WHAT JACK SMITH DIDN'T SAY IN HIS DOUBLE JEOPARDY RESPONSE

Jack Smith just submitted his response to Trump's immunity claims before the DC Circuit.

While most attention will be on the absolute immunity claims, given the disqualification of Trump in Colorado and Maine, I'm more interested in Smith's response to Trump's claim that his impeachment acquittal precludes these charges.

That's because, depending on how this appeal goes, Jack Smith could make the question of Trump's (dis)qualification much easier by superseding this indictment with an insurrection charge.

Most of the response argues that impeachment and criminal charges are different things. That argument is likely to prevail by itself.

In addition, though, the response repeated a passage, almost verbatim, that appeared in Smith's response before Chutkan. In it, Smith said that the elements of offense currently charged do not overlap with the elements of offense for an insurrection charge.

> Any double-jeopardy claim here would founder in light of these principles. Without support, the defendant asserts that his Senate acquittal and the indictment in this case involve "the same or closely related conduct." Br.52. Not so. The single article of impeachment alleged a violation of "Incitement of Insurrection," H.R. Res. 24, 117th Cong. at 2 (Jan. 11, 2021) (capitalization altered), and charged that the defendant had "incit[ed] violence against the Government of the United States," id. at 3. The most

> analogous federal statute is 18 U.S.C. § 2383, which prohibits "incit[ing] . . . any rebellion or insurrection against the authority of the United States or the laws thereof." A violation of Section 2383 would therefore require proof that the violence at the Capitol on January 6, 2021, constituted an "insurrection against the authority of the United States or the laws thereof" and that the defendant incited that insurrection. Incitement, in turn, requires proof that the speaker's words were both directed to "producing imminent lawless action" and "likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927-28 (1982). None of the offenses charged here—18 U.S.C. § 371, 18 U.S.C. § 1512(c)(2) and (k), and 18 U.S.C. § 241—has as an element any of the required elements for an incitement offense. And the elements of the charged offenses—e.g., conspiring to defeat a federal governmental function through deceit under Section 371, obstruct an "official proceeding" under Section 1512, and deprive persons of rights under Section 241—are nowhere to be found in the elements of a violation of Section 2383 or any other potential incitement offense. The mere fact that some of the conduct on which the impeachment resolution relied is related to conduct alleged in the indictment does not implicate the Double Jeopardy Clause or its principles. See Dixon, 509 U.S. at 696.

This doesn't mean that Smith *will* supersede Trump, if this appeal succeeds. There are a lot of reasons not to do so (including that Trump would get to file a motion to dismiss that charge).

That said, Smith might have another reason to do so if SCOTUS significantly narrowed the obstruction charge in the *Fischer* appeal, because the obstruction charge is how Smith is presenting the evidence that Trump caused the attack on the Capitol.

In my view, this language keeps options open.