Article II — Presidential Immunity — State Criminal Investigation — Trump v. Vance

In September 2016, then-candidate Donald J. Trump assured the American public that he would release his tax returns as soon as the IRS finished a "routine audit" of his taxes, a claim the White House Press Secretary repeated in July 2020.[1] Meanwhile, the President litigated two cases before the Supreme Court last Term seeking to prevent various parties from accessing his tax returns.[2] In one of the cases, President Trump challenged a grand jury subpoena served by the New York District Attorney on his accountants,[3] arguing that the President had absolute immunity from state criminal process.[4] Last Term, in *Trump v. Vance*,[5] the Supreme Court held that the President does not enjoy absolute immunity from state criminal subpoenas, nor is he entitled to a heightened standard of need.[6] Though the Court's conclusion was soundly grounded in precedent, its appeal to originalism to give additional authority to its holding codified an oversimplified version of the history of the Framers into separation of powers doctrine.

In 2019, Cyrus R. Vance, Jr., the District Attorney for the County of New York, began investigating possible fraud by President Trump and his company.[7] After serving a grand jury subpoena on the Trump Organization, to which the company responded "at least in part," Vance served a grand jury subpoena on the accounting firm Mazars on August 29, 2019, seeking various records, including President Trump's tax returns since January 2011.[8] President Trump sued and filed a motion for

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[1] Katie Rogers, *Trump on Releasing His Tax Returns: From "Absolutely" to "Political Prosecution,"* N.Y. TIMES (Sept. 1, 2020), https://nyti.ms/3iX75zc [https://perma.cc/FD5T-QGGD]. Tax audits do not prevent the release of one's tax returns. Victor Lipman, *The President's "Under Audit" Tax Excuse Is, and Always Has Been, Bogus*, FORBES (Apr. 10, 2019, 8:25 AM), https://www.forbes.com/sites/victorlipman/2019/04/10/the-presidents-under-audit-tax-excuse-is-and-always-has-been-bogus [https://perma.cc/7YCF-9KCB]. Shortly before this issue went to print, the *New York Times* obtained President Trump's tax returns. *See* Russ Buettner, Susanne Craig & Mike McIntire, *The President's Taxes: Long-Concealed Records Show Trump's Chronic Losses and Years of Tax Avoidance*, N.Y. TIMES (Sept. 27, 2020), https://nyti.ms/3jmgeBf [https://perma.cc/QFJ8-PM7Y].

[2] *See* Trump v. Vance, 140 S. Ct. 2412, 2420 (2020); Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2026–27 (2020); *see also infra* p. 540–49.

[3] *See* Trump v. Vance, 395 F. Supp. 3d 283, 291 (S.D.N.Y. 2019).

[4] *See Vance*, 140 S. Ct. at 2420–21. The United States, as amicus curiae, argued instead that a state prosecutor must demonstrate a heightened need for the President's private papers. *Id.* at 2429.

[5] 140 S. Ct. 2412.

[6] *Id.* at 2431.

[7] *See* William K. Rashbaum & Benjamin Weiser, *D.A. Is Investigating Trump and His Company Over Fraud, Filing Suggests*, N.Y. TIMES (Aug. 20, 2020), https://nyti.ms/3k4sBlX [https://perma.cc/YGY6-5DFU]. Prior to August 2020, it was believed that the investigation was focused on "hush-money payments" made in the run-up to the 2016 election. *Id.*; *see* William K. Rashbaum & Ben Protess, *8 Years of Trump Tax Returns Are Subpoenaed by Manhattan D.A.*, N.Y. TIMES (July 15, 2020), https://nyti.ms/2V3kFVZ [https://perma.cc/964B-SQRP].

[8] *Vance*, 395 F. Supp. 3d at 291.

a temporary restraining order and a preliminary injunction to enjoin enforcement of the subpoena.[9] Vance opposed the motion and moved to dismiss the complaint, while Mazars took no position on the case.[10]

In the District Court for the Southern District of New York, Judge Marrero declined to "endorse such a categorical and limitless assertion of presidential immunity from judicial process."[11] The court first determined that it should abstain from intervening in state court proceedings under *Younger v. Harris*.[12] To eliminate the need for a remand if the Second Circuit were to disagree, the district court went on to deny preliminary injunctive relief on the merits, determining that the President had failed to demonstrate irreparable harm[13] or a likelihood of success on the merits.[14] The court rejected the President's argument that he should be immune from all criminal proceedings, finding that not all such proceedings would interfere with his official duties.[15] Lastly, the Supreme Court's guidance in *Clinton v. Jones*[16] and a balancing test of the competing interests "persuade[d] [the court] to reject the President's request for injunctive relief" as President Trump's interest in confidentiality was "far outweighed" by the interests of the state in enforcing its laws.[17]

