



Compelling Presidential Compliance with a Judicial Subpoena

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Special Counsel Robert Mueller [reportedly](#) warned President Trump’s lawyers in a March meeting that if the President declined to participate in a voluntary interview, Mueller could issue a subpoena compelling the President’s testimony before a grand jury. The alleged exchange raises the question of whether a sitting President, consistent with the separation of powers and [Article II](#) of the Constitution, may be required to comply with a subpoena for his testimony as part of an ongoing criminal investigation.

Before addressing this question, it is necessary to define the type of subpoena that may be envisioned by the Special Counsel. Special Counsel Mueller, who has been vested with the powers and duties of “[any United States Attorney](#),” has not been provided independent and unilateral authority to issue generalized subpoenas for testimony. Instead, any subpoena to the President would likely be issued by a grand jury—at the [request](#) of the Special Counsel—but under the [authority of the judiciary](#). The subpoena would therefore accurately be framed as an attempt by the judicial branch to compel testimony from the President, giving rise to possible concerns under the separation of powers.

The Supreme Court has not directly confronted the question of compelled presidential testimony; however, the question is not a novel one. It is, in fact, a question that has been the subject of some debate throughout American history and any evaluation of the President’s obligations should be undertaken within that historical context.

Examples from History: Thomas Jefferson and William Jefferson Clinton

The question of a President’s obligation to comply with a judicial subpoena connected to a criminal investigation appears to have first arisen in 1807 during the [criminal prosecution of Aaron Burr](#). Had Burr taken the advice of his own character from *Hamilton* to “[talk less](#)” and “[smile more](#),” perhaps he would not have found himself in the unenviable situation of being a defendant in a trial for treason. But he had allegedly conspired to create a separate and independent country in the present day southwestern United

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States and was, therefore, in need of exculpatory evidence. For that he turned to the sitting President, Thomas Jefferson, who Burr asserted had a letter in his possession that would clear Burr's name. Although Jefferson objected, Chief Justice John Marshall—who presided over the trial—rejected arguments that a sitting President was not subject to judicial compulsory process and issued a subpoena to the President directing him to turn over the letter. [Jefferson's objection](#) had relied principally on the separation of powers, asserting that if the President were “subject to the commands” of the judiciary, the courts could “bandy him from pillar to post...and withdraw him entirely from his constitutional duties.” In a precedent that would be replicated by future Presidents, Jefferson overlooked the subpoena, and instead turned over the letter and other documents to the federal prosecuting attorney in what he viewed as a voluntary act.

Notwithstanding Jefferson's position, the [formal executive branch position](#) has drawn a clear distinction between judicial subpoenas for documents and those for testimony. With regard to documents, the executive branch has acknowledged that the President enjoys no absolute immunity, suggesting instead that any exemption from compliance “must be based on the nature of the information sought rather than any immunity from process belonging to the President.” With respect to testimony, however, the executive branch has asserted that “sitting Presidents are not required to testify in person at criminal trials.” Accordingly, while Presidents since Jefferson have provided courts with written interrogatories, depositions, and videotaped testimony, no sitting President has been forced to personally testify.

Nearly 200 years after the Burr trial, President Clinton took a page from the Jefferson playbook when he was faced with a somewhat similar scenario. Kenneth Starr, who had been appointed as an Independent Counsel to look into the Whitewater, and later Lewinsky, matters had a grand jury [issue a subpoena](#) to the President in 1998 for testimony relating to that investigation. The subpoena prompted negotiations between Starr and the White House, which ultimately resulted in a compromise in which Clinton agreed to testify voluntarily before the grand jury, rather than under compulsion, in exchange for Starr withdrawing the subpoena. Starr also [agreed](#) to the President's condition that he testify from the White House over closed circuit video, rather than in person. Thus, like Jefferson, Clinton provided information voluntarily rather than under compulsion.

Judicial Decisions Relating to Presidential Immunity from Compulsory Process

Although the Supreme Court has not directly addressed the question of whether a President can be compelled to provide testimony before a grand jury, it has issued a series of three decisions that give a general sense of the principles governing presidential claims of immunity from judicial process. These cases reflect a delicate balancing of two countervailing principles: accountability, consistent with the central tenet of the American system that no man is above the law, and executive branch independence, including the proposition that courts are not required to “[proceed against the \[P\]resident as against an ordinary individual.](#)”

The Court unequivocally rejected the idea that the President is immune from all compulsory judicial process in *U.S. v. Nixon*. That case involved a criminal trial subpoena issued to President Nixon seeking tape recordings made in the oval office. The tapes were needed as evidence in the prosecution of those suspected of the Watergate break-in. The President's attorneys argued that the President was absolutely immune from such a subpoena for two reasons: the tapes were protected by executive privilege and the separation of powers “insulates a President from a judicial subpoena in an ongoing criminal prosecution.” The Court disagreed, holding instead that the President's interests in maintaining confidentiality could not “prevail over the fundamental demands of due process of law in the fair administration of criminal justice.” The *Nixon* case therefore stands for the proposition that a President may be ordered to comply with a judicial subpoena for documents, but the opinion did not address compelled testimony.

Nearly a decade later in *Nixon v. Fitzgerald*, the Court again affirmed that the separation of powers does not require presidential immunity from all compulsory judicial process, but nevertheless determined that the President does enjoy absolute immunity from civil suits seeking damages for his official acts. Like *Nixon*, the *Fitzgerald* opinion engaged in a functional balancing of interests, this time finding in favor of the former President. The Court appears to have provided at least three justifications for according the President an absolute shield in this context: his “unique position in the constitutional scheme;” the “risks of the effective functioning of government” that may result from the “diversion of [the President’s] energies by concern with private lawsuits;” and concern that making the President susceptible to damages lawsuits would make him “unduly cautious in the discharge of his official duties.”

Finally, in the 1997 opinion of *Clinton v. Jones*, the Court held that the President is not immune from civil suits for damages arising from unofficial acts. That case involved allegations made against President Clinton based on acts taken before he assumed office. The *Jones* opinion distinguished *Fitzgerald*, finding most of the justifications for immunity for official acts to be “inapplicable to unofficial conduct.” The President, however, also argued that the separation of powers prohibited the suit from proceeding while he remained in office because the “burden” a civil case would put “on the Presidents time and energy” would “impair the effective performance of his office.” The Court rejected this argument, holding instead that “if properly managed...[the civil suit] appears to us highly unlikely to occupy any substantial amount of [the President’s] time.” Moreover, the Court went on to state that the fact that a court’s action “may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the constitution.”

It is important to note that although permitting the civil suit to go forward, the *Jones* court explicitly avoided the question of compelled presidential testimony. The opinion noted that although previous Presidents have “responded to written interrogatories, given depositions, and provided videotaped trial testimony...no sitting President has ever testified, or been ordered to testify, in open court.” The case before it, the Court reasoned:

Does not require us to confront the question whether a court may compel the attendance of the President at any specific time or place. We assume that the testimony of the President, both for discovery and for use at trial, may be taken at the White House at a time that will accommodate his busy schedule, and that, if a trial is held, there would be no necessity for the President to attend in person, though he could elect to do so.

It is clear that a wide array of variables may generally be at play in any assessment of the validity of a subpoena issued to the President, including whether the subpoena is issued as part of a civil or criminal proceeding; whether the information sought relates to official or unofficial acts; and whether the subpoena is for documents or testimony. When read together, *Nixon*, *Fitzgerald*, and *Jones* would appear to establish at least two important governing principles. First, with regard to accountability, it is clear that the President is not absolutely immune from all judicial compulsory process. The Court has “[unequivocally and emphatically endorsed](#)” the principle that the President may be made to comply with a criminal subpoena for documentary evidence, and that he is subject to civil proceedings for unofficial acts. Second, the President is not to be treated like any other official, thus the Constitution prevents the courts from subjecting the President to judicial requirements that impede him from carrying out his Article II duties in violation of the separation of powers. For this reason, the President is not subject to civil suits for damages in cases arising from his official acts.

One of the chief separation-of-powers questions stemming from a possible subpoena to the current President appears to relate to the degree of interference that compliance with a subpoena for grand jury testimony would have on the President’s ability to perform his constitutional duties. Presidents have [previously testified](#) on a voluntary basis without any apparent and immediate consequence to their ability to carry out their constitutional functions. Moreover, the “distraction” and “diversion” [burdens](#) imposed upon the President by a subpoena for testimony could be analogized to the burdens imposed by being

compelled to comply with a criminal subpoena for documents or being subject to a civil proceeding as long as the President is given some degree of flexibility in where, when, and for how long he provides such testimony. As previously noted however, the executive branch has historically adopted the position that the President cannot be made to testify. An order to appear and testify, it is argued, is [meaningfully](#) different from an order to submit documents because it would require the President's [personal participation](#), and create a period of time in which the President is physically unable to carry out, or attend to, his official duties.

Finally, it should be noted that even if a court is willing and able to enforce a grand jury subpoena for testimony, the President would still be able to assert available privileges such as executive privilege and the Fifth Amendment privilege against self-incrimination in response to specific questions.