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Strategy Memorandum Against the Trump Indictments

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NATIONAL CONSTITUTIONAL LAW UNION
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I. Introduction

All of the legal cases against Donald J. Trump should fail under the principle that a President cannot be held liable in any way for an action he took while in office unless he is first convicted of impeachment. In other words, all actions a President takes while in office must be presumed to be legal unless the President is convicted of impeachment.

In its recent decisions on gun control and abortion (*i.e., New York State Rifle & Pistol Association, Inc. v. Bruen and Dobbs v. Jackson Women's Health Organization*), the Supreme Court confirmed that the Constitution must be interpreted in its historical context, without consideration given to balancing tests or means-end analysis. Specifically, in *Bruen*, the Supreme Court held that the meaning of constitutional provisions are "fixed" according to how these provisions were understood when they were ratified.

Thus, *Bruen* and *Dobbs* provide an avenue to argue for presidential immunity for actions a President took during office that goes beyond existing case law. These decisions allow for arguments to be made that reach back to the initial understanding of executive power that existed when the Constitution was written and ratified, shaving away restrictions and exceptions to executive power that have since accumulated in case law.

II. Summary of the Historical Analysis Framework of Bruen and Dobbs

In *Bruen*, the Supreme Court was faced with a modern New York gun regulation. The Supreme Court rejected any form of means-ends analysis in evaluating whether this regulation violated the Second Amendment. Instead, the Supreme Court found that the fixed meaning of the Second Amendment could only be deduced by looking to historic gun laws that existed in 1791, when the Second Amendment was ratified, or in 1868, when the Fourteenth Amendment, which incorporated the Second Amendment to apply to the states, was ratified. The Supreme Court invalidated the gun regulation at issue in *Bruen* after finding it was beyond the scope of gun regulations that existed in 1791 or 1868. In essence, the Supreme Court found that the fixed meaning of the Second Amendment means that any regulation that infringes upon the right to bear arms more than laws that commonly existed before the Second Amendment became operative are unconstitutional.

In *Dobbs*, the Supreme Court took a similar path in evaluating whether abortion rights are protected under the Fourteenth Amendment, hewing to historical analysis alone and rejecting any balancing tests of competing interests. In this case, the Supreme Court traced laws prohibiting abortion from the 13th Century until 1868, when the Fourteenth Amendment was ratified, to find that abortion rights were not deeply rooted in the nation's history and traditions to such an extent that the right to have an abortion would have been protected when the Due Process Clause was adopted in 1868.

Thus, *Bruen* and *Dobbs* must be read to support the proposition that all constitutional provisions must have the same fixed meaning they did when they were adopted. At issue herein is the main text of the Constitution—including the Article concerning executive power (Article II) and the Section concerning impeachment (Article 1 Section 3)—which was ratified in 1788. Accordingly, under *Bruen* and *Dobbs*, the meaning of these provisions must be interpreted as they would have been at that time, informed by (1) the contemporaneous understanding of those who drafted and ratified the Constitution; (2) analogous laws and legal doctrine that existed at that time; and (3) historical antecedents dealing with similar subject matter that proceeded the ratification of these constitutional provisions.

Such historical analysis provides a new way of arguing for executive power and presidential immunity from legal liability that goes beyond existing case law. This memorandum attempts to scratch the surface of these arguments to show how such arguments can provide for a more vigorous defense against the charges made against Mr. Trump. However, the full breadth of the arguments that could be made under *Bruen* and *Dobbs*' framework of historical analysis will require significant research. For that reason, this memorandum concludes with a section describing potential additional areas of research that may yield additional arguments to aid Mr. Trump in defense of the charges that have been brought against him.

III. General Argument

Prior to the adoption of the Constitution, under the Articles of Confederation, there was no national executive. Having freed themselves from the oversight of a King and Parliament that had not given the Colonies adequate local control, the newly independent states first chose to operate as a confederation without a strong central government. For various reasons, this arrangement proved to be unwieldy, and the Constitutional Convention was held to draft a new governing document for the young nation. The Constitution that emerged was drafted in 1787, ratified in 1788, and became operative in 1789.

This new Constitution created both a national legislature (Congress) and a national executive (the President). As Alexander Hamilton pointed out in *Pacificus No. 1* (29 June 1793), there is an important difference in the grant of powers made to the Executive and the Legislative Branches. Article II provides: "The Executive Power shall be vested in a President of the United States of America." Meanwhile, Article I provides: "All legislative Powers ***herein granted*** shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives (emphasis added)."