The Second Circuit vacated the district court's dismissal under *Younger* but affirmed its denial of the President's motion for a preliminary injunction and remanded.[18] Writing for a unanimous panel, Chief Judge Katzmann[19] deemed *Younger* abstention unjustified,[20] but found that the President was not entitled to injunctive relief because he was unlikely to succeed on the merits.[21] Though the court recognized that the President "occupies a unique position in the constitutional scheme,"[22] it pointed out that the Mazars subpoena did not implicate executive privilege or the President's official actions,[23] nor did it compel

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[9] *Id.*

[10] *Id.*

[11] *Id.* at 289.

[12] 401 U.S. 37 (1971); *Vance*, 395 F. Supp. 3d at 293; *see id.* at 293–301 (applying abstention doctrine).

[13] *Vance*, 395 F. Supp. 3d at 303–04; *see also id.* at 300–01.

[14] *Id.* at 304; *see id.* at 304–16 (analyzing likelihood of success).

[15] *See id.* at 310–12. The President's argument relied on memoranda from the Office of Legal Counsel, *id.* at 305, but the court found no support for the claimed immunity in the Constitution's text or history, *see id.* at 313.

[16] 520 U.S. 681 (1997); *see Vance*, 395 F. Supp. 3d at 313–14.

[17] *Vance*, 395 F. Supp. 3d at 315; *see id.* at 315–16.

[18] Trump v. Vance, 941 F.3d 631, 646 (2d Cir. 2019).

[19] Chief Judge Katzmann was joined by Judges Chin and Droney.

[20] *Vance*, 941 F.3d at 637–39. The court emphasized that the involvement of both state and federal actors in the litigation counseled against abstention. *Id.* at 637–38.

[21] *See id.* at 639–40.

[22] *Id.* at 642 (quoting Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982)).

[23] *Id.* at 641.

"the President *himself* to do anything."[24] Therefore, relying on "the long-settled proposition that 'the President is subject to judicial process in appropriate circumstances,'" the court rejected President Trump's absolute immunity argument.[25] That the subpoena came from a state prosecutor did not affect the court's analysis because the subpoena at issue "d[id] not involve 'direct control by a state court over the President.'"[26] The court also rejected the President's arguments that the subpoena would cause stigma against him[27] and that it was coercive.[28] Lastly, the court rejected the United States' arguments that prosecutors must make a "heightened showing of need for the documents sought."[29] The heightened need standard was drawn from executive privilege cases, and the court found no reason to expand it to the President's personal papers.[30]

The Supreme Court affirmed.[31] Writing for the Court, Chief Justice Roberts[32] opened by retelling the story of Aaron Burr's treason trial, in which Chief Justice Marshall upheld a subpoena issued to President Jefferson.[33] The Court then discussed the two-hundred-year history of Presidents obeying subpoenas, ending with a retelling of *United States v. Nixon*.[34] Having granted certiorari to determine "whether Article II and the Supremacy Clause categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting President,"[35] the Court answered both questions in the negative.[36]

The Court first rejected the President's absolute immunity claim. Because federal criminal subpoenas to the President have been understood to be constitutional in the Court's prior cases,[37] President Trump argued that state criminal subpoenas bring three unique burdens: diversion, stigma, and harassment.[38] The Court rejected all three. First, the

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[24] *Id.* at 642.

[25] *Id.* at 640 (quoting Clinton v. Jones, 520 U.S. 681, 703 (1997)).

[26] *Id.* at 642 (quoting *Clinton*, 520 U.S. at 691 n.13).

[27] *Id.* at 643 ("Surely [President Nixon's designation as an unindicted co-conspirator] carrie[d] far greater stigma than the mere revelation that matters involving the President are under investigation.").

[28] *Id.* at 645 ("It is Mazars, not the President, that would be cited for contempt in the event of non-compliance.").

[29] *Id.*

[30] *See id.* at 645–46.

[31] *Vance*, 140 S. Ct. at 2431.

[32] Chief Justice Roberts was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.

