IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CASE NO. 23SC188947
	:	
DONALD JOHN TRUMP,	:	Judge: Scott McAfee
	:	
Defendant.	:	

PLEA IN BAR/MOTION TO DISMISS ON CONSTITUTIONAL AND STATUTORY DOUBLE JEOPARDY GROUNDS AND SUPPORTING MEMORANDUM OF LAW

President Trump files this plea in bar/motion to dismiss on double jeopardy grounds, and in support relies on this memorandum of law:

I. President Trump's Trial and Acquittal by the U.S. Senate Bars Criminal Prosecution for Offenses Arising from the Same Course of Conduct.

The indictment must be dismissed because President Trump was impeached, tried by the Senate, and *acquitted* on articles of impeachment that arise from the same alleged facts and course of conduct as the criminal indictment in this case[*]. In January 2021, President Trump was impeached by the House on articles arising from the same course of conduct at issue in the indictment. H. RES. 24 (117th Cong. 1st Sess.), at https://www.congress.gov/bill/117th-congress/house-resolution/24/text.

[*]The full January 2021 impeachment record is found at https://www.govinfo.gov/collection/impeachment-related-publications and is incorporated herein solely for purposes of determining this motion.

The articles of impeachment charged that President Trump "repeatedly issued false statements asserting that the Presidential election results were the product of widespread fraud and should not be accepted by the American people or certified by State or Federal officials;" made "false claims" in a speech on January 6; engaged in "prior efforts to subvert and obstruct the certification of the results of the 2020 Presidential election," including through a phone call to the Georgia Secretary of State; and "threatened the integrity of the democratic system." *Id.* The Constitution's plain text, structural principles of separation of powers, our history and tradition, and principles of Double Jeopardy bar a federal or state prosecution from seeking to re-charge and re-try a President who has already been impeached and acquitted in a trial before the U.S. Senate.

The text of the Constitution straightforwardly provides that only a "Party *convicted*" by the Senate may be charged by "Indictment, Trial, Judgment and Punishment"—not a party *acquitted*. As the Senate acquitted President Trump, the prosecution may not re-try him in this Court.

To be removed from office, the President must be convicted by trial in the Senate, which has exclusive authority under the Constitution for such trials: "The Senate shall have the sole Power to try all Impeachments. … And no Person shall be convicted without the Concurrence of two thirds of the Members present." U.S. CONST. art. I, § 3, cl. 6. "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." U.S. CONST. art. I, § 3, cl. 7 (emphasis added).

Because the Constitution specifies that only "the Party *convicted*" by trial in the Senate may be "liable and subject to Indictment, Trial, Judgment and Punishment," *id.*, it presupposes that a President who is *not* convicted may *not* be subject to criminal prosecution. *Id.* As Justice Alito notes, "[t]he plain implication" of the phrase "the Party convicted" in this Clause "is that criminal prosecution, like removal from the Presidency and disqualification from other offices, is a consequence *that can come about only after the Senate's judgment*, not during or prior to the Senate trial." *Trump v. Vance*, 140 S. Ct. 2412, 2444 (2020) (Alito, J., dissenting) (emphasis added). "This was how Hamilton explained the impeachment provisions in the Federalist Papers. He wrote that a President may 'be impeached, tried, and, upon conviction ... would *afterwards* be liable to prosecution and punishment in the ordinary course of law.'" *Id.* (quoting THE FEDERALIST No. 69, p. 416 (C. Rossiter ed. 1961) (emphasis added)); *see also* THE FEDERALIST No. 77, at 464 (A. Hamilton) (a President is "at all times liable to impeachment, trial, [and] dismission from office," but any other punishment must come only "by *subsequent* prosecution in the common course of law") (emphasis added).

