THE FEDERALISM THAT MARK MEADOWS WANTS THE 11TH CIRCUIT TO REVERSE

Mark Meadows immediately appealed the decision Judge Steve Jones issued Friday not to remove the Georgia prosecution of the former White House Chief of Staff to federal court, so the decision will not be final until at least one right wing court has had a chance to reverse it.

The most important decision from the 11th Circuit and SCOTUS in the meantime will be whether to stay the proceedings in Georgia as this appeal goes forward, which is not supposed to happen under removal, but the appeals courts may view the appeal as something different procedurally.

For now, then, I want to map out how Jones unwound the difficult issues of federalism and separation of powers to get to his decision, because they lie at the core of both January 6-related prosecutions of Trump. This is a decision that weighs the supremacy of federalism over the state, the reservation to states to conduct elections, and the separation of powers between the executive and the legislative. Meadows' appeal is likely to be the second or third time SCOTUS gets to weigh in on Trump's conduct on January 6 (the first being his attempt to use Executive Privilege to prevent the Archives from sharing documents with the January 6 Committee, another being appeals of the civil lawsuits out of DC), so the logic Jones applied here may influence later criminal proceedings against Trump and others.

After laying out that 28 U.S.C. § 1442(a)(1) is one exception to the precedent that the federal government does not intervene in state prosecutions, Judge Jones noted that the standard for removal is low. Meadows doesn't

need to prove his case; he needs to prove that the prosecution is "closely connected with" his role as a federal officer.

> The Supreme Court has cautioned that "an airtight case on the merits in order to show the required causal connection" is not required and that courts are to "credit" the movant's "theory of the case" for the elements of the jurisdictional inquiry.5 Jefferson Cnty. v. Acker, 527 U.S. 423, 432 (1999). "The point is only that the officer should have to identify as the gravamen of the suit an act that was, if not required by, at least closely connected with, the performance of his official duties." Id. at 447 (Scalia, J., dissenting).

Having acknowledged the standard is low, Jones nevertheless found that Meadows had not met that bar, because the actions he is accused of taking as part of the RICO conspiracy served the ultimate goal of affecting state election activities and procedures on behalf of the Trump campaign.

> The Court concludes that Meadows has not met even the "quite low" threshold for removal. Again, what the Court must decide for purposes of federal officer removal is whether the actions Meadows took as a participant in the alleged enterprise (the charged conduct) were related to his federal role as White House Chief of Staff. The evidence adduced at the hearing establishes that the actions at the heart of the State's charges against Meadows were taken on behalf of the Trump campaign with an ultimate goal of affecting state election activities and procedures. Meadows himself testified that working for the Trump campaign would be outside the scope of a White House Chief of Staff. Hearing Tr. 113:2–6.

Based on this formula — that Meadows' activities were taken on behalf of the Trump campaign with the goal of affecting state election activities — Jones distinguished Meadows' activities from his job as Chief of Staff in two ways.

First, while Meadows made expansive claims about his role as Chief of Staff that he attempted to use to claim he had to set up the meetings Trump had with Georgia (and other state) officials, Jones noted that both sides agreed the Hatch Act prohibited White House employees, including Meadows, from using his official position to engage in election activity.

> Meadows also testified that as White House Chief of Staff he was bound by the Hatch Act11 and he could not engage in political activity. Hearing Tr. 39:7–25; 135:21–136:5. As discussed more fully below, the Hatch Act prohibits "an employee" from "us[ing] his official authority or influence for the purpose of affecting the result of an election." 5 U.S.C. § 2732(a)(1). This includes, "[u]sing his or her official title while participating in political activity." 5 C.F.R. § 734.302(b)(2). And political activity is defined as, "activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group." Id. § 734.101.
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> The Court finds that the color of the Office of the White House Chief of Staff did not include working with or working for the Trump campaign, except for simply coordinating the President's schedule, traveling with the President to his campaign events, and redirecting communications to the campaign. Thus, consistent with his testimony and the federal statutes and regulations, engaging in political activities is exceeds the outer limits of the Office of the White House Chief of Staff.

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> When questioned about the scope of his authority, Meadows was unable to explain the limits of his authority, other than his inability to stump for the President or work onbehalf of the campaign. Hearing Tr. 111:12–113:6. The Court finds that Meadows did not adequately convey the outer limits of his authority, and thus, the Court gives that testimony less weight.12
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> 12 In this case, Meadows was the main witness presenting testimony for his case. Thus, the Court must determine the appropriate amount of weight to assign to his testimony when evaluating it, the same as it does any other witness in an evidentiary hearing. However, given the nature of the motion, and the pending criminal proceedings the Court makes these decisions with great caution. The determinations here do not go to Meadows's propensity to be truthful as a general matter. However, the Court cannot undertake the task assigned by 28 U.S.C. § 1455(b)(5) without assigning the appropriate weight to the testimony.
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> [snip]
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> The Hatch Act prohibits executive branch employees from "us[ing] [their] official authority or influence for the purpose of interfering with or affecting the result of an election[.]" 5 U.S.C. § 7323(a)(1). The federal regulation governing political activities of federal employees prohibits the same. 5 C.F.R. § 734.302(a). The regulation, moreover, broadly defines "political activity" to be "activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group." Id. § 734.101. The types of behaviors that Meadows is alleged to be

> involved in included post-election activities and election outcomes in various States pertaining to a particular candidate for office. If these potentially political activities indeed come against the Hatch Act, its regulations limit such efforts. These prohibitions on executive branch employees (including the White House Chief of Staff) reinforce the Court's conclusion that Meadows has not shown how his actions relate to the scope of his federal executive branch office. Federal officer removal is thereby inapposite. [my emphasis]

Meadows had *tried* to argue that the overt acts accuse him of nothing more than those permitted activities, organizing Trump's schedule and redirecting communications to the campaign. But Jones only bought that argument in the context of one of the overt acts attributed to Meadows (getting a phone number from Scott Perry). For the rest, Jones ruled that Meadows was engaged in activities for the campaign.

