DOUBLE JEOPARDY- INDIANS - COURTS: WHETHER SUCCESSIVE PROSECUTIONS ARISING FROM A SINGLE ACT ARE BARRED BY THE CONSTITUTION'S DOUBLE JEOPARDY CLAUSE

Denezpi v. United States, 142 S. Ct. 1838 (2022).

ABSTRACT

In *Denezpi v. United States*, the United States Supreme Court interpreted the Double Jeopardy Clause as it applied to the question of whether successive prosecutions can arise from a single act. The Court *held* that the Double Jeopardy Clause of the Fifth Amendment does not prevent successive prosecutions of different offenses that stemmed from a single action, even if a sole sovereign prosecutes them. In this case, Merle Denezpi, a member of the Navajo Nation, was charged in a tribal CFR court for assault and battery and was sentenced to 140 months. Several months later, Denezpi was charged with a federal crime of aggravated sexual abuse and sentenced to thirty years. Denezpi challenged his prosecution in federal court, arguing it violated the Double Jeopardy Clause to the United States Constitution, because he had already been prosecuted and sentenced by a prosecutor who exercised federal authority in the Court of Indian Offenses, meaning he was prosecuted twice by the United States. Denezpi lost in the district court, and the Tenth Circuit of the U.S. Court of Appeals affirmed. The Court *held* that the Double Jeopardy Clause does not bar consecutive prosecutions of separate offenses resulting from a single act, even if one sovereign prosecutes them, holding that because tribes and the federal government are two separate sovereigns, their offenses are necessarily different. The Court relied on the dual-sovereignty principle and emphasized that two offenses rooted in the same act can be prosecuted separately without violating the Double Jeopardy Clause, even if the crimes have the same elements and could not be twice prosecuted by a single sovereign. Denezpi's single act comprised of assault and battery crimes under the code of the Ute Mountain Ute Tribe, and aggravated sexual abuse in Indian country under federal law. Justice Gorsuch's dissent argued the CFR court derives powers from the federal government; therefore, one prosecuting authority charged Denezpi twice for the same offense, which is prohibited by the Double Jeopardy Clause in the U.S. Constitution.

I. FACTS

In *Denezpi v. United States*,[1] two members of the Navajo Nation, Merle Denezpi ("Denezpi") and V.Y., traveled together to Towaoc, Colorado, a town within the Ute Mountain Ute Reservation.[2] The two spent time in a house belonging to Denezpi's friend.[3] When Denezpi was alone with V.Y., he barricaded the door, and then threatened and forced V. Y. to have sex with him.[4] When Denezpi fell asleep, V. Y. escaped and reported the incident to the tribal authorities.[5] An officer working for the Federal Bureau of Indian Affairs subsequently filed a criminal complaint with the Court of Indian Offenses ("CFR court").[6] Denezpi was charged with three crimes: assault and battery, terroristic threat, and false imprisonment.[7] Denezpi pleaded guilty to assault and battery in violation of the Ute Mountain Code.[8] The terrorist

1. 142 S. Ct. 1838 (2022).
2. *Denezpi*, 142 S. Ct. at 1844.
3. *Id*.
4. *Id.*
5. *Id.*
6. *Id*.; *Court of Indian Offenses*, U.S. DEP'T OF THE INTERIOR INDIAN AFFS., https://www.bia.gov/CFRCourts (last visited Mar. 27, 2023) ("Courts of Indian Offenses (CFR ccourts) operate where Tribes retain jurisdiction over American Indians that is exclusive of state jurisdiction, but where tribal court have not been established to fully exercise that jurisdiction.").
7. *Denezpi*, 142 S. Ct. at 1844.
8. *Id.*

threat and false imprisonment charges in violation of the CFR code were dismissed, and Denezpi was sentenced to time served. [9]

Six months later, Denezpi was indicted by a federal grand jury on one count of aggravated sexual abuse in Indian country in the District of Colorado.[10] This offense is covered under the Major Crimes Act.[11] Denezpi moved to dismiss the charge, arguing that it was barred under the Double Jeopardy Clause ("Clause") of the Fifth Amendment.[12] The district court denied the motion, a jury convicted Denezpi, and the court sentenced him to 360 months' imprisonment.[13]

The Tenth Circuit affirmed and concluded that the prosecution in federal court, the second conviction, did not constitute double jeopardy because the tribe's inherent sovereignty provided the source of power used to prosecute the tribal code violation in the CFR court, while the federal government used their power to prosecute Denezpi under the Major Crimes Act in the subsequent prosecution.[14]

