Tax & Financial Records Case

Manhattan DA-Mazars Case
Key Excerpts from 2019 Appeals Court Opinion

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On Oct. 7, 2019, President Trump appealed the district court decision. A Second Circuit 3-judge panel, with Judges Chin, Droney and Katzmann, was assigned to Case No. 19-3204. DOJ filed an amicus brief in support of the President. On Nov. 4, 2019, the panel affirmed the district court's ruling in part and vacated in part, upheld the Manhattan DA's grand jury subpoena, and remanded the case to the district court for further proceedings. *Trump v. Vance*, 2019 WL 5687447 (Nov. 4, 2019). Here are key excerpts from the panel's 34-page opinion, each excerpt of which consists of a direct quotation taken from the text of the opinion, with no changes in punctuation but with footnotes omitted.

Appellate ruling
We agree that *Younger* abstention does not apply to the circumstances of this case. We hold, however, that any presidential immunity from state criminal process does not extend to investigative steps like the grand jury subpoena at issue here. We accordingly AFFIRM the district court's decision on the immunity question, which we construe as an order denying a preliminary injunction, VACATE the judgment of the district court dismissing the complaint on the ground of *Younger* abstention, and REMAND for further proceedings consistent with this opinion.

Key issue
This case presents the question of when, if ever, a county prosecutor can subpoena a third-party custodian for the financial and tax records of a sitting President, over which the President has no claim of executive privilege.

Thorough and thoughtful district court ruling
After a compressed briefing schedule, the able district court issued a thorough and thoughtful decision and order on October 7, 2019.

Respect for state functions
Younger abstention is grounded "partly on traditional principles of equity, but . . . primarily on the 'even more vital consideration' of comity," which "includes 'a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.'"

Federal officers require protection of federal forum
The demands of federalism are diminished, however, and the importance of preventing friction is reduced, when state and federal actors are already engaged in litigation. Recognition of this reality underlies legislative enactments like the federal officer removal statute, 28 U.S.C. § 1442(a)(1), which is grounded in a congressional decision that "federal officers, and indeed the Federal Government itself, require the protection of a federal forum." See *Willingham v. Morgan*, 395 U.S. 402, 407 (1969). It is also reflected in the Supreme Court's observation that allowing federal actors to access federal courts is "preferable in the context of healthy federal-state relations." *Leiter Minerals, Inc. v. United States,* 352 U.S. 220, 226 (1957). We think this is strikingly so when the federal actor is the President of the United States, who under Article II of the Constitution serves as the nation's chief executive, the head of a branch of the federal government.

President has invoked federal jurisdiction to vindicate federal interests
Specifically, we do not believe that *Younger's* policy of comity can be vindicated where a county prosecutor, however competent, has opened a criminal investigation that involves the sitting President, and the President has invoked federal jurisdiction "to vindicate the 'superior federal interests' embodied in Article II and the Supremacy Clause."

No *Younger* abstention here
Legitimate arguments can be made both in favor of and against abstention here. Because *Younger's* policy of comity cannot be vindicated in light of the state-federal clash before us, and because the President raises novel and serious claims that are more appropriately adjudicated in federal court, we conclude that abstention does not extend to the circumstances of this case.

No injunctive relief
Because we conclude that the President is unlikely to succeed on the merits of his immunity claim, we agree with the district court that he is not entitled to injunctive relief.

Nature of presidential immunity claim
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, including pre-indictment investigation, and that the *Mazars* subpoena cannot be enforced in furtherance of any investigation into his activities.

No decision today on overall contours of presidential immunity, but no bar on grand jury subpoena to a third party for non-privileged materials

We have no occasion to decide today the precise contours and limitations of presidential immunity from prosecution, and we express no opinion on the applicability of any such immunity under circumstances not presented here. Instead, after reviewing historical and legal precedent, we conclude only 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.

President is subject to judicial process

We begin with the long-settled proposition that "the President is subject to judicial process in appropriate circumstances." *Clinton v. Jones*, 520 U.S. 681, 703 (1997). Over 200 years ago, Chief Justice Marshall, sitting as the trial judge in the prosecution of Aaron Burr, upheld the issuance of a subpoena duces tecum to President Jefferson. *United States v. Burr*, 25 F. Cas. 30, 34–35 (C.C.D. Va. 1807) (No. 14,692D) (Marshall, C.J.); see also *United States v. Burr*, 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14,694) (Marshall, C.J.) (explaining that it was "not controverted" that "the president of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession"); *Clinton*, 520 U.S. at 703–04 & 704 n.38 (endorsing Marshall's position). Consistent with that historical understanding, presidents have been ordered to give deposition testimony or provide materials in response to subpoenas. *See Clinton*, 520 U.S. at 704–05 (collecting examples). In particular, "the exercise of jurisdiction [over the President] has been held warranted" when necessary "to vindicate the public interest in an ongoing criminal prosecution." *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982).

Nixon precedent is no absolute presidential immunity from judicial process

The most relevant precedent for present purposes is *United States v. Nixon*, 418 U.S. 683 (1974). There, a subpoena directed President Nixon to "produce certain tape recordings and documents relating to his conversations with aides and advisers" for use in a criminal trial against high-level advisers to the President. *Id*. at 686. Nixon objected on two grounds: first, that the communications memorialized in the requested materials were privileged; second, that the separation of powers "insulates a President from a judicial subpoena in an ongoing criminal prosecution." *Id*. at 705–06. The Supreme Court unanimously disagreed, noting that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."

The President has not persuasively explained why, if executive privilege did not preclude enforcement of the subpoena issued in *Nixon*, the Mazars subpoena must be enjoined despite seeking no privileged information and bearing no relation to the President's performance of his official functions. The *Nixon* Court explained that even the President's weighty interest in candid and confidential conversations with his advisers

could not justify a blanket privilege that would "cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts." Id. at 712.