The Hatch Act doesn't apply to the President and Vice President. So if Jones' ruling relied exclusively on the application of the Hatch Act, it would have no relevance for Trump.

But Jones also relied on the Elections Clause of the Constitution that reserves the conduct of elections to the states.

> The Constitution does not provide any basis for executive branch involvement with State election and post-election procedures. The Elections Clause expressly reserves the "Times, Places, and Manner" of elections to state legislatures. U.S. Const. art. I, § 4, cl. 1; see also Shelby Cnty. v. Holder 570 U.S. 529, 543 (2013) ("[T]he Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to

> regulate elections." (quoting Gregory v. Ashcroft, 501 U.S. 452, 461–62 (1991)); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 833–34 (1995) ("[T]he Framers understood the Elections Clause as a grant of authority [to state legislatures] to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints."). States have been tasked under the Elections Clause to "provide a complete code" for elections which ought to include "regulations 'relat[ing] to . . . prevention of fraud and corrupt practices [and] counting of votes . . . .'" Moore v. Harper, 600 U.S. —-, 143 S. Ct. 2065, 2085 (2023) (quoting Smiley v. Holm, 285 U.S. 355, 366 (1932)). This is not a power incident to a State's police powers but "derives from an express grant in the Constitution." Fish v. Kobach, 840 F.3d 710, 727 (10th Cir. 2016).
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> [snip]
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> Thus, the executive branch cannot claim power to involve itself in States' election procedures when the Constitution clearly grants the States the power to manage elections under the Elections Clause. [my emphasis]

Note that Jones relied on both Shelby County (rejecting part of the Voting Rights Act) and Moore v. Harper (rejecting the Independent State Legislature theory) in this passage, both opinions authored by Chief Justice Roberts and the more recent one joined by Justices Kavanaugh and Barrett. There's nothing controversial or surprising about this. But in both cases, there's fierce Republican support at SCOTUS for the states' authority in conducting their own elections — on paper, at least, even more fiercely among SCOTUS' more radical right wing

members.

Meadows' appeal will have to argue positions directly the reverse of those that the Trump campaign floated during the campaign.

Meadows *had* tried to invoke two other bases for the White House Chief of Staff to butt into state elections: the Take Care Clause and the executive's ability to offer advice to Congress.

> 13 The only potential constitutional authority, the Take Care Clause, does not enable the type of election oversight to which the State's Indictment pertains. See U.S. Const. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed[.]"). Yet, executive authority under the Take Care Clause "does not extend to government officials over whom [the Executive] has no power or control." Thompson v. Trump, 590 F. Supp. 3d 46, 78 (D.D.C. 2022). The Court accordingly rejects Meadows's suggestion that the Take Care Clause provides a basis for finding executive authority over state election procedures. Doc. No. [45], 9–10.
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> The Court is also unpersuaded by Meadows's contention that his acts involving state election procedures are within executive power to advise Congress. Doc. No. [45], 10. It would be inconsistent with federalism and the separation of powers, to find that activities which are delegated to the states are also within the scope of executive power because the executive branch may advise Congress. Cf. Fish, 840 F.3d at 725–26 ("The [Elections] Clause is a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices." (quoting Foster, 522 U.S. at

> 69). The Court will not find that the executive branch has some advisory authority in this space in light of the express constitutional grant over elections to the States.

But here, too, Jones noted that the executive simply had no role here.

Here's how this analysis works in practice, as Jones applied it to Meadows' visit to Cobb County to monitor the vote count.

> Similarly, Overt Act 92 alleges that Meadows traveled to Cobb County, Georgia where he "attempted to observe the signature match audit being performed there by law enforcement officers from the Georgia Bureau of Investigations and the Office of the Georgia Secretary of State." Doc. No. [1-1], 44. Meadows testified that his actions with respect to this allegation were:
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> > in line with [his duties], because what I did was go to the Cobb County convention center to look at the process that they were going through. And in doing so was trying to, again, check that box to say, all right, everything is being done right here, and so if there's allegations of fraud, we need to move on to something else.
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> Hearing Tr. 152:4–17. The Court factually finds that Meadows overseeing State election recount processes related to President Trump's reelection campaign. Meadows failed to provide sufficient evidence that these actions related to any legitimate purpose of the executive branch. Accordingly, the Court finds Meadows has not met his burden in establishing that Overt Act 92 is related to scope of the Office of White House Chief of Staff.

The executive has no role in such vote counts. And so the only purpose for Meadows to observe the count was on behalf of Trump's campaign.

As Trump's federal prosecution proceeds, there will be (and has been, in appellate consideration of the application of the 18 USC 1512(c)(2) to the vote certification) similar analysis about the Electoral College Act that reserves certain roles to Congress, not the executive. In his post-election activities, Trump (and Meadows) were simply intervening in one of the few areas where, thus far, judges have ruled that the executive has no role.

The analysis will be different for Jeffrey Clark because DOJ — but not its civil division — *does* have a role in investigating any federal election crime. Georgia has focused their response to Clark's bid to remove his prosecution by presenting the testimony of the people who were in charge at DOJ, who slapped down Clark's intervention.

But as to Meadows, Judge Jones has found that the things he did to intervene in Georgia's elections on Trump's behalf had no valid federal purpose.

Update: Meadows has asked Judge Jones for a stay, not (yet) the 11th Circuit.