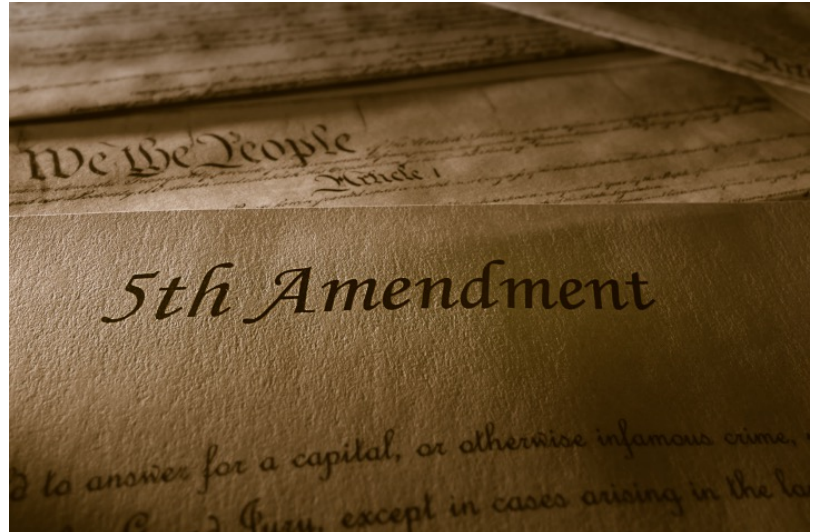




Written by [Joe Wolverton, II, J.D.](#) on October 7, 2023

# Would a Criminal Trial on Charges on Which He Was Acquitted During Impeachment Expose Trump to Double Jeopardy?

In a case that many pundits predict will end up before the U.S. Supreme Court, former President Donald J. Trump has filed a motion to dismiss charges filed against him in federal court. Asserting a novel constitutional defense to criminal charges filed against him in relation to his actions on and related to the events at the Capitol on January 6, 2021, the former president contends that he cannot face criminal prosecution in relation to a criminal charge of which the U.S. Senate acquitted him as part of the impeachment process without being placed in double jeopardy — being prosecuted twice for the same acts.



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Predictably, lawyers of the Biden administration's Justice Department hold a different viewpoint.

The Double Jeopardy Clause, enshrined in the Fifth Amendment to the United States Constitution, is a fundamental safeguard against multiple prosecutions for the same crime. In relevant part, it reads:

"No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

As with so many constitutional clauses, this provision is designed to protect individuals from the oppressive power of the government and the potential for harassment through repeated prosecutions.

Double jeopardy, defined narrowly, forbids "only sanctions which can be considered as 'punishment.'"

To apply the Double Jeopardy Clause to the situation of a former president facing criminal charges after impeachment, we must consider several key factors:

**1. Impeachment vs. Criminal Prosecution:** Impeachment and criminal prosecution are distinct processes with different purposes. Impeachment is a political process, outlined in the Constitution, whereby Congress has the authority to remove a sitting president or other federal official for "high crimes and misdemeanors." It involves a two-step process: the House of Representatives drafts articles of impeachment, and the Senate conducts a trial to determine whether to remove the official from office. It does not result in criminal penalties, but can lead to the removal from office and, in a separate Senate vote, disqualification from holding future office.

**2. Standard of Proof:** Impeachment and criminal prosecution have different standards of proof. In an impeachment trial, the standard is a political one, in which members of Congress vote based on their judgment of whether the official's actions constitute "high crimes and misdemeanors." In a criminal trial, the standard is much higher, as the prosecution must prove guilt beyond a reasonable doubt. The difference in standards reflects the distinct purposes of these processes.



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**3. Different Outcomes:** Impeachment can lead to removal from office and disqualification from future office, but it does not involve incarceration or fines. Criminal prosecution, on the other hand, can result in imprisonment, fines, or other criminal penalties.

