

NOTE
NOT A KING: PRESIDENT TRUMP
AND THE CASE FOR
PRESIDENTIAL SUBPOENA
REFORM

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INTRODUCTION

One of the earliest investigations into a sitting president began in 1796. The House of Representatives demanded documents from President George Washington as part of its investigation into a treaty he had negotiated with Great Britain.¹ Washington refused to comply, resting his argument on a doctrine now known as Executive Privilege—the concept that private communications between a president and his advisors should remain confidential so that the president may exercise the full powers of the office uninhibited.² Since Washington’s refusal, a number of presidents have been dogged by other kinds of investigations—for conduct official or private, for matters criminal or civil. But no president has been subject to investigation like Donald Trump.

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1. George Washington, *Message to the House Regarding Documents Relative to the Jay Treaty*, Mar. 30, 1796, https://avalon.law.yale.edu/18th_century/gw003.asp. In one of the earliest invocations of privilege over U.S. government documents, President Washington responded to a House request for his written negotiation instructions given to Secretary of State John Jay, who held a series of meetings with British diplomats to draft a treaty on Washington’s behalf. *See generally id.* The House was considering repealing the treaty and wanted the negotiation instructions to determine whether the negotiation was flawed. Washington refused to turn over the documents, citing the secretive “nature of foreign negotiation” and the lack of any constitutional purpose for the House to demand them—highlighting that it had not passed a resolution mentioning impeachment. *Id.* Washington’s refusal laid the foundation for the Executive Privilege.

2. *Id.*

Federal law enforcement, Congress, and State prosecutors in New York all conducted investigations of Trump during his presidency. Even this list is not exhaustive: it excludes two impeachment proceedings—one for abuse of power and obstruction of Congress and the second for inciting insurrection—as well as a number of civil lawsuits against Trump in his personal capacity.³ The scale of investigation was unprecedented. Yet it is President Trump’s unique strategy to opposing investigations that renders his treatment of investigations remarkable. Two predecessors, Presidents Nixon and Clinton, were faced with similar investigative perils, but responded in far less dramatic fashion. Nixon moved to quash a subpoena for his Oval Office tapes on the grounds that they were shielded by Executive Privilege. Clinton accepted the validity of a number of subpoenas but objected to a civil lawsuit by claiming he was constitutionally immune to such proceedings while president. Both Nixon and Clinton pursued their arguments at the Supreme Court; both lost.

President Trump did not file straightforward motions to quash grand jury subpoenas, nor did he narrowly accommodate requests from investigators. Instead, he argued that he was completely exempt from complying with all demands for information—including demands by state prosecutors and Congress. In both logic and spirit, these arguments contradicted the holdings of *United States v. Nixon*,⁴ which held that neither Executive Privilege nor presidential status render grand jury subpoenas unenforceable, and *Clinton v. Jones*, which held that presidents are not absolutely immune from judicial proceedings while in office.⁵

Trump escaped the long shadows of *Nixon* and *Jones* in part because of defects in our legal system that demand our attention. First, Special Counsel regulations—a hastily developed replacement for independent prosecutor statutes—are gravely defective and foster unnecessary secrecy and confusion. Second, courts’ deference to presidents appearing in personal capacities allowed Trump to pursue brazen and unfounded constitutional claims. Finally, a lack of legal

3. See, e.g., *Trump v. Carroll*, 52 N.Y.S.3d 330, 333 (S.D.N.Y. 2020) (addressing a civil lawsuit for against Trump for sexual assault); *D.C. v. Trump*, 291 F. Supp. 3d 725, 733 (D.C. Md. 2018) (addressing emoluments clause lawsuits against Trump for his private businesses); *Jacobus v. Trump*, 51 N.Y.S.3d 330, 333 (N.Y. Sup. Ct. 2017) (addressing a civil lawsuit against Trump and noting that “Trump was at all relevant times a candidate” and not sitting president for the purposes of the litigation).

4. 418 U.S. 683, 706 (1974).

5. 520 U.S. 681, 705–06 (1997).

clarity about Congressional subpoenas allowed Trump to stonewall a co-equal branch of government. The result was something neither Clinton nor Nixon accomplished: concealment of relevant evidence until Trump’s term had ended.

Part I examines various investigations into President Trump. Part II reviews the respective legal approaches Presidents Nixon, Clinton, and Trump enlisted to counter presidential subpoenas in courts of law. Part III explores more deeply the problems that allowed Trump’s delay tactics and temporary evasion of lawful subpoenas. It goes on to recommend policy solutions that would prevent future presidents from invoking similarly unpersuasive arguments. Unless reforms are implemented, it will be left to the same judicial process to remind the next iteration of President Trump that he or she is not king—a truth so fundamental to our constitutional system it should go without saying more than two centuries into the American experiment.⁶

I. A PRESIDENT UNDER SIEGE

During Trump’s 2016 presidential campaign, a series of contacts between Trump Campaign officials and individuals connected to Russian government intelligence agencies sparked an FBI investigation.⁷ After Trump’s win, U.S. intelligence agencies recorded Michael Flynn, then President-Elect Trump’s named National Security Advisor, speaking with the Russian Ambassador Sergei Kislyak.⁸ In that conversation, Flynn implicitly promised to lift sanctions on Russia that were imposed by President Obama in response to Russia’s interference in the 2016 election.⁹ The conversation raised the specter of prosecution under the Logan Act, a criminal statute prohibiting private citizens from conducting foreign policy.¹⁰

6. *Comm. on the Judiciary v. McGahn*, 415 F. Supp. 3d 148, 213 (D.D.C. 2019) (pointing out that the “primary takeaway from the past 250 years of recorded American history is that Presidents are not kings”).

7. 1 ROBERT S. MUELLER, III, U.S. DEP’T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 ELECTION 80–81 (2019) [hereinafter Mueller Report Vol. I].

8. Evan Perez & Jim Sciutto, *US Investigating Flynn Calls with Russian Diplomat*, CNN (Jan. 23, 2017), <https://www.cnn.com/2017/01/23/politics/flynn-russia-calls-investigation/index.html>.

9. Letter from Dir. of Nat’l Intelligence, to Sens. Grassley and Johnson (May 29, 2020), <https://www.grassley.senate.gov/odni-grassley-johnson-flynn-transcripts>.

10. Clare Foran, *What Is the Logan Act and What Does It Have to Do With Flynn?*, THE ATLANTIC (Feb. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/02/logan-act-michael-flynn-trump-russia/516774/>.

The FBI was also aware of a series of private reports collected by Trump's opponents regarding his relationship with Russia.¹¹ The reports cited Russian sources and sub-sources and included a number of unverified allegations: namely, that Trump knew of Russia's election interference operation, that Russia financially supported Trump, that Russian banks financed election interference, and that Russia possessed videos depicting Trump in compromising positions.¹² Those reports and news of Flynn's calls to the Ambassador were leaked to the public as Trump assumed office.¹³ Eventually, the controversy forced Flynn to resign.¹⁴ Trump repeatedly demanded that FBI Director James Comey drop any further investigation and asked that he publicly declare that Trump was not under investigation with regard to Russia.¹⁵ The Director refused,¹⁶ and eventually, Trump fired him.¹⁷ What ensued was a series of investigations: several by federal law enforcement, others by Congress, and a criminal investigation by New York State prosecutors.

A. *The "Feds"*

Federal investigations, though not legally challenged by President Trump, informed probes by Congress and the Manhattan D.A.'s office, both of which Trump ultimately challenged.¹⁸ These investigations began with the firing of FBI Director Comey: Trump ordered Deputy Attorney General Rod Rosenstein to draft a letter announcing Comey's dismissal and to include in that letter a comment that the

11. Statement for the R. from James Comey, to Senate Select Comm. on Intelligence (Jun. 8, 2017).

12. Ken Bensinger, Miriam Elder, & Mark Schoofs, *These Reports Allege Trump Has Deep Ties to Russia*, BUZZFEED NEWS (Jan. 10, 2017), <https://www.buzzfeednews.com/article/kenbensinger/these-reports-allege-trump-has-deep-ties-to-russia>.

13. David Ignatius, *Why Did Obama Dawdle on Russia's Hacking?*, WASH. POST (Jan. 12, 2017), https://www.washingtonpost.com/opinions/why-did-obama-dawdle-on-russias-hacking/2017/01/12/75f878a0-d90c-11e6-9a36-1d296534b31e_story.html.

14. Maggie Haberman et al., *Michael Flynn Resigns as National Security Advisor*, N.Y. TIMES (Feb. 14, 2017), <https://www.nytimes.com/2017/02/13/us/politics/donald-trump-national-security-adviser-michael-flynn.html>.

15. *Open Hr'g with Former FBI Director James Comey: Hr'g before the Select Comm. on Intelligence of the U.S. Senate*, 114th Cong. 4 (2017) (statement of Sen. Mark Warner).

16. *Id.*

17. Maggie Haberman et al., *'Enough Was Enough': How Festering Anger at Comey Ended in His Firing*, N.Y. TIMES (May 10, 2017), <https://www.nytimes.com/2017/05/10/us/politics/how-trump-decided-to-fire-james-comey.html>.

18. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020); *Trump v. Vance*, 140 S. Ct. 2412 (2020).

Russia investigation was a hoax—which troubled Rosenstein.¹⁹ A draft without the Russia language was made public and Comey was removed from his position.²⁰

The next morning, Trump met with the Russian Foreign Minister Sergei Lavrov and said, “I just fired the head of the FBI. He was crazy, a real nut job. I faced great pressure because of Russia. That’s taken off . . . I’m not under investigation.”²¹ When news outlets reported these comments, the White House responded that Trump really meant to say that Comey had “created unnecessary pressure on our ability to *engage and negotiate* with Russia.”²² Shortly after, Trump gave a nationally televised interview during which he stated that when he decided to fire Comey, he was thinking, “[Y]ou know, this Russia thing with Trump and Russia is a made-up story. It’s an excuse by the Democrats for having lost an election they should’ve won.”²³ In response to these events, Deputy Attorney General Rosenstein—on his own volition—appointed former FBI Director Robert S. Mueller III as a Department of Justice Special Counsel to investigate Russian election interference.²⁴

Over the course of a two-year investigation, Mueller prosecuted thirty-four people, three Russian organizations, and obtained a number of guilty pleas and convictions.²⁵ Early in the investigation, reporters from *The New York Times* asked Trump whether Mueller would cross a “red line” if he looked at Trump’s finances and his family members’ finances for connections to Russia.²⁶ Trump responded, “I would say yes . . . [I]t’s possible there’s a condo or something . . . and somebody from Russia buys a condo, who knows? I don’t make any money from Russia.”²⁷ Trump continued, “No, I think that’s a violation. Look, this is

19. See 2 ROBERT S. MUELLER, U.S. DEP’T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 ELECTION 62 (2019) [hereinafter Mueller Report Volume II].

20. *Id.*

21. *Id.*

22. *Id.* at 71 (emphasis added).

23. *Id.* at 73.

24. Dep’t of Justice, App’t of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters, Order No. 3915-2017 (May. 17, 2017) [hereinafter Appointment Order].

25. Ashley Turner, *What We Know About Special Counsel Mueller’s Russia Probe So Far*, CNBC (Mar. 25, 2019, 3:08 PM), <https://www.cnbc.com/2019/03/22/what-we-know-about-special-counsel-muellers-russia-probe-so-far.html>.

26. *Excerpts from the Times’s Interview with Trump*, N.Y. TIMES (Jul. 19, 2017), <https://www.nytimes.com/2017/07/19/us/politics/trump-interview-transcript.html>.

27. *Id.*

about Russia. So, I think if he wants to go, my finances are extremely good, my company is an unbelievably successful company But I have no income from Russia. I don't do business with Russia."²⁸

Mueller did not examine Trump's personal finances, nor did he investigate financial crimes like bribery, tax fraud, or money laundering related to Trump.²⁹ The scope of Mueller's investigation was narrowly focused on election interference activity.³⁰ But Mueller referred a number of cases to other investigators: For instance, after he had interviewed Michael Cohen, the President's then-personal attorney and an executive at the Trump Organization, Mueller referred to the appropriate authorities in New York information about possible campaign finance law violations involving payments made during Trump's presidential campaign to women with whom he had had extramarital affairs.³¹ But Mueller never spoke publicly once during the investigation, and his silence left the scope of his work largely unclear to outsiders. Some members of Congress expressed dismay that it seemed like Mueller had left many stones unturned—namely, financial ties between Trump and Russia.³²

Twelve other cases that Mueller referred elsewhere remain redacted.³³ Cohen surrendered to the FBI on August 21, 2018, and pled guilty to eight criminal charges: five counts of tax evasion, one count of making false statements to a financial institution, one count of willfully causing an unlawful corporate contribution, and one count of making an excessive campaign contribution at Trump's request.³⁴ The press

28. *Id.*

29. Testimony of Robert Mueller to the House Intelligence Committee, July 24, 2019, <https://docs.house.gov/meetings/IG/IG00/20190724/109808/HHRG-116-IG00-Transcript-20190724.pdf>.