II. LEGAL BACKGROUND

Writing for the Court, Justice Barrett discussed the Clause and its relation to the dual-sovereignty doctrine as well as the historical background of Indian courts.[15] The source of power for the CFR court and the tribal code is determinative in analyzing the Clause.[16]

A. DOUBLE JEOPARDY AND DUAL SOVEREIGNTY

"The Double Jeopardy Clause[17] protects a person from being prosecuted twice 'for the same offence.'"[18] However, a person can be prosecuted twice for the same offense[19] without offending the Clause if prosecuted by different sovereigns.[20] "An offense defined by one sovereign is necessarily

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9. *Id.*

10. *Id.*

11. *Id.*; 18 U.S.C. § 1153 ("Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A . . . shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.").

12. *Denezpi*, 142 S. Ct. at 1844.

13. *Id.*

14. *Id.*

15. *Id.* at 1845.

16. *Id.*

17. U.S. CONST. amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb").

18. *Denezpi*, 142 S. Ct. at 1840.

19. *Id.* at 1846 ("[O]ffence mean[s] 'the violation of a law.'").

20. *Id.*

different from an offense defined by another, even when the offenses have identical elements."[21] A sovereign is a political concept of supreme authority by a governing body.[22] "This dual-sovereignty principle applies where 'two entities derive their power to punish from wholly independent sources.'"[23]

"The Clause by its terms does not prohibit twice placing a person in jeopardy 'for the same *conduct* or *actions*.'"[24] Instead, the Clause prohibits successive prosecutions for the same "offence."[25] Offenses, or acts committed against laws, are defined by the sovereign which makes and enacts the laws.[26] "Because the sovereign source of a law is an inherent and distinctive feature of the law itself, an offense defined by one sovereign is necessarily a different offense from that of another sovereign."[27] Because of this, "offenses can be separately prosecuted without offending the Double Jeopardy Clause-even if they have identical elements and could not be separately prosecuted if enacted by a single sovereign."[28] The states, the federal government, and tribes are all separate sovereigns, and "[w]hen a tribe enacts criminal laws, then, 'it does so as part of its retained sovereignty and not as an arm of the Federal Government.'"[29]

B. BACKGROUND ON THE UTE MOUNTAIN UTE TRIBE AND INDIAN COURTS

"Six years after the Indians Reorganization Act of 1934,[30] the Weenuche Band at Ute Mountain Ute Reservation organized a tribal government and enacted a tribal constitution."[31] That is when the Weenuche Band of the Ute Nation of Indians became what it is now known as the Ute Mountain Ute Tribe.[32] The Tribal Council is the governing body of the Ute Mountain Ute Tribe.[33] The Tribal Council consists of seven elected members chosen by popular vote of tribal members.[34] The Chairman of the council is elected for

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21. *Id*.
22. *Sovereignty,* CORNELL L. SCH., https://www.law.cornell.edu/wex/sovereignty#:~:text=The%20Sovereign%20is%20the%20one,power%20of%20others%20to%20interfere (last visited Nov. 8, 2022).
23. *Denezpi*, 142 S. Ct. at 1841 (quoting Puerto Rico v. Sánchez Valle, 579 U. S. 59, 68 (2016)).
24. *Id*. at 1844 (quoting Gamble v. United States, 139 S. Ct. 1960, 1965 (2019)).
25. *Id*.
26. *Id*.
27. *Id*. 1844-45 (citing *Gamble*, 139 S. Ct. at 1965).
28. *Id*. at 1845 (citing *Gamble*, 139 S. Ct. at 1965).
29. *Id*.
30. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934).
31. UTE MOUNTAIN TRIBE, https://www.utemountainutetribe.com (last visited Mar. 27, 2023).
32. *Id.*
33. *Id*.
34. *Id.*

a term of three years.[35] The Tribal Council is funded by the Tribe, the United States Bureau of Indian Affairs, the Department of Health and Human Services, and the Indian Health Services.[36]

The United States consists of three sovereign entities that co-exist: "the Federal government, the States, and the Indian Tribes."[37] The three sovereigns have their own judicial systems and "each plays an important role in the administration of justice in this country."[38] Tribal courts have been expanding since the Indian Reorganization Act of 1934.[39] The Indian Reorganization Act of 1934 "allowed the tribes to organize their governments, by drafting their own constitutions, adopting their own laws through tribal councils, and setting up their own court systems."[40] The Indian Reorganization Act of 1934 attempted to restore the rights of tribes to self-governance by encouraging tribes to forego utilizing CFR courts,[41] and instead use their own self-governed court system.[42]

