



Written by [Steve Byas](#) on September 8, 2022

Second Indictment of Steve Bannon Raises Double Jeopardy and Double Standard Questions

Steve Bannon, former publisher of Breitbart News and one-time close political confidant of former President Donald Trump, traveled to New York on Thursday to turn himself in after a New York grand jury returned an indictment against him, with accusations that Bannon played a role in “defrauding donors” who gave money to the “Build the Wall Charity.”

These are essentially the same charges that Bannon faced in August of 2020, when shortly before the presidential election, federal prosecutors announced their intentions to pursue Bannon for the same alleged crime. This latest prosecution has raised serious questions about putting Bannon in “double jeopardy,” specifically forbidden by the Fifth Amendment to the U.S. Constitution. President Trump pardoned Bannon before he left office, even though he (Trump) had nothing to do with the scheme and had publicly denounced the effort.



Steve Bannon surrenders in New York court to face charges (AP Images)

When Trump first heard of the charges, he told reporters that he did not favor private efforts like the “Build the Wall Charity” to build a wall along the U.S. border with Mexico — to stop illegal entry into the country — largely because he considered it something the federal government should be doing, not a private charity.

Build the Wall Charity actually built more border wall — for less money and in less time — than the federal government. The organization used privately donated funds to construct a wall — a wall that Trump had promised to build if he were elected in 2016, but was blocked from completing by a hostile Congress.

State prosecutors in New York are essentially charging Bannon with the very same “crime” that he was pardoned for by President Trump near the end of his term. A president has near-plenary power to pardon any person for a real or alleged violation of federal law — a power the Framers of the Constitution gave to the president to place a check on abuse by the judicial branch. In other words, the president cannot pardon a person for state and local charges, only federal charges. When President Bill Clinton was about to leave office in 2001, he pardoned his brother, Roger, for federal drug charges, but he would not have been able to pardon him for, say, a traffic ticket in Arkansas.

Bannon surrendered his passport in an agreement to allow him to stay out of jail on bail, and released a



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statement in which he said, “Just days after being swatted three different times by deranged thugs from New York City inspired by the Biden Administration to assassinate me by police, the [George] Soros-backed DA has decided to pursue phony charges against me sixty days before the midterm election.”

He compared this latest attempted prosecution to the federal charges he faced in 2020. “The SDNY [the federal Southern District of New York prosecutors] did the exact same thing in August 2020,” he said. “This is nothing more than a partisan political weaponization of the criminal justice system.”

Prosecutors, of course, had a different take on the indictment that they sought. They allege that donors were duped in the fundraising by Build the Wall Charity because not all of the money went to building the wall. Instead, some of the money — \$350,000, prosecutors allege — went to Brian Kolfage, the group’s president, despite Kolfage’s assurances that he was “taking zero dollars of a salary, no compensation,” and that Bannon was aware of this.

In fact, Alvin Bragg, the Manhattan district attorney, claimed that Bannon “acted as the architect of a multi-million dollar scheme to defraud thousands of donors across the country.” If convicted, Bannon faces five to 15 years in prison.

It is widely believed that federal prosecutors — and state prosecutors, as in this case — are very selective in whom they decided to prosecute. Many Americans have witnessed the spectacle of Democrats skating — most famously Hillary Clinton in 2016 — without any punishment for breaking federal laws, while simultaneously observing that Republicans — like Bannon and conservative filmmaker Dinesh D’Souza — are prosecuted aggressively.

Former CIA Director John Brennan was accused of lying to Congress — a federal crime — but, of course, nothing was done to him, as he was part of the Obama administration and a fierce Trump critic.

Readers who are familiar with the Bill of Rights of the U.S. Constitution might ask why state prosecution of a person for the same alleged offense for which Brannon was pardoned at the federal level is allowed, as it would seem to violate the Fifth Amendment’s prohibition on double jeopardy. The Fifth Amendment states clearly, “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.”

Not surprisingly, the words of the Bill of Rights mean very little when someone the Left wants to see prosecuted needs to be hounded by state officials. We have seen this play out quite often in recent years — the clear words of the Constitution are held to not mean what they actually say. As President Joe Biden said recently, the Bill of Rights protections are not absolute — apparently whenever these protections get in the way of the progressive agenda.

These advocates of trying a person once in federal court, then in state court, or vice-versa, argue that if a state prosecutes someone, it does not prevent the federal government from putting the person, for a second time, in danger of life or limb. This is known as the “dual sovereignty” doctrine — since both the state and the federal governments are “sovereignities,” then each can conduct a second trial even after a person is found not guilty or, as in Bannon’s case, pardoned.

In *Heath v. Alabama*, the Supreme Court opined, “The dual sovereignty doctrine is founded on the common-law conception of crime as an offense against the sovereignty of the government.”

Adam Adler, writing in the *Yale Law Review* in November 2014, noted that many constitutional scholars believe “dual sovereignty” was not the intent of the Framers. “Most opponents,” Adler wrote, “believe the doctrine is fundamentally unfair to defendants, that it is directly at odds with the values of the



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Double Jeopardy Clause, and that it lacks historical legitimacy.”

It certainly seems in conflict with the so-called Incorporation Doctrine, not enunciated by the Supreme Court until less than 100 years ago, which holds that the Bill of Rights restricts not only the federal government, but also the states, as well. Under this interpretation, then, if the First Amendment states that Congress cannot infringe on freedom of speech, neither can a state. Scholar Rauol Berger argued in his book that the Incorporation Doctrine is not supported by the Constitution.

In this case, however, the Fifth Amendment’s prohibition on double jeopardy, designed to protect a citizen from repeated prosecutions for the same alleged offense by an over-zealous or tyrannical prosecutor, no longer applies, because, well, the state is “sovereign.” However, the Supreme Court has previously ruled that a state is *not* sovereign in its prohibition of same-sex marriage, for example, but *is* sovereign in gutting protections against double jeopardy.

If it seems as though all of this is inconsistent, highly selective, and hypocritical, it is because it is all of those things.

Applied consistently, the doctrine would allow a defendant to agree to a plea deal (90 percent of both federal and state-charged offenses presently end in a plea deal, with no trial) in say, Oklahoma, but then prosecutors could opt to prosecute him again and seek a more severe sentence. That would certainly discourage someone from agreeing to a plea deal, thinking, what good does it do? The same thing could happen (as in this case) when an accused person is pardoned, or found not guilty at the federal level, but then has new charges filed at the state level by a leftist prosecutor for partisan purposes.

Unfortunately, many who call themselves “civil libertarians” will choose to look the other way when an ally of their hated enemy, Donald Trump, is in the crosshairs of a partisan prosecutor. This is not just about Steve Bannon, however. It is about the piecemeal surrender of the precious rights protected in our federal Constitution, all in the name of “getting” Trump.

Today it is Bannon. Tomorrow, it may be you.

Correction: As originally published the article unintentionally referred to former CIA Director John Brennan as a Trump “loyalist”; the intended word was “critic.” We apologize for the mistake.



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