30. See Appointment Order, *supra* note 24.

31. Dareh Gregorian, *Mueller Mystery: What are the other 12 criminal referrals?*, NBC NEWS (Apr. 18, 2019 5:55 PM), <https://www.nbcnews.com/politics/donald-trump/mueller-mystery-what-are-12-criminal-referrals-n996166>.

32. Jen Kirby, *The Last Minutes of Mueller's Testimony Made the Best Case for the Russia Investigation*, VOX (Jul. 24, 2019, 4:55 PM), <https://www.vox.com/policy-and-politics/2019/7/24/20726405/mueller-testimony-russian-interference-adam-schiff>.

33. One case reportedly involved an investigation Mueller pursued regarding an Egyptian bank in relation to an alleged \$10 million contribution to Trump's 2016 campaign, but the case was closed after Attorney General Barr replaced the attorney overseeing the office handling the matter. Katelyn Polantz, Evan Perez, & Jeremy Herb, *Feds Chased Suspected Foreign Link to Trump's 2016 Campaign Cash for Three Years*, CNN (Oct. 14, 2020, 8:59 PM), <https://www.cnn.com/2020/10/14/politics/trump-campaign-donation-investigation/index.html>.

34. Press Release, *Michael Cohen Pleads Guilty in Manhattan Federal Court to Eight Counts, Including Criminal Tax Evasion and Campaign Finance Violations*, DEP'T OF JUSTICE (Aug. 21, 2018) (on file with author).

reported that federal prosecutors in New York were focused on the Trump Organization,³⁵ but as of March, 2021, no such investigation has emerged.

B. Congress

Before Cohen began serving his sentence, he testified publicly for more than seven hours before the House Oversight Committee about his work with Trump and the Trump Organization.³⁶ He detailed Trump's potential misconduct before and during his presidency: unlawfully reimbursing hush money payments during his presidential campaign, implicitly directing Cohen to lie to investigators, and filing false financial statements with banks and insurance companies before he assumed office.³⁷ Cohen's testimony prompted the House of Representatives to investigate President Trump and the Trump Organization. In April 2019, the House Intelligence Committee and the House Financial Services Committee issued subpoenas to the President's accounting firm, Mazars USA, and his primary lender, Deutsche Bank AG, for ten years of Trump's financial records.³⁸

House Committee members justified their investigations by emphasizing that Mueller had not pursued Trump's foreign financial ties.³⁹ President Trump immediately filed petitions to block Congressional subpoenas from enforcement in federal court.⁴⁰ He

35. Luppe Luppen & Hunter Walker, *New York Attorney General Unveils Investigation into Trump Company's Finances*, YAHOO NEWS (Aug. 24, 2020), <https://news.yahoo.com/new-york-attorney-general-unveils-investigation-into-trump-companys-finances-223323626.html>. Two sources familiar with the situation told Yahoo News that the U.S. Attorney's Office for the Southern District of New York was conducting an aggressive investigation into Trump's real estate business in 2019, with a specific focus on questionable practices related to the valuation of his properties. The New York Attorney General also alluded to the existence of a federal investigation in court documents.

36. Testimony of Michael D. Cohen, Comm. on Oversight and Reform, U.S. House of Rep. 116-03 (Feb. 27, 2019).

37. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2022 (2020).

38. Jan Wolfe, *Trump Sues to Block Congress Subpoena for His Financial Records*, REUTERS (Apr. 22, 2019, 9:33 AM), <https://www.reuters.com/article/us-usa-trump-congress/trump-sues-to-block-congress-subpoena-for-his-financial-records-idUSKCN1RY0YD>.

39. See Kyle Cheney & Zachary Warmbrodt, *Schiff Says FBI Hasn't Probed National Security Risks of Trump's Foreign Financial Ties*, POLITICO (Aug. 26, 2020, 5:19 PM), <https://www.politico.com/news/2020/08/26/adam-schiff-fbi-trump-foreign-financial-ties-402318> (noting that despite Mueller's refusal, the Intelligence Committee would continue to press for bank records).

40. David Farenthold et al., *Trump Sues in Bid to Block Congressional Subpoena of Financial Records*, WASH. POST (Apr. 22, 2019), https://www.washingtonpost.com/politics/trump-sues-in-bid-to-block-congressional-subpoena-of-financial-records/2019/04/22/a98de3d0-6500-11e9-82ba-fcfeff232e8f_story.html.

claimed that Congress had no legitimate legislative reason to subpoena his financial records, was acting as law enforcement, and was using its subpoena power to harass the President.⁴¹

C. *The State of New York*

Not long after Congress had issued its subpoenas to Mazars and Deutsche Bank, New York State investigators did the same. They issued a nearly identical subpoena to Trump's accounting firm. President Trump moved to block that subpoena, too, arguing that "the person who serves as President, while in office, enjoys absolute immunity from criminal process of any kind."⁴²

The background of the New York State investigation highlights some deficiencies in the Special Counsel's probe. Early on in Mueller's tenure as Special Counsel, his team traveled to New York to meet with state investigators in order to establish cooperation between offices.⁴³ Public reporting suggested that Mueller's team was working with New York Attorney General Eric Schneiderman on possible money laundering violations, but Mueller never brought such charges.⁴⁴ After Cohen was indicted on federal charges for the illegal hush money payments made during the 2016 campaign,⁴⁵ many speculated that New York federal prosecutors were picking up cases handed off by Mueller.⁴⁶ Although Cohen's federal indictment stated that he had committed crimes "at the direction of" Donald Trump, no further federal investigation of Trump materialized in New York.⁴⁷ But then, a year after Mueller had completed his report, the Manhattan District Attorney subpoenaed the Trump Organization for its corporate

41. See Wolfe, *supra* note 38.

42. Trump v. Vance, 395 F. Supp. 3d 283, 288 (S.D.N.Y. 2019).

43. Josh Dawsey, *Mueller Teams Up with New York Attorney General in Manafort Probe*, POLITICO (Aug. 30, 2017, 7:26 PM), <https://www.politico.com/story/2017/08/30/manafort-mueller-probe-attorney-general-242191>.

44. *Id.*

45. Ben Protess & William K. Raushbaum, *Manhattan D.A. Subpoenas Trump Organization Over Stormy Daniels Hush Money Payments*, N.Y. TIMES (Aug. 1, 2019), <https://www.nytimes.com/2019/08/01/nyregion/trump-cohen-stormy-daniels-vance.html>.

46. Christina Wilkie, *Mueller Referred Evidence of 14 Other Potential Crimes to Federal Officials. Only Two of Them are Publicly Known*, CNBC (Apr. 18, 2019), <https://www.cnbc.com/2019/04/18/mueller-evidence-14-potential-crimes-only-two-publicly-known.html>.

47. Darren Samuelsohn, *Feds' Probe into Trump Hush Money Payments is Over, Judge Says*, POLITICO (Jul. 17, 2019), <https://www.politico.com/story/2019/07/17/trump-hush-money-payments-probe-over-1418074>.

records,⁴⁸ launching a state criminal investigation of the President.

The D.A. was examining whether senior executives at the Trump Organization had falsified business records about the hush money payments, which may have violated state criminal law.⁴⁹ When it emerged that the D.A. had also sent a grand jury subpoena to Trump’s accounting firm, Mazars, for tax records dating back to 2011, it became clear that the investigation was broader than originally reported.⁵⁰ Later filings indicated that the investigation involved fraud and that the grand jury was investigating a “protracted period of criminal conduct” at President Trump’s business.⁵¹ *The New York Times* reported that Trump’s primary lender, Deutsche Bank, had already complied with subpoenas a year earlier.⁵² Faced with two probes into his finances, Trump attempted to block the New York investigation too, employing expansive constitutional claims that bore closer resemblance to the rights of a king than a president.⁵³

II. A NOVEL DISREGARD FOR THE LAW

Although it is true that almost every modern president has been investigated,⁵⁴ there are only two presidents who were investigated in a manner remotely close to the investigations described above: Richard Nixon and Bill Clinton. Both took different approaches to resisting investigators—and both lost. Examining their failed arguments demonstrates that President Trump’s attempts to block investigators were remarkably unmoored from both political and legal precedent.

48. Protes & Raushbaum, *supra* note 45.

49. *Id.*

50. Tom Winter & Hallie Jackson, *Manhattan DA Subpoenas Trump’s Tax Returns in Probe of Hush Money Payments*, NBC NEWS (Sept. 16, 2019), <https://www.nbcnews.com/politics/donald-trump/manhattan-da-subpoenas-trump-s-tax-returns-probe-hush-money-n1055046>.

51. William K. Rashbaum & Benjamin Weiser, *D.A. Is Investigating Trump and His Company Over Fraud, Filing Suggests*, N.Y. TIMES (Aug. 3, 2020), <https://www.nytimes.com/2020/08/03/nyregion/donald-trump-taxes-cyrus-vance.html>.

52. David Enrich et al., *Trump’s Bank Was Subpoenaed by N.Y. Prosecutors in Criminal Inquiry*, N.Y. TIMES (Aug. 5, 2020), <https://www.nytimes.com/2020/08/05/nyregion/trump-taxes-vance-deutsche-bank.html>.

53. In *Mazars*, the Court held that President Trump’s constitutional claims would “seriously risk impeding Congress in carrying out its responsibilities,” did not distinguish between privileged and nonprivileged information, or official and personal information, and represented a “significant departure from the longstanding way of doing business between the branches [of government].” *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2023 (2020).

54. Sonam Sheth, *Obama is the only president since Nixon who didn’t face an independent investigation*, BUS. INSIDER (Oct. 23, 2017), <https://www.businessinsider.com/obama-nixon-trump-russia-independent-investigation-2017-10>.

Trump went further than either comparable predecessor: He rebuffed demands for information about his finances, claimed a “total immunity” that appeared internally illogical and inconsistent with precedent, and avoided filing proper claims in order to delay transmission of evidence until after the 2020 election. While he did not prevail in court, Trump succeeded in concealing evidence about his finances during his presidency, something that Nixon and Clinton both failed to do.

A. *President Nixon’s Approach*

President Nixon faced a perilous criminal investigation, which also ensnared his closest associates, but his efforts to counter investigators were the most straightforward of the three presidents examined in this Note. First, Nixon asserted Executive Privilege, a legal principle recognized in American law. Second, the Supreme Court expedited the process of hearing the appeal on Nixon’s motion to quash the subpoena due to its regard of the public importance of the matter. Third, Nixon’s limited cooperation with prosecutors allowed them to file a narrow subpoena. Fourth, Nixon filed a straightforward motion to quash instead of invoking some form of absolute immunity associated with the presidential office. Finally, Nixon’s claim of privilege covered official conduct, not personal conduct. In later sections, comparisons between these aspects of Nixon’s case and President Trump’s approach to investigations demonstrates the radical nature of Trump’s arguments.

Like President Trump, a cohort of President Nixon’s campaign staff was involved in potentially criminal conduct aimed at hobbling the chances of Nixon’s political opponents.⁵⁵ They broke into the Democratic Party headquarters at the Watergate Complex in Washington, D.C., where they had planned to photograph campaign documents and install wiretaps in telephones.⁵⁶ The DNC Chairman’s phone was among the phones to be tapped.⁵⁷ But the wiretaps were not

55. See generally JOHN DEAN, *THE NIXON DEFENSE: WHAT HE KNEW AND WHEN HE KNEW IT* 12–13 (2014) (describing a conspiracy to break into the DNC offices at the Watergate Hotel to plant eavesdropping devices).

56. Walter Rugaber, *Watergate Trial in Closed Session*, N.Y. TIMES (Jan. 18, 1973), <https://www.nytimes.com/1973/01/18/archives/watergate-trial-in-closed-session-judge-clears-court-to-hear.html>.