There are currently five CFR courts left in the nation that serve multiple tribes.[43] CFR courts were created in the 1880s as a primary court that operated under the Code of Federal Regulations to aid in the adjudication of less serious criminal offenses and disputes between tribal members on reservations.[44]

> CFR courts have jurisdiction over two sets of crimes. First, federal regulations set forth a list of offenses that may be enforced in CFR court. In addition, a tribe's governing body may enact ordinances that, when approved by the Assistant Secretary, are enforceable in CFR court and supersede any conflicting federal regulations.[45]

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35. *Id.*

36. *Id.*

37. Sandra D. O'Connor, *Lessons from the Third Sovereign Indian Tribal Courts*, 33 TULSA L. J. 1, 1 (1997); Steven W. Perry et al., *Tribal Courts in the United States, 2014 – Statistical Tables*, BUREAU OF JUST. STATS. (Jul. 2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/tcus14st_0.pdf.

38. O'Connor, *supra* note 37, at 1.

39. *Id.*

40. *Id*.

41. *Id*. ("Before the Act, tribal judicial systems were based around the Courts of Indian Offenses, which were established in the 1880's by the federal Office of Indian Affairs.").

42. Perry et al., *supra* note 37, at 3.

43. *Court of Indian Offenses*, *supra* note 6 (the five CFR courts are: Albuquerque, Southern Plains, Western Region, Eastern Oklahoma Region, and the Southwest Region CFR court.).

44. Denezpi v. United States, 142 S. Ct. 1838, 1843 (2022); *see* Adam Crepelle, *Tribal Lending and Tribal Sovereignty,* 66 DRAKE L. REV. 1, 29 (2018); Perry et al., *supra* note 37, at 3.

45. *Denezpi*, 142 S. Ct. at 1843 (citations omitted).

Today, many tribes have displaced CFR courts by establishing their own court systems.[46] Tribes that have not implemented their own court system continue to rely on CFR courts.[47] The Ute Mountain Ute Tribe has not yet established its own court system, so it continues to utilize the Southwest Region CFR court.[48] The Ute Mountain Ute Tribe has adopted its own tribal penal code which is enforceable in the CFR court.[49] The core dispute in this case lies in the violation of the tribal code and the code's source of power in relation to the dual-sovereignty principle.[50]

C. THE CRIME

Denezpi was charged with assault and battery in violation of the Ute Mountain Ute Tribal Code, and was subsequently prosecuted in the CFR court.[51] An officer of the Federal Bureau of Indian Affairs brought the charge.[52] "The Magistrate sentenced Denezpi to time served–140 days' imprisonment."[53]

Six months later, "a federal grand jury . . . indicted Denezpi on one count of aggravated sexual abuse in Indian Country . . . ."[54] The federal government relied on the Major Crimes Act to prosecute the second offense utilizing federal jurisdiction.[55] The Major Crimes Act grants federal courts jurisdiction for certain listed offenses over Indian defendants.[56]

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46. *Id.*
47. *Id.*
48. *Id.* at 1844; *see also Court of Indian Offenses*, *supra* note 6.
49. *Denezpi*, 142 S. Ct. at 1844.
50. *Id.*
51. *Id.*
52. *Id*.
53. *Id.*
54. *Id.*
55. *Id.*
56. *See* 18 U.S.C. § 1153. *See generally* United States v. John, 437 U.S. 634 (1978). *See also Criminal Jurisdiction Major Crimes Act*, 2 AM. INDIAN L. REV. 148, 148–49 (1974) http://www.jstor.org/stable/20067828 (discussing development in the law regarding the Major Crimes Act); *The Major Crimes Act -18 U.S.C. § 1153,* DEP'T OF JUST. ARCHIVES (Jan. 22, 2020), https://www.justice.gov/archives/jm/criminal-resource-manual-679-major-crimes-act-18-usc-1153.