Tax returns are not privileged
Here, none of the materials sought by the Mazars subpoena implicates executive privilege. Cf. *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 384 (2004) ("In light of the fundamental and comprehensive need for every man's evidence in the criminal justice system . . . the Executive Branch [must] first assert privilege to resist disclosure. . . ."). Nor does the subpoena seek information regarding the President's "action[s] taken in an official capacity." *Clinton*, 520 U.S. at 694. The subpoena seeks only the President's private tax returns and financial information relating to the businesses he owns in his capacity as a private citizen. These documents do not implicate, in any way, the performance of his official duties.

Unlikely to impair President's performance of official duties
Footnote 12. We note that the past six presidents, dating back to President Carter, all voluntarily released their tax returns to the public. While we do not place dispositive weight on this fact, it reinforces our conclusion that the disclosure of personal financial information, standing alone, is unlikely to impair the President in performing the duties of his office.

President occupies unique position
It is true that the President "occupies a unique position in the constitutional scheme," *Fitzgerald*, 457 U.S. at 749, and we are mindful of the Supreme Court's admonition that a court should not "proceed against the president as against an ordinary individual," *Nixon*, 418 U.S. at 708 (quoting *Burr*, 25 F. Cas. at 192).

President is not required to do anything at all
[T]he Supreme Court quoted with approval Justice Story's conclusion that the President is not "liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office." *Fitzgerald*, 457 U.S. at 749 (quoting 3 J. Story, Commentaries on the Constitution of the United States § 1563, pp. 418–19 (1st ed. 1833)). … But we are not faced, in this case, with the President's arrest or imprisonment, or with an order compelling him to attend court at a particular time or place, or, indeed, with an order that compels the President himself to do anything. The subpoena at issue is directed not to the President, but to his accountants; compliance does not require the President to do anything at all. … So while the President may be correct that state courts lack the authority to issue him orders—a question we have no need to address today—that provides no basis to enjoin the enforcement of a subpoena issued to a third party simply because the President is implicated in the subject matter of the investigation.

No crime has been charged; investigation is not too debilitating
The President has not been charged with a crime. The grand jury investigation may not result in an indictment against any person, and even if it does, it is unclear whether the President will be indicted. The District Attorney represents, and the President does not contest, that the grand jury is investigating not only the President, but also other persons

and entities. Even assuming, without deciding, that a formal criminal charge against the President carries a stigma too great for the Constitution to tolerate, we cannot conclude that mere investigation is so debilitating. Indeed, that contention is hard to square with *Nixon*. Although that case concerned a trial subpoena, rather than one issued by a grand jury, the grand jury had previously named President Nixon an unindicted coconspirator. See *Nixon*, 418 U.S. at 687. Surely that designation carries far greater stigma than the mere revelation that matters involving the President are under investigation. It is true that the Supreme Court did not decide whether it was appropriate for the grand jury to so name President Nixon, an issue on which it originally granted certiorari. See id. at 687 n.2. But the fact that Nixon was ordered to comply with a subpoena seeking documents for a trial proceeding on an indictment that named him as a conspirator strongly suggests that the mere specter of "stigma" or "opprobrium" from association with a criminal case is not a sufficient reason to enjoin a subpoena—at least when, as here, no formal charges have been lodged.

Hesitance to interfere with grand jury
We are thus hesitant to interfere with the "ancient role of the grand jury." *Branzburg*, 408 U.S. at 686.

Heavy toll to prohibit state criminal investigation of presidential associates
Our concern is heightened by the fact that the grand jury in this case is investigating not only the President, but also other persons and entities. Assuming, again without deciding, that the President cannot be prosecuted while he remains in office, it would nonetheless exact a heavy toll on our criminal justice system to prohibit a state from even investigating potential crimes committed by him for potential later prosecution, or by other persons, not protected by any immunity, simply because the proof of those alleged crimes involves the President. Our "twofold aim" that "guilt shall not escape or innocence suffer," *Nixon*, 418 U.S. at 709, would be substantially frustrated if the President's temporary immunity were interpreted to shield the conduct of third parties from investigation.

Presidential immunity does not bar state grand jury subpoena
[W]e hold only that presidential immunity does not bar a state grand jury from issuing a subpoena in aid of its investigation of potential crimes committed by persons within its jurisdiction, even if that investigation may in some way implicate the President.

Coercion is not at issue
A subpoena is a perfectly ordinary way of gathering evidence; it strains credulity to suggest that a grand jury is permitted only to request the voluntary cooperation of witnesses but not to compel their attendance or the production of documents. … More importantly, the subpoena is not directed to the President and so it cannot "coerc[e]" him at all. It is Mazars, not the President, that would be cited for contempt in the event of non-compliance. *Cf. Sirica*, 487 F.2d at 711 (concluding that an order compelling President Nixon to produce documents requested by a subpoena for in camera examination "is not a form of criminal process"). This case therefore presents no concerns about the constitutionality of holding a sitting President in contempt.

Narrow ruling

We emphasize again the narrowness of the issue before us. This appeal does not require us to consider whether the President is immune from indictment and prosecution while in office, nor to consider whether the President may lawfully be ordered to produce documents for use in a state criminal proceeding. We accordingly do not address those issues. The only question before us is whether a state may lawfully demand production by a third party of the President's personal financial records for use in a grand jury investigation while the President is in office. With the benefit of the district court's well articulated opinion, we hold that any presidential immunity from state criminal process does not bar the enforcement of such a subpoena.

President Trump appealed the decision of the Second Circuit to the Supreme Court.