Thus, in *Pacificus No. 1*, Alexander Hamilton argued that the unqualified grant of Executive Power given to the President by Article II meant that the "general doctrine then of our constitution is, that the Executive Power of the Nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instrument." In other words, subject only to those "exceptions [specifically listed in the Constitution] the Executive Power of the Union is completely lodged in the President." *Id.*

The text of the Constitution supports Hamilton's position in Pacificus No. 1. Article I, Section 8 of the Constitution only gives limited authority to Congress to pass laws relating to certain issues ("To borrow Money on the credit of the United States"; "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"; etc.). No similar provision of the Constitution specifically grants only limited powers to the Executive.

Instead, Article II, Section 2 merely provides a handful of situational restrictions on the President's Executive power; it does not generally limit Executive power to certain specific domains (*i.e.,* the President is only empowered as Commander-in-Chief of state militias when they are called in the service of the nation; the President's pardon powers do not extend to cases of impeachment; recess appointments by the President are time-limited; etc.).

Thus, Hamilton's argument that the executive power of the United States is generally vested in the President, while the legislative power is only vested in Congress in a limited manner relating to specific areas of law (with the remainder of the legislative power reserved to the state legislatures) is correct. To determine the proper breadth of such general executive power under the precedents of *Bruen* and *Dobbs*, requires that a court examine the historical understanding of executive power that existed in 1787-89. The Federalist Papers provide an obvious place to start any such historical analysis.

While Federalist Paper No. 70 is mainly concerned with the benefits of a unitary president over a plural executive, it also provides support for the idea that the President was intended to be an almost all-powerful executive beyond the reach of legal proceedings. Indeed, Federalist Paper No. 70 specifically cites the Roman dictators to articulate the need for an "energetic Executive" and not a "feeble Executive."In Roman history, such a dictator stood above and outside of the law during his tenure of office. Thus, Federalist Paper No. 70 supports the idea that the Founders were mindful of the fact that the executive office in the Constitution was established—i.e., the Presidency—would have tremendous powers and occupy a unique position in relation to the law.

At the same time, the Federalist Papers are conspicuously silent on the idea that the President would normally be subject to any legal liability whatsoever for failing to perfectly adhere to a prosecutor's interpretations of a statute passed by Congress. Indeed, Federalist Paper No. 66 states that "powers relating to impeachments are, as before intimated, an essential check in the hands of that body upon the encroachments of the executive."

Read in combination, the historical record clearly articulates the idea of a powerful executive, limited *only* by: (1) Congress's power of impeachment; and (2) the specific restrictions on presidential actions delineated in Article II.

Such a powerful executive, who could not be prosecuted while in office, accords with the powers of other national executives on the world stage in 1787-89. Neither the King of England, the King of France, or the Holy Roman Emperor could be prosecuted for non-compliance with a statute. As national sovereigns, these monarchs were all above the law. In fact, the King of England still—to this day—is above the law and immune to any civil or criminal proceedings.

While analogizing the powers and immunities of the President to that of the King of England might seem to conflict with the fact that the United States fought the Revolutionary War to free themselves from George III's executive authority, such a view of U.S. history requires one to forget about the time period between the Revolutionary War and the Constitutional Convention. Indeed, the perceived need for such a national executive was a primary reason why the United States decided to replace the Articles of Confederation with the Constitution.

While the Constitution did not restore the office of King, it did create a national executive—the President—who shared many powers and duties traditionally associated with a monarch, the chief difference being that the President was to be elected to four-year terms, instead of being a hereditary office that was held for life.

This is not to say the President is immune from any prosecutions whatsoever, but in order to bring legal action against the President relating to his time in office, the President must first be convicted of impeachment. This is why Article 1 Section 3 of the Constitution of the United States provides (*emphasis added*):

"Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."

Indeed, at the time the Constitution was ratified, it was widely recognized that impeachment, and not mere legal proceedings alone, were the *only* way to check the President. Impeachment was written into the Constitution for the purpose of removing an official who had "rendered himself obnoxious," in the words of Benjamin Franklin. Without impeachment, Franklin argued, citizens' *only* recourse was assassination.

Similarly, Senator Maclay recorded the views of Senator Ellsworth and Vice President John Adams—both delegates to the Convention—that "the President, personally, was not subject to any process whatever. . . . For [that] would . . . put it in the power of common justice to exercise any authority over him and stop the whole machine of Government." Journal of William Maclay 167 (E. Maclay ed. 1890).

After such an impeachment conviction, the President could be said to lose any shield of immunity that he previously possessed as President. But until that occurs, the President, being endowed with the full range of executive powers of the nation (see *Pacificus No. 1*), is not liable to any legal proceedings that might be brought against him relating to his tenure of office. See *Kendall v. United States*, 37 U. S. 524, 610 (1838) ("The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power"); cf. *Clinton v. Jones*, 520 U.S. 681, 696 (1997) ("With respect to acts taken in his "public character"—that is, official acts the President may be disciplined principally by impeachment.").

Thus, at the very least, the President's immunity from legal liability for any act he committed while in office must be viewed to extend as far as his executive authority might extend. In Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982), the Supreme Court found that the President was shielded from liability for "acts within the 'outer perimeter' of his official responsibility."