57. Robert Pear, *Watergate, Then and Now—2 Decades After a Political Burglary, the Questions Still Linger*, N.Y. TIMES (Jun. 15, 1992), <https://www.nytimes.com/1992/06/15/us/watergate-then-now-2-decades-after-political-burglary-questions-still-linger.html>.

entirely effective, so the conspirators had to return to the scene of the crime to repair the problems.⁵⁸ A security guard noticed the intruders when they returned the second time, and he alerted police. Five men were arrested at the scene and charged with attempted burglary and attempted interception of telephone and other communications.⁵⁹ By January 1973, the burglars had been convicted or had pleaded guilty—just days after Nixon’s second inauguration.⁶⁰

White House officials moved to distance President Nixon from the criminal endeavor. John Dean, a White House lawyer, later testified that a top Nixon aide, John Ehrlichman, had ordered him to destroy evidence.⁶¹ Nixon blocked FBI investigations into the source of funding for the burglaries.⁶² Dean believed he could go to prosecutors and tell them the truth in order to protect Nixon, but when he discussed this plan with Nixon, he suspected that the President was recording their conversations.⁶³ Later, during Senate hearings, Dean revealed this suspicion, which triggered Congressional and grand jury subpoenas for what became known as “the Nixon tapes.”⁶⁴

Department of Justice Special Prosecutor Archibald Cox and the Senate subpoenaed the tapes, but Nixon asserted Executive Privilege over them.⁶⁵ Once former senior White House aides had been indicted, Nixon released transcripts of the relevant White House tapes in an acknowledgement that they were not entirely shielded by privilege. Still, believing the audio would be far more damaging, he continued fighting to keep the recordings hidden.

The Supreme Court took up the Executive Privilege issue in *United*

58. *Id.*

59. *Id.*

60. Trials began January 8, 1973; E. Howard Hunt pled guilty January 11; four others pled guilty January 15; two others were convicted after trial on January 30. THE WATERGATE FILES: TIMELINE, https://www.fordlibrarymuseum.gov/museum/exhibits/watergate_files/content.php?section=1&page=a (last visited Feb. 13, 2021).

61. DEAN, *supra* note 55, at 425.

62. Alfred E. Lewis, *5 Held in Plot to Bug Democrats’ Office Here*, WASH. POST (Jun. 18, 1972), <https://www.washingtonpost.com/wp-dyn/content/article/2002/05/31/AR2005111001227.html>.

63. DEAN, *supra* note 55, at 240–41.

64. *Id.*

65. *United States v. Nixon*, 418 U.S. 683, 686 (1974). It should be noted that President Nixon fired Cox and several other Department of Justice officials in an effort to curtail the investigation, but the subpoena for the tapes was continued by Cox’s successor, Leon Jaworski. Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, WASH. POST, Oct. 21, 1973 at A01.

States v. Nixon.⁶⁶ The Court denied President Nixon's motion to quash subpoenas, which were issued by a federal court and had directed Nixon to produce certain tape recordings and documents relating to his conversations with aides and advisors.⁶⁷ Nixon's journey to the Court was a short one. During the criminal investigations, Cox's subpoena for the Nixon tapes was issued by the U.S. District Court for the District of Columbia.⁶⁸ The President appealed the decision to the Court of Appeals for the District of Columbia Circuit, but before the D.C. Circuit could hear the case, the U.S. Supreme Court granted certiorari to review the case immediately.⁶⁹ The Court circumvented the normal process because of "the public importance of the issues presented" and "the need for their prompt resolution."⁷⁰

Because Nixon had cooperated with the prosecutor, the prosecutor was able to narrow the scope of the subpoena, avoiding a broad demand for all Nixon's Oval Office tape recordings and a serious Executive Privilege problem. In *Nixon*, the Court described the subpoena process, including several important characterizations pertinent to the comparison to President Trump's approach. It characterized the subpoena as requiring "the production . . . of certain tapes, transcripts, or other writings relating to certain *precisely identified* meetings between the President and others."⁷¹ This description suggests that the subpoena was narrowly tailored to specific tapes and was not a broad demand for all tapes that existed. The Court also noted that the "Special Prosecutor was able to fix the time, place, and persons present at these discussions because the White House daily logs and appointment records had been delivered to him."⁷²

The Court also pointed out that President Nixon had filed a motion to quash the subpoenas to accompany his claim of privilege over their contents.⁷³ A large portion of the Court's opinion in *Nixon* is devoted to the motion to quash analysis. The Court held that subpoenas "may be quashed if their production would be unreasonable or unproductive, but not otherwise."⁷⁴ The Court outlined three hurdles for the

66. *See generally id.*

67. *Id.*

68. *Id.* at 686.

69. *Id.* at 686–87.

70. *Id.* at 687.

71. *Id.* at 688.

72. *Id.*

73. *Id.* at 688.

74. *Id.* at 700.

prosecutor to meet to obtain the tapes: relevancy, admissibility, and specificity.⁷⁵ The Court determined that the subpoenas at issue had cleared all three hurdles: Dean's Senate testimony rendered the tapes relevant, the Court had decided Executive Privilege did not apply to potentially criminal conduct, which meant the evidence was admissible, and the subpoenas' level of specificity (a product of Nixon's partial cooperation) made them reasonable.⁷⁶ The Court held that there was a sufficient likelihood that the tapes contained conversations relevant to the offenses charged in the indictment of Nixon's associates.⁷⁷ The Court also deferred to the district court's discretion because it was the best arbiter for deciding whether a subpoena was necessary.⁷⁸ Although the Court noted that where a subpoena is directed to the president of the United States, appellate review should be particularly meticulous, the Court nevertheless did not establish any heightened standard of scrutiny for presidential subpoenas.⁷⁹

The Court then evaluated President Nixon's claim of Executive Privilege over the Oval Office tapes.⁸⁰ Nixon claimed that Executive Privilege was absolute for all communications as they related to Executive Branch duties, but he did not claim that Executive Privilege applied to all of his communications writ large during his presidency.⁸¹ In any event, his strategy proved futile. The Supreme Court explicitly rejected President Nixon's arguments for absolute, unqualified presidential immunity from judicial process for all conversations relating to Executive Branch duties.⁸² Even for presidential communications covered by Executive Privilege, the Court found that "absent a claim of need to protect military, diplomatic or sensitive national security secrets," it is difficult to accept that "even the very important interest in confidentiality of Presidential communications" precludes production of evidence to a court of law under a subpoena.⁸³

The Court determined that the public "has a right to every man's evidence, except for those persons protected by constitutional, common law or statutory privilege."⁸⁴ The Court passed comment on

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 702.

79. *Id.*

80. *Id.* at 703.

81. *Id.* at 705.

82. *Id.* at 706.

83. *Id.*

84. *Id.* at 709.

the breadth of Nixon’s claim, too: “No case of the Court . . . has extended this high degree of deference to a President’s generalized interest in confidentiality.”⁸⁵ In light of *Nixon*, President Trump’s far more expansive requests for deference to his even more generalized interest in confidentiality demonstrate that the legal system has grown too weak to impose meaningful accountability on the President, despite the clarity provided by the Supreme Court decades ago.

B. President Clinton’s Approach

President Clinton also faced multiple investigations into his conduct over the course of his two terms. Two features of President Clinton’s approach warrant review. First, President Clinton cooperated—somewhat extensively—with a series of investigations that spanned nearly all eight years of his presidency. Second, Clinton’s claim of absolute immunity from a civil proceeding was resoundingly rejected in accordance with longstanding precedent.

Civil lawsuits, in tandem with a long-running investigation by Independent Counsel Kenneth Starr, spawned legal headaches for Clinton that ultimately resulted in his impeachment.⁸⁶ He was first investigated for connections to Whitewater Development Corporation and a failed savings and loan company.⁸⁷ Under the contours of an independent counsel statute passed in the wake of the Nixon era, a special judicial panel appointed attorney Kenneth Starr to investigate the matter.⁸⁸

Similar to the Senate’s simultaneous hearings on subjects related to the Nixon criminal investigations, Republicans in Congress voted to enforce subpoenas for notes taken at joint meetings between the White House Counsel’s office and Clinton’s private lawyers.⁸⁹ Although the White House initially resisted, Clinton ultimately provided the notes, despite viable claims of attorney-client privilege.⁹⁰ In fact, both Nixon and Clinton provided documents in response to subpoenas for potentially privileged evidence. This pattern continued as the investigative train rolled through a number of other “scandals” that

85. *Id.* at 711.

86. Charles Tiefer, *The Specially Investigated President*, 5 U. CHI. L. SCH. ROUNDTABLE 143, 143–44 (1998).

87. *Id.* at 155. The investigation escalated when Deputy White House Counsel Vincent Foster died by suicide, giving rise to speculation of a coverup. *Id.*

88. *Id.*

89. *Id.* at 156.

90. *Id.*

emerged during Clinton's tenure: "Travelgate," an investigation into the dismissal of seven employees at the White House travel office, "Filegate," an investigation into delayed production of files by the White House Counsel's office, and "Bosniagate," an investigation into Clinton's permission of arms shipments between Iran and Bosnia without Congressional approval. Other investigations included probes into campaign finance matters, First Lady Hillary Clinton's possible obstruction, and, of course, President Clinton's extramarital affairs and his allegedly perjurious comments about them.⁹¹ Clinton complied to some extent with each of these investigations.⁹²

During Clinton's first term, Paula Jones, a former employee of the Arkansas Industrial Development Commission, sued him and another man for sexual harassment during Clinton's gubernatorial administration.⁹³ Clinton "promptly advised the District Court that he intended to file a motion to dismiss on grounds of Presidential immunity, and requested the court to defer all other pleadings and motions until after the immunity issue was resolved."⁹⁴ The District Court denied his motion to dismiss, on the grounds that even the most favorable case for Clinton limited presidential immunity to acts incidental to the official duties of the *presidency*.⁹⁵ The judge did stay the trial proceedings until after Clinton's term had ended, but permitted discovery to continue.⁹⁶ Clinton appealed to the Eighth Circuit and lost.⁹⁷ The Supreme Court granted certiorari.

The Court was unsparing: "Petitioner's principal submission—that 'in all but the most exceptional cases,' the Constitution affords the President temporary immunity from civil damages litigation arising out of events that occurred before he took office—cannot be sustained on the basis of precedent."⁹⁸ The primary concern for presidential immunity, the Court held, is rooted in the desire to avoid a President being "unduly cautious in the discharge of his official duties."⁹⁹ In short,

91. *Id.* at 156–60.

92. *Id.*

93. *Clinton v. Jones*, 520 U.S. 681, 684–85 (1997).

94. *Id.* at 686.

95. *See id.* at 686 (citing *Nixon v. Fitzgerald*, 457 U.S. 731 (1997), for the proposition that the president has "absolute immunity from civil damage actions arising out of the execution of the official duties of office" but that immunity was not so expansive it gave the president absolute immunity while in office).

96. *Id.* at 688.

97. *Clinton v. Jones*, 72 F.3d 1354, 1361 (8th Cir. 1996).

98. *Jones*, 520 U.S. at 692.

99. *Id.* at 694 (citing *United States v. Nixon*, 418 U.S. 683, 752 n. 32 (1974)).

presidential immunity is meant to empower a President to carry out the duties of his office without fear of litigation over every official decision he makes.

That reasoning “provides no support for an immunity for unofficial conduct,”¹⁰⁰ meaning Clinton could not claim presidential immunity for conduct that had occurred before he became president. Justice Stevens was particularly explicit in making this point: “[W]e have *never* suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity.”¹⁰¹ The Court considered the Founders’ perspectives on presidential subpoenas and decided that the historical sources were ultimately inconclusive.¹⁰² Nevertheless, *Jones* stands for the principle that, unless a suit involves or encroaches upon Executive duties, a president is not immune from suit merely because a proceeding may upset or distract him.¹⁰³

The Court examined the long history of presidential compliance with legal proceedings to demonstrate that Clinton’s total immunity argument had little merit. Many examples pepper our nation’s history. Chief Justice Marshall ruled that it was lawful to subpoena President Jefferson in the treason trial of Aaron Burr.¹⁰⁴ President Monroe responded to written interrogatories.¹⁰⁵ President Grant voluntarily gave a lengthy deposition in a criminal investigation.¹⁰⁶ President Nixon complied with the subpoena for his Oval Office tapes.¹⁰⁷ President Ford gave a deposition in a criminal trial.¹⁰⁸ And Clinton himself had already been deposed for *two* criminal proceedings.¹⁰⁹

It is important to note what the Court did *not* decide in *Jones*: the Court did not consider whether a comparable claim might succeed in a

100. *Id.*

101. *Id.* (emphasis added).

