'm -- maybe with
24 the DOJ there's more -- there's less daylight
25 between us -- than us and the President's

1 lawyers, but I think the important point that I
2 would want to leave the Court with is that, even
3 if one were to adopt that standard or even,
4 frankly, I think the DOJ standard, the fact is
5 we've already met that test given the findings
6 of the courts below.

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

13 And I'm just trying to understand what
14 daylight actually exists. And is it fair to say
15 that the only daylight that exists between you
16 and the Solicitor General is who bears the
17 burden of proof?

18 MR. DUNNE: That's right.

19 JUSTICE GORSUCH: I'm not trying to
20 put words in your mouth. I'm -- I'm trying to
21 understand.

22 MR. DUNNE: No, Your Honor, I think it
23 is the burden and the difference in the language
24 which I've pointed out to Justice Sotomayor. I
25 think that language, different -- those

1 differences are important because I don't think
2 that the DOJ's language works in a grand jury
3 investigation.

4 JUSTICE GORSUCH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Kavanaugh?

7 JUSTICE KAVANAUGH: Thank you, Chief
8 Justice.

9 And good afternoon, Mr. Dunne. On
10 that last point that you were talking about with
11 Justice Gorsuch, the difference between the
12 Nixon heightened need standard, you said it
13 doesn't work in a grand jury. What do you do
14 with Judge Wald's opinion in *In Re Sealed Case*,
15 which took Nixon and did apply it in a grand
16 jury context?

17 MR. DUNNE: Yes, well, Justice --
18 Justice Kavanaugh, as I think you mentioned in
19 the earlier argument, the fact remains that *In*
20 *Re Sealed Case* was, indeed, applying the Nixon
21 standard as the Nixon Court contemplated to a
22 claim of executive privilege. And as has been
23 pointed out earlier today, I think that that's a
24 very different analysis to be undertaken for a
25 very different purpose. And I don't think one

1 can just simply, you know, import that language
2 and apply it to --

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

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

13 JUSTICE KAVANAUGH: Okay.

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

24 JUSTICE KAVANAUGH: Let's -- let's, if
25 we can, move on to the Article II issue then.

1 Do you acknowledge that there's an Article II
2 interest at stake here?

3 MR. DUNNE: Yes.

4 JUSTICE KAVANAUGH: And what do you
5 think it is?

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

12 JUSTICE KAVANAUGH: And do you think
13 time -- what Justice Breyer referred to as time
14 and energy distraction are appropriate Article
15 II interests?

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

1 I think the Clinton Court hypothesized
2 that, perhaps, you know, a -- a request for
3 actual in-person testimony at trial by a
4 President might be inappropriate in -- in --

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

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

18 Is that -- can you address that?

19 MR. DUNNE: Well, that's -- that's one
20 distinction, Your Honor. I -- I suppose on the
21 other side of the coin, there is the important
22 difference that, you know, there are, you know,
23 potentially thousands or -- or many more
24 potential private litigants out there who are
25 not bound by the kinds of ethical and

1 jurisdictional and other constraints that
2 prosecutors are bound by and to which this Court
3 has long paid deference.

4 I think that the -- the reason for
5 concern in a -- in a civil context is actually
6 much higher than it should be --

7 JUSTICE KAVANAUGH: And then -- I'm
8 sorry, if I can get my last question in.

9 On the federal/state, if there is an
10 Article II interest at stake, and you said that
11 there is, it's different, of course, from the
12 executive privilege interest, but there's some
13 Article II interest at stake, I think the other
14 side says it would be odd if the standard were
15 easier to meet for a state prosecutor than for a
16 federal prosecutor. And I just want to give you
17 an opportunity to address that.

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

1 JUSTICE KAVANAUGH: So you --

2 MR. DUNNE: Whether --

3 JUSTICE TO KAVANAUGH: Just to stop
4 you there, you're okay with whatever standard
5 applies to a federal prosecutor in a case where
6 there's an Article II interest also applying to
7 the state prosecutor?

8 MR. DUNNE: Well, I -- I'm not sure
9 exactly what you have in mind, Your Honor, but I
10 -- I think the --

11 JUSTICE KAVANAUGH: Well, I guess the
12 Nixon standard. You're -- you're not okay with
13 the Nixon standard, I don't think, but I just
14 want to explore that.

