

## The Breakfast Club

### Constitutional Minute for 11 April 2023

#### Right #12: Protection Against Double Jeopardy

In the 1999 movie *Double Jeopardy* starring Tommy Lee Jones and Ashley Judd, a wife is framed and convicted of her husband's death even though a body was not found. Sent to prison, she eventually gets out on parole. She knows she was innocent of the charge and eventually learns her husband is still alive. If she is successful in hunting him down and killing him now for his complicity in the treachery, can she be retried for the crime of murder? I won't spoil the ending, you'll have to watch the movie, which is free with Amazon Prime.

The Double Jeopardy clause of the Fifth Amendment has been involved in all sorts of interesting charges and trials. Where did the clause come from?

Commenting in his famous 1833 *Commentaries on the Constitution*, Justice Joseph Story wrote:

"This, again, is another great privilege secured by the common law. The meaning of it is, that a party shall not be tried a second time for the same offence, after he has once been convicted, or acquitted of the offence charged, by the verdict of a jury, and judgment has passed thereon for or against him. But it does not mean, that he shall not be tried for the offence a second time, if the jury have been discharged without giving any verdict; or, if, having given a verdict, judgment has been arrested upon it, or a new trial has been granted in his favour; for, in such a case, his life or limb cannot judicially be said to have been put in jeopardy." (emphasis added)

So we got the double jeopardy standard from the common law? It is therefore based on common sense, as confirmed by countless judge's decisions: you should only be placed in jeopardy once for a specific crime. Common sense.

And, yes, the Double Jeopardy clause has been incorporated against the states. In [\*Benton v. Maryland\*, 395 U.S. 784 \(1969\)](#), the Supreme Court decided the states are bound to observe this bedrock principle.

... nor shall any person be subject *for the same offence to be twice put in jeopardy of life or limb.*"

But there is an enormous "gotcha" involved in this principle: In fact, you could even say the principle of double jeopardy has become a farce. "Under the multiple sovereignties doctrine, multiple sovereigns can indict a defendant for the same crime. Federal and state governments can have overlapping criminal laws, so a criminal offender may be convicted in individual states and federal courts for exactly the same crime or for different crimes arising out of the same facts."<sup>i</sup>

In the famous Rodney King trial of four police officers, after being acquitted of assault in state court, two of the four officers were convicted under a federal civil rights statute. So much for double jeopardy.

There is also the matter of criminal law versus civil law. The [\*O.J. Simpson case\*](#) is one of the most famous examples of this. Due to the differences in how the jury is required to treat the evidence in each instance ("beyond a reasonable doubt" in criminal cases, "preponderance of the evidence" in civil cases), a person can be acquitted under a criminal complaint while convicted under a similar civil complaint. Murder (criminal law) can be considered as denying someone their civil right to life (civil

law). The Simpson case provides the perfect example: acquitted of murder in criminal court, he was subsequently found guilty in civil court of wrongful death.

The *Body of Liberties of the Massachusetts Collonie in New England*, published in 1641, is the first appearance of the Double Jeopardy clause in America: "No man shall be twice sentenced by Civill Justice for one and the same Crime, offence, or Trespass." Madison's original draft of the amendment in 1789 read: "No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense." Wordsmithing as the BOR proceeded through the House and Senate produced the wording we have today. New Hampshire's 1784 Constitution was the first state constitution to include a double jeopardy clause. A similar clause was added to the 1902 Virginia Constitution.

What constitutes "the same offense? Sometimes the same act or conduct may violate different statutes.

A defendant was first convicted of operating an automobile without the owner's consent, and later he was convicted of stealing the automobile. In [Brown v. Ohio](#), the Supreme Court concluded that the same evidence was necessary to prove both offenses, and that in effect there had been only one offense. It overturned the second conviction.

However, in [United States v. Felix](#), the U.S. Supreme Court ruled: "a[n]...offense and a conspiracy to commit that offense are not the same offense for double jeopardy purposes." Having failed to prove you committed the offense, the state could still convict you of conspiracy to do so if the evidence was sufficient.

"Twice put in jeopardy" When is a defendant actually placed "in jeopardy?" In jury trial, jeopardy begins when the jury is empaneled and sworn in, in a bench trial it begins when the court begins to hear evidence after the first witness is sworn in, or when a court accepts a defendant's unconditional plea.

"In [Breed v. Jones, 421 U.S. 519 \(1975\)](#), the Supreme Court found that double jeopardy applies to an individual who was tried as a juvenile and was later tried as an adult for the same crime. This is because juvenile courts usually have the option to try a minor as an adult. If that court chooses to try the individual as a juvenile, a later trial court may not try that same individual as an adult for the same crime.<sup>ii</sup>

You'll recall my recent mention of the nefarious program called *Civil Asset Forfeiture (CAF)*. In [United States v. Ursery, 518 US 267 \(1996\)](#), the Supreme Court held that property seizures under CAF did not constitute a "punishment" for purposes of the double jeopardy clause. The civil property forfeiture is a "remedial civil sanction," and not a punitive criminal "punishment." (There once again is the distinction between civil and criminal law). Acquitted in criminal court, you still may not get seized property back.

For further reading: Note: this is the only book I can find devoted exclusively to this topic.

[Double Jeopardy, The History, The Law, by George C. Thomas III, 1998.](#)

Next week: Right #13: Protection Against Self-Incrimination

Prepared by: Gary R. Porter, Executive Director, Constitution Leadership Initiative, Inc. for The Breakfast Club.  
Contact: [gary@constitutionleadership.org](mailto:gary@constitutionleadership.org); 757-817-1216

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<sup>i</sup> [https://en.wikipedia.org/wiki/Double\\_jeopardy](https://en.wikipedia.org/wiki/Double_jeopardy)

<sup>ii</sup> [https://www.law.cornell.edu/wex/double\\_jeopardy](https://www.law.cornell.edu/wex/double_jeopardy)