102. The Court briefly examined Clinton’s reference to President Jefferson’s protest of a subpoena for his testimony during the trial of Aaron Burr, but balanced it with Jones’s counterevidence of comments at the Constitutional Convention that the president is amenable to the law “in his private character as a citizen, and in his public character by impeachment.” *Id.* at 695–96.

103. *Id.* at 701.

104. *Id.* at 703–04.

105. *Id.* at 704.

106. *Id.*

107. See *United States v. Nixon*, 418 U.S. 683, 714 (1974) (referencing the District Court’s *in camera* review of document obtained via subpoena).

108. See *United States v. Fromme*, 405 F. Supp. 578, 583 (E.D. Cal. 1975) (requiring President Ford to give a deposition).

109. *Id.*

state tribunal and noted that if the case was being heard in a state forum, then concerns about federalism, comity, and local prejudice would arise.¹¹⁰ It was from this small hill President Trump launched his constitutional battle in *Vance*, asserting a different kind of total immunity from subpoenas issued by a state grand jury, despite the logic of his arguments flying in the face of the reasoning established in *Jones* and *Nixon*.

C. President Trump's Approach

President Trump went farther than Nixon or Clinton, especially by claiming total immunity from a criminal investigation because of its state-level origin. While Trump's claim was ostensibly grounded in the fact that the Supreme Court had never addressed whether a *state* grand jury could subpoena a sitting president,¹¹¹ the logic of nearly all Trump's arguments applied to federal criminal proceedings, too.¹¹²

Trump's positions in both subpoena cases were rife with inconsistencies. When House Committees subpoenaed Deutsche Bank and Mazars in April 2019, Trump contested the move by arguing the subpoenas had no legislative purpose, amounted to Congress improperly engaging in "law enforcement," and violated separation of powers principles.¹¹³ Aside from the inconsistency that Trump was suing in his private capacity and not as president (and thus no separation of powers issue had arisen in the traditional sense),¹¹⁴ his argument that Congress shouldn't engage in law enforcement was rendered somewhat illogical when he also opposed a subpoena from traditional law enforcement—the Manhattan D.A.—for the very same documents. Turning to a different argument entirely to block that subpoena, Trump, his businesses, and his family argued that President Trump enjoyed "absolute immunity" from state criminal process under Article II and the Supremacy Clause.¹¹⁵ Trump argued that Congress could not play law enforcement, but also that state law enforcement could not

110. *Jones*, 520 U.S. at 691.

111. *Id.* (emphasis added).

112. Petition for Writ of Certiorari, *Trump v. Vance*, 140 S. Ct. 2412 (2020) (No. 19-3204) (claiming that Article II and the Supremacy Clause of the Constitution dictate that the president of the United States cannot be subject to *criminal process* while in office with no rationale excluding federal criminal process from that assertion (emphasis added)).

113. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2022–32 (2020).

114. *Id.* at 2034 (stressing that separation of powers concerns were "no less palpable" because President Trump sued in his personal capacity, but stopping short of accepting the dispute as a traditional separation of powers problem).

115. *Trump v. Vance*, 140 S. Ct. 2412, 2416 (2020).

investigate Trump by virtue of his status as president, implicitly endorsing the view that the only government entity that could investigate the president is the very branch he himself controls.

At every stage, President Trump’s arguments failed.¹¹⁶ Starting with the Congressional subpoenas, the D.C. Circuit held that Congress has a broad ability to investigate pursuant to legislation and that the mere act of requesting materials relating to a president does not violate separation of powers principles.¹¹⁷ Evaluating Congress’s Deutsche Bank subpoena, the Second Circuit similarly concluded that because the subpoena’s purposes were not pretextual, the Court would defer to Congress’s assertion that its legislative purpose was valid.¹¹⁸ The court noted the privacy interests of President Trump “should be accorded more significance than those of an ordinary citizen because [he] is the President,” in part because it “risk[s] at least some distraction of the Nation’s Chief Executive in the performance of his official duties.”¹¹⁹ Nonetheless, the Second Circuit concluded that because claims of presidential distraction historically have applied narrowly, notably in both *Nixon* and *Jones*,¹²⁰ it could not justify blocking a subpoena to *third parties*—which required no action on Trump’s part—as an encroachment on his official duties as president.¹²¹

The absolute immunity argument against the state grand jury subpoena fared poorly as well. The District Judge denied Trump’s initial request to block the subpoena.¹²² The Second Circuit affirmed, placing Trump’s arguments in historical context. Importantly, the Second Circuit’s reasoning mirrors—almost precisely—the Supreme Court’s ultimate conclusion.¹²³ The Second Circuit began with the

116. See, e.g., *Trump v. Deutsche Bank AG*, 943 F.3d 627, 652 (2d Cir. 2019) (citing *Quinn v. United States*, 349 U.S. 155, 160–61 (1955), for the proposition that inquiry into private affairs—even of the president—is valid as long as the inquiry is related to a valid legislative purpose); *Trump v. Mazars*, 940 F.3d 710, 723 (D.C. Cir. 2019) (holding that the “power of the Congress to conduct investigations . . . is broad” and that it “encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes”).

117. *Mazars*, 940 F.3d at 733–34.

118. *Id.*

119. *Deutsche Bank AG*, 943 F.3d at 675.

120. *Id.*

121. *Id.*

122. *Trump v. Vance*, 395 F. Supp. 3d 283, 290 (S.D.N.Y. 2019).

123. *Trump v. Vance*, 140 S. Ct. 2412, 2431 (2020) (concluding “Two hundred years ago, a great jurist of our Court established that no citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding. We reaffirm that principle today and hold that the President is neither absolutely immune from state criminal subpoenas . . . nor entitled to a heightened standard of need.”).

history:

Over 200 years ago, Chief Justice Marshall . . . upheld the issuance of a subpoena duces tecum to President Jefferson. Consistent with that historical understanding, presidents have been ordered to give deposition testimony or provide materials in response to subpoenas. In particular, “the exercise of jurisdiction [over the President] has been held warranted” when necessary to vindicate public interest in an ongoing criminal prosecution The President relies on what he described at oral argument as “temporary absolute presidential immunity”—he argues that he is absolutely immune from all stages of state criminal process while in office [A]fter reviewing historical and legal precedent, we conclude . . . that presidential immunity does not bar the enforcement of a state grand jury subpoena directing a third party to produce non-privileged material, even when the subject matter under investigation pertains to the President.¹²⁴

Noticing President Trump’s logical departure from *Nixon*, the Second Circuit was troubled by Trump’s failure to assert privilege in any form.¹²⁵ Because President Trump’s financial documents were not privileged, it was hard to imagine they should warrant *more* protection than the Nixon tapes, which enjoyed at least a colorable claim of Executive Privilege.¹²⁶ Furthermore, the grand jury subpoena was issued to a third party, not President Trump.¹²⁷ The Second Circuit found no support in *Nixon* for the proposition that a president’s “private and non-privileged documents may be absolutely shielded” from scrutiny.¹²⁸ Trump went 0–3 in his efforts to block both Congress’s and the grand jury’s subpoenas before reaching the Supreme Court.¹²⁹ The D.C. Circuit and Second Circuit agreed that Congress’s subpoena power is broad and that Trump’s arguments for absolute immunity from state grand juries were unfounded in the law.¹³⁰ Despite the

124. *Trump v. Vance*, 941 F.3d 631, 640 (2d Cir. 2019) (internal citations omitted).

125. *See id.* at 641 (stressing that Nixon’s claim of Executive Privilege—while unsuccessful—at least presented a legitimate rationale for quashing the subpoena. President Trump offered no similar rationale).

126. *Id.*

127. *Id.* at 640.

128. *See id.* (comparing Trump’s argument to the *Nixon* Court’s conclusion that even documents exposing the president’s confidential, official conversations may properly be obtained by subpoena).

129. *Vance*, 941 F.3d at 631; *Trump v. Deutsche Bank AG*, 943 F.3d 627, 675 (2d Cir. 2019); *Trump v. Mazars USA, LLP*, 940 F.3d 710, 723 (D.C. Cir. 2019).

130. *Vance*, 941 F.3d at 631; *Trump v. Deutsche Bank AG*, 943 F.3d 627, 675 (2d Cir. 2019); *Trump v. Mazars USA, LLP*, 940 F.3d 710, 723 (D.C. Cir. 2019).

apparent lack of a circuit split or even a particularly novel question of law, the Supreme Court accepted both cases for review and scheduled them for argument in March 2020—as public interest in Trump’s financial history continued to grow.¹³¹

The arguments in the *Vance* case did not really present novel questions of law, beyond the question of whether state grand juries can subpoena a sitting president. But Trump did not focus his argument so narrowly: His lawyers argued that Article II and the Supremacy Clause *required* that presidential immunity applied to any criminal process, which implicitly included federal criminal process and thus contradicted both *Nixon* and *Jones*.¹³² Trump differentiated his claim from Nixon’s not based on distinctions between federal and state prosecutors, but on the fact that the Special Prosecutor in *Nixon* disclaimed any intent to indict Nixon during his presidency—a distinction which bears little (if any) resemblance to federalism principles, comity concerns or Vance’s status as a local state prosecutor.¹³³ Trump’s concerns about state grand jury subpoenas encroaching on the office of the president also applied equally to federal prosecutors.¹³⁴ The core of Trump’s claim was not that state prosecutors are uniquely unsuited to investigate a president in our federalist system, but rather that “issuing compulsory criminal process to the sitting President, when it is accompanied by a threat of indictment, crosses a constitutional line.”¹³⁵

At oral argument, Chief Justice Roberts punctured that balloon: “[F]or all that, you don’t argue that the grand jury cannot *investigate* the President, do you?”¹³⁶ President Trump’s counsel dodged the question by claiming they were not seeking to enjoin the grand jury

131. See *Democrat Schiff Questions If Mueller Probing Trump-Deutsche Bank Link*, REUTERS (Feb. 10, 2019), <https://www.reuters.com/article/us-usa-trump-russia/democrat-schiff-questions-if-mueller-probing-trump-deutsche-bank-link-idUSKCN1PZ0PU> (describing a “wide investigation into . . . Trump’s financial dealings, including ‘credible reports of money laundering and financial compromise’”).

132. Transcript of Oral Argument at 5–6, *Trump v. Vance*, 140 S. Ct. 2412 (2020) (No. 19-635). In pursuit of this argument, President Trump’s counsel acknowledged President Trump was being investigated for criminal violations by a state grand jury and claimed subpoenas targeting the president, even addressed to third parties, violated the Constitution. *Id.*

133. Brief for Petitioner, *Trump v. Vance*, 140 S. Ct. 2412 (2020) (No. 19-3204) at 7.

134. *Id.* at 5–7. Trump raised the prospects of being indicted while in office, distraction from official duties, and public stigma and opprobrium resulting from criminal investigation as reasons to caution against permitting criminal investigations of a sitting president. Each of these logically applies to federal investigations, too.

135. *Id.* at 9.

136. *Id.* (emphasis added).

investigation but were instead arguing for temporary immunity to the grand jury's subpoenas.¹³⁷ The Chief Justice noted the logical problem: "Well, in other words, it's okay for the grand jury to investigate, except it can't use the traditional and most effective device that grand juries have typically used to investigate, which is the subpoena?"¹³⁸

Ultimately, the Court did not overrule decades of precedent in favor of President Trump's novel legal theory that subpoenas relating to the president are invalid when issued by state grand juries. In *Vance*, the Court concluded that "Article II and the Supremacy Clause do not categorically preclude, [n]or require a heightened standard for, the issuance of a state criminal subpoena to a sitting President."¹³⁹ It was not exactly new precedent—the Court's holding was consistent with what it previously held in *Nixon* and *Jones*.¹⁴⁰ Still, other distinctions about *how* the cases unfolded warrant scrutiny.