Applying this holding from Fitzgerald under current constitutional law, however, leads one back to *Dobbs* and *Bruen*, given that the "outer perimeter" of the President's executive authority must be viewed in its fixed historical context as it was intended in 1787-89.

Federalist Paper No. 70's reference to the power of a Roman Dictator; Federalist Paper No. 66's reference to impeachment as the sole check on the executive; the commentary of Founders as to the President's immunity from legal processes other than impeachment; and the more expansive grant of Executive power found in Article II as compared to the limited grant of Legislative power found in Article I (as noted in Pacificus No. 1) all point to the idea of an "outer perimeter" of the President's executive authority that is extremely vast.Perhaps not an "outer perimeter" so vast that it would shield the President from liability for shooting a random, innocent civilian on Fifth Avenue (as the King of England would be shielded from to this day), but at least so vast as encompass any act plausibly connected with the President's operation of the executive branch.

Critically, any act by the President in connection with his executive authority would remain shielded from legal liability regardless of the perceived wisdom of this act. While the President is in office, he alone possesses the power to determine whether his course of action is in the nation's interest. *Unless Congress found such a course of action to be so unwise to result in an impeachment conviction, any course of action must be found to be within the "outer perimeter" of executive authority as long as the President can articulate a plausible reason as to why he believed this course of action was in the national interest.*

Any less broad interpretation of where this "outer perimeter" extends to would risk creating a "feeble Executive" (*contra* Federalist Paper No. 70) such that the legal process could be used to "stop the whole machine of Government" (*contra* Journal of William Maclay 167). *See also* 3 J. Story, Commentaries on the Constitution of the United States § 1563, pp. 418-419 ("There are ... incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among those must necessarily be included the power to perform them without any obstruction or impediment whatsoever. The president cannot, therefore, be liable to arrest, imprisonment, or detention while he is in the discharge of the duties of his office, and for this purpose, his person must be deemed, in civil cases at least, to possess an official inviolability."); 10 Works of Thomas Jefferson 404, (P. Ford ed. 1905) (letter of June 20, 1807, from President Thomas Jefferson to United States Attorney George Hay), quoted in *Fitzgerald*, supra, at 751, n. 31. ("But would the executive be independent of the judiciary, if he were subject to the commands of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?").

These concerns make it irrelevant that Mr. Trump is being subject to legal proceedings after his term in office has expired. What is important is that the indictments against him relate to actions he took while he was still President. The concerns about a "feeble Executive" are no less relevant whether legal actions are instituted during a President's tenure of office or after it has expired. In either case, if a President believes that actions he takes as the executive could be held against him (in the absence of an impeachment conviction), this would necessarily interfere with his operation of the machine of Government and reduce the energy with which he would be able to carry out his executive duties.

The forgoing arguments in favor of presidential immunity from legal liability in the absence of a conviction for impeachment can generally be made in two forms. Both forms of this argument take advantage of this historical analysis framework established by *Bruen* and *Dobbs*.

The first form of the argument would jettison most of the case law about presidential authority and base itself primarily upon the extent of executive authority the president would have been presumed to have in 1787-89. This argument would primarily rely on historical writings about powers the president was believed to have had when the Constitution became operative. These writings could be supplemented by analogies to the powers of other national executives that existed at this time and to the executive actions taken by our earliest presidents. The conclusion of the first form of the argument is that the President—like the King of England he replaced as the national executive—is completely immune from any legal proceedings relating to his time in office unless he is first convicted of impeachment.

The second form of the argument would use the historical analysis framework established in *Bruen* and *Dobbs* to deemphasize the non-historical considerations about the proper extent of executive authority that appear in cases such as *Fitzgerald*, which stray from purely historical analysis in an attempt to "balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch." *See id.* at 754; *contra Bruen*, Syllabus, (summarizing Opinion at pp.9-10) ("Since *Heller* and *McDonald*, the Courts of Appeals have developed a 'two-step' framework for analyzing Second Amendment challenges that combines history with means-end scrutiny. The Court rejects that two-part approach as having one step too many."). *This second form of the argument made in this memorandum would similarly find the President is immune to legal proceedings related to his time in office unless first convicted of impeachment, provided, however, that the actions of the President being held to legal scrutiny fall within the "outer perimeter" of executive power, as such executive power was understood in 1787-89.*

In summary, the first form of the argument laid out in this memorandum would find that the President is completely immune to legal liability for actions taken during his tenure in office unless first convicted of impeachment. The second form of the argument laid out in this memorandum simply adds a qualifier that limits this presidential immunity to the "outer perimeter" of executive power, as such executive power was understood in 1787-89. Both arguments would rely on *Bruen* and *Dobbs* to reach back to the original understanding of presidential authority and immunity that existed when the Constitution was written and ratified.