15 MR. DUNNE: No, because of the -- the
16 fact that that was applying to claims of
17 executive privilege.

18 But I think, to get to your point, I
19 -- I -- I think what it comes down to is that,
20 you know, in the -- in the Nixon and Clinton
21 cases, we're -- we're talking about, you know,
22 Article III versus -- we're talking about
23 separation of powers analysis.

24 Here, the analogy is we're balancing
25 federalism and Tenth Amendment concerns about

1 police power of the states against the Supremacy
2 Clause. So it's a different analysis perhaps,
3 but it's very analogous.

4 JUSTICE KAVANAUGH: Thank you.

5 CHIEF JUSTICE ROBERTS: Counsel, we
6 have time for a little bit of a second round,
7 and I guess the thing that I would like to focus
8 on first is this question of how you examine the
9 burden on the -- on the President or the
10 presidency.

11 I just don't understand how it works
12 in terms of you or -- or the President being
13 asked to devote a certain amount of time to
14 reviewing, for example, in this case, the -- the
15 -- the 10 years of documents or whatever.

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

20 You know, most Presidents throughout
21 their term have a pretty long to-do list. And
22 I'm just wondering how it's ever going to be any
23 different in evaluating what that burden is. It
24 seems to me that it would be the same no matter
25 what. You really wouldn't need a particular

1 hearing on that.

2 MR. DUNNE: Well, I guess, Your Honor,
3 when we're talking about, you know, in -- in the
4 context of a particular subpoena, like this one,
5 or a litigation or what have you, like in -- in
6 Clinton, again, this Court has already decided
7 that you can't shield a -- a president from any
8 sort -- every sort of private distraction.

9 And I just want to emphasize here,
10 again, that --

11 CHIEF JUSTICE ROBERTS: That was in
12 the -- that was in the civil context. The
13 question is whether or not a criminal
14 investigation might be a little bit more
15 distracting.

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

25 So I'm not sure that, again, the

1 abstract concern about, you know, possible
2 mental distraction or even public stigma under
3 this Court's prior analysis is sufficient to
4 adopt a new bright-line constitutional rule that
5 forbids any kind of process like this, given the
6 -- the history.

7 CHIEF JUSTICE ROBERTS: It's a little
8 bit of a -- it's a little bit of a -- that is
9 what the President's personal lawyers advocated.
10 It's not what the Solicitor General advocated,
11 not an absolute rule.

12 MR. DUNNE: Yes, I know, Your Honor.
13 And -- and, therefore, the answer in that case
14 is what's happened here, which is a
15 case-specific analysis before a court, which, as
16 they do all the time, is able to balance and
17 listen to arguments about burdens.

18 And, as here, when the court finds
19 there's no Article II burden whatsoever, after
20 an opportunity to be heard, that should be the
21 answer. And -- and that's what's happened here.

22 CHIEF JUSTICE ROBERTS: Justice
23 Thomas, anything further?

24 JUSTICE THOMAS: One brief question,
25 Mr. Dunne. There's been much discussion about

1 burdens on the President. I'd like from you a
2 couple of specific examples of what you think a
3 burden would be that actually counts in your
4 analysis on the part of the President.

5 MR. DUNNE: Well, I guess, Your Honor,
6 again, hypothetically, because our -- our
7 subpoena imposes, we say, no burden whatsoever.

8 JUSTICE THOMAS: I understand that.

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

19 I would suggest there along those
20 lines too that if -- if there -- if a president
21 were to be -- were -- were to be asked to
22 produce -- show up for multiple days of
23 consecutive deposition testimony or something
24 like that, those -- those kinds -- those are
25 practical burdens, or if -- if the demands were

1 that he show up at a particular time or place
2 that is -- you know, where there are conflicts
3 and that kind of thing, again, since we're
4 talking here about private conduct and no
5 executive privilege, what we get to are really
6 practical concerns about impositions on -- on
7 presidential activities. And that's, I think,
8 what we're talking about.