President Trump never asserted any colorable claim of privilege, unlike Nixon.¹⁴¹ Trump argued that there should be a heightened standard for any subpoena issued to the president, which was squarely inconsistent with the analysis in *Nixon*,¹⁴² in spirit if not in law. With respect to the evidence, Trump advocated for protections over *unprivileged* evidence about *unofficial* conduct broader than those Nixon had advocated for. Plus, Nixon sought to protect *privileged* evidence relating to *official* conduct—and Nixon's claim was rejected.¹⁴³ Exacerbating the expansive scope of this new theory was Trump's total refusal to cooperate with investigators, which again differentiated him from Nixon in that it made narrowing the subpoenas impossible for prosecutors or Congress.¹⁴⁴

137. *Id.*

138. *Id.*

139. *Trump v. Vance*, 140 S. Ct. 2412, 2416 (2020).

140. Compare Trump's argument that presidents are absolutely immune from criminal process to the holding in *Nixon*, where the Court concluded that "to read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to the enforcement of criminal statutes . . . would upset the constitutional balance of a 'workable government.'"; cf. *Clinton v. Jones*, 520 U.S. 681, 705 (1997) ("[F]ederal courts have the power to determine the legality of [the president's] unofficial conduct.").

141. See discussion *supra* notes 65–85 and accompanying text (describing that Nixon asserted Executive Privilege over tapes of conversations in the Oval Office and lost).

142. See discussion *supra* notes 73–79 and accompanying text (describing that the Supreme Court in *Nixon* said only that meticulous review was warranted for presidential subpoenas but declined to establish a heightened standard).

143. See discussion *supra* notes 81–85 and accompanying text (describing that *Nixon* characterized the president's claims as the high watermark of presidential immunity—and denied them—but President Trump's arguments went much higher).

144. See discussion *supra* notes 71–72 and accompanying text (describing that Nixon offered

Other distinctions arose from the way the federal courts handled the Trump cases. The Supreme Court did not expedite hearing over the issues relating to a criminal investigation involving President Trump, again departing from *Nixon*.¹⁴⁵ It also entertained his broad constitutional claim of absolute immunity without requiring him to file an accompanying motion to quash or asking him to make alternative arguments in the event his immunity claim failed, as Nixon had.¹⁴⁶ Trump tried painstakingly to avoid both the political and legal implications of *Nixon* and the logical conclusions emanating from it, and federal courts allowed him to successfully do so.

While Trump's legal claim of absolute immunity bore some similarity to Clinton's claim in *Jones*, Trump categorically refused to cooperate with any investigation into his financial affairs—unlike Clinton.¹⁴⁷ Trump effectively ignored the long line of historical precedent that supported the Court's rejection of presidential immunity in *Jones*.¹⁴⁸ And he ignored the *Jones* principle that presidents challenging subpoenas on the grounds they will distract from the office must show that the subpoena actually encroaches upon the duties of the presidency. In other words, such challenges cannot be justified by mere *emotional* distraction.¹⁴⁹

Alarming, Trump's legal contortions continued on past the Supreme Court. After the Court upheld the subpoenas in *Vance*, it

White House logs to investigators, allowing prosecutors to subpoena specific tapes instead of the contents of all Oval Office tapes in Nixon's possession).

145. See discussion *supra* note 69 and accompanying text (describing that the Court expedited appellate process over Nixon's claim of Executive Privilege but did not do so for the Manhattan D.A. subpoena over the President's financial documents).

146. See discussion *supra* notes 73–79 and accompanying text. The Second Circuit noted—albeit in litigation after the Supreme Court's decision in *Vance*—that a party would ordinarily challenge a subpoena like the one at issue by filing a motion to quash before the state court that had impaneled the grand jury. *Trump v. Vance*, 977 F.3d 198, 207 (2d. Cir. 2020). Such motions trigger a clear analysis courts regularly undertake. In Trump's case, it meant he would bear the burden of coming forward with concrete evidence sufficient to rebut the presumption of validity accorded to Grand Jury subpoenas, something the Second Circuit noted was “no small feat.” *Id.* But Trump never filed a motion to quash in a single case where he opposed subpoenas during his presidency.

147. See discussion *supra* notes 89–91 and accompanying text (describing that Clinton complied with several investigations by Congress and prosecutors, turning over potentially privileged evidence in the process).

148. See discussion *supra* notes 98–103 and accompanying text (describing that the Supreme Court was explicit in *Jones* that presidential immunity covers official conduct and that “distraction” applies only to the official duties of the presidency, not emotional distraction).

149. See discussion *supra* notes 98–103 and accompanying text (describing how discovery in a civil case that involved President Clinton was not sufficient “distraction” to intrude on his official duties).

remanded the case to the District Court for further argument on the issues of overbreadth, bad faith, and other possible Article II-specific avenues.¹⁵⁰ This District Court heard expedited argument on President Trump’s new claims that the subpoenas were overbroad or issued in bad faith. But Trump curiously presented them through a constitutional claim raised under 42 U.S.C. § 1983,¹⁵¹ again failing to raise the straightforward motion to quash through which these new claims would normally be brought.¹⁵² The District Court rejected his arguments just weeks after the Supreme Court remanded the case in a lengthy 103-page ruling which articulated frustration with Trump’s legal tactics:

The President began this action by invoking Article II to raise a sweeping claim of immunity rejected by every court to consider it. He then received guidance on potentially valid challenges to the Mazars Subpoena, including ones specifically tied to Article II, from no less an authority than the Supreme Court. He . . . raised claims of bad faith and overbreadth available to the broader public and conclusorily [sic] asserted that these alleged defects in the grand jury process violated his Article II rights. The Court is not persuaded . . . Justice requires an end to this controversy.¹⁵³

Trump predictably appealed. More than a year since the issuance of the criminal subpoena by the grand jury, the Second Circuit again concluded Trump’s arguments were without merit.¹⁵⁴ The court expressed particular confusion about why he brought a § 1983 claim and openly suggested that Trump had engaged in peculiar legal tactics to avoid the harsh motion to quash standard.¹⁵⁵

The procedural posture of this case . . . is unusual. A party would ordinarily challenge a subpoena like the one at issue by filing a motion to quash before the state court that had impaneled the grand jury. As noted above, to prevail on an ordinary motion to quash, the moving party bears the burden to come forward with ‘concrete evidence’ sufficient to rebut ‘the presumption of validity accorded

150. *Trump v. Vance*, 140 S. Ct. 2412, 2419 (2020).

151. A § 1983 claim is a federal cause of action which provides for civil actions when a “person . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws.” 42 U.S.C. § 1983 (2018). President Trump claimed state prosecutors were depriving him of his constitutional rights as a president by subpoenaing his accounting firm.

152. *Trump v. Vance*, No. 19 Civ. 8694, slip op. at 103 (S.D.N.Y. Aug. 20, 2020).

153. *Id.* (emphasis added).

154. *Trump v. Vance*, 977 F.3d 198, 207 (2d. Cir. 2020).

155. *Id.* at 207.

to Grand Jury subpoenas.¹⁵⁶

The Second Circuit later stressed this standard would have presented Trump with “no small feat.”¹⁵⁷ But because Trump made this other § 1983 claim instead, the District Attorney was forced to file a motion to dismiss Trump’s claim, reversing the burden.¹⁵⁸ The motion to dismiss standard differs significantly from the motion to quash standard: The prosecutor’s motion to dismiss would fail if Trump’s stated facts—which must be presumed as true—presented a viable claim.¹⁵⁹ Under a motion to quash test, however, it would be the *subpoena* that enjoys the presumption of validity, and Trump would bear the burden of demonstrating its bad faith or overbreadth.¹⁶⁰ But Trump contended that presuming the validity of the subpoena, as a court would under a motion to quash test, would somehow unfairly impose a heightened pleading standard on *him*.¹⁶¹ The Second Circuit flatly disagreed.¹⁶² But then it suggested that Trump did not need to rebut the presumption of validity at this stage, implying that it was engaging in a mixture of the motion to quash and motion to dismiss analyses.¹⁶³ Regardless of this confusion, Trump lost and appealed—again—to the Supreme Court, where the petition remained unanswered until February 2021, about eighteen months after the original issuance of the criminal grand jury subpoena.¹⁶⁴ The electorate did not know whether there were “protracted periods of criminal conduct” at Trump’s business before the November 2020 election.¹⁶⁵

President Trump’s absolutist arguments were not limited to financial investigations, either. When the House subpoenaed testimony from former White House Counsel Don McGahn and documents he possessed in pursuit of an impeachment investigation related to obstruction of justice,¹⁶⁶ McGahn refused to comply unless an

156. *Id.* at 206–07.

157. *Id.* at 207.

158. *Id.*

159. *Id.*

160. *Id.* (emphasis added).

161. *Id.* (emphasis added).

162. *See id.* (“We disagree.”).

163. *Id.*

164. Arian de Vogue, *Supreme Court allows release of Trump tax returns to NY prosecutor*, CNN (Feb. 22, 2021 3:56 PM), <https://www.cnn.com/2021/02/22/politics/supreme-court-trump-taxes-vance/index.html>.

165. William K. Rashbaum & Benjamin Weiser, *D.A. is Investigating Trump and His Company Over Fraud, Filing Suggests*, N.Y. TIMES (Aug. 3, 2020), <https://www.nytimes.com/2020/08/03/nyregion/donald-trump-taxes-cyrus-vance.html>.

166. *Comm. on the Judiciary of the U.S. H.R. v. McGahn*, 951 F.3d 510, 514 (D.C. Cir. 2020).

accommodation was reached with the White House.¹⁶⁷ Trump argued that certain White House advisors enjoy total immunity from compelled testimony about matters relating to their service of the president.¹⁶⁸ The ensuing battle, which presented a closer constitutional question about Executive Privilege and presidential immunity, still provided important guidance that will be relevant to remedies considered in Part III.

The House brought suit to enforce the subpoena and won in District Court, but a three-judge panel at the D.C. Circuit Court of Appeals reversed on the grounds the House Committee lacked standing to sue.¹⁶⁹ The full D.C. Circuit later reversed the panel decision, determining after *en banc* review that the House did in fact have standing.¹⁷⁰ The D.C. Circuit noted that when the House of Representatives employs its subpoena power in service of its impeachment power, then a subpoena to White House aides for testimony is an enforceable demand for information, and questions of Executive Privilege must be raised and litigated separately—again rejecting President Trump’s claim of absolute immunity for an approach that bore closer resemblance to typical American legal procedure.¹⁷¹

Importantly, the original panel at the D.C. Circuit—after receiving the case on remand—ruled that there was no cause of action for the House to pursue subpoenas in court, rendering enforcement of the subpoena impossible despite the House’s standing to bring the suit.¹⁷² The decision was grounded in the fact that Congress has “granted an express cause of action to the Senate—but not to the House” for enforcing subpoenas through civil litigation.¹⁷³ While Congressional lawyers insisted that a federal court could grant equitable relief on its own under Article III, the panel disagreed with that, too: The existence of the statutory power in the Senate implies courts cannot infer it for the House.¹⁷⁴ The court also expressed reluctance at characterizing an “interbranch information dispute” between branches of government as

167. *Id.*

168. *Id.*

169. *Id.*

170. Comm. on the Judiciary of the U.S. H.R. v. McGahn, 968 F.3d 755, 760 (D.C. Cir. 2020) (*en banc*).

171. *Id.* at 765.

172. Comm. on the Judiciary of the U.S. H.R. v. McGahn, 973 F.3d 121, 123 (D.C. Cir. 2020) (on remand from reh’g *en banc*).

173. See *id.* (citing 2 U.S.C. § 288d and 28 U.S.C. § 1365(b)).

174. *Id.* at 123–24.

a traditional equitable claim.¹⁷⁵ The panel pointed out that the line of cases used in support of equitable relief all cited statutory powers, not constitutional ones like impeachment.¹⁷⁶

It is clear the D.C. Circuit struggled with constitutional questions about enforcing Congressional subpoenas to the Executive Branch. The judges cited the fact that Congress’s power to enforce subpoenas is currently limited to two avenues: a statutory criminal contempt mechanism and the inherent congressional contempt power.¹⁷⁷ According to the panel, because Congress had not passed legislation creating a civil subpoena enforcement power for the House, it had none.¹⁷⁸ Critically, the panel practically invited legislators to take up the cause: “We note that this decision does not *preclude* Congress (or one of its chambers) from ever enforcing a subpoena in federal court; it simply precludes it from doing so without first enacting a statute authorizing such a suit.”¹⁷⁹ McGahn’s testimony has still not been received by the House of Representatives.