IV. The Indictments Against Mr. Trump

Each of the indictments against Mr. Trump relates to actions he took while President of the United States, and this provides fertile ground for the above arguments to be made.

First, the New York State indictment against Mr. Trump for Falsifying Business Records In The First Degree relates to the actions Mr. Trump allegedly took between February 2017 and December 2017—during which he was President.

Second, the federal indictment against Mr. Trump under the Espionage Act relates to Mr. Trump's possession of classified documents he gave to himself while still holding the office of President.

Third, the federal indictment against Mr. Trump relates to events between Election Day 2022 and January 20, 2023, and therefore, is concerned with actions he took while he was still President.

Accordingly, this memorandum argues that Mr. Trump should not be held liable for any of the actions these indictments concern themselves with because he was President at the time of the allegations made against him, and he has not been convicted of impeachment.

V. Argument Applied to the New York State Indictment

The first form of the argument made in this memorandum, namely that the President is protected from legal liability for any actions he took while President (unless first convicted of impeachment), is sufficient to defeat the charges made in this indictment since all such charges related to payments he made during his tenure as President.

The second form of the argument made in this memorandum, namely that the President is protected from legal liability for any actions he took while President that fall within the "outer perimeter" of his executive powers, also applies to the charges contained in the New York indictment. Mr. Trump is accused of paying "hush money" to silence an individual who could have blackmailed him. It is easy to see how such payments would accord with President Trump's executive responsibilities given that payments made via private transactions could have saved the nation's executive from a distracting episode that naturally would have transpired were these monies paid from publicly documented campaign finance expenditures. Moreover, it was up to President Trump alone, as the nation's executive at the time, to determine whether it was in the nation's best interest to pay these funds in a private rather than a public way. Because Congress has not convicted President Trump of impeachment relating to this decision, he should be immune to any legal liability flowing from this decision.

VI. Argument Applied to the Federal Espionage Act Indictment

The federal indictment relating to the Espionage Act claims to relate to Mr. Trump's possession of documents after he ceased being President. However, this indictment leaves out that Mr. Trump must have given these documents to himself as a private citizen while he was still President. In other words, Mr. Trump did not break into the White House to steal these documents after President Biden was inaugurated; he directed these documents be transferred to Mar-a-Lago while he still was in office.

Regardless of what the Espionage Act says, it cannot be applied against the President in a manner that would undermine his inherent executive authority, as such authority is described in Article II and to the extent such authority would have been understood to reach in 1787-89. In 1787-89, it would have been understood that the President of the United States—like the King of England, the King of France, the Holy Roman Emperor, or a Roman Dictator—could have disclosed state secrets to anyone he thought was appropriate to receive them, particularly to himself in his capacity as a private citizen.

Pacificus No. 1 is especially on point here. Pacificus No. 1 concerned President George Washington's Proclamation of Neutrality. While no provision of the Constitution expressly authorized President Washington's Proclamation of Neutrality, Alexander Hamilton argued that President Washington had inherent executive authority to issue the same given the broad grant of Executive power contained in Article II. Hamilton found that Article II's grant of Executive power must be interpreted to contain such powers as may "flow from the general grant of that power, interpreted in conformity to other parts [of] the constitution." After considering how the constitution only narrowly limits executive powers, Hamilton found that "[w]ith these exceptions the Executive Power of the Union is completely lodged in the President." Moreover, Hamilton found that the Executive power extended to all aspects of national power not otherwise allocated to the Legislative or Judicial Branches. In other words, the President "had a right, and if in his opinion the interests of the Nation required it, it was his duty" to take whatever action he saw fit to take, provided the President did not exceed the express limitations on Executive power contained in the Constitution, nor infringe on powers specifically granted to the Judicial and Legislative branches.

No part of the Constitution places limits on the ability of the President of the United States to disclose state secrets to anyone he deems fit to receive them. Thus, in this respect, the President—vested with the nation's whole executive power—must be said to possess the authority to disclose state secrets beyond the reach of Congress or the Courts to constrain (unless such President is first convicted of impeachment).

The Espionage Act must draw its authority from the provision in Article I, Section 8, which empowers Congress to make laws to "provide for the common Defense … of the United States." However, the rules of construction require that this general grant of power must be found to be subservient to the specific grant of power contained in Article II, Section 2, which makes the President the commander in chief. Thus, while Congress has the authority to restrict the dissemination of state secrets generally, this authority cannot be said not extend so far as to govern the actions of the President without infringing upon the President's executive prerogative as commander in chief.

Any interpretation of the Espionage Act that would act to regulate the President would, therefore, necessarily conflict with the broad grant of Executive power contained in Article II, as well as the specific grant of power that makes the President the commander in chief.

