

# TRUMP CANNOT BE TRIED FOR JANUARY 6 UNDER DOUBLE JEOPARDY CLAUSE

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Special Counsel Jack Smith

accuses former President Donald Trump of causing the January 6, 2021, Capitol riot through his “lies” about the 2020 presidential election. To that end, he indicted Trump yesterday (8/01) on four federal counts — one of which carries a potential death penalty.

But Smith’s indictment itself offers nothing new. It carries same criminal charge of the second impeachment resolution against Trump, namely “incitement of insurrection,” and for which he was acquitted by the Senate. It is barred, therefore, by the Constitution’s Double Jeopardy Clause.

The Double Jeopardy Clause, contained within the Fifth Amendment, prevents any person from being tried twice in a federal court for the same crime.

It does not prevent someone from being tried for the same crime in a state court and a federal court, because state and federal governments are considered to be “dual sovereigns.” But it applies to the federal level — and while an impeachment trial in the Senate is not a formal criminal proceeding, it has many of the same features as a federal criminal trial.

One of the Constitution’s Impeachment Clauses, in Article I, Section 3, Clause 7, does say that a person who has been *convicted* by the Senate in an impeachment trial can still face a federal criminal trial: “the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.”

It does *not* say that a person who has been *acquitted* by the Senate can still be subject to the criminal process. Arguably, the Constitution intended to protect an acquitted official.

That seems even more convincing when considering that the standard of proof in the Senate is *lower* than in a criminal court — there is no requirement of proof beyond a reasonable doubt, just a preponderance of evidence as in civil court cases.

As Alexander Hamilton himself observed in *Federalist 65*, a Senate trial risks of being decided by political factors. An acquittal there is *harder* to win than one in criminal court.

The question then is: Can a president be criminally tried by the federal judiciary for the same crime from which he was legislatively acquitted?

The answer must be No. Therefore, Trump is protected by the Double Jeopardy Clause. The new indictment should be quashed before trial, and the country should be spared the drama.

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*Joel B. Pollak is the author of Neither Free nor Fair: The 2020 U.S. Presidential Election.*

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