

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

MERLE DENEZPI,)
)
 Petitioner,)
)
 v.) No. 20-7622
)
 UNITED STATES,)
)
 Respondent.)

Pages: 1 through 72

Place: Washington, D.C.

Date: February 22, 2022

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MERLE DENEZPI,)

Petitioner,)

v.) No. 20-7622

UNITED STATES,)

Respondent.)

- - - - -

Washington, D.C.

Tuesday, February 22, 2022

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:35 a.m.

APPEARANCES:

MICHAEL B. KIMBERLY, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

ERICA L. ROSS, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:35 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 2076-22, Denezpi versus United States.

Mr. Kimberly.

ORAL ARGUMENT OF MICHAEL B. KIMBERLY
ON BEHALF OF THE PETITIONER

MR. KIMBERLY: Thank you, Mr. Chief Justice, and may it please the Court:

The Double Jeopardy Clause implicates two distinct exercises of sovereign authority: first, the authority to say what an offense is, and, second, the authority to put an individual in jeopardy for committing an offense.

This Court has consistently assumed the importance to the dual-sovereignty doctrine of both expressions of sovereign power. The analysis thus asks not only whether the two law-giving entities draw their authority from separate sovereigns but also whether the two law-enforcing entities do so.

The government disagrees. It says that the separateness of the offense-defining entities is all that matters. But that position

1 would invite the precise abuses that the Double
2 Jeopardy Clause was intended to prevent, and the
3 CFR courts themselves provide the evidence.
4 Assault, for an example, is an offense under
5 both tribal law and the BIA's regulatory
6 criminal code.

7 According to the government, if
8 Petitioner had gone to trial rather than taking
9 a plea on the tribal offense and he had been
10 acquitted, the very same prosecutor would have
11 been free the very next day to bring a
12 successive prosecution for a substantively
13 identical offense, this time having honed his
14 case and refined his proof based on the lessons
15 learned in the first prosecution. That is not
16 an outcome that the framers of the Double
17 Jeopardy Clause would have thought tolerable.

18 In arguing otherwise, the government
19 focuses on a single word, "offense," which it
20 takes entirely in isolation and to which it
21 applies rigid dictionary definitions. But the
22 Bill of Rights prevents not only transgressions
23 of the amendment's literal terms but also
24 governmental efforts to circumvent their
25 protections.

1 Blockburger itself embodies this
2 anti-circumvention principle. It holds that
3 technically different defenses codified in
4 different code sections comprising different
5 elements nonetheless may constitute conceptually
6 the same offense for double jeopardy purposes
7 when, for example, one is a lesser included of
8 the other.

9 And our position is that the same
10 Blockburger rule ought to apply anytime a single
11 sovereign undertakes successive prosecutions,
12 regardless whether separate sovereigns have
13 defined the respective offenses.

14 And I welcome the Court's questions.

15 JUSTICE THOMAS: Mr. Kimberly, just to
16 -- just so that I understand what you mean by
17 the -- we have to take the prosecution, the
18 source of the prosecution into account, let's
19 say, prior to trial, the tribe charges
20 Petitioner here and -- on day one. On day two,
21 the federal government charges Petitioner.

22 Are those two separate offenses with
23 which he's being charged?

24 MR. KIMBERLY: These are both charges
25 in the CFR court?

1 JUSTICE THOMAS: One in CFR court, one
2 in federal district court.

3 MR. KIMBERLY: I think those are not
4 the same offense, Your Honor, because it would
5 be the tribe bringing the charge. I think what
6 distinguishes this case --

7 JUSTICE THOMAS: No, no, that's not
8 what I'm saying. The -- the -- the tribe --
9 there's a -- there's -- there's a charge under
10 tribal law --

11 MR. KIMBERLY: Mm-hmm.

12 JUSTICE THOMAS: -- that's charged --
13 for the same activity, just what we're talking
14 about here, but, before trial, the -- the
15 federal prosecutor charges under federal law
16 just as you have here, but there is no trial
17 yet.