President Trump’s legal tactics, combined with his public and private obstruction of the Special Counsel investigation, blocked multiple branches of government from critical evidence related to his conduct. Part III dives deeper into particularly problematic aspects of President Trump’s approach to subpoenas. It also presents several courses of action to remedy the confusion that resulted from the Special Counsel investigation, Trump’s exploitation of deference to the presidency in courts of law, and the lack of a clear statutory scheme for subpoenas issued to the president. These shortcomings (among others) allowed Trump to argue for temporary absolute immunity, despite 200 years of contrary precedent. While President Trump ultimately lost each legal battle, he won a war Nixon and Clinton never did: preventing evidence from being disclosed until his presidency was over. Trump even ran for reelection while the evidence remained blocked and the

175. *Id.* at 124.

176. *See id.* at 125. The panel in *McGahn* detailed the issues in *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927), which it distinguished because it “arose out of a habeas corpus suit filed after the Senate exercised its inherent contempt power to arrest the Attorney General’s brother.” *McGahn*, 973 F.3d at 125. It used a similar distinction to dismiss the citation of another case, *Quinn v. United States*, 349 U.S. 155, 160–61 (1955), which suggested Congress has “the authority to compel testimony” through “its own processes”—for the proposition that the “power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.” *McGahn*, 973 F.3d at 125.

177. *Id.*

178. *Id.*

179. *Id.* at 125–26 (emphasis added).

electorate uninformed about his possible criminal conduct.

Chief Justice Roberts' struggle with President Trump's theory of presidential immunity was rooted in the fact that its contours "would seem to go much farther than resisting the subpoena."¹⁸⁰ Roberts expressed skepticism about the logic of President Trump's propositions: "I don't know why you don't resist the investigation in its entirety or why your theory wouldn't lead to that."¹⁸¹ Trump's attorney dodged,¹⁸² but Roberts was nudging Trump's attorneys to state their position: They objected to any and all investigations of a sitting president. It is this position that, more than anything, transposed President Trump's political approach onto his legal one. His lawyers contorted to make arguments that flew in the face of *Nixon* and *Jones* and countless other cases in order to appease a client who, like a king, would not accept any authority other than his own.

III. PREVENTING FUTURE TRUMPS

The common refrain against impeachment is that the proper means of removing a president is an election. Setting aside the merits of that position, it nevertheless relies on an assumption that voters will have adequate information to make a sound judgment about the president's performance, character, and abilities. When the president withholds critical information from the public, he gravely inhibits the electorate's power to hold him accountable through the traditional political process. In short, President Trump's tactics exposed major flaws in the system.

Three reforms could resolve some of these problems. First, Congress should amend Special Counsel regulations to create a direct channel between a Special Counsel investigating the president and Congress or the public to avoid confusion and subsequent subpoenas arising from multiple corners of the government. Second, Congress should modify the deference that a president receives in federal court by creating a cause of action for presidents to pursue when appearing in their personal capacity to oppose subpoenas. It was abundantly clear that many of President Trump's arguments would fail, yet broad deference to his claims afforded by way of his office permitted him to delay investigations into his conduct with expansive and unsupported

180. Transcript of Oral Argument at 7, *Trump v. Vance*, 140 S. Ct. 2412 (2020) (No. 19-635).

181. *Id.*

182. *See id.* ("Well, our – our position is that criminal process against the President – and that's what we're talking about, that's what's before the Court – criminal process targeting the President is a violation of the Constitution.").

arguments. Third, Congress should pass new laws to govern its authority to investigate presidents and Executive Branch officials, a power federal courts have already recognized Congress possesses with respect to subpoenas. The status-quo, which allowed President Trump to disable investigation after investigation, failed in that it neither provided effective oversight nor served the interest of keeping the public informed. The United States *needs* better law for presidential investigations.

A. *Fixing the Special Counsel Regulations*

Public frustration over Special Counsel Mueller’s investigation cut in both ideological directions. Republicans complained that Mueller pursued too many of President Trump’s associates on charges unrelated to a conspiracy with Russia to interfere in the 2016 election. Democrats alleged that Mueller left many Trump-Russia stones unturned by failing to investigate Trump’s finances and alleged misconduct by Trump’s family members.¹⁸³ The media criticized Mueller as well. Indeed, the *New York Times* hypothesized that Mueller was fearful he might “endanger [his] own image by expressing a forthright view of [Trump’s conduct], even if the future of the Republic might be at stake.”¹⁸⁴

Since Watergate, there have been two modes of special inquiry into presidential misconduct—both of which have elicited criticism.¹⁸⁵ The first kind of inquiry is performed by an *Independent Counsel*, like Ken Starr, who operates outside the Executive Branch and answers to the judiciary and Congress.¹⁸⁶ The second kind is a *Special Counsel*, like Mueller. Special Counsels work under a regulatory scheme meant to secure a level of independence, but because they answer to the Attorney General, they effectively remain under the control of the president.¹⁸⁷ Special Counsels report their findings only to the Attorney General and no one else.¹⁸⁸ There is no provision in the regulations for direct communications to the public or Congress—except for

183. See Bob Bauer, *It’s Time to Reform the Special-Counsel Rules—Again*, THE ATLANTIC (June 1, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/mueller-and-comey-were-very-different-special-counsels/590836/> (critiquing Muller’s investigation as a “confusing, half-in and half-out analysis of possible obstruction of justice”).

184. The Editorial Board, *Decoding Robert Mueller*, N.Y. TIMES (May 29, 2019), <https://www.nytimes.com/2019/05/29/opinion/robert-mueller-trump.html>.

185. Bauer, *supra* note 183 and accompanying text.

186. *Id.*

187. *Id.*

188. 28 CFR § 600.8 (limiting communications by the Special Counsel to solely the Attorney General).

communications made by the Attorney General.¹⁸⁹

Both types of Counsel have been met with harsh criticism. The Independent Counsel statute, which was passed in the wake of Nixon’s firing of the Attorney General, Deputy Attorney General, and Special Counsel Archibald Cox,¹⁹⁰ provided a broad mandate for a panel of judges from the D.C. Circuit Court of Appeals to appoint a special prosecutor if the Attorney General deemed it necessary.¹⁹¹ In 1998, Justice Scalia excoriated the law as unconstitutional in his dissenting opinion in *Morrison v. Olson*.¹⁹² Scalia believed the independent counsel statute should be struck down because criminal prosecution is an exercise of “purely executive power” to be exclusively controlled by the president—not any other branch of government.¹⁹³ The Independent Counsel statute also elicited political critiques: The Clinton investigation cost \$40 million and polled poorly among the American public.¹⁹⁴ Ultimately Congress permitted the independent counsel law to expire on June 30, 1999.¹⁹⁵

Separate from the Independent Counsel statute are the Special Counsel regulations, which the Department of Justice adopted just after the Independent Counsel statute had expired.¹⁹⁶ The regulations require an appointment of a non-government person in sensitive cases, and only the Attorney General can dismiss the Special Counsel.¹⁹⁷ Additionally, the Special Counsel can only be dismissed “for cause”: misconduct, dereliction of duty, or other good cause.¹⁹⁸ Political reasons

189. 28 CFR § 600.9 (providing for communications to Congress by the Attorney General about Special Counsel investigations).

190. Ethics in Government Act of 1978, Pub. L. 94-521, 92 Stat. 1824 (1978). As the Watergate investigation ramped up, Archibald Cox prepared to issue subpoenas to President Nixon for Oval Office tapes. Nixon ordered his Attorney General to fire Cox. The Attorney General resigned. Nixon then ordered his Deputy Attorney General to fire Cox, and instead, he resigned. Solicitor General Robert Bork eventually carried out the order. Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, WASH. POST, Oct. 21, 1973 at A01.

191. *Id.*

192. See 487 U.S. 654, 699 (1998) (Scalia, J., dissenting) (noting that while “issues of this sort” sometimes come before the court “clad in sheep’s clothing . . . this wolf comes as a wolf”).

193. *Id.* at 734.

194. *Independent Probes of Clinton Administration cost nearly \$80 million*, CNN (Apr. 1, 1999), <https://edition.cnn.com/ALLPOLITICS/stories/1999/04/01/counsel.probe.costs/>.

195. Jim Mokhiber, *A Brief History of the Independent Counsel Law*, PBS (May 1998), <https://www.pbs.org/wgbh/pages/frontline/shows/counsel/office/history.html>.

196. 28 CFR § 600 (2020).

197. 28 CFR § 600.7(d). However, the recent Special Counsel appointment of U.S. Attorney for Connecticut John Durham to investigate the origins of the Mueller Investigation did not comply with this provision, raising questions about what the phrase “outside the government” means.

198. *Id.*

alone would not carry the day.¹⁹⁹ Although these protections would appear to shield any Special Counsel from political interference, Mueller’s top deputy stated that Mueller had resisted investigating President Trump’s finances for fear of being fired.²⁰⁰ While the Special Counsel regulations make clear that removal can only be for cause and issued by the Attorney General, the regulations are not statutory law and President Trump could have conceivably ordered the Attorney General to rescind them, and then fired Mueller.²⁰¹ Trump could also simply have found a contrived reason to fire Mueller for cause, or circumvented the Justice Department regulations on the grounds that they do not apply to him, fired Mueller, and triggered a legal battle over his authority to go around them after Mueller was gone.²⁰² The Special Counsel’s office was acutely aware of these potential outcomes, and Mueller’s deputy highlighted that “[w]e still do not know if there are other financial ties between the president and either the Russian government or Russian oligarchs” as a result of the fears that the investigation would be terminated prematurely.²⁰³

According to Mueller’s deputy, Special Counsels face a number of obstacles when investigating a president: namely, the pardon power, the Attorney General’s control over the appointment, and the fact that every person has constitutional rights to respond to charges of criminality in court, which presidents cannot do because current Justice Department policy prohibits them from being indicted.²⁰⁴ The deputy’s

199. *Id.*

200. During the Special Counsel probe, former federal prosecutor Andrew Weissman was hired by Mueller to serve as his deputy for the prosecution of Trump’s campaign chair, Paul Manafort. According to Weissman, early in the investigation shortly after the discovery of a June 2016 meeting between President Trump’s son, son-in-law, and campaign manager and Russians inside Trump Tower, the team was informed they Mueller would be fired the following day. While the firing never came to fruition, the team was warned several times in 2017 that Trump was preparing to fire Mueller. Weissman says Mueller, as a result of the threats, came to believe the investigation should be narrowly focused on Russian election interference operations and seen through to its conclusion, even if it meant backing away from other important questions and ultimately leaving them unanswered. ANDREW WEISSMAN, *WHERE THE LAW ENDS: INSIDE THE MUELLER INVESTIGATION* 112–17 (2020).

201. Matthew Nussbaum, *Can Trump fire Mueller? Yup, and in more ways than one*, POLITICO (Jun. 13, 2017 3:19 PM), <https://www.politico.com/story/2017/06/13/can-trump-fire-special-counsel-robert-mueller-239500>.

202. It was reported that Trump claimed conflicts of interest over a fee dispute regarding Mueller’s membership at a Trump golf club to White House lawyers in an early attempt to oust Mueller from his position. Josh Gerstein, *DOJ releases part of Mueller’s conflict of interest waiver*, POLITICO (Sept. 14, 2019 11:13 AM), <https://www.politico.com/story/2019/09/14/justice-dept-mueller-conflict-of-interest-1496171>.

203. *Id.*

204. *See id.* (noting that a current Department of Justice opinion states that a sitting president

warnings proved prescient. President Trump pardoned Michael Flynn, Paul Manafort, Roger Stone, and George Papadopoulos—each of whom was charged or convicted, or who pleaded guilty in the investigation.²⁰⁵ Despite Mueller concluding that, in four instances, President Trump’s conduct met all elements of the crime of obstruction of justice, Attorney General Bill Barr, who introduced the conclusions of the report to the public, said that Mueller “did not reach a conclusion on whether Trump obstructed justice” and that he and Deputy Attorney General Rosenstein independently concluded that Trump had not.²⁰⁶ Mueller told Attorney General Barr that he had distorted his team’s conclusions with his public statements.²⁰⁷ But during testimony to Congress, Mueller remained reticent to conclude President Trump committed a crime—lending credence to the idea that Special Counsels struggle with the policy that presidents cannot be indicted in a court of law.²⁰⁸

More effective and formal communication between independent or special investigators and the public is warranted, and Congress or the Department of Justice should provide for this in existing regulations. Even though Mueller’s investigation did not generate the constitutional showdown that other Trump-related probes did, it is critical to keep in mind that subpoenas by Congress and a state prosecutor’s office were necessary for two primary reasons. First, there was widespread confusion about what exactly Mueller was investigating. And second, Mueller was hesitant to pursue Trump’s

cannot be indicted).