III. COURT'S ANALYSIS

A. THE MAJORITY OPINION

1. Double Jeopardy and Dual Sovereignty

The Double Jeopardy Clause can be found in the Fifth Amendment to the United States Constitution.[57] The Clause "was well established and encompassed" within seventeenth century common law pleas of *autrefois acquit, autrefois convict,* and *autrefois attaint* which literally translates to "other times acquitted, convicted, or attainted . . . ."[58]

"[T]he Clause prohibits separate prosecutions for the same offense; it does not [necessarily] bar successive prosecutions by the same sovereign."[59] The focus of the Clause is whether subsequent prosecutions are for the same offense.[60] An "offence" is defined by the law, and the law is defined by the sovereign that enacted those laws.[61] A particular law defined by one sovereign[62] is different than a law of another sovereign, even if the two offenses share identical elements and could not be separately prosecuted if enacted by a single sovereign.[63]

In the present case, even if the first prosecutor exercised federal authority[64] rather than tribal authority through the CFR court prosecution, the second prosecution still would not violate the Clause because the first prosecution utilized tribal code.[65] The Court has previously determined a tribal code derives its source of power from its inherent tribal authority which eliminates any double jeopardy.[66]

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57. U.S. CONST. amend. V (stating in part, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"); *Denezpi*, 142 S. Ct. at 1844.

58. William S. McAninch, *Unfolding the Law of Double Jeopardy*, 44 S.C. L. REV. 411, 414 (1993) (discussing the common law history of the modern rule against double jeopardy); *see also* Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution A Proposed Approach*, 92 GEO. L.J. 1183, 1186 (2004) (discussing the origin of the Double Jeopardy Clause).

59. *Denezpi*, 142 S. Ct. at 1843.

60. *Id.* at 1844; *see* U.S. Const. amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb").

61. *Denezpi*, 142 S. Ct. at 1844.

62. Puerto Rico v. Sanchez Valle, 579 U.S. 59, 62 (2016) (stating that whether a prosecuting authority is a sovereign is determined by answering "whether the prosecutorial powers of two jurisdictions have independent origins — or, said conversely, whether those powers derive from the same 'ultimate source.'").

63. *Denezpi*, 142 S. Ct. at 1844-45 (citing Gamble v. United States, 139 S. Ct. 1960, 1965 (2019)).

64. *Id*. at 1846 (The Court did not address the question of whether CFR Court prosecutors exercise federal authority. "We need not sort out whether prosecutors in CFR courts exercise tribal or federal authority . . . .").

65. *Id.*

66. *Id.* at 1845-46; United States v. Wheeler, 435 U.S. 313, 323 (1978).

To reiterate, the Clause "does not bar successive prosecutions of distinct offenses, even if a single sovereign prosecutes them".[67] *Who* prosecutes is irrelevant to the Clause,[68] instead, it is the source of the law that makes an impact on whether a violation of the Clause occurs.[69] "Because the sovereign source of a law is an inherent and distinctive feature of the law itself, an offense defined by one sovereign is necessarily a different offense from that of another sovereign."[70]

This is where the dual sovereignty principle applies: "where 'two entities derive their power to punish from wholly independent sources.'"[71] The Court cited to the seminal case of *United States v. Wheeler*,[72] a case that reached the Court in 1978.[73] In *Wheeler*, a member of the Navajo Tribe was convicted in tribal court for violating tribal code, and he was later charged in federal court for the same conduct.[74] *Wheeler* rejected the double jeopardy argument and reasoned before the Europeans arrived in America, Indian "tribes were 'self-governing sovereign political communities' with 'the inherent power to prescribe laws for their members and to punish infractions of those laws.'"[75] Therefore, although Congress has in some ways regulated tribal power, it did not *create* tribal power, which is a significant distinction to make.[76] The Court relied on this idea of inherent Indian sovereignty to explain the tribal code's source of power in the present case.[77] *Wheeler* recognized that a tribe's power to enact criminal laws comes from its retained sovereignty rather than an arm of the federal government.[78] Therefore, the initial tribal prosecution of the defendant in *Wheeler* did not bar a later federal prosecution for the same offense, since the tribal code prosecution has inherent prosecutorial authority.[79]

The reasoning in *Wheeler* controls this case.[80] Therefore, although a federal official conducted the initial prosecution using tribal code in the CFR court, the federal government prosecuted Denezpi in the second proceeding

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67. *Denezpi,* 142 S. Ct. at 1849.

68. *Id*. at 1840 ("The Double Jeopardy Clause does not ask who puts a person in jeopardy. It zeroes in on what the person is put in jeopardy for: the 'offence.' The Court has seen no evidence that 'offence' was originally understood to encompass both the violation of the law and the identity of the prosecutor.").

69. *Id*.

70. *Id*. (citing Gamble v. United States, 139 S. Ct. 1960, 1965 (2019)).