Indeed, American history confirms this understanding of Executive powers; it is well documented that Presidents John F. Kennedy and Lyndon B. Johnson, among others, used and revealed government secrets purposefully. Moreover, neither Federalist Paper No. 70 nor Pacificus No. 1 can be read in a manner that would allow Congress to constrain a President from taking any actions he saw fit with documents relating to national security issues.

Moreover, the fact that the President can declassify documents at any time for any reason accords with this understanding that the President's management of state secrets is beyond Congress's ability to regulate.

Thus, President Trump was acting in a fully constitutional manner when he transferred classified documents to himself, in his capacity as Citizen Trump, prior to his tenure in office expiring. Indeed, he could have constitutionally transferred the documents he retained at Mar-a-Lago to anyone up until his last second in office. If he transferred such secret documents for a corrupt reason or actually endangered national security by such a transfer, he could be impeached for this reason and then criminally charged pursuant to Article 1 Section 3 of the Constitution. But this has not happened.

Then, once he came into possession of these documents in his capacity as Citizen of Trump, they were documents that he had received legally from President Trump. At this point, said documents became Citizen Trump's "papers" and "property" subject to protections under the 4th and 5th Amendments. Perhaps the federal government could sue Citizen Trump (1) to enjoin him from sharing these documents with any third person or (2) to take these documents from him in a manner akin to eminent domain, but his mere possession of documents that he legally received from himself in his capacity of President Trump cannot be illegal—regardless of what any law says. Citizen Trump received these documents from President Trump, who had inherent executive authority to share these documents with anyone, making Citizen Trump's possession of these documents per se not illegal.

To find Citizen Trump's possession of these documents to be illegal would necessarily undermine the President's inherent executive power to give government documents to anyone they deem fit to receive them. In other words, if the President makes someone a criminal by giving them a document, the President really isn't free to disclose state secrets in a manner consistent with his opinion of what is in the national interest. His giving of the document, and the recipient's receipt of the same, are two sides of the same coin. To make either side of the coin illegal renders the entire act illegal, which would not accord with the executive power the President was intended to have in 1787-89.

One does not even need to reach the constitutional issues related to these documents being the "papers" or "property" of Citizen Trump, given that 18 U.S.C. 793(e) only deals with "unauthorized possession" of state secrets.

There simply was no such "unauthorized possession" of these documents given that President Trump gave them to himself in his capacity as a private citizen while he was still President and, therefore, endowed with the executive power to share state secrets in whatever manner, and with whomever, he saw fit (again unless convicted of impeachment for sharing documents in a manner that was corrupt or undermined U.S. national interests).

Citizen Trump's possession of classified documents at Mar-a-Lago is somewhat analogous to the New York Times's publication of the Pentagon Papers. See New York Times Co. v. United States, 403 U.S. 713 (1971). In that case, the Supreme Court refused to enjoin the New York Times from publishing articles that disclosed classified information that the New York Times had illegally acquired. The Supreme Court found that the First Amendment protected such publication of government secrets, ignoring the manner by which these secrets had been obtained.

Accordingly, Mr. Trump's argument that he had a right to possess these documents is even stronger than the arguments that were at issue in New York Times Co. Unlike the New York Times, Citizen Trump received the classified documents he maintained at Mar-a-Lago from an individual with the inherent authority to give him these documents, i.e., himself in his capacity as President. Moreover, in New York Times Co., the federal government had the ability to make a plausible argument that national security was actually being jeopardized by the publication of government secrets. Here, no such argument can be made, as Citizen Trump has not publicly published these documents. Moreover, to the extent, Citizen Trump discussed these documents with third persons, such speech by Citizen Trump would fall no less under the protection of the free speech provision of the First Amendment than the New York Times publication of Pentagon Papers fell under the free press provision of the First Amendment.

The argument that President Trump's failure to declassify these documents renders Citizen Trump's possession of them illegal should fail because such an argument seeks to regulate the President's freedom to disseminate state secrets by reducing his executive prerogative to a binary option. In other words, such an argument would handicap the range of executive actions available to the President by demanding that documents be either classified or not classified, in which case they would be available to anyone.

It is easy to imagine a scenario in which a President could want a certain classified document to remain classified and thus generally restricted but also to share such a document with specific individuals lacking the requisite security clearance—the sharing of classified information with another head of state, for example.

The executive authority granted to the President in Article II allows the President the flexibility to pick and choose whom he shares classified information with, which is all that he did when he transferred classified documents to himself in his capacity as a private citizen. Congress has no authority to infringe upon such executive flexibility by reducing the President's opinions to a binary decision.

Both forms of the argument made in this memorandum can be utilized to defeat the Espionage Act charges made in this indictment. The calculated disclosure of state secrets clearly is an executive action.