Justice Alito's interpretation of the Clause is well-founded. The longstanding canon of interpretation *expressio unius est exclusio alterius* (or the "negative-inference canon") reflects "the principle that specification of the one implies exclusion of the other validly describes how people express themselves and understand verbal expression." SCALIA & GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, § 10, p. 107 (2012). "When a car dealer promises a low financing rate to 'purchasers with good credit,' it is entirely clear that the rate is *not* available to purchasers with spotty credit." *Id.* So also here, when the Constitution provides that "the Party convicted" in the Senate may be subject to criminal prosecution, "it is entirely clear that" the Party *acquitted* in a Senate trial "is *not*" subject to criminal prosecution for official acts. *Id.* This is true because the phrase "the Party convicted" "can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved." *Id.* Because there are only two possible outcomes from a Senate trial—conviction or acquittal—specifying the implications of only *one* outcome clearly means that those implications do *not* apply to the other outcome. *See id.*

The context of the Impeachment Judgment Clause strongly supports the negative implication that a Senate-acquitted President may *not* be prosecuted. Indeed, even the OLC memo discussing Double Jeopardy, concedes the argument "has some force." *Whether a Former President May Be Indicted and Tried for the*

Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. 110, 114 (2000) ("Double Jeopardy Memo").

The concession is an understatement. In England, "the House of Lords could not only remove officials from office and disqualify them from holding office, but also impose a full range of criminal punishments on impeachment defendants." *Id.* at 126. The Impeachment Judgment Clause altered that by limiting the punishments the Senate could impose to just removal and disqualification and then creating an exception to Double Jeopardy by saying a *convicted* officer could be criminally prosecuted. *See id.* at 126–27; *see also* U.S. CONST., art. I, § 3, cl. 7. But nothing indicates it altered the criminal nature of the impeachment process. To the contrary, the second proviso in the Clause is unnecessary if impeachment and conviction have *no* jeopardy implications.

That reading is to be avoided. *See*, *e.g.*, *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012) (surplusage canon). Since the Clause references only "the Party Convicted," the usual rules of Double Jeopardy apply to acquittals—they "bar ... a subsequent prosecution for the same offense." *Ball v. United States*, 163 U.S. 662, 671 (1896). Indeed, OLC admits this reading is reasonable. *See* Double Jeopardy Memo, 24 Op. O.L.C. at 116–18.

Justice Story certainly found it persuasive. In the section of the *Commentaries* cited by OLC, *see* J.A.641; 24 Op. O.L.C., at 125–26, he notes that under the British

system, where the House of Lords could "pronounce a full and complete sentence," an acquittal would bar further prosecution. 3 Story, *supra*, § 780. But under the constitutional structure, where impeachment and conviction result in removal and disqualification, Story recognized "that provision should be made" authorizing additional prosecution, or else there would be "extreme doubt, whether ... a second trial for the same offence could be had, either after an acquittal, or a conviction ...." *Id*. The only provision for future criminal prosecution in the Impeachment Judgment Clause is for "the Party convicted ... ." U.S. CONST., art. I, § 3, cl. 7. OLC, to be sure, said that Justice Story believed the Impeachment Judgment Clause "removed any doubt about a double jeopardy bar in the case of Senate acquittals ... ." Double Jeopardy Memo, 24 Op. O.L.C. at 126. There is no analysis behind that statement, which makes sense because the assertion is baseless. The express reference to prosecution after *conviction* does not make "provision"—to borrow from Justice Story—for prosecution after *acquittal*. The opposite is true.

This interpretation reflects the original public meaning of the impeachment clauses. "The Framers ... appeared to anticipate that a President who commits serious wrongdoing should be impeached by the House and removed from office by the Senate—and then prosecuted thereafter." Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2158 (1998). "James Wilson—who had participated in the Philadelphia Convention at which the document was

drafted—explained that, although the President … is amenable to [the laws] in his private character as a citizen, and *in his public character by impeachment*.'" *Clinton v. Jones*, 520 U.S. 681, 696 (1997) (emphasis added) (quoting 2 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 480 (2d ed. 1863) (cleaned up). "With respect to acts taken in his 'public character'—that is, official acts—the President may be disciplined principally by impeachment…." *Id.*

In addition, in Federalist No. 43, James Madison indicated that concerns about politically motivated prosecutions led to the adoption of the definition of "treason" in Article III, Section 3, Clause 1 of the Constitution:

> As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it; but as *new fangled and artificial treasons, have been the great engines, by which violent factions, the natural offspring of free governments, have usually wreaked their alternate malignity on each other*, the [Constitutional] convention have with great judgment opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the congress, even in punishing it, from extending the consequences of guilt beyond the person of its author.