71. *Id.* (quoting Puerto Rico v. Sanchez Valle, 579 U.S. 59, 68 (2016)).

72. 435 U.S. 313 (1978).

73. *Id.*

74. *Id.* at 315.

75. *Denezpi,* 142 S. Ct. at 1845 (quoting *Wheeler*, 435 U.S. at 322-23).

76. *Id.* (citing *Wheeler*, 435 U.S. at 328).

77. *Id.*

78. *Id.* (citing *Wheeler*, 435 U.S. at 328).

79. *Id.*

80. *Id.*

under the Major Crimes Act.[81] Thus, "Denezpi's single act transgressed two [distinct] laws: the Ute Moutnain Ute Code's assault and battery ordinance and the United States Code's proscription of aggravated sexual abuse in Indian country."[82] Similar to *Wheeler*, the Ute Mountain Ute Tribe in the present case "exercised its 'unique' sovereign authority in adopting the tribal ordinance" and prosecuted Denezpi under that law.[83] Equally, Congress correctly exercised the United States' sovereign power when it enacted the federal criminal statute later used to prosecute Denezpi in district court.[84] The two laws, defined by two distinct sovereigns, the Ute Mountain Tribe and the federal government, proscribe separate offenses.[85] Since the two offenses are different, Denezpi's second prosecution would not put him in jeopardy for the same offense; consequently, the Court held there was no violation of the Clause.[86]

2. Denezpi's Argument

In his argument, Denezpi agreed that sovereigns define distinct laws and therefore, distinct offenses.[87] He also agreed the Ute Mountain Ute Tribe and the United States Federal Government are two distinct sovereigns, and that the two prosecutions included a tribal offense as well as a federal offense.[88]

However, Denezpi suggested *who* prosecutes the offense makes a significant distinction.[89] "Denezpi claims that prosecutors in CFR courts exercise federal authority because they are subject to the control of the Bureau of Indian Affairs" regardless of the code used.[90] This statement stems from his argument that CFR courts are an arm of the federal government; therefore, the federal prosecution should be barred by the Clause after an initial prosecution in the CFR court.[91] The basis of Denezpi's argument is that since CFR courts are extensions of the federal government, he was prosecuted twice by the federal government for his single act; therefore, the second prosecution violated the Clause.[92]

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81. *Id.* at 1846.
82. *Id.* at 1845.
83. *Id.*
84. *Id. See generally* United States v. John, 437 U.S. 634 (1978). *See* 18 U.S.C. § 1153; *Criminal Jurisdiction Major Crimes Act*, *supra* note 56, at 148-49; *The Major Crimes Act -18 U.S.C. § 1153*, *supra* note 56.
85. *Denezpi,* 142 S. Ct. at 1845.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 1846.
90. *Id.*
91. Reply Brief of Appellant Merle Denezpi at *3, *Denezpi,* 142 S. Ct. 1838 (No. 19-1213).
92. *Denezpi,* 142 S. Ct. at 1846.

The Court did not analyze whether prosecutors in CFR courts exercise tribal or federal authority because the Court disagreed with Denezpi's original premise that the Clause considers *who* the prosecutor is in a case.[93] Rather, the Court determined the focus of the Clause is to prohibit successive prosecutions "for the same offence."[94] Therefore, even if Denezpi is correct that the first offense, which was a violation of tribal law, was prosecuted by the federal government, the Court concluded the Clause does not bar the federal government from prosecuting Denezpi successively under the Major Crimes Act, a violation of federal law.[95] This is because "an offense defined by one sovereign is different from an offense defined by another."[96]

Denezpi's argument was incorrect because it treated "the dual-sovereignty doctrine as an exception to the Clause."[97] However, the Court has made clear that, "[a[lthough the dual-sovereignty rule is often dubbed an 'exception' to the double jeopardy right, it is not an exception at all. On the contrary, it follows from the text that defines that right in the first place."[98] The Clause places its emphasis on the offense itself, rather than the person or body that has placed that person in jeopardy.[99] "We have seen no evidence that 'offence" was originally understood to encompass both the violation of the law and the identity of the prosecutor."[100]

Adopting Denezpi's approach would have required the Court to hold that "a person's single act constitutes two separate offenses at the time of commission (because the act violates two different sovereigns' laws) but that those offenses later become the same offense if a single sovereign prosecutes both."[101] The Court refused to accept this result.[102]