Moreover, here, the argument as to the President's inherent executive authority to transfer state secrets to anyone he deems fit to receive them isn't being made to directly defeat the Espionage Act charges, which are only related to Citizen Trump's possession of these documents. Instead, the arguments in support of President Trump's inherent executive authority to transfer these documents are only needed in this case as a hook—in order to argue that Citizen Trump's receipt of these documents must have rendered him an authorized recipient of these documents (contra 18 U.S.C. 793[e]), such that these documents became Citizen Trump's "papers" and/or "property," subject to protection under the Fourth and Fifth Amendments once he received them. After these conclusions are reached, Citizen Trump's possession of these documents becomes even more beyond the reach of the legal system than the New York Times publication of classified documents was in New York Times Co., which involved the access to state secrets unauthorized by any President.

VII. Argument Applied to the Federal 2020 Election Indictment

The federal indictment related to the 2020 election involves four conspiracy counts relating to the time period when Trump was still president.

Again, the first form of the argument laid out herein would provide an absolute bar against any criminal charges relating to President Trump's actions up until the moment President Biden was sworn into office. Thus, Mr. Trump should face no legal liability for his actions between Election Day and January 20, 2021, because he has not been convicted of impeachment.

The second form of this argument is particularly applicable to the charges made against Trump in this indictment because, as President, he had the authority and the duty to enforce various laws relating to the 2020 election, including The Electoral Count Act of 1887. Ensuring the legitimacy of the election results undoubtedly falls within the "outer perimeter" of executive power; as such, executive power was understood in 1787-89. Moreover, the specific course of action President Trump chose in order to ensure this law was being complied with after the 2020 election was for him alone to determine. Since Congress did not view his course of action as so poor as to merit a conviction for impeachment, he should be viewed to be immune from any legal liability relating to the allegations made in this indictment.

VIII. These Arguments Do Not Greatly Expand Presidential Power

The arguments made in this memorandum do not act to expand presidential power as much as they might seem to at first blush. These arguments simply stand for the proposition that if a President's actions are not so wrong as to warrant a conviction for impeachment, the President's inherent executive authority shields him from legal liability for these actions.

While this does place the President on an entirely different level as compared to a private citizen, or even a Cabinet official, this is wholly appropriate given that the American people (through the electoral college) voted to place this individual into office. In other words, President Trump was elected both to be commander in chief and to be placed in a unique position in relation to the Nation's laws.

The fact that no President has ever attempted to pardon himself is the dog that didn't bark here. If Presidents thought they could be prosecuted for their actions when in office upon leaving office, then every President would pardon themselves of all crimes they might have committed on their way out the door. But this has never happened, seemingly because all Presidents have assumed that they were immune from legal liability for all of their acts while in office (unless first convicted of impeachment).

Accordingly, all the arguments raised in this memorandum do is formalize this understanding of presidential immunity to legal liability in the absence of a conviction for impeachment. Indeed, things are likely to veer into even more dangerous ground if this doctrine is not formalized. If Presidents believe that they are vulnerable to legal prosecutions that second guess the judgment calls they make while in office, then (1) the presidency will devolve into a feeble executive that practices defensive governance in the same manner that doctors afraid of malpractice suits practice defensive medicine; and/or (2) Presidents will begin to pardon themselves at the conclusion of their term in office. Clarifying a doctrine of presidential immunity for their acts while in office (unless convicted of impeachment) avoids both of these scenarios, which would operate to (1) reduce the energy of the executive branch and/or (2) incentivize lawless action by the executive branch.

In other words, due to the President's unlimited power to pardon, there simply is no way to constitutionally subject the President or his administration to the laws of the United States as if he were an ordinary citizen, even if this would result in better government (and it wouldn't). It would be preferable (and more in accordance with the original understanding of Executive power that existed at the time the Constitution was ratified) for courts to acknowledge that the President is elected to occupy an office that places him in a unique position in relation to the law, one which renders him immune to legal liability for acts he commits while in office unless he is first convicted of impeachment.

IX. There Are Reasons To Believe That The Supreme Court Will Accept This Argument

This memorandum lays out a legal theory of presidential power and immunity with significant implications. Beyond being a valid and logical argument, in order to be successful, this theory must also be a theory that the Supreme Court would be willing to adopt. There are two reasons to believe the arguments made in this memorandum could earn the support of five Supreme Court Justices.

First, this theory provides the Supreme Court with a simple and direct way of stopping this sort of litigation in the future. If the Supreme Court is not willing to put a halt to the prosecution of a former president in these cases, then America should start expecting that every change of presidential administration will be followed by a series of prosecutions. Such a situation would almost certainly damage the nation and the American People's confidence in our court system.

Conversely, a Supreme Court decision in line with the arguments made in this memorandum stops such a cycle from even beginning. Importantly, such a decision would not result in an unaccountable president but would instead ensure that such accountability occurs in the proper forum: An impeachment trial in the Senate. By its very nature, prosecuting a former President for their actions while in office is a political act, and it is proper that such a political act begin in the political body of Congress rather than in a court of law. It does not seem far-fetched to think that at least five Justices would be amenable to deciding the Trump indictments utilizing a theory that will keep them out of the business of hearing retributive lawsuits brought against former presidential administrations.