[33] *See Vance*, 140 S. Ct. at 2421–23.

[34] 418 U.S. 683 (1974); *see Vance*, 140 S. Ct. at 2423–24.

[35] *Vance*, 140 S. Ct. at 2420.

[36] *Id.* at 2431.

[37] *Id.* at 2425 ("*[F]ederal* criminal subpoenas do not 'rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions.'" (quoting Clinton v. Jones, 520 U.S. 681, 702 (1997))).

[38] *Id.*

Court rejected the argument that state criminal subpoenas would distract the President from his duties.[39] President Trump invoked *Nixon v. Fitzgerald*,[40] which recognized a President's absolute immunity from civil liability based on his official acts in part because such liability could "distract a President from his public duties."[41] However, the Court pointed out that *Fitzgerald* did not recognize absolute immunity based on distraction alone.[42] Citing "200 years of precedent,"[43] the Court found that "a properly tailored criminal subpoena will not normally hamper the performance of the President's constitutional duties."[44] Second, the Court rejected President Trump's argument that the stigma associated with a subpoena would "undermine his leadership."[45] Having previously "denied absolute immunity claims by Presidents in cases involving allegations of serious misconduct" on two occasions, the Court determined that grand jury secrecy rules act to prevent the sort of stigma President Trump feared.[46] Third, the Court rejected the argument that allowing criminal subpoenas would make a President an easy target for harassment by politically motivated local prosecutors.[47] *Clinton* had rejected a similar argument,[48] and the Court determined that legal safeguards already existed to prevent the sort of abuse the President feared.[49] Therefore, the Court concluded that the President does not enjoy absolute immunity from state criminal subpoenas.[50]

The Court further determined that a state grand jury subpoena need not satisfy a heightened need standard. A heightened need standard would extend to the President's personal papers a protection intended for official documents.[51] Such a protection would contradict Marshall's decision in *United States v. Burr*,[52] which specifically held that as to papers "*not of an official nature*," the President "must stand . . . in nearly the same situation with any other individual."[53] Further, such a heightened standard would not be necessary for the President to fulfill his

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[39] *Id.* at 2427.

[40] 457 U.S. 731 (1982).

[41] *Id.* at 753; *see id.* at 756.

[42] *Vance*, 140 S. Ct. at 2426. The Court had previously explained that "the 'dominant concern' in *Fitzgerald* was not mere distraction but the distortion of the Executive's 'decisionmaking process' with respect to official acts that would stem from 'worry as to the possibility of damages.'" *Id.* (quoting *Clinton*, 520 U.S. at 694 n.19).

[43] *Id.* at 2427.

[44] *Id.* at 2426.

[45] *Id.* at 2427. The Solicitor General did not endorse this argument. *Id.*

[46] *Id.* (citing *Clinton*, 520 U.S. at 685; United States v. Nixon, 418 U.S. 683, 687 (1974)).

[47] *Id.* at 2427, 2429.

[48] *See id.* at 2427 (citing *Clinton*, 520 U.S. at 708).

[49] *See id.* at 2428–29.

[50] *Id.* at 2429. The Court was unanimous on this point. *Id.*

[51] *Id.*

[52] 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694).

[53] *Vance*, 140 S. Ct. at 2429 (quoting *Burr*, 25 F. Cas. at 191 (emphasis added)).

Article II functions.[54] Finally, the Court determined that "the public interest in fair and effective law enforcement cut[] in favor of comprehensive access to evidence."[55] The Court's decision did not leave the President without protections against subpoenas: he can challenge subpoenas as any citizen could,[56] and he can raise subpoena-specific constitutional challenges.[57]

Justice Kavanaugh concurred in the judgment.[58] He agreed that the President is not absolutely immune from state grand jury subpoenas and that the case should be remanded to the district court.[59] However, he wrote separately to argue that *Nixon*'s "demonstrated, specific need"[60] standard, which he described as a "tried-and-true test that accommodates both the interests of the criminal process and the Article II interests of the [p]residency," should apply.[61] Justice Kavanaugh concluded that lower courts faced with similar cases "will almost invariably have to begin by delving into" states' reasons and motivations for seeking the President's information.[62]

Justice Thomas dissented. He would have vacated the order, to allow the President to argue that he was entitled to relief against the enforcement of the subpoena.[63] First, Justice Thomas agreed with the majority that the President did not enjoy absolute immunity from state criminal subpoenas.[64] However, outlining the President's significant and unique role[65] and arguing for judicial restraint,[66] Justice Thomas concluded that the President is entitled to injunctive and declaratory relief if he can show that he is "unable to comply because of his official duties."[67] Unlike the heightened need standard, Justice Thomas's proposed standard would "place[] the burden on the President but [would]

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54 *Id.* at 2429–30.

