Written by **Joe Wolverton, II, J.D.** on July 16, 2013

Zimmerman Federal Hate Crimes Prosecution Would Be Double Jeopardy

On July 13, a jury acquitted George Zimmerman of charges of second-degree murder and manslaughter in the death of Trayvon Martin. Despite being found not guilty of criminally killing Martin, Zimmerman faces an uncertain and dangerous future. Before the verdict was announced, radical groups were calling for riots and for personal attacks on Zimmerman.

In the wake of his acquittal, Zimmerman now faces another threat to his freedom and his future.

As reported by *The New American*,

> Zimmerman could also face a civil trial if Martin's family brings a wrongful death suit against him for the fatal shooting that Zimmerman's lawyers successfully argued in the criminal trial was a matter of self-defense.
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> The Justice Department has said it is investigating the case, and Ben Jealous, president of the NAACP, said the nation's oldest and largest civil rights organization has urged the department to bring criminal charges against Zimmerman, who was born to a white father and Hispanic mother, for allegedly violating the civil rights of Martin, an African-American.

There is a problem with such a scenario. As the *Wall Street Journal* reports, "Millions of Americans would see such federal charges as an example of double jeopardy, and a politicized prosecution to boot."

While many Americans have a workable understanding of this critical concept, a more thorough examination of double jeopardy may help explain why the Founding Fathers included protection from it in the Bill of Rights.

An article in the Long Island *Newsday* presents the problem in a nutshell:

> The U.S. Justice Department, which opened an investigation into the George Zimmerman case Sunday, could charge him with federal civil rights violations, local attorneys said.
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> While a Florida jury found neighborhood watch volunteer Zimmerman not guilty of second-degree murder, a federal probe would examine whether he violated Martin's civil rights when he fatally shot him Feb. 16, 2012, in Sanford, Fla.
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> To prove such violations requires a different standard of evidence and law than what was used in the state case against Zimmerman. So a federal prosecution would not be double jeopardy, they said.

The Fifth Amendment to the Constitution guarantees that "No person shall … be subject for the same offense to be twice put in jeopardy of life or limb."

Joseph Sobran once wrote, "One of the great goals of education is to initiate the young into the

conversation of their ancestors; to enable them to understand the language of that conversation, in all its subtlety, and maybe even, in their maturity, to add to it some wisdom of their own."

To that end, it is important to understand what "double jeopardy" meant in the language of the Framers of the Constitution.

In his decision in the case of *United States v. Gilbert,* Justice Joseph Story sets the metes and bounds of the protection:

> My judgment is, that the words in the constitution, "Nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb," mean that no person shall be tried a second time for the same offence, where a verdict has been already given by a jury. The party tried is in a legal sense, as well as in common sense, in jeopardy of his life, when a lawful jury have once had charge of his offence as a capital offence upon a good indictment, and have delivered themselves of the charge by a verdict.

Later in the same decision, Story explained the common law provenance of this particular principle:

> This too is the clear, determinate and well settled doctrine of the common law, acting upon the same principle, as a fundamental rule of criminal jurisprudence. I deem it a privilege of inestimable value to the citizen; and that it was introduced into the constitution upon the soundest principles of prudence and justice. But if it were otherwise, it is my duty to administer the constitution as it stands and not to incorporate new provisions into it. If this clause does not prohibit a new trial, where there has already been a regular trial and verdict, then it is wholly immaterial whether the verdict is of acquittal or of conviction of the offence.

The lawyers, pundits, and professional race-baiters currently clamoring for another trial on charges of violating a federal civil rights statute point to the fact that a second trial would require "a different standard of evidence and law." They cannot, however, claim that a second shot at punishing Zimmerman would involve a different set of facts — one more favorable to a guilty verdict.

In fairness, such a scenario is not covered by the Constitution. This is undoubtedly due to the fact that not a single man present at the Constitutional Convention in 1787 could have imagined that the limited government they were establishing would one day promulgate thousands of pages of federal crimes, particularly since such a police power was not granted by the states to the federal government. According to the 10th Amendment, then, that power is retained by the states and the people.

Furthermore, the Obama administration would face a formidable legal obstacle were it decide to prosecute Zimmerman for having violated the federal Hate Crime Prevention Act.

In order to prove that Zimmerman was guilty under that statute, the Justice Department would have to demonstrate that the attack on Trayvon Martin was not only unjustified, but that it was motivated by race.

Apart from the difficulty in carrying its burden of proof in a federal hate crimes case, a more insuperable roadblock in the path of a Justice Department decision to prosecute Zimmerman a second time is the lack of constitutional authority to do so.

The federal government is a government of limited, enumerated powers. If a power is not given to it in the Constitution, the federal government is prohibited from legislating in that area.

There is not a single syllable in the Constitution that gives the federal government police power over issues of state or local law enforcement. Therefore, Congress has no authority to criminalize the

behavior covered by the several federal hate crime laws.

This does not mean, however, that violent crimes will go unpunished. As the Heritage Foundation explained in 2009:

> The fact that the federal Constitution does not authorize Congress to address particular conduct does not mean that such conduct must be left unpunished. In the case of "hate crimes," the underlying violent conduct is punishable as a crime in every state, regardless of the motivation of the perpetrator or identity of the victim. Further, almost every state has adopted criminal offenses that increase the penalty for certain violent crimes deemed to be "hate crimes." Whether or not such enhancements are needed, they do not exceed the states' authority under the Constitution to criminalize violent, non-economic activity that is truly local in nature. And they do not undermine the ultimate responsibility and accountability of state and local officials to investigate and prosecute such crime.

A statement issued Sunday by President Obama may make the question of double jeopardy moot. In the message posted on the White House website, President Obama urged "calm reflection" and declared, "We are a nation of laws, and a jury has spoken."

Should, however, Attorney General Eric Holder or his boss cave to the pressure from "civil rights" organizations and decide to prosecute George Zimmerman, the Constitution will be offended in two ways: First, George Zimmerman will be denied one of his civil rights — specifically that protecting him from being tried twice for the same crime (double jeopardy) as guaranteed by the Fifth Amendment; second, the core constitutional concepts of federalism and enumerated powers will once again be sacrificed by the federal government on the altar of absolute, consolidated power over the life and limb of every American.

Joe A. Wolverton, II, J.D. is a correspondent for The New American *and travels frequently nationwide speaking on topics of nullification, the NDAA, and the surveillance state. He can be reached at jwolverton@thenewamerican.com*