Second, by adopting the arguments laid out in this memorandum and by basing them on the precedents of *Bruen* and *Dobbs*, the Supreme Court would necessarily be integrating the historical analysis framework of *Bruen* and *Dobbs* into all future cases concerning executive power. As constitutional law currently stands, *Bruen* and *Dobbs* are one-off decisions, concerning specific issues (gun control and abortion), that could be simply reversed by a future Supreme Court with a different ideological composition. However, if the historical analysis framework of *Bruen* and *Dobbs* is adopted to apply to all controversies under constitutional law, then these decisions, and the doctrine of historical analysis they rely on, will become fortified against reversal.

Simply stated, the more embedded and integrated the historical analysis framework of *Bruen* and *Dobbs* becomes in constitutional law generally, the more unlikely it becomes that these decisions will be reversed because any such reversal will then necessarily call into question the validity of numerous other decisions. This is akin to the idea that a case like *Marbury v. Madison* is "super precedent," which means that it is a decision that cannot be reversed without simultaneously undermining the reasoning behind numerous other decisions. Such embedding and integration of a decision or legal doctrine into numerous cases, in various areas of constitutional law, makes overturning it akin to requiring a complete demolition and reconstruction of the palace of constitutional law, rather than the mere redecoration of a couple of rooms.

This memorandum attempts to articulate a legal theory of presidential immunity that can be applied to each of the three indictments. The argument essentially boils down to a simple question: "Could George Washington have been prosecuted if he took similar actions and if the relevant statutes existed while he was President?" If the answer is "no," then it is equally improper to prosecute Mr. Trump under these indictments, given that Bruen and Dobbs mandate that all constitutional provisions be applied in accordance with their fixed meaning in 1787-1789.

X. How to Utilize These Arguments Immediately

The arguments made in this memorandum can be used by Mr. Trump in an appeal if he is convicted in any of the cases against him. But it is always preferable to be on offense rather than on defense. Fortunately, there is a way to bring a legal action on the basis of the theory laid out in this memorandum immediately, before any trial is held.

This can be done by seeking a Writ of Prohibition from a circuit court to prevent a trial from occurring. As detailed above, a President should be immune to any legal process, including indictment, for actions that occurred while he was in office. Under this legal theory, it is not only improper to convict Mr. Trump for actions he took while he was President, but it is also improper to indict him for such actions in the first place. In other words, the district court Mr. Trump is to be tried in doesn't even have jurisdiction to try him on these matters because he has not been convicted of impeachment. Instead, the proper jurisdiction, in this case, is the House of Representatives, which could impeach him, then the Senate, which could convict him of impeachment. Only after such an impeachment conviction could Mr. Trump be properly indicted in a district court.

A Writ of Prohibition can be issued to prohibit a lower court from issuing orders in a matter it has no jurisdiction over. This writ traces its lineage to English common law, where it was used by the temporal courts to prohibit the ecclesiastical courts from exercising jurisdiction over cases that were properly the concern of the state and not the church. See, e.g., 3 Blackstone Commentaries * 112 ("A prohibition is a writ … directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court [*i.e.*, here, a court of impeachment in the Senate].")

In American jurisprudence, this writ has been mainly used by superior courts to keep inferior courts within the limits and bounds of the jurisdiction prescribed by law. The Writ of Prohibition has proven especially useful in the context of criminal law issues analogous to those raised in this memorandum: including criminal law issues such as double jeopardy, or when the charging instrument was legally insufficient or defective. *See, e.g., Brayer v. Supreme Court*, 7 App. Div. 2d 887, 181 N.Y.S.2d 311 (4th Dep't 1959) (prohibiting a district attorney from proceeding with an indictment issued by a grand jury the district attorney lacked the power to convene). Here, Mr. Trump is being subject to legal jeopardy he should not be subject to prior to impeachment, and therefore, the indictment relating to his actions as president is legally insufficient. Thus, this is exactly the kind of scenario where such a writ may be successful.

Both Federal Rule of Civil Procedure 21 and 28 U.S. Code § 1651 authorizes such writs. The general rule regarding the issuance of a writ of prohibition is that:

Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary.

In re Rice, 155 U.S. 396, 402-03 (1894).

Mr. Trump has various remedies available to him to attack the charges made against him in the indictments, but he has no legal remedy whatsoever other than a Writ of Prohibition to attack the fact that he was indicted in the first place, particularly when the indictments relate to his time in office, and he has not been convicted of impeachment.