Denezpi's single act led to prosecutions from a tribal ordinance and a federal statute.[103] Since the federal government and the Ute Mountain Ute Tribe are separate, distinct sovereigns, the offenses charged by each sovereign are different.[104] The Court concluded the second prosecution by the federal government did not violate the Clause.[105]

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93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* (quoting Gamble v. United States, 139 S. Ct. 1960, 1995 (2019)).
99. *Id.* at 1846-47 ("An offense has always referred to the crime itself, which is complete when a person has carried out all of its elements . . . . [Additionally,] an offense is committed before it is prosecuted.").
100. *Id.* at 1840.
101. *Id.* at 1847.
102. *Id.*
103. *Id.* at 1849.
104. *Id.*
105. *Id.*

B. THE DISSENTING OPINION

Justice Gorsuch's dissent, joined in part by Justice Kagan and Justice Sotomayor, held that Denezpi was charged twice for the same crime in violation of the Clause.[106] The dissent reasoned the dual-sovereignty doctrine does not align with the meaning of the Constitution, citing to Justice Gorsuch's dissent in *Gamble v. United States*.[107] The dissent stated that CFR courts are "part of the Federal Government,"[108] and because of this, the majority incorrectly analyzed the source of the first prosecution.[109] As stated in the dissent, Denezpi's first prosecution in the CFR court "was for the violation of federal regulations that assimilated tribal law into federal law."[110] The minority explains the application of the dual-sovereignty doctrine comes into play when two requirements are met: first, that the prosecutions are brought by laws of two different sovereigns and, second, the "'prosecuting entities' must 'derive their power to punish from wholly independent sources.'"[111] The dissent would hold that neither condition is met in this case.[112] The minority reasons that the CFR court trial constituted a federal conviction because Denezpi violated "§11.449, which assimilates federally approved tribal ordinances into federal law."[113] This is because CFR courts "may be an arm of the Federal Government."[114] This is in opposition to the majority's view, that the first conviction was tribal and the second was federal.[115] This dissent emphasized that CFR courts are intertwined with the federal government.[116] This is because the federal government employed and controlled the prosecutors in the CFR court, Denezpi was sentenced by a magistrate judge whom the federal government had the power to appoint and remove,[117] and Denezpi was incarcerated in a federal detention center facility.[118] Further, federal officials define and approve the offenses in CFR courts.[119] "Federal agency officials played every meaningful role in his case: legislator, prosecutor, judge, and jailor."[120] In the context of tribal law, the

106. *Id.* (Gorsuch, J., dissenting).
107. *Id.* (citing Gamble v. United States, 139 S. Ct. 1960, 1996 (2019)).
108. *Id.* (citing Law and Order on Indian Reservations, 58 Fed. Reg. 54406, 54407 (Oct. 21, 1993)).
109. *Id.* at 1852.
110. *Id.*
111. *Id*. at 1854 (quoting Puerto Rico v. Sanchez Valle, 579 U.S. 59, 68 (2016)).
112. *Id*.
113. *Id*. at 1852.
114. *Id*. at 1854.
115. *Id*. at 1852.
116. *Id*. at 1854.
117. *Id*. at 1855; *see* 85 Fed. Reg. 10714 (Feb. 25, 2020); 25 C.F.R. § 11.202 (2023).
118. *Denezpi,* 142 S. Ct. at 1855.
119. *Id*.
120. *Id*.

dissent argues that the tribal offense "assimilates federally approved tribal ordinances into federal law."[121]

As the dissent points out, the extended application of the dual-sovereignty doctrine by the majority has serious potential dangers.[122] The majority's holding could potentially open the doors for a state to prosecute a defendant twice for identical offenses, as long as one offense is prohibited by state law and one is prohibited by federal law.[123] At its extreme, the doctrine may encourage prosecutors to treat the primary trial as a "dress rehearsal" for the subsequent trial.[124] The majority and dissent are in complete disagreement about how much weight the Clause gives the prosecuting authority and whether charges under CFR courts are considered federal.[125] This indicates the Clause and its application may not be clear cut.