55 *Id.* at 2430.

56 *See id.*

57 *See id.* at 2430–31. Upon remand, Judge Marrero rejected President Trump's argument that the subpoena was "overbroad and issued in bad faith," Trump v. Vance, No. 19 Civ. 08694, 2020 WL 4861980, at *1 (S.D.N.Y. Aug. 20, 2020), declaring: "Justice requires an end to this controversy," *id.* at *33. President Trump nonetheless continues to oppose the subpoena. *See* Benjamin Weiser & William K. Rashbaum, *Trump Must Turn Over Tax Returns to D.A., Judge Rules*, N.Y. TIMES (Sept. 1, 2020), https://nyti.ms/3l1VyzA [https://perma.cc/UU5T-XBZS].

58 Justice Kavanaugh was joined by Justice Gorsuch.

59 *Vance*, 140 S. Ct. at 2431 (Kavanaugh, J., concurring in the judgment).

60 *Id.* at 2432 (quoting United States v. Nixon, 418 U.S. 683, 713 (1974)).

61 *Id.*

62 *Id.* at 2433.

63 *Id.* at 2434 (Thomas, J., dissenting).

64 *See id.* at 2434–36.

65 *See id.* at 2437–38.

66 *See id.* at 2438–39.

67 *Id.* at 2436.

also require[] courts to take pains to respect the demands on the President's time."[68]

Justice Alito also dissented, contending that a subpoena to the President must meet a heightened need standard.[69] Though he agreed with the majority that the President did not have absolute immunity from subpoenas, he would have held that a heightened need standard is required to "take[] into account the need to prevent interference with a President's discharge of the responsibilities of the office."[70] While Justice Thomas's standard would place the burden on the President,[71] Justice Alito's would place the burden on the prosecution to show a special need for the subpoenaed records.[72] Because "a criminal prosecution holds far greater potential for distracting a President . . . than does the average civil suit," Justice Alito argued that "[t]he Court's decision threaten[ed] to impair the functioning of the [p]residency" and that "the Constitution demands greater protection" for the President.[73]

Although the Court had previously discussed the trial of Aaron Burr,[74] the *Vance* opinion elevated the dispute to a much sharper focus. The Court's extended discussion of *Burr* made an appeal to originalism to support the result it reached. But, in doing so, the Court adopted an overly simplistic story of *Burr* and canonized it into the Court's separation of powers doctrine. The Burr trial amply illustrated the Founders' disagreements as to many separation of powers issues. Recalling it undermines rather than reveals the singular original intent sought by an originalist approach to modern separation of powers.

The Court invoked the Burr trial in a nod to originalism. The Court's holding was dictated by *Nixon* and *Clinton*[75] and its own separation of powers concerns.[76] Yet Chief Justice Roberts took great pains to discuss the implications of *Burr* at length.[77] As the Court acknowledged, Chief Justice Marshall was sitting as Circuit Justice in the Burr

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[68] *Id.* at 2437. Justice Thomas explicitly rejected the heightened need standard that the President and Justice Alito supported, *id.* at 2439 n.3, and thus agreed with the majority on both the absolute immunity and heightened need standard issues, *see id.* at 2431 n.6 (majority opinion).

[69] *See id.* at 2448–49 (Alito, J., dissenting).

[70] *Id.* at 2448.

[71] *Id.* at 2437 (Thomas, J., dissenting).

[72] *See id.* at 2449 (Alito, J., dissenting) ("[A] prosecutor should be required (1) to provide at least a general description of the possible offenses . . . under investigation, (2) to outline how the subpoenaed records relate to those offenses, and (3) to explain why it is important that the records be produced . . . while the President is still in office.").

[73] *Id.* at 2452.

[74] *See* Clinton v. Jones, 520 U.S. 681, 703–04 (1997); United States v. Nixon, 418 U.S. 683, 707–08, 713–15 (1974).

[75] *See, e.g.*, *Vance*, 140 S. Ct. at 2427.