205. *Pardons Granted by President Donald Trump*, DEP’T OF JUSTICE (Jan. 29, 2021), <https://www.justice.gov/pardon/pardons-granted-president-donald-trump>.

206. *Attorney General William P. Barr Delivers Remarks on the Release of the Report on the Investigation Into Russian Interference in the 2016 Presidential Election*, DEP’T OF JUSTICE (Apr. 18, 2019), <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-release-report-investigation-russian>.

207. After the submission of Report of the Special Counsel on the Investigation into Russian Interference in the 2016 Presidential Election and Obstruction of Justice, Attorney General Barr held a press conference and sent a letter to Congress claiming the investigation did not establish criminal wrongdoing by President Trump. Robert Mueller then wrote a letter to Attorney General Barr stating his remarks “did not fully capture the context, nature, and substance of this Office’s work and conclusions.” Letter to the Honorable William Barr, *Re: Report of the Special Counsel on the Investigation into Russian Interference in the 2016 Presidential Election and Obstruction of Justice*, DEP’T OF JUSTICE (Mar. 27, 2019), <https://www.npr.org/2019/04/30/718883130/mueller-complained-that-barr-summary-of-trump-russia-probe-lacked-context>.

208. See discussion *supra* note 204 and accompanying text (noting that Department of Justice regulations prohibit the indictment of a sitting president, preventing Special Counsels from accusing them of crimes because they cannot give presidents the chance to confront the charges in court).

financial information largely because of Trump's influence over Mueller's own appointment. Had Mueller been required to submit updates or discuss the investigation publicly in testimony to Congress or brief announcements through the Justice Department, then the public would have had a greater understanding of the investigation, and Congress and other prosecutors might have known to pursue financial leads sooner. Investigations of presidents are, at least in some part, about ensuring that voters have enough information to make an informed decision about whether a president deserves their political support. Some critics might argue that a public-facing Special Counsel would create a circus like the Clinton Independent Counsel had,²⁰⁹ but there is a reasonable middle ground between Mueller's total silence and Starr's numerous press conferences.

Special Counsel testimony to a Congressional committee in three-month intervals would help ensure that a Special Counsel's work is not being curtailed by the president or, if it is, that any obstructive behavior is presented to voters. Testimony should focus on the broad contours of the status of an investigation and answering questions about whether certain steps will or will not be pursued, subject to sensitivity protections regarding ongoing criminal proceedings. If the public, Congress, or the Manhattan D.A. had known earlier that Mueller concluded Trump had obstructed justice, or that the Special Counsel team was not pursuing financial leads, or that Mueller intended to abide by Justice Department policy not to indict a sitting president, the investigations of the Trump era might have been remarkably more efficient.

B. Reforming Presidential Deference in Federal Courts

Next is the issue of President Trump's constitutional claims. Trump did not just take advantage of Supreme Court deference to the Executive Branch in subpoena cases, he abused it. His convoluted arguments alleging absolute immunity from state grand jury subpoenas or claiming that he was entitled to a heightened standard for any subpoena involving him contradicted the holdings of both *Nixon* and *Jones*. Courts did not expedite hearings like they did for Nixon's appeals. And Trump's failures to file straightforward claims caused

209. Joe Concha, *Joe Lockhart praises Mueller, while slamming Starr for holding press conferences*, THE HILL (Mar. 8, 2019 11:40 AM), <https://thehill.com/homenews/media/433220-joe-lockhart-praises-mueller-while-slamming-starr-for-holding-press>.

(and continue to cause) judicial confusion.²¹⁰

President Trump’s argument in *Vance* that he was absolutely immune from criminal process rested on shaky ground from the outset. The *Vance* decision reads as a recitation of *Nixon* and *Jones*, primarily because Trump’s arguments had effectively ignored both cases: In *Vance*, the Court concluded that “Article II and the Supremacy Clause do not categorically preclude, or require a heightened standard, for the issuance of a state criminal subpoena to a sitting President.”²¹¹ One new element the Court could have considered worthy of analysis in *Vance* might have been whether state prosecutors—but not federal ones—were precluded from investigating a president on federalism grounds. Recall that in *Jones*, the Supreme Court noted that it would not address whether a president should be amenable to legal process in state court, which would raise questions about federalism, local prejudice and comity concerns.²¹² And, to his credit, President Trump did raise some political arguments questioning the wisdom of allowing local prosecutors across the country—often elected themselves—to pursue criminal investigations of a sitting president.²¹³ But most of Trump’s arguments could be logically applied to both federal *and* state prosecutors, suggesting acceptance of his argument would require at least some reversal of *Nixon*.²¹⁴ Moreover, *Vance* did not spend much time addressing federalism or local prejudice, since the core of Trump’s claim was not that state prosecutors are uniquely unsuited to investigate a president but rather that compulsory criminal process to the sitting President crosses a constitutional line when it is not accompanied by a promise not to indict him.²¹⁵ The logical extension of Trump’s arguments to federal investigations raises questions about why the Supreme Court allowed Trump to recycle rejected presidential claims.

The Court’s final pronouncement in *Vance* clearly reaffirmed

210. President Trump filed subsequent constitutional claims over the subpoenas by the Manhattan D.A. instead of filing a straightforward motion to quash. *See* discussion *supra* notes 150–165 and accompanying text.

211. *Trump v. Vance*, 140 S. Ct. 2412, 2416 (2020).

212. *Clinton v. Jones*, 520 U.S. 681, 704 (1997).

213. Trump argued that States and localities often “disagree with choices made by the President,” like decisions about deploying federal resources, and that the prospect of states and localities registering that disagreement through investigations could inhibit the president from fully performing his presidential duties. Reply Brief for Petitioner, *Trump v. Vance*, 140 S. Ct. 2412 at 10 (No. 19-3204).

214. *See* discussion *supra* notes 132–135 and accompanying text.

215. Brief for Petitioner, *Trump v. Vance*, 140 S. Ct. 2412 (2020) (No. 19-3204) at 9.

Nixon: “[N]o citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding.”²¹⁶ Chief Justice Roberts, the author of the majority opinion, relied on “two hundred years” of support for that conclusion.²¹⁷ President Trump’s hodgepodge of inconsistent arguments—many of which contradicted centuries of precedent—should not have warranted deference presidents typically receive in federal court. Courts also permitted Trump to advocate for a heightened standard for presidential subpoenas, something that *Nixon* almost explicitly foreclosed.²¹⁸ Remember, too, that President Nixon moved to quash the subpoena issued for his Oval Office tapes²¹⁹; something which Trump has still not done to date. Instead of presenting arguments courts typically assess, Trump raised a blanket claim of presidential immunity similar to the one rejected in *Jones*, based on arguments similar to the ones rejected in that case.

Courts bear some responsibility for allowing Trump to delay proceedings without filing straightforward claims. Recall that the *Nixon* Court fast-tracked President Nixon’s attempt to quash the subpoena for his Oval Office tapes past the D.C. Circuit Court of Appeals and straight to the Supreme Court in recognition of “the public importance of the issues presented and the need for their prompt resolution.”²²⁰ The *Vance* Court made no similar decision. Instead, it slow-walked President Trump’s attempt to block criminal investigations into his conduct. In fact, the Supreme Court *delayed* hearing the case: Oral argument was originally scheduled for March 2020 but was delayed two months because of the COVID-19 pandemic.²²¹ While this was an understandable delay, the case was still only heard after six others presented before it.²²² Further delay after the Supreme Court’s decision in *Vance* when the case was remanded presents questions, too: after the Second Circuit’s second rejection of Trump’s request to block the grand jury subpoena using the unusual § 1983 claim, Trump’s emergency petition to the Supreme Court for a stay pending appeal of that

216. *Id.* at 2431.

217. *Id.*

218. See discussion *supra* Part II.A.

219. *United States v. Nixon*, 418 U.S. 683, 686 (1974).

220. *Id.* at 686–87.

221. Devin Dwyer, *Coronavirus Forces Supreme Court to Delay Cases to Protect Health of Justices, Attorneys*, ABC NEWS (Mar. 16, 2020), <https://abcnews.go.com/Politics/coronavirus-forces-supreme-court-delay-cases-protect-health/story?id=69620103>.

222. *Calendar of Events May 2020*, SCOTUSBLOG, <https://www.scotusblog.com/events/2020-05/> (last accessed Feb. 22, 2021).

decision sat for four months before it was denied without hearing.²²³ It is unclear why the current Supreme Court waited so long and did not view the ongoing criminal investigation into President Trump with the same urgency that a previous Court had viewed the indictment and trial of President Nixon's associates. But reason cautions against courts selectively weighing the public import of a criminal investigations involving a president because it would invite judges to make what could fairly be characterized as a political decision.

The Supreme Court also had opportunities to ask Trump to present claims rooted in existing law and could have demanded that Trump file a motion to quash to accompany his claim of absolute immunity.²²⁴ The Court could have asked the parties to address supplemental issues that would remain at stake in *Vance* in the event Trump's arguments for absolute immunity had failed. In fact, the Court took care to issue a supplemental question before the oral argument in *Vance* at the request of Justice Kavanaugh, who wanted to know whether the political question doctrine prohibited the case from adjudication in federal courts.²²⁵ Instead of demanding that Trump make legal arguments supported by existing law, the Court left these legitimate claims unaddressed for more than a year.²²⁶ Trump's novel claim—made in his private capacity—received too much deference in federal court. Congress and courts can and should adjust deference given to presidents appearing in their private capacity and making claims not rooted in existing law to block subpoenas. Courts should not end all deference to presidents appearing in their private capacity. Even in his position as a private citizen, the president deserves additional legal rights as the occupant of one of the most demanding offices in the country. But deference to the president and deference to unsupported legal theories are two entirely different principles.

Three possible changes, which could be made through a Congressional statute creating a cause of action for presidents to challenge subpoenas in federal court, would foster more efficient and

223. Adam Liptak, *Supreme Court Denies Trump's Final Bid to Block Release of Financial Records*, N.Y. TIMES (Feb. 22, 2021 11:11 AM), <https://www.nytimes.com/2021/02/22/us/supreme-court-trump-taxes-financial-records.html>.

224. *Trump v. Vance*, 140 S. Ct. 2412, 2431 (2020).

225. Amy Howe, *Justices Ask For More Briefing in Trump Tax>Returns Cases*, SCOTUSBLOG (Apr. 27, 2020), <https://www.scotusblog.com/2020/04/justices-ask-for-more-briefing-in-trump-tax-returns-cases/>.

226. *Trump v. Vance*, No. 19 Civ. 8694, slip op. at 103 (2020) (emphasis added).

legally sound proceedings in this arena.²²⁷ First, the statute could mandate a higher level of scrutiny for any presidential lawsuit to block a lawful subpoena made in a president's private capacity that does not state an existing doctrine of law, like a privilege, as its basis. Second, the statute could mandate that any case involving criminal grand jury subpoenas relating to a president should be considered a matter of public import and expedited through the appellate process. Third, where a president lodges a constitutional claim not currently recognized by law, courts could require the parties to address additional claims that will likely arise later in the proceeding, like overbreadth or bad faith. Since the constitutional question of whether a sitting president can be subject to subpoena by federal and state grand juries and Congress has been squarely answered in the affirmative, a new statute regulating proceedings on this issue should withstand constitutional muster as long as it does not violate any president's constitutional rights.²²⁸

These changes might invite criticism that the courts would be dragged too readily into political investigations or that Congress risks a dramatic increase in investigation of sitting presidents. But they would also foster expeditious oversight of the head of the Executive Branch and avoid re-litigation of these issues every two decades. And judges can usually separate the goats from the sheep: If investigators begin harassing presidents, judges can toss subpoenas out or Congress could amend the law. Congress is not powerless to remedy the problems President Trump exposed in fighting presidential subpoenas—and should further codify its power as discussed in the next section.