9 CHIEF JUSTICE ROBERTS: Thank you.

10 Justice Ginsburg, anything further?

11 JUSTICE GINSBURG: Nothing further.

12 CHIEF JUSTICE ROBERTS: Justice
13 Breyer?

14 JUSTICE BREYER: No, thank you. Go
15 ahead.

16 CHIEF JUSTICE ROBERTS: Justice Alito?

17 JUSTICE ALITO: One quick question. I
18 don't know how good this Court is about
19 predicting the consequences of some of our
20 decisions, but would you say that the -- the
21 Court's prediction in -- in Clinton versus Jones
22 that the decision wouldn't have much of an
23 impact on the Presidency has been borne out by
24 history?

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

1 I -- my view of the chronology in Clinton v.
2 Jones, I'll try to be brief, is that I -- I
3 think, contrary to some people's view of
4 history, I think that the -- the -- the district
5 court, following this Court's decision, kept a
6 rather close rein on discovery in that case and,
7 don't forget, later granted summary judgment in
8 favor of the President long before trial.

9 It was only that it came out later, of
10 course, that it turns out that in his brief
11 deposition in the case that the President
12 committed perjury, which is what led to the
13 impeachment proceedings and other travails he
14 had.

15 So I don't think it was this Court's
16 opinion or the litigation itself that led to
17 those problems. Frankly, it was his decision to
18 lie under oath.

19 So I -- I -- I don't -- I think that
20 this -- this Court's conclusion in both Nixon
21 and Clinton that they could not -- you could
22 not, you know, accept the notion there's going
23 to be a parade of horrors, either in a
24 particular case or across the board, still has
25 borne out over history.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor?

3 JUSTICE SOTOMAYOR: I'm not sure that
4 I understood your statement earlier that the
5 only difference between you and the SG -- well,
6 there are two differences, one in -- in the
7 articulation of special needs or heightened
8 standard, but you said it's the burden of proof.

9 But you've already conceded to -- to
10 one of my colleagues that there is an automatic
11 burden on an article -- on the Article II clause
12 by subpoenaing a sitting president, period.

13 MR. DUNNE: No, I've not -- I've not,
14 Your Honor. I'm sorry, but I have not -- I have
15 not conceded that.

16 JUSTICE SOTOMAYOR: All right. What
17 then are you conceding when you say there's a
18 burden?

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

20 JUSTICE SOTOMAYOR: And -- and what
21 kind of burden are you talking about? And,
22 number three, articulate more precisely what
23 problems you have with the heightened standard
24 that Nixon set in its grand jury subpoena.

25 MR. DUNNE: Yeah, I guess, in my

1 response, I think, to Justice Gorsuch, my
2 concern -- my -- what I acknowledged was that,
3 yes, a subpoena like this implicates Article II
4 issues and potential burdens, and it's those
5 which have to be weighed in a case-specific
6 analysis.

7 I wasn't conceding that the mere fact
8 of a subpoena imposes "an Article II burden." I
9 think that's -- that's the distinction I would
10 -- I would -- I would draw.

11 And, again, getting back to the
12 language question, I -- again, it's the DOJ's
13 language that calls for a stringent showing that
14 a request is directly relevant to central issues
15 at trial and specific charging decisions.

16 And, again, very simply, as a
17 practical matter, no court and no prosecutor
18 could -- could meet that standard because, in a
19 grand jury, one is not thinking about charging
20 decisions or central issues at trial. And
21 that's why I think the simple language that the
22 DOJ is -- is applying in its new heightened
23 showing standard is just not workable.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?

25 JUSTICE KAGAN: Mr. Dunne, on -- on

1 the question of a possible distinction between
2 state prosecutors and federal prosecutors, the
3 President's lawyers have urged that there's a
4 legal difference arising from the Supremacy
5 Clause. And I don't think we've talked about
6 that argument yet.

7 What -- what is your response to that?

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

20 So I think that that's the parallel to
21 the -- the balancing in the -- in the federal
22 prosecutor context, but I think it's even more
23 important given the federalism concerns and the
24 fact that, you know, state prosecutors, of
25 course, not only do they have the reserve police

1 power of the states, but in -- in context of
2 criminal investigations, there, a large body of
3 criminal conduct is only prosecutable by the
4 states. So that's the thing that has to be
5 balanced here.