[76] The discussion of these concerns was described by Justice Thomas as a "primarily functionalist analysis." *Id.* at 2434 (Thomas, J., dissenting).

[77] *See id.* at 2421–23, 2425, 2429, 2431 (majority opinion).

trial[78] — *Burr* was not a Supreme Court decision and has limited precedential value in the Court.[79] Accordingly, the Court's use of *Burr* in *Clinton* and *Nixon* was ancillary to its central holdings.[80] In *Vance*, however, the Court held up *Burr* as the foundation for the historical practice of Presidents complying with subpoenas.[81] As it was not cited as precedent, nor used merely as background, the Court's extended discussion of the Burr trial is best understood as an attempt to shore up its holding by reference to original intent. Some originalists discount certain decisions of the Marshall Court as inconsistent with the original understanding, but most would generally treat the decisions of Chief Justice Marshall as binding on most constitutional questions.[82] One originalist scholar has suggested that an approach in which history is woven throughout an otherwise precedent-driven opinion — garnering support from some, but not all originalist Justices — was characteristic of the Court's last Term.[83] Although *Vance* is not an originalist opinion, Chief Justice Roberts's extended discussion of the Burr trial and the "great jurist"[84] who presided over it appears intended to draw on a notion of an original understanding that would support his holding.

Yet the Court's appeal to originalism is unhelpful in resolving modern separation of powers issues. Dean Erwin Chemerinsky argues that "originalism is particularly poorly suited to separation of powers cases" because, among other things, "the Framers' intent is unclear or nonexistent" as to "many essential government powers"[85] and "there is fairly strong evidence that the Framers meant for the allocation of powers to be adjusted among the branches over time."[86] In other words, in the

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[78] *Id.* at 2422.

[79] *Cf.* Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1762–63 (2003) (discussing the problem of Supreme Court Justices rehearing the cases they had decided while sitting as Circuit Justices).

[80] Though *Clinton* described *Nixon* as "unequivocally and emphatically endors[ing] Marshall's position" that the President could be subject to subpoena, Clinton v. Jones, 520 U.S. 681, 704 (1997), this endorsement was implicit as the *Nixon* Court did not cite *Burr* for this proposition, *see* United States v. Nixon, 418 U.S. 683, 707–08, 715 (1974) (citing *Burr* for the proposition that the courts should accord higher deference to the President than they would to ordinary citizens).

[81] *Vance*, 140 S. Ct. at 2423–24.

[82] *See* Peter J. Smith, *The Marshall Court and the Originalist's Dilemma*, 90 MINN. L. REV. 612, 664–65 (2006).

[83] *See* William Baude, Opinion, *Conservatives, Don't Give Up on Your Principles or the Supreme Court*, N.Y. TIMES (July 9, 2020), https://nyti.ms/2BXBU5X [https://perma.cc/5E9M-SP2V].

[84] *Vance*, 140 S. Ct. at 2431.

[85] Erwin Chemerinsky, *A Paradox Without Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases*, 60 S. CAL. L. REV. 1083, 1105 (1987). *But see* Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821, 861–62 (1985) (arguing for an originalist approach to parts of the Constitution dealing with the structure of government).

[86] Chemerinsky, *supra* note 85, at 1107–08. Chemerinsky also criticizes the Burger Court for applying originalism when reviewing congressional action, but not presidential action, *see id.* at

separation of powers context, an originalist methodology may itself counsel against originalism.[87] Furthermore, with regard to most separation of powers issues, including presidential immunity, there was no consensus amongst the Founders. James Madison suggested that the Constitutional Convention consider the privileges of the Executive, but the issue was not discussed, which at least one delegate interpreted to mean that the President had no special privilege.[88] Nor was there any consensus outside of the Convention or in the First Congress.[89] In short, "[t]he members of the Founding generation simply disagreed on this issue."[90] Writing for the Court in *Clinton*, Justice Stevens acknowledged the limited value of historical evidence in this area and explicitly declined to rely on it.[91] The Court in *Vance* could have similarly recognized the conflicting historical evidence instead of basing its holding on one reading of it.

Vance is particularly illustrative of these concerns, as the Court omitted discussion of the significant disagreements between the Framers involved in the Burr trial. One commentator has noted that Chief Justice Roberts "recounted a sanitized version of this seminal dispute,"[92] as evidenced by three key omissions. First, the Court did not make it clear that Jefferson agreed to produce the requested documents *before* he was aware of the subpoena.[93] Therefore, Jefferson was not complying with the subpoena, and one cannot infer that he recognized it as a legitimate use of judicial power.[94] Second, Jefferson wrote in his letter to the prosecutor that he agreed "*voluntarily* to furnish on all occasions . . .