18 Are those two separate offenses?

19 MR. KIMBERLY: If I'm understanding
20 Your Honor's hypothetical correctly, it's a
21 tribe charging one offense; it's the federal
22 government charging a federal offense?

23 JUSTICE THOMAS: Exact same charges --

24 MR. KIMBERLY: Exact same charge --

25 JUSTICE THOMAS: -- we have here.

1 MR. KIMBERLY: -- before jeopardy has
2 attached. It -- it sounds to me like those are
3 separate offenses to which the dual-sovereignty
4 doctrine would apply. And --

5 JUSTICE THOMAS: Okay. Now what
6 undoes that? If, let's say, after that, the --
7 you reach a -- you're tried in the CFR court,
8 and we have what we have, the outcome we have
9 here, then you have a trial in federal court.

10 What changes the fact that you have
11 two separate charge -- two separate offenses?

12 MR. KIMBERLY: Well, I -- I think --
13 so there are two ways of answering this.

14 I think the first way of answering
15 this is to say that when the prosecuting entity,
16 the first time, is a federal instrumentality
17 that is relying on federal law to authorize a
18 federal officer to prosecute a tribal offense in
19 federal court, that is, in effect, the United
20 States making the offense its own.

21 After all, we -- we -- we need in the
22 CFR court the operation of a federal law --
23 here, it's 11 C.F.R. 11.108 -- to make the
24 tribal offense enforceable by a federal officer
25 in federal court. And that process, the Court

1 could -- could say, in a sense imbues the
2 offense with at least in part a federal
3 character.

4 And that is distinct, I think -- if I
5 was understanding Your Honor's hypothetical,
6 it's distinct from when a tribe in a tribal
7 court pursues a prosecution for that same
8 offense.

9 JUSTICE THOMAS: Thank you.

10 JUSTICE SOTOMAYOR: Is that your only
11 difference? Going back to our decision in
12 Wheeler, the Court in Wheeler went through quite
13 a number of ways in which the Navajo tribal
14 court at issue was subject to ultimate federal
15 control.

16 And I want to know what you see as the
17 difference between the federal control
18 recognized by us in Wheeler and the federal
19 control at issue here in CF -- CRT -- CFR
20 courts?

21 MR. KIMBERLY: Well, I think the
22 question in Wheeler, Your Honor, was just
23 whether the tribes actually constitute separate
24 sovereigns for purposes of the dual-sovereignty
25 doctrine. And so, in undertaking that analysis,

1 the Court looked, as it later described it in
2 Sanchez Valle, as -- as the wellsprings of the
3 authority that the tribe has both to define and
4 punish crimes.

5 The Court acknowledged that there is
6 congressional control over the tribes in certain
7 actions that they can take, but that did not
8 extinguish the -- the core source of the
9 authority the tribes have for defining and
10 prosecuting offenses.

11 JUSTICE SOTOMAYOR: So tell me what
12 distinguishes it here.

13 MR. KIMBERLY: The -- the question
14 here is -- is somewhat different. It's
15 accepting that those -- that the tribes in the
16 United States are separate sovereigns. It's who
17 is bringing its sovereign -- which of those two
18 is bringing its sovereign authority to bear in
19 prosecutions brought in the CFR courts?

20 And our position is that it must be
21 federal because prosecutors in -- the prosecutor
22 in this case, the prosecutor in the Ute Mountain
23 Ute Tribe CFR court, is a federal officer
24 answerable to federal authorities. He is not a
25 tribal answer -- officer answerable to tribal

1 authorities. He draws his authority in the CFR
2 to prosecute, and the CFR court draws its
3 authority to punish from the Code of Federal
4 Regulations and from the United States Code
5 authorizing those -- the promulgation of those
6 regulations.

7 JUSTICE SOTOMAYOR: So would it have
8 mattered if the tribe had contracted with the
9 government to provide the prosecutor? The tribe
10 had actually provided the prosecutor?

11 MR. KIMBERLY: I -- I think -- I think
12 the answer may well be yes, Your Honor. If the
13 tribe were furnishing the prosecutor such that
14 the prosecutