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Trump's Case: When Novel Theories Become Legal Principles

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Defendant Donald J. Trump and his supporters have assailed the 34-count felony indictment of the former president brought by the Manhattan District Attorney as resting on a flimsy, untested and novel legal theory that converts Trump's alleged misdemeanors to felonies.

While a jury of President Trump's peers will decide his fate, assuming the case goes to trial, it turns out that the theory of the case underlying the 34 felony charges brought by the Manhattan district attorney, Alvin Bragg, may not be novel at all. New York legal experts have pointed to a lengthy record in the state of converting misdemeanor charges to felonies.

Setting aside the question of whether Bragg is promoting an untested legal theory, that he is swimming in unchartered waters, does the alleged novelty of his legal theory, or any legal theory, weaken its strength and legitimacy? How do new legal theories become established legal principles and constitutional doctrines, including those of enduring importance? These are questions central to our constitutional system and civic education.

Every legal concept and principle, every constitutional doctrine, has a creation story. They require invention, beginning, perhaps with a mere

assertion by legal scholars, judges and other public figures. Some American legal principles, not enumerated in the Constitution, evolve slowly, over a long period of time, with roots in English legal history that reflect fundamental controversies surrounding the evolution of constitutional government. The doctrine of judicial review is such an example.

Other legal doctrines, including the assertion of executive privilege, arrive suddenly, like a thunderclap or a lightning bolt, lacking doctrinal paternity, historical precedent and practice. These are declarations grounded on an "ipse dixit"—it is so because I say it is so. Like Topsy in Uncle Tom's Cabin, executive privilege "never was born. It just grewed like cabbage and corn."

Judicial review—the authority of a court to declare laws and governmental actions unconstitutional—is a pillar of American Constitutionalism, but it was a mere seedling and bizarre legal theory, at that, when James Otis asserted it in 1761 in the landmark Writs of Assistance Case. That case represented a historic battle waged against a repressive English law that rankled colonists' conceptions of a yet unarticulated legal concept: the right to privacy derived from unreasonable searches of their homes and businesses.

Otis, a young, Boston attorney, whose growing reputation for genius, eloquence and creative legal reasoning, drew attention from men of great stature, including John Adams. Otis argued on behalf of colonists that the writs of assistance statute, which authorized sweeping searches—fishing expeditions—violated colonists' constitutional and natural rights. He reached a crescendo when asserting a novel legal theory: the court has the right and duty to declare the law null and void, that is, unconstitutional. The court was stunned by the argument that judges possessed the power of judicial review. Otis lost his case, of

course, because judicial review had never taken root in Anglo-American legal history.

But Otis's creative legal theory quickly found currency, for two reasons. First, it drew upon the observations of Sir Edward Coke, the magisterial 17th Century English champion of the common law, to whom the colonists looked for defense of English liberties and early expressions of constitutionalism. Otis's legal research took him to Coke who, in 1610, in the landmark *Dr. Bonham's Case*, offered a minority opinion from the bench: a law against common right and reason should be declared null and void. Coke's novel theory never found foundation in England, as it surely could not, since Parliament is sovereign and its laws are not subject to judicial review. In Coke, Otis found instant pedigree.

Second, Otis's argument provided a sorely needed weapon for colonial lawyers to wield in court as they attacked as unconstitutional a series of statutes familiar to readers—the Stamp Act, the Sugar Act and the Iron Act, among others—that violated the rights of an emerging citizenry. Otis's powerful argument was cited and quoted again and again in courts up and down the Eastern Seaboard. For this argument and other contributions, Otis is widely recognized as the Godfather of American Constitutionalism. His novel theory became a cornerstone of our legal system.

Executive privilege—the claim of presidential power to withhold information from Congress and investigators—has no similar pedigree. In fact, the English King had no authority to withhold information from Parliament. There was no historical figure in England—no member of Parliament and no legal scholar—who invoked the words or asserted the spirit of “executive privilege.”

Executive privilege was, in fact, not invoked in the United States until 1954, when President Dwight D.

Eisenhower conjoined the words "executive" and "privilege" to justify his decision to withhold information from Senator Joseph McCarthy, who was bullying governmental officials on the false accusation of communist loyalties. Americans cheered Eisenhower's novel legal theory and his willingness to denounce McCarthy, but that legal concept, neither grounded in the text or the history of the Constitution and at odds with the architecture imposing executive accountability, would become a regrettable doctrine in the presidential arsenal for circumventing legal and constitutional requirements.

In the end, novel legal theories, whether invoked in 18th century Boston or 21st century New York, should be judged on their merits.