



# Double Jeopardy, Dual Sovereignty, and Enforcement of Tribal Laws

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On June 13, 2022, the U.S. Supreme Court in a 6-3 decision [upheld](#) the federal prosecution of a man who had already been convicted of, and punished for, a lesser-included offense by a Court of Indian Offenses. Merle Denezpi argued that the U.S. Constitution’s Double Jeopardy Clause should bar the second prosecution, but the Supreme Court disagreed, holding that the second prosecution was for a separate offense and thus not constitutionally barred.

## Double Jeopardy and the Dual Sovereignty Doctrine

The Double Jeopardy Clause of the Constitution’s [Fifth Amendment](#) prohibits any person from being “twice put in jeopardy of life or limb” for the same offense. This prohibition on “double jeopardy” means that, generally speaking, a person cannot be prosecuted twice for the same crime. However, two different sovereign governments may prosecute the same offense without violating the Double Jeopardy Clause; this is known as the “[dual sovereignty](#)” doctrine. The Supreme Court has upheld the ability of the federal and state governments to prosecute a defendant successively for violating both federal and state laws, even if those laws seem to criminalize the same conduct. “[W]here there are two sovereigns, there are two laws, and two ‘offences,’” the Court has [explained](#).

## Tribes and Dual Sovereignty

Federally recognized tribes retain [inherent powers](#) of limited sovereignty, including a general power to enforce certain tribal laws against members of federally recognized tribes on tribal lands—a power that is, in some instances, [exclusive of state](#) criminal jurisdiction. In 1978, the Supreme Court [affirmed](#) that tribal and federal prosecutions are brought by separate sovereigns, and therefore are not barred by the Double Jeopardy Clause.

[Most](#) tribal prosecutions are carried out in tribal courts operated by the tribes themselves. Where tribal courts [have not been established](#), however Federal Courts of Indian Offenses—also called CFR Courts [because](#) they are governed by provisions of the *Code of Federal Regulations*—may exercise the jurisdiction on behalf of those tribes. (An “Indian” is [defined](#) in the relevant regulations as a member of a federally recognized tribe.) Tribes without tribal courts may pass tribal ordinances, which [become](#)

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enforceable by the CFR Courts after approval by a Department of Interior official. Unless a tribal ordinance conflicts, CFR Courts may also enforce a list of crimes defined in the regulations. Five CFR Courts currently serve 16 of the 574 federally recognized tribes.

In *Denezpi*, the Supreme Court faced the question of whether the Double Jeopardy Clause permitted both a CFR Court and a federal district court to prosecute a crime. *Denezpi*, a member of a federally recognized tribe, committed a violent sexual assault on another tribal member within the boundaries of the Ute Mountain Ute Reservation. The Ute Mountain Ute Tribe had jurisdiction, but did not have its own tribal court. In a CFR Court, *Denezpi* pleaded guilty to violating a tribal assault and battery ordinance passed by the Ute Mountain Ute Tribe, and received a sentence of time served (140 days' incarceration). Thereafter, a federal prosecutor brought charges against *Denezpi* in federal district court for aggravated sexual abuse in violation of the Major Crimes Act. A jury convicted *Denezpi*, and the court sentenced him to 30 years' imprisonment. *Denezpi* challenged that second prosecution and sentence, arguing it was barred by the Double Jeopardy Clause. Although the CFR Court was enforcing a tribal ordinance, *Denezpi* said, CFR Court and its prosecutors are controlled by the Bureau of Indian Affairs, and his CFR Court prosecution was therefore a federal prosecution to which he could not be subjected twice.

## Supreme Court Decision

The Supreme Court disagreed with *Denezpi*, instead upholding the U.S. Court of Appeals for the Tenth Circuit's conclusion that the second prosecution was not barred by the Double Jeopardy Clause. Justice Amy Coney Barrett wrote the Court's opinion, which focused largely on the language of the Double Jeopardy Clause and the meaning of "offense." Even assuming that *Denezpi* had been twice prosecuted by the United States (a point which the Court declined to examine), what mattered was whether the offenses were the same. As the Court put it, "the Double Jeopardy Clause does *not* prohibit successive prosecutions by the same sovereign. It prohibits successive prosecutions 'for the same offense.'" When two offenses are defined by separate sovereigns, the Court explained, those offenses are inherently different. "[T]he sovereign source of a law is an inherent and distinctive feature of the law itself," so "an offense defined by one sovereign is necessarily a different offense from that of another sovereign." The fact that the source of *Denezpi*'s first conviction was a tribal ordinance, according to the Court majority, meant that violation of a federal statute was a separate offense not barred by the Double Jeopardy Clause.

Justice Neil Gorsuch dissented, reiterating his view that the dual sovereignty doctrine "is at odds with the text and original meaning of the Constitution." In a portion of the dissent joined by Justices Elena Kagan and Sonia Sotomayor, Justice Gorsuch recounted the history of the Courts of Indian Offenses, highlighting the United States' involvement in developing, staffing, defining the jurisdiction of, and overseeing those bodies. Accordingly, he wrote, the "historical wellsprings" of the Courts of Indian Offenses' authority "lie not in the Ute Mountain Ute or any other Tribe, but in the halls of the Department of the Interior." Because "[f]ederal agency officials played every meaningful role" in the first prosecution, the dissent found the majority opinion's distinction between the offenses unpersuasive.

In a portion of his dissent not joined by the other dissenting justices, Justice Gorsuch called the Court of Indian Offenses "a curious regime," created by the executive branch without any reference to legislative authorization. "[O]ne might wonder," Justice Gorsuch wrote, "how an executive agency can claim the exclusive power to define, prosecute, and judge crimes—three distinct functions the Constitution normally reserves for three separate branches." Because the defendant in *Denezpi* did not raise these questions—including "whether the Constitution permits executive officials rather than a judge and jury to try him for crimes"—those questions remain unanswered by the courts.

## Considerations for Congress

Should Congress wish to insulate the CFR Courts from future constitutional challenges, such as those identified by Justice Gorsuch, it could consider legislation to affirm or authorize them, adding at least a legislative imprimatur to the executive branch's creation. Conversely, Congress could consider legislation eliminating the CFR Courts or prohibiting federal prosecutions for offenses already prosecuted by the CFR Courts.

Given that *Denezpi* did not address whether the federal prosecution would have been precluded if the CFR Court had convicted the defendant of a regulatory offense rather than a tribal ordinance violation, Congress could consider limiting CFR Courts' jurisdiction to offenses rooted in tribal law. Congress could also consider a range of alternative measures to enable tribes that have not established their own courts to prosecute tribal offenses. These could include designating additional funding and resources to enable more tribes to establish tribal courts, or working with tribes to authorize a different, less federally controlled body to enforce tribal laws on behalf of tribes that choose to delegate that aspect of their sovereignty.

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