Written by **R. Cort Kirkwood** on July 9, 2020

U.S. Supreme Court: Trump Not Immune From State and Local Prosecutors' Subpoenas

The U.S. Supreme Court ruled today that state, county, and local prosecutors can pursue criminal subpoenas on sitting presidents, but that a subpoena from Congress, particularly for a president's personal papers or information, cannot trespass the separation of powers.

The first case involved a subpoena from leftist New York County District Attorney Cyrus R. Vance for President Trump's tax returns and other records, which replicated a subpoena from the House Committee on Oversight and Reform that was the subject of the second case.

Both subpoenas sought records held by the president's personal accounting firm.

In the 7-2 ruling that a county district attorney can subpoena the president in a criminal case, the first time in American history one has done so, Chief Justice John Roberts wrote that the president is no different than any citizen and must submit to the demand.

But the ruling, dissenting Justice Samuel Alito averred, might well set a precedent that subjects Trump and other presidents to an endless barrage of politically-motivated state and local prosecutions.

Trump v. Vance

Vance's subpoena in 2018 seeks eight years of records supposedly to find out whether Trump paid hush money to washed-up porn queen Stormy Daniels.

The nut of Trump's complaint in U.S. District Court to quash the subpoena was that the Supremacy Clause of the Constitution protects him from criminal prosecution because a state would otherwise have control over the president.

As well, responding to state and local criminal allegations would distract him from his official duties, Trump argued, and adversely affect his ability to conduct himself as president because of damage done to his reputation.

"The Framers of our Constitution understood that state and local prosecutors would be tempted to criminally investigate the President to advance their own careers and to advance their political agendas," Trump argued. "And they likewise understood that having to defend against these actions would distract the President from his constitutional duties."

Thus, the Constitution forbids a district attorney from pursuing a subpoena while the president is in office. "Any other rule is untenable," Trump argued. "It would allow a single prosecutor to circumvent the Constitution's specific rules for impeachment."

And so the district court must enjoin the subpoena until Trump leaves office, the complaint concluded.

To reach its 22-page decision in the *Vance* case, the high court reached back to Chief Justice John Marshall's ruling that President Thomas Jefferson was subject to a subpoena in the action he was pursuing against Aaron Burr. Then Roberts marched forward through myriad other cases in which presidents complied with subpoenas:

> Following [James] Monroe's lead, his successors have uniformly agreed to testify when called in criminal proceedings, provided they could do so at a time and place of their choosing. In 1875, President Grant submitted to a three-hour deposition in the criminal prosecution of a political appointee embroiled in a network of tax-evading whiskey distillers.... A century later, President Ford's attempted assassin subpoenaed him to testify in her defense.... Ford obliged ... in the first videotaped deposition of a President. President Carter testified via the same means in the trial of two local officials who, while Carter was Governor of Georgia, had offered to contribute to his campaign in exchange for advance warning of any state gambling raids.

Carter testified in another case two years later, and President Clinton "testified three times, twice via deposition pursuant to subpoenas in federal criminal trials of associates implicated during the Whitewater investigation, and once by video for a grand jury investigating possible perjury."

Then Roberts got around to President Richard Nixon. In 1974, the court rejected Nixon's attempt to quash a subpoena from the special prosecutor investigating the Watergate break-in. Nixon argued that the Constitution provides "an absolute privilege of confidentiality to all presidential communications."

Not so, the court ruled.

"The Court recognized the countervailing interests at stake," Roberts wrote:

> Invoking the common law maxim that "the public has a right to every man's evidence," the Court observed that the public interest in fair and accurate judicial proceedings is at its height in the criminal setting, where our common commitment to jus-tice demands that "guilt shall not escape" nor "innocence suffer."... Because these dual aims would be "defeated if judgments" were "founded on a partial or speculative presentation of the facts," the Nixon Court recognized that it was "imperative" that "compulsory process be available for the production of evidence needed either by the prosecution or the defense."

Thus, Nixon's "generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial." Two weeks later, President Nixon dutifully released the tapes.

In *Trump v. Vance*, the court ruled that answering criminal charges would be no more time consuming than answering civil charges, and that "a properly tailored criminal subpoena will not normally hamper the performance of the President's constitutional duties," and will not tarnish his reputation:

> There is nothing inherently stigmatizing about a President performing "the citizen's normal duty of ... furnishing information relevant" to a criminal investigation....
>
> Prior Presidents have weathered these associations in federal cases and there is no reason to think any attendant notoriety is necessarily greater in state court proceedings."

Thus, Roberts wrote in his opening line, "In our judicial system, 'the public has a right to every man's evidence.' Since the earliest days of the Republic, 'every man' has included the President of the United States."

Trump, the justices ruled, must fight the subpoena in a lower court.

Alito's Dissent

Alito wrote that the case sets a precedent that will almost certainly affect future presidents.

"The event that precipitated this case is unprecedented," he wrote:

> The specific question before us — whether the subpoena may be enforced — cannot be answered adequately without considering the broader question that frames it: whether the Constitution imposes restrictions on a State's deployment of its criminal law enforcement powers against a sitting President. If the Constitution sets no such limits, then a local prosecutor may prosecute a sitting President. And if that is allowed, it follows *a fortiori* that the subpoena at issue can be enforced. On the other hand, if the Constitution does not permit a State to prosecute a sitting President, the next logical question is whether the Constitution restrains any other prosecutorial or investigative weapons.

Knocking down the majority's arguments from history, Alito concluded that the court erred in suggesting a criminal case will not be more distracting than a civil case. But again, trouble lies ahead:

> Never before has a local prosecutor subpoenaed the records of a sitting President. The Court's decision threatens to impair the functioning of the Presidency and provides no real protection against the use of the subpoena power by the Nation's 2,300+ local prosecutors. Respect for the structure of Government created by the Constitution demands greater protection for an institution that is vital to the Nation's safety and well-being.

Associate Justice Clarence Thomas also dissented.

Identical to House Subpoena

The court ruled 7-2 for Trump in the other case, but Alito's and Thomas' dissents in *Vance* highlight a significant fact: The two subpoenas are almost identical, as Trump's complaint to quash the Vance subpoena explained with side-by-side excerpts.

"Quite remarkably," the complaint observed, "the District Attorney's subpoena … is identical to the House Oversight Committee's subpoena … (except for a few stylistic edits)."

The only difference is that the House Committee did not ask for Trump's tax returns, as did Vance: "Essentially, then, the District Attorney cut-and-pasted the House Oversight and House Ways and Means subpoenas":

> The subpoena is a bad faith effort to harass the President by obtaining and exposing his confidential financial information, not a legitimate attempt to enforce New York law. It precisely mirrors the House Oversight Committee's subpoena … and the House Ways and Means Committee's subpoena for the President's tax returns — themselves blatant efforts to obtain the President's confidential information to score political points. The District Attorney is duplicating the House's efforts even though New York has no jurisdiction over the topics that the House (falsely) claims to be studying.

In other words, Vance is part of the Democrat Party's five-year-long operation to smear and impeach the president with spurious claims and charges, albeit with a state criminal prosecution that, if successful or even permitted to proceed, could mean trouble for any future president a state or local prosecutor doesn't like.

Photo: AP Images

R. Cort Kirkwood is a long-time contributor to The New American *and a former newspaper editor.*