

# SUPREME COURT OF THE UNITED STATES

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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. )  
 )  
- - - - -

Pages: 1 through 107  
Place: Washington, D.C.  
Date: May 12, 2020

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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 fronted 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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