1106, and argues that this approach ignores "what should be the real issue: [whether] one branch of government [is] usurping the powers of another," *id.* at 1108.

87 *Id.* at 1108.

88 Eric M. Freedman, *The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?*, 20 HASTINGS CONST. L.Q. 7, 15–16 (1992).

89 *Id.* at 17–18. *Compare* TENCH COXE, AN EXAMINATION OF THE CONSTITUTION FOR THE UNITED STATES OF AMERICA 8 (Philadelphia, Poulson 1788) ("[The President's] person is not so much protected as that of a member of the house of representatives; for he may be proceeded against like any other man in the ordinary course of law." (emphasis omitted)), *with* THE FEDERALIST NO. 69, at 414 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing the President cannot be indicted while in office).

90 Freedman, *supra* note 88, at 20.

91 Clinton v. Jones, 520 U.S. 681, 695–97 (1997) ("A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side." *Id.* at 697 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring)).).

92 Josh Blackman, *Symposium: It Must Be Nice to Have John Marshall on Your Side*, SCOTUSBLOG (July 10, 2020, 2:40 PM), https://www.scotusblog.com/2020/07/symposium-it-must-be-nice-to-have-john-marshall-on-your-side [https://perma.cc/2C8Y-MSME].

93 *See Vance*, 140 S. Ct. at 2423; Josh Blackman, Presidential Subpoenas During the *Burr* Trials 7 (July 9, 2020) (unpublished manuscript), https://ssrn.com/abstract=3647781 [https://perma.cc/4ALR-S6T4].

94 *Cf.* John C. Yoo, *The First Claim: The Burr Trial,* United States v. Nixon*, and Presidential Power*, 83 MINN. L. REV. 1435, 1449 (1999) ("Jefferson's thoughts concerning the October letter . . . focused on convenience, rather than on constitutionality.").

whatever the purposes of justice may require,"[95] but the Court omitted the word "voluntarily" from its opinion,[96] changing the tone of the phrase significantly and presenting Jefferson as much more amicable to the exercise of judicial power than he really was. Finally, though the Court acknowledged Jefferson's assertion that "[h]is 'personal attendance' . . . was out of the question,"[97] it did not mention that the subpoena *required* Jefferson's presence and that, according to at least some interpreters, Jefferson "actively flouted the subpoena."[98] In short, the originalist meaning of *Burr* is more complicated and nuanced than the Court's opinion in *Vance* may have suggested,[99] partly because Jefferson and Marshall, two Founders, disagreed sharply on separation of powers issues.[100] In retelling the story of Aaron Burr's trial, Chief Justice Roberts adhered to a more simplified understanding, presenting a story that supported the Court's result but was importantly incomplete.

The *Vance* Court's appeal to originalism entrenches a simplified history in precedent. The Supreme Court's treatment of history, even if incomplete or erroneous, creates a "common law of history"[101] or "historical factual precedent" that may be treated as authoritative by the lower courts.[102] Whether "[r]ight or wrong," the Court's retelling "is *the only* historical account . . . that matters now because it is the one that binds lower courts."[103] When the Court's historical account is incorrect, as it has been "on numerous occasions,"[104] the Court risks "inscrib[ing]

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95 Letter from Thomas Jefferson, President of the U.S., to George Hay, U.S. Dist. Att'y for Va. (June 12, 1807), *in* 10 THE WORKS OF THOMAS JEFFERSON 398 n.1, 398 n.1 (Paul Leicester Ford ed., 1905) (emphasis added).

96 *See Vance*, 140 S. Ct. at 2423; *see also* Blackman, *supra* note 93, at 7 (emphasizing that "voluntarily" was the "key word").

97 *Vance*, 140 S. Ct. at 2423 (quoting Letter from Thomas Jefferson, President of the U.S., to George Hay, U.S. Dist. Att'y for Va. (June 17, 1807), *in* 10 THE WORKS OF THOMAS JEFFERSON, *supra* note 95, at 400 n.1, 400 n.1).

98 Blackman, *supra* note 92. *But see* Yoo, *supra* note 94, at 1438 (finding "from the historical evidence that Jefferson did not defy a court's subpoena" but that he "refused to allow the courts the final say on [executive privilege]").