IV. DOUBLE JEOPARDY AND TRIBES IN NORTH DAKOTA

There are five federally recognized tribes at least partially located within North Dakota, each having their own tribal court systems instead of using CFR courts.[126] The double jeopardy issues in *Denezpi* have been previously raised in tribal courts like the courts utilized by tribes in North Dakota.[127] The holding in *Denezpi* runs parallel with *Bearcomesout v. United States*,[128] a case brought by Tawnya Bearcomesout ("Bearcomesout") from the Northern Cheyenne Tribe in Montana.[129] Like tribes in North Dakota, the Northern Cheyenne Tribe does not use CFR courts and instead has its own tribal court system.[130]

Bearcomesout was charged with homicide in the Northern Cheyenne Tribal Court.[131] Subsequently, she was sentenced to one year imprisonment through the tribal court system.[132] After the charge in tribal court, Bearcomesout was indicted on charges of voluntary and involuntary

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121. *Id*. at 1852.

122. *Id.*

123. *Id*. at 1855.

124. *Id.*

125. *Id.*

126. *Tribal Nations*, N.D. INDIAN AFFS., https://www.indianaffairs.nd.gov/tribal-nations (last visited Apr. 19, 2023).

127. *See* United States v. Bearcomesout, No. CR 16-13-BLG-SPW, 2016 WL 3982455, (D. Mont. July 22, 2016), *aff'd*, 696 F. App'x 241 (9th Cir. 2017).

128. No. CR 16-13-BLG-SPW, 2016 WL 3982455, (D. Mont. July 22, 2016).

129. *Bearcomesout*, 2016 WL 3982455, at *1.

130. *Montana Indian Law*, MONT. GOV., https://indianlaw.mt.gov/nc/ (last visited Apr. 25, 2023); *Tribal Court*, SISSTON WAHPETON OYATE, https://www.swo-nsn.gov/departments/justice-department/tribal-court/ (last visited May 1, 2023); *History*, STANDING ROCK SIOUX TRIBE, https://www.standingrock.org/about/history/ (last visited May 1, 2023); *see Court of Indian Offenses*, *supra* note 6.

131. *Bearcomesout*, 2016 WL 3982455, at *1.

132. *Id*.

manslaughter in federal court.[133] Bearcomesout filed a motion to dismiss the federal charges on double jeopardy grounds.[134] She argued the tribe and federal government are not separate sovereigns; therefore, since both charges were brought by the same sovereign, the federal charges should be barred by the Clause.[135]

Bearcomesout argued the tribe's inherent sovereignty has been extinguished;[136] therefore, the tribal court prosecution was "in essence a federal prosecution," and the subsequent indictment violated the Clause.[137] Bearcomesout supported her argument that the tribe lost their inherent sovereignty by relying on the Northern Cheyenne Tribe's Constitution, which states that promulgating and enforcing ordinances of the tribe requires approval and review by the Secretary of the Interior, a federal officer.[138] "Bearcomeout argues that the general requirements demonstrate that the federal government, through its review and approval power, dictates the management of all Tribal functions. She further argues that by acquiescing to federal government review and approval power over prosecutions, the Tribe has no prosecutorial sovereignty."[139] However, cases such as *Puerto Rico v. Sánchez Valle*[140] show that courts continue to hold that tribes maintain sovereignty for the purpose of the Clause "until Congress chooses to withdraw the plenary power it has."[141] This means "'Congress . . . can regulate virtually every aspect of the tribes without rendering tribal sovereignty a nullity.'"[142] Therefore, "it doesn't matter whether the tribe gives the power to review ordinances to the Secretary of the Interior, or whether the tribe 'possesses the usual attributes, or acts in the common manner, of a sovereign entity.'"[143] What matters "is the 'ultimate source' of the power 'undergirding the respective prosecutions,'"[144] and the Supreme Court has already decided "the tribe's prosecutorial sovereignty is inherent."[145] Therefore, a tribe deciding to subject its governance to federal

133. *Id.*
134. *Id*.
135. *Id*.
136. *Id*. at *2 ("Bearcomesout argues that the law has evolved such that the Northern Cheyenne Tribe's concept of self-governance and sovereignty has disappeared.").
137. *Id*.
138. *Id*.
139. *Id*.
140. 579 U.S. 59 (2016).
141. *Sanchez Valle*, 579 U.S. at 64.
142. *Bearcomesout*, 2016 WL 3982455, at *2 (citing United States v. Lara, 541 U.S. 193, 215 (2004)).
143. *Id*. (quoting *Sanchez Valle*, 579 U.S. at 67).
144. *Id*. (quoting *Sanchez Valle,* 579 U.S. at 67).
145. *Id*.; United States v. Wheeler, 435 U.S. 313, 323 (1978).