Given these distinctions, the question of whether trying Donald Trump on the same charges after impeachment violates the Double Jeopardy Clause is a complex and fervently debated one. Here are some arguments on both sides of the issue:

#### **Arguments in Favor of Violation of Double Jeopardy:**

Again, this is reportedly President Trump's principal argument in his claim that to hold him legally liable for acts for which he was previously acquitted would be double jeopardy. Despite disparaging denials made by people yet suffering from Trump Derangement Syndrome, there is some merit in these assertions. They might not ultimately prove dispositive, and they are in some way novel, but they do deserve careful, studied consideration.

1. **Punitive Nature of Impeachment:** Some argue that impeachment, particularly when it leads to disqualification from future office, carries punitive consequences. Therefore, subjecting a former president to criminal prosecution for the same conduct may be seen as imposing double punishment for the same offense, which violates the Double Jeopardy Clause.
2. **Same Conduct, Different Forums:** Critics contend that the conduct in question remains the same whether it's addressed through impeachment or criminal prosecution. Therefore, trying a former president in both forums for the identical actions could be seen as double jeopardy, as it involves the government pursuing multiple punishments for a single offense.

#### **Arguments Against Violation of Double Jeopardy:**

1. **Distinct Purposes:** Proponents of this view emphasize the different purposes of impeachment and criminal prosecution. Impeachment is primarily a political process intended to safeguard the government's integrity and protect against abuse of power. Criminal prosecution, on the other hand, is a legal process aimed at punishing individuals for violating criminal laws. As such, they argue that these processes serve different functions and should not be considered double jeopardy.

There is support from the Founding Fathers for this point.

James Wilson, in [a lecture written on the Impeachment Clause](#), observed the distinct spheres occupied by the impeachment process and the criminal law:

On one hand, the most powerful magistrates should be amenable to the law: on the other hand, elevated characters should not be sacrificed merely on account of their elevation. No one should be secure while he violates the constitution and the laws: every one should be secure while he observes them.

In *The Federalist* No. 65, Alexander Hamilton, speaking of the trial of impeachment, declared:

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. [Emphasis in original.]



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Even more directly relevant to his inquiry is a [statement made by Representative James Bayard](#), Sr. of Delaware. In 1798, during the impeachment proceedings against former Senator William Blount, Bayard said:

Impeachment is a proceeding purely of a political nature. It is not so much designed to punish an offender as to secure the State. It touches neither his person nor his property, but simply divests him of his political capacity.

When taken in concert, these three statements from the 18th century point to the outcome of the political procedure known as impeachment as having no relevance to the application of a criminal code to the former office holder.

On to the second point against criminal charges filed after acquittal on charges of impeachment being an act of double jeopardy.

2. Different Standards of Proof: The varying standards of proof required in impeachment and criminal trials reflect the disparate nature of these proceedings. Impeachment relies on political judgment, while criminal prosecution demands rigorous legal proof. This distinction further supports the argument that they are not two prosecutions for the same offense.

3. Constitutional Mechanisms: The Constitution provides Congress with the authority to impeach and try federal officials, including the president. It also permits criminal prosecution for criminal conduct. Supporters of this view argue that both processes are authorized by the Constitution and can coexist without violating double jeopardy principles.

In fact, this must be so, otherwise the Constitution would contradict itself, and such an assumption must not be made unless there is no other more reasonable presumption. As Emmerich de Vattel wrote in his book *The Law of Nations* — a book relied upon and referred to by nearly every Founding Father — regarding “absurdities” in contracts:

Every interpretation that leads to an absurdity, ought to be rejected; or, in other words, we should not give to any piece a meaning from which any absurd consequences would follow, but must interpret it in such a manner as to avoid absurdity. (Book II, Chapter 17, Section 282)

In other words, it would be absurd for the Constitution to provide for criminal prosecution for criminal conduct and impeachment, if those two procedures would trigger double jeopardy.

### **Conclusion:**

In conclusion, the question of whether trying Donald Trump on the same charges after impeachment constitutes a violation of the Double Jeopardy Clause is contentious and legally complex. While the Supreme Court has not directly addressed this specific scenario, it is essential to consider the distinct purposes and standards of proof in impeachment and criminal prosecution, as well as the constitutional mechanisms in place for each. Ultimately, the resolution of this question may require further legal analysis, and it remains a topic of ongoing debate among legal scholars and experts.



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