99 *See* Blackman, *supra* note 93, at 16; Yoo, *supra* note 94, at 1438, 1464.

100 *See* Yoo, *supra* note 94, at 1451–52, 1458. *But see id.* at 1452 ("Jefferson had reached virtually the same position as Marshall, . . . suggest[ing] that a President could return a subpoena without complying should his duties prevent him.").

101 Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL. 809, 889 (1997).

102 Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 90 (2013).

103 *Id.* at 91; *see* Richards, *supra* note 101, at 889.

104 Larsen, *supra* note 102, at 93; *see also id.* at 93–94 (cataloging various errors). As Justice Jackson observed, "[j]udges often are not thorough or objective historians." Robert H. Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 6 (1945); *see also* Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1263–64 (2012) (challenging the Court's factfinding methodologies); Larsen, *supra* note 102, at 101 (arguing that Justices use historical facts "to build arguments and to tell a 'story'"). Even Justice Scalia

disfiguring views of [history] into precedent"[105] in a way that is especially difficult to correct. Even if later courts realize the error, they must face the difficult decision between following the erroneous precedent or announcing the mistake.[106] As Judge Sutton writes, "both horns of the dilemma are sharp indeed."[107] As a result, the Court may take decades to correct its errors and, even then, might not fully correct the historical record.[108] In *Vance*, the Court purported to "reaffirm" a principle established by *Burr*,[109] but the history of the Burr trial "is not so simple and does not stand as a rock-solid precedent for either side" of the presidential immunity debate.[110] Ultimately, although the Burr trial has long loomed large in the Court's mythos,[111] Chief Justice Roberts's simplified retelling in *Vance* will likely become the authoritative account of the dispute.[112]

Vance was always going to mention *Burr*. It is a foundational case and was quoted in both *Nixon* and *Clinton*.[113] However, *Burr* is not a binding precedent, and while history is and should be relevant to constitutional interpretation,[114] the Court's recounting of Aaron Burr's treason trial simplified the dispute between Jefferson and Marshall and created the false impression of a singular original understanding of the President's amenability to subpoena. This incomplete version of history is now codified as Supreme Court precedent, and may well reverberate through American jurisprudence for generations to come.

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acknowledged that the judiciary "does not present the ideal environment for entirely accurate historical inquiry." Antonin Scalia, Essay, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989).

105 Jeffrey S. Sutton, Essay, *The Role of History in Judging Disputes About the Meaning of the Constitution*, 41 TEX. TECH L. REV. 1173, 1185 (2009).

106 *Id.* at 1186.

107 *Id.*

108 *See, e.g.*, Louis Fisher, *The Staying Power of Erroneous Dicta: From* Curtiss-Wright *to* Zivotofsky, 31 CONST. COMMENT. 149, 206–13 (2016) ("In *Zivotofsky v. Kerry*, [135 S. Ct. 2076 (2015),] the Supreme Court corrected the sole-organ erroneous dicta that had magnified presidential power in external affairs for 79 years." *Id.* at 206. "[T]he Court decided not to address a number of related issues . . . ." *Id.* at 207.).

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

110 Yoo, *supra* note 94, at 1438; *see also* Raoul Berger, *The President, Congress, and the Courts*, 83 YALE L.J. 1111, 1111–13 (1974) (discussing "demonstrably erroneous" conclusions, *id.* at 1111, that commentators have drawn from *Burr*); Blackman, *supra* note 93, at 16; Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. 1119, 1162 (2020).

111 *See, e.g.*, Yoo, *supra* note 94, at 1437–38.

112 *Cf.* Larsen, *supra* note 102, at 92–93 (discussing instances of lower courts "rel[ying] on the Justices as historians rather than as a source of legal rules," *id.* at 93).

113 Clinton v. Jones, 520 U.S. 681, 699 (1997); United States v. Nixon, 418 U.S. 683, 708, 713 (1974); *see also* Yoo, *supra* note 94, at 1437.

114 *See* Chemerinsky, *supra* note 85, at 1100 ("[N]on-originalism allows the Court to use both the lessons of history and modern values in deciding constitutional questions."); Richards, *supra* note 101, at 890 ("[H]istory is relevant to judicial process, it is relevant to our understanding of the Constitution, and it should be entitled to some weight in judicial decisions." (emphasis omitted)).