The ideal case to apply this memorandum's legal theory using a Writ of Prohibition is in the federal election indictment. On its face, this indictment only applies to issues of national interest and actions Mr. Trump took while he was still in office. Conversely, the New York indictment relates to issues arguably wholly personal in nature, while the Espionage Act Indictment arguably concerns actions that continued after Mr. Trump's tenure of office expired. The prosecution will argue that such factual disputes make the issuance of the Writ of Prohibition "discretionary" rather than "a matter of right." *See In re Rice*, 155 U.S. at 402-03.

Neither of these issues is present in the federal election indictment. As such, the nature of the charges laid out in the federal election indictment—the president's conduct in relation to an issue of national interest—is exactly the type of charges that a president should be shielded from facing unless he is first convicted of impeachment. Simply stated, the federal election indictment has been brought in the wrong forum for jurisdiction to be proper: the only proper forum over this matter currently is an impeachment trial in Congress; courts would only gain jurisdiction over this matter if Mr. Trump were first convicted of impeachment.

There is minimal to no legal risk in seeking such a Writ of Prohibition immediately. At best, it would end the case against Mr. Trump before it even started. It should, at least, result in a stay of the trial while the Writ of Prohibition is litigated and possibly appealed. And, at worst, if the Writ of Prohibition is not granted, such a ruling is unlikely to affect the viability of any appeal Mr. Trump may need to make in the future since any litigation involving this writ would be constrained to arguments over whether the indictment is impermissible on its face. Even if such litigation fails, the arguments made in this memorandum, as well as numerous others, could still be made in defense of Mr. Trump on appeal, when there is a complete trial record for an appellate court to consider instead of simply the face of the indictment, which is all that a Writ of Prohibition would attack.

Indeed, a Writ of Prohibition could be sought simultaneously or before a motion to dismiss, as they would address different issues. A motion to dismiss would take issue with the details of the charges laid out in the indictment; meanwhile, a Writ of Prohibition takes issue with the fact that any indictment has been brought against a former president for actions he took while in office, regardless of the particular substance of the allegations contained in the indictment.

Indeed, if a Writ of Prohibition were granted, this would preclude the trial court from even ruling on a motion to dismiss because the Writ of Prohibition would block the trial court from exercising any jurisdiction over the case, unless Mr. Trump were first convicted of impeachment. Thus, seeking a Writ of Prohibition to preclude the trial court from even hearing the federal election case against Mr. Trump at this time should be viewed as a free, extra bite at the apple that there is little reason not to take.

Seeking a Writ of Prohibition in this manner also would provide Republicans in Congress with an opportunity to join Mr. Trump in opposing this indictment. It is not just Mr. Trump's constitutional rights that are being ignored by the bringing of this indictment, but the constitutional rights of every member of Congress, too. It is the responsibility and power of such members of Congress—not the courts—to determine whether to hold or not hold a president legally liable for actions he took while in office. As such, seeking a Writ of Prohibition provides a perfect opportunity for Republican Members of Congress to join in defense of Mr. Trump against this indictment, either as parties jointly seeking the writ to vindicate their own constitutional powers or as amicus supporting the issuance of a such a writ given the lack of any conviction for impeachment.

XI. Avenues for Further Research to Bolster these Arguments

This memorandum attempts to explain the potential value of using the historic context analysis of *Bruen* and *Dobbs* to argue for a more robust doctrine of presidential immunity from legal liability (in the absence of a conviction for impeachment) than exists in current law. However, this memorandum only does so by using a handful of contemporaneous documents. If these arguments are to be made, significant research should be undertaken to bolster the historical record. Some areas worth additional research are: (1) other contemporaneous letters and records about executive immunity, executive authority, and/or impeachment authored during the drafting of the Constitution and in the years that followed ; (2) the executive actions of the early Presidents (such as President Washington's Proclamation of Neutrality, as discussed in *Pacificus No. 1*) ; (3) the legal immunities provided to the colonial governors; (4) the legal immunities of the executives of other nations in 1787-98; (5) the legal immunities of State governors during the time when the Articles of Confederation was operative; (6) the access to and control of state secrets by colonial governors; (7) the access to and control of state secrets by State governors during the time when the Articles of Confederation was operative; (8) the access to and control of state secrets by political leaders and military officers of the several states during the Revolutionary War; (9) the learned writings that would have been relied on by the Founders, including those by Hume, Montesquieu, and Blackstone.

XII. Conclusion

This memorandum attempts to articulate a legal theory of presidential immunity that can be applied to each of the three indictments. In essence, the argument boils down to a simple question: "*Could George Washington have been prosecuted if he took similar actions and if the relevant statutes existed while he was President?*" If the answer is "no," then it is equally improper to prosecute Mr. Trump under these indictments, given that *Bruen* and *Dobbs* mandate that all constitutional provisions be applied in accordance with their fixed meaning in 1787-1789.

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The National Constitutional Law Union

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