6 CHIEF JUSTICE ROBERTS: Justice
7 Gorsuch?

8 JUSTICE GORSUCH: Nothing further.
9 Thank you, Chief.

10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh?

12 JUSTICE KAVANAUGH: Thank you, Chief
13 Justice.

14 I just wanted to ask again, deferral
15 of the investigation until after the presidency,
16 assuming statute of limitations issues were
17 solved -- which is a big assumption, I
18 understand -- can you tick off the concerns you
19 would have about that so that we have those
20 clear?

21 MR. DUNNE: Yes. Yes, Justice
22 Kavanaugh. Again, it's -- point number one
23 would be the -- putting aside statute of
24 limitations concern, which I don't think one can
25 discount here because I don't think it's been

1 addressed, you know, ever, obviously, by this
2 Court in -- in this context, and that's what
3 we're -- that's our paramount concern, to be
4 honest, at this point because the clock is
5 ticking.

6 But even if that were to be addressed
7 somehow, the risk of -- you know, over time by
8 waiting, of losing evidence and losing witnesses
9 and that kind of thing is a very real risk.
10 Again, I think the OLC Moss memo addressed that
11 expressly in -- in saying that a grand jury
12 proceeding should be allowed to proceed.

13 But, secondly, here -- and it's not
14 unusual -- since there are other third-parties
15 at issue in the investigation, requiring us to
16 delay because a president is still in office as
17 to those third-parties in -- in gathering
18 important evidence could yield them being above
19 the law if the statute of limitations runs as to
20 them.

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Mr. -- Mr.
23 Dunne, would you like a minute or two to wrap
24 up?

25 MR. DUNNE: Yes, Your Honor, thank

1 you.

2 Your Honors, the issue presented here
3 today is extremely narrow but extremely
4 important. We have a state investigation that's
5 well founded, implicates no official conduct or
6 executive privilege, involves a variety of
7 third-parties, faces serious time constraints,
8 and has been found to impose no Article II
9 burdens.

10 These facts put our subpoena well
11 within the scope of legal process permitted by
12 this Court for generations, indeed, back to
13 1807. Past decisions have consistently found
14 that courts already have robust tools to protect
15 presidents from abusive claims or demands.

16 There's no need here to upend
17 precedent or to write a new rule that undermines
18 federalism, especially when such a rule would
19 create a risk that American presidents, as well
20 as third-parties, could unwittingly end up above
21 the law.

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Mr. Sekulow, you have two minutes for

1 rebuttal.

2 REBUTTAL ARGUMENT OF JAY A. SEKULOW

3 ON BEHALF OF THE PETITIONER

4 MR. SEKULOW: Thank you, Mr. Chief
5 Justice.

6 Let me start with this, and there's
7 some agreement. The New York district attorney,
8 New York County district attorney, acknowledges
9 that their subpoena implicates Article II issues
10 and burdens. They also agree that there is
11 harms that could arise to the presidency. We
12 say those harms have actually existed.

13 The other aspect of this is the
14 ordering, who carries the burden here. That
15 seems to be the issue that's left open. This
16 Court's decision in Cheney answered that very
17 clearly, that said that the exacting standard is
18 carried by the party requesting the information.
19 So it would be carried by the Respondent in this
20 particular case.

21 There has been no showing and no
22 findings of heightened need standards being met
23 here. That -- and I think it's again also
24 important to remember -- and I think this came
25 up in the context of earlier questioning --

1 there's a different stigma that attaches to
2 criminal process than civil litigation. And I
3 don't think that stigma should be ignored in a
4 case like this.

5 But the irony of all of this is that
6 the House of Representatives and the district
7 attorney issued essentially the same subpoenas
8 to the same custodian for the same records.

9 The House said it wants the records so
10 it can legislate, not for law enforcement
11 reasons. The district attorney says he wants
12 the same records for law enforcement reasons; he
13 has no legislative authority.

14 But what's really happening here could
15 not be clearer. The presidency is being
16 harassed and undermined with improper process
17 that was issued, in our view, for illegitimate
18 reasons. The copying of the subpoena speaks to
19 that.

20 The framers saw this coming, and they
21 structured the Constitution to protect the
22 President from this encroachment.

23 Thank you, Mr. Chief Justice.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel. The case is submitted.

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