227. The constitutionality of such a law would surely be subject to debate, much of which would depend on its language. However, a number of cases suggest that if Congress passed a law regulating procedure of federal claims made by presidents in their personal capacity to block subpoenas, it would fall within its constitutional authority to regulate Article III courts. *See, e.g.*, *Miller v. French*, 530 U.S. 327 (2000) (holding that Congress can validly amend constitutional law with a regulation on remedies as long as it does not violate a constitutional rule); *United States v. Klein*, 80 U.S. 128 (1872) (holding that Congress is only prohibited from commanding unconstitutional outcomes when regulating Article III cases); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 50 U.S. 647 (1850) (holding that where Congress passes a constitutional statute which falls within the ambit of its authority, the statute's consequences are permitted to be inconsistent with previous federal law as long as they do not violate constitutional law). There is even a viable argument that by creating a cause of action for a president to seek immediate judicial review of any subpoena—but, of course, imposing no heightened standards on such review—the law would actually benefit presidents, not harm them. Whether creating a specific cause of action for presidents *itself* inherently imposes a heightened standard presents a thornier question for another paper.

228. *Miller v. French*, 530 U.S. 327 (2000) (holding that Congress can validly amend constitutional law with regulation as long as it honors constitutional rules).

C. *Creating a Congressional Statute for Presidential Subpoenas*

One truth the Trump presidency revealed is that Americans are wary of impeachment.²²⁹ Yet impeachment remains the primary mechanism to exercise oversight of the president. During the Supreme Court’s recitation of historical evidence in *Jones*, it pointed to remarks by James Wilson, delegate to the Constitutional Convention in Philadelphia, who stated that the president, “far from being above the laws,” is “amenable to them in his private character as a citizen, and in his public character by impeachment.”²³⁰ With the decisions of *Mazars* and *McGahn* affirming that Congress has a constitutional subpoena power and the standing to pursue it in federal court when it legislates rules for doing so, Congress should codify the House of Representatives’ subpoena powers against the president into federal law.

What would such a statute look like? Look no further than *Trump v. Mazars*.²³¹ In *Mazars*, although the Court explicitly rejected President Trump’s demand for a heightened standard to restrict Congressional subpoenas for presidential evidence,²³² it set forth a four-part test for courts to use when evaluating the lawfulness of a Congressional subpoena to a president. That test offers guidance for a new House subpoena statute. First, the law should require any subpoena to be accompanied by a legislative purpose that warrants the significant step of involving the president and his evidence.²³³ Second, the law should demand that a House committee tailors the subpoena so it is no broader than necessary—the more specific, the better.²³⁴ Third, the law should require detailed and substantial evidence in support of whatever legislative purpose is cited in justification for the subpoena.²³⁵ Fourth, the law should mandate that each subpoena include a careful assessment of the burdens imposed on the president

229. See discussion *infra* note 241 and accompanying text (discussing polling which showed that Americans were evenly divided on the issue of impeachment regardless of evidence presented).

230. *Clinton v. Jones*, 520 U.S. 681, 696 (1997).

231. See *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2036 (2020) (creating a four-part test for the enforcement of congressional subpoenas for information relating to the private papers of the president).

232. *Id.* at 2032 (holding that the request the House establish a “demonstrated, specific need” for information or show that it is “critical” to its purpose would “seriously risk impeding Congress in carrying out its responsibilities”).

233. *Id.* at 2035.

234. *Id.* at 2036.

235. *Id.*

by the subpoena and an explanation for why there are no less invasive means of obtaining the information.²³⁶

The law could follow the lead of similar statutes and include exemptions and exceptions mentioned in the *McGahn* case: other compulsory statutes exempt persons testifying on matters of governmental privilege;²³⁷ previous statutes created a limited form of immunity for individuals about facts they were compelled to testify upon to Congress.²³⁸ The new statute should also create an enforcement mechanism for subpoenas issued by any House Committee as discussed by the D.C. Circuit in *McGahn*.²³⁹ No matter what the final result looks like, it is evident from *Mazars* and *McGahn* that federal courts would accept a statute codifying the House's ability to subpoena the president or Executive Branch officials and an accompanying cause of action to enforce subpoenas for presidential papers, White House testimony, and Executive Branch evidence.

When President Trump was impeached on charges of abuse of power and obstruction of Congress just six months after Mueller testified publicly,²⁴⁰ Americans were divided on the question of whether Trump should be impeached and removed from office.²⁴¹ Intriguingly, more Americans approved of impeachment charges than approved his conviction and removal on those same charges.²⁴² This distinction suggests Americans are less wary of the House of Representatives investigating presidential wrongdoing than they are of the Senate removing the president from office. Yet the House was unable to compel testimony from a number of individuals—including McGahn—

236. *Id.*

237. 28 U.S.C. § 1365(a) (2018).

238. *See, e.g.*, *In re Chapman*, 166 U.S. 661, 665 n.1 (1897) (holding that “[n]o person examined and testifying before either house of congress, or any committee of either house, shall be held to answer criminally in any court of justice”).

239. U.S. H.R. v. McGahn, 973 F.3d 121, 126 (D.C. Cir. 2020).

240. Articles of Impeachment Against Donald John Trump, H. R. Res. 755, 116th Cong. (2019).

241. Gallup, one of the most reputable polling institutions in the United States, found that 46 percent of Americans favored Trump's conviction and removal, compared to 33 percent who favored President Clinton's conviction and removal in 1999. Frank Newport, *Impeachment from the American Public's Perspective*, GALLUP (Jan. 24, 2020), <https://news.gallup.com/opinion/polling-matters/284030/impeachment-american-public-perspective.aspx>. The same poll demonstrated that American opinions on impeachment of President Trump largely tracked their approval or disapproval of his job performance. However, it also found that deviation was higher among those who disapproved of Trump's job performance as president than those who approved, indicating there is a higher bar for conviction and removal of a president than his acquittal. *Id.*

242. *Id.*

in its impeachment proceeding, and critical evidence pertinent to Trump's guilt or innocence went unheard.²⁴³

The House should remedy problems that enabled its own shortcomings in Executive Branch oversight. It is notable that the D.C. Circuit again vacated the second judgment denying the House's petition to enforce the subpoena in *McGahn* and scheduled another *en banc* rehearing. This suggests that the full court of appeals may not agree with the panel's conclusion that the House must pass a law creating a cause of action to enforce subpoenas in federal court.²⁴⁴ Regardless of whether it overrules the conclusion that a statutory cause of action is required, the House should address the problems with presidential subpoenas anyway. While Americans may view impeachment as divisive, instances of presidential misconduct are not going to decrease in the modern era where electronic communication and advancements in technology have created a wider array of evidence for investigators. Instead of resisting these changes, the House—and, where appropriate, the Senate—would do well to confront this issue head on and adjust Congress's system of presidential oversight accordingly.

CONCLUSION

President Nixon said, "I welcome this kind of examination because people have got to know whether or not their president's a crook. Well, I'm not a crook."²⁴⁵ He publicly welcomed investigations, even if he resisted them privately, in the hopes of being seen as a politician beyond reproach.²⁴⁶ Implicit in the historic dance between presidents and their investigators is the tension between resistance and cooperation. Two poles—a president's desire to avoid implication of wrongdoing on one end and the public's interest in obtaining information about a president's conduct on the other—demand

243. Spencer Hsu and Anne Marminow, *Former White House Counsel Don McGahn does not have to testify to House, appeals court finds*, WASH. POST (Feb. 28, 2020 5:38 PM), https://www.washingtonpost.com/local/legal-issues/former-white-house-counsel-don-mcgahn-does-not-have-to-testify-to-house-appeals-court-finds/2020/02/28/eb846412-3c5a-11ea-baca-eb7ace0a3455_story.html.

244. Comm. on the Judiciary of the U.S. H.R. v. McGahn, No. 19-5331, 2020 U.S. App. LEXIS 32573, at *6 (D.C. Cir. Oct. 15, 2020).

245. Cokie Roberts & Steve Inskeep, *A History of Presidential Tax Returns*, NPR: MORNING EDITION (Feb. 15, 2019), <https://www.npr.org/2019/02/15/695054845/a-history-of-presidential-tax-returns>.

246. *See id.* (noting that President Nixon's tax returns were in fact leaked by someone at the IRS, leading to his insistence that he was not a crook).

compromise between powerful forces in a decentralized government. But President Trump did not accept this reality. From the outset, Trump denounced any investigation into his conduct as a witch hunt, openly obstructed investigators, and resisted authority at every turn.²⁴⁷ His conduct betrayed the notion that a president would always want to be viewed as cooperative and truthful, the foundation of compromise between presidents and investigators.

President Trump should not be faulted for fighting investigations into his conduct in federal court, since many presidents in history have pushed back against investigators. But other presidents accepted the letter and the logic of the law. They did not employ roundabout ways of contesting precedent on presidential investigations. By doing both, Trump challenged the very principles of oversight that underpin the constitutional system. His use of arguments that exceeded the scope of his claims, ignorance of the logical application of *Nixon* and *Jones*, avoidance of arguments rooted in existing law, and rejection of States and Congress as separate branches of government present separate but equally dangerous approaches that future presidents could build upon. If no adjustments are made, successful delays of the transmission of presidential evidence will continue, and courts will be left reminding presidents that they are not kings²⁴⁸ as they review new iterations of the same recycled arguments again and again.

During President Trump's tenure, multiple judges came to the conclusion that the president is not a king, implicitly or explicitly.²⁴⁹ It is true that in some cases, Trump's lawsuits presented novel questions of law, like *Mazars* which raised the issue of whether Congress could pursue a presidential investigation absent an impeachment inquiry (it

247. Cheyenne Haslett and Jordyn Phelps, *Trump attacks Mueller for continuing 'Phony Witch Hunt' day after Manafort accused of lying*, ABC NEWS (Nov. 27, 2018 3:22 PM), <https://abcnews.go.com/Politics/trump-attacks-mueller-day-manafort-accused-lying/story?id=59439963>; Erin Durkin, *Trump attacks 'disgraced' Mueller and rails against 'phony' obstruction claims*, THE GUARDIAN (Aug. 20, 2018 10:40 AM), <https://www.theguardian.com/us-news/2018/aug/20/trump-mueller-obstruction-russia-investigation-phony>.

248. See *McGahn*, *supra* at note 6, at 213 (pointing out that the "primary takeaway from the past 250 years of recorded American history is that Presidents are not kings" in response to President Trump's argument that courts had no authority to enforce House subpoenas).

249. See, e.g., *Trump v. Mazars*, 140 S. Ct. 2019, 2035 (2020) (rejecting Trump's claim that presidents were immune from Congressional oversight absent an impeachment inquiry); *Trump v. Vance*, 140 S. Ct. 2412, 2431 (2020) (rejecting Trump's claim that presidents were totally immune from state grand jury subpoenas); *Comm. on the Judiciary v. McGahn*, 415 F. Supp. 3d 148, 213 (D.D.C. 2019) (rejecting Trump's claim that courts cannot enforce Congressional subpoenas by pointing out that presidents are not kings).

could).²⁵⁰ And the Court did create a new avenue for presidents to challenge Congressional subpoenas.²⁵¹ But the *Vance* case offered no similar major development in presidential investigations law; rather, it reads as a recitation of *Nixon* and *Jones*. That is because it was abundantly clear that there is no total immunity for a sitting president from a grand jury subpoena. The Court’s final words in *Vance* are little more than a time warp to *Nixon*: “[N]o citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding.”²⁵² For the country to survive another decade, let alone another 243 years, no president should be permitted to disrupt oversight so expansively again by employing political and legal claims that ignore this logic and precedent. Preventing such abuse requires improved Special Counsel regulations, less deference to presidents appearing in their personal capacity, and a statutory scheme that guides Congressional subpoenas to presidents. These solutions offer clear remedies to presidential abuse of the legal system without jeopardizing the American constitutional framework, and they present a pathway back toward holding the president accountable—if we ever did.

250. *Mazars*, 140 S. Ct. at 2035.

251. *See id.* at 2035–36 (holding that courts should first “carefully assess whether the asserted legislative purpose warrants the significant step of involving the President,” then “insist on a subpoena no broader than reasonably necessary to support Congress’s legislative object,” then show attentiveness “to the nature of the evidence offered by Congress to establish that a subpoena advance a valid legislative purpose,” and finally “be careful to assess the burdens imposed on the President by a subpoena”).

252. *Vance*, 140 S. Ct. at 2431.