oversight has no bearing on its sovereignty.[146] The Ninth Circuit affirmed this holding with a brief memorandum.[147] Bearcomesout filed a petition for writ of certiorari to the United States Supreme Court in November 2017,[148] which was distributed for conference several times pending results of *Gamble v. United States*[149] before ultimately being denied in June 2019, around the time *Gamble* was decided.[150]

Bearcomesout is comparable to *Denezpi*. Both cases involve a tribal court prosecution followed by a federal court prosecution and the use of the Double Jeopardy Clause defense by a defendant. The biggest difference is that the first prosecution in *Denezpi* was in a CFR court, whereas the first prosecution in *Bearcomesout* was in a tribal court.[151] "Formal tribal courts, unlike the CFR courts, are under tribal control and are directly oriented to the needs of tribal members."[152] Importantly, *Bearcomesout* involves a tribal prosecution by a tribal court system similar to the tribal systems used by tribes located in North Dakota.[153] Just as in *Bearcomesout,* some of the tribes within North Dakota also expressly provide for federal oversight by the Secretary of Interior within their own constitutions.[154] Although *Bearcomesout* never made it to the Supreme Court, *Denezpi* confirms that even a prosecution in a court system heavily intertwined with the federal government, a CFR court, will not violate a defendant's rights under the Clause if followed by a federal prosecution, because the source of power that created the law in question is the ultimate inquiry.[155] *Bearcomesout* similarly

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146. *Bearcomesout*, 2016 WL 3982455, at *3.

147. United States v. Bearcomesout, 696 F. App'x 241 (9th Cir. 2017).

148. Petition for Writ of Certiorari, Bearcomesout v. United States, 696 F. App'x 241 (9th Cir. Aug. 17, 2017) (No.16-30276).

149. 139 S. Ct. 1960 (2019).

150. *Search Results*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-6856.html (last visited Apr. 17, 2023).

151. Denezpi v. United States, 142 S. Ct. 1838, 1844 (2022); *Bearcomesout*, 2016 WL 3982455, at *1.

152. *Tribal Courts*, DEP'T OF JUST. ARCHIVES, https://bjs.ojp.gov/topics/tribal-crime-and-justice/tribal-courts (last visited Apr. 25, 2023).

153. *Bearcomesout*, 2016 WL 3982455, at *1.

154. CONST. AND BYLAWS OF THE TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS art. IX, § 5 ("The Tribal Council shall exercise the following powers . . . . To enact ordinances, *subject to the review of the Secretary of the Interior*, or his duly authorized representative, governing conduct of the members of the Band and Indians from other tribes on the reservation, providing for the maintenance of law and order and the administration of justice by establishing a police force and a tribal court and defining their powers and duties; and regulating the inheritance of property of the members of the Band except trust land.") (emphasis added); CONST. AND BYLAWS OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RSRV. art. II, § 3 ("The Tribal Business Council shall have power to promulgate ordinances, *subject to review by the Secretary of the Interior*, governing future membership, the adoption of new members and the revision of the membership rolls from time to time as determined by such ordinances.") (emphasis added).

155. *Denezpi,* 142 S. Ct. at 1849.

held that a tribal court prosecution followed by a federal prosecution is not barred by the Clause; this follows the reasoning in *Denezpi* because tribal courts are more detached from the federal government in comparison to federally created CFR courts.[156] The holding in both cases indicate courts are willing to preserve the dual sovereignty doctrine to ensure that tribes are maintaining their sovereignty when it comes to double jeopardy; therefore, defendants can continue to be prosecuted in federal courts under subsequent prosecutions.[157]

V. CONCLUSION

In *Denezpi v. United States*, the United States Supreme Court held the Double Jeopardy Clause was not violated because Denezpi's sole act led to prosecutions from two distinct sovereigns: the Ute Mountain Ute Tribe and the federal government.[158] The Ute Mountain Ute Tribe sought prosecution under their own law, while the federal government prosecuted Denezpi under federal code.[159]

The dissent disagreed that Denezpi's double jeopardy rights were not violated because the source of law for the prosecutor's initial prosecution in the CFR court is governed by the federal government.[160] However, the majority broadly explored the law and determined the source of law dictates the sovereignty for the initial prosecution, not the prosecutor's source of power.[161] This Court's majority and dissenting opinions illustrates some of the complexities in interpreting the Clause.

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156. *Bearcomesout*, 2016 WL 3982455, at *2-3.
157. *Denezpi,* 142 S. Ct. at 1852.
158. *Id.* at 1849.
159. *Id*.
160. *Id.* at 1852.
161. *Id.* at 1844.

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