THE FEDERALIST No. 47 (Madison) (emphasis added). Hamilton thrice said criminal prosecution can only *follow* impeachment *and conviction*. *See* FEDERALIST NO. 65; FEDERALIST NO. 69; FEDERALIST NO. 77. In Federalist No. 65, Alexander Hamilton explained that the Constitution entrusted impeachment trials to the Senate because the risk of politically motivated criminal trials, which would inevitably be

tainted by factionalism and partisanship, was too great in the courts, including even the Supreme Court:

> A well constituted court for the trial of impeachments, is an object not more to be desired than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or in other words from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself. *The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties, more or less friendly or inimical, to the accused*. In many cases, it will connect itself with the pre-existing factions, and will inlist all their animosities, partialities, influence and interest on one side, or on the other; and in such cases there will always be the greatest danger, that the decision will be regulated more by the compar[a]tive strength of parties than by the real demonstrations of innocence or guilt.

THE FEDERALIST No. 65 (Hamilton) (emphasis added). Hamilton went on to argue that even the Supreme Court should not handle prosecutions of major political figures: "The awful discretion, which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community, *forbids the commitment of the trust to a small number of persons*. These considerations seem alone sufficient to authorise a conclusion, that the Supreme Court would have been an improper substitute for the Senate, as a court of impeachments." *Id.* (emphasis added).

Other statements by Charles Lee, *see Marbury*, 5 U.S. at 149, and Chief Justice Marshall likewise point to impeachment as the primary means of addressing

presidential malfeasance. To the same effect is a Gouverneur Morris statement OLC discussed; he said that "'[t]he Executive ought therefore to be impeachable for treachery; Corrupting his electors, and incapacity ... . For the latter he should be punished not as a man, but as an officer, and punished only by degradation from office.'" Double Jeopardy Memo, 24 Op. O.L.C. at 128.

Punishment of the President *is* irreducibly political and so belongs primarily to the branch most politically accountable—Congress and, ultimately, the Senate. "The subjects of [impeachment] are those offenses which proceed from the misconduct of public men ... . They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself." FEDERALIST NO. 65 (Hamilton). "[T]he Senate [is] the most fit depositary of this important trust." *Id.* By requiring widespread political consensus within the U.S. Senate—the historical "cooling saucer" of the Republic—before a President can be criminally prosecuted, the Impeachment Judgment Clause protects Presidents from "new fangled and artificial treasons." FEDERALIST NO. 47. The Supreme Court has repeatedly affirmed the view that impeachment is political—and so is the principal, constitutionally prescribed method to address Presidential malfeasance. *See Clinton*, 520 U.S. at 696; *Fitzgerald*, 457 U.S. at 757.

In addition, treating impeachment as the exclusive remedy for alleged crimes committed in office is consistent with the Supreme Court's immunity decisions as

to other sensitive officials, such as federal judges. The Supreme Court has held that judges are absolutely immune from civil liability and criminal prosecution for their official acts, and that the sole remedy is impeachment: "But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, *the judges of these courts can only be reached by public prosecution in the form of impeachment*, or in such other form as may be specially prescribed." *Bradley v. Fisher*, 80 U.S. 335, 354 (1871) (emphasis added).

In *Nixon v. Fitzgerald*, the Supreme Court reinforced this conclusion by emphasizing that the proper remedy against a President for official misfeasance is "the threat of impeachment," not criminal prosecution:

> A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive. There remains the constitutional remedy of impeachment. In addition, there are formal and informal checks on Presidential action…. The President is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment. Other incentives to avoid misconduct may include a desire to earn reelection, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature.

Nixon v. Fitzgerald, 457 U.S. 731, 757 (1982). *See also, e.g.*, *Bradley v. Fisher*, 80 U.S. 335, 354 (1871) ("But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts [i.e., Article III courts] can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed.").

Here, President Trump is not a "Party convicted" in an impeachment trial by the Senate. U.S. CONST. art. I, § 3, cl. 7. In January 2021, he was impeached by the House on articles arising from the same course of conduct at issue in the indictment. H. RES. 24 (117th Cong. 1st Sess.), *at* https://www.congress.gov/bill/117th-congress/house-resolution/24/text. Among other allegations, the articles of impeachment charged that President Trump "repeatedly issued false statements asserting that the Presidential election results were the product of widespread fraud and should not be accepted by the American people or certified by State or Federal officials;" made "false claims" in a speech on January 6; engaged in "prior efforts to subvert and obstruct the certification of the results of the 2020 Presidential election," including through a phone call to the Georgia secretary of state; and "threatened the integrity of the democratic system." *Id.* The indictment here rests on the very same alleged facts. President Trump was acquitted of these charges after trial in the Senate. He is thus not a "Party convicted" under Article I, Section 3, Clause 7, and he is not subject to "Indictment, Trial, Judgment and Punishment" for the same course of conduct. U.S. CONST. art. I, § 3, cl. 7.

In sum, under the Constitution, the Executive Branch—including the prosecution—lacks authority to second-guess the determination of acquittal made by the United States Senate, the body to which the Constitution explicitly entrusts this authority. To do so violates the Impeachment Judgment Clause and the

principles of separation of powers, by unlawfully encroaching on authority exclusively vested in Congress. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-89 (1952). "The Founders of this Nation entrusted the [impeachment] power to the Congress alone in both good and bad times." *Id.* at 589.

II. President Trump's Prosecution is Barred by the Georgia Constitution and OCGA § 16-1-8(c).

The Georgia Constitution states, "**Jeopardy of life or liberty more than once forbidden.** No person shall be put in jeopardy of life or liberty more than once for the same offense except when a new trial has been granted after conviction or in case of mistrial." Ga. Const. Art. I, § I, Para. XVIII. President Trump already was put in jeopardy for the "same offense," *i.e.*, same conduct, when he was tried, and acquitted, in the U.S. Senate.

Per the argument in Section I above, if he had been convicted in that forum, he could have been subject to further prosecution by the State of Georgia. But President Trump was acquitted. Thus, his prosecution by Fulton County prosecutors is barred.

The State also is barred from prosecuting President Trump under the statutory double jeopardy provisions of OCGA § 16-1-8 (c) because he has been previously acquitted of federal crimes stemming from the same conduct.

President Trump recognizes that states are sovereigns separate from the federal government, and a state's power to undertake criminal prosecutions is derived from its own inherent sovereignty. *Heath v. Alabama*, 474 U.S. 82, 89 (1985). Under the dual sovereignty doctrine, where a single act violates the law of two sovereigns (e.g., the United States and a state), an individual may be prosecuted and punished by each sovereign without violating double jeopardy. *See Heath,* 474 U.S. at 88. Under this doctrine, a state is not constitutionally barred from prosecuting an accused merely because the federal government had already done so. *See Heath*, 474 U.S. at 88; *Sullivan v. State*, 279 Ga. 893, 894, 900 (2005).

But the Georgia General Assembly has elected to impose a statutory limitation to successive prosecutions under OCGA § 16-1-8 (c). That statute provides:

> A prosecution is barred if the accused was formerly prosecuted in a district court of the United States for a crime which is within the concurrent jurisdiction of this state if such former prosecution resulted in either a conviction or an acquittal and the subsequent prosecution is for the same conduct, unless each prosecution requires proof of a fact not required in the other prosecution or unless the crime was not consummated when the former trial began.

Here, considering the U.S. constitutional provision requiring that a President may only be tried in the U.S. Senate, "district court" should be read to include that forum. Moreover, "concurrent jurisdiction" should be found to exist for the alleged "crimes" included within the impeachment record, *see* n.1 *supra*, and the offenses

alleged against President Trump in the indictment in this case. Finally, the "subsequent prosecution" here is alleged to be the "same conduct" for which President Trump was acquitted in the Senate and no additional "proof of fact" is required here. Accordingly, the Fulton County prosecution is prohibited under § 16-8-1(c).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify I electronically filed the foregoing document with the Clerk of Court using Odyssey Efile Georgia electronic filing system that will send notification of such filing to all parties of record.

This 8th day of January, 2024.

/s/ Steven H. Sadow
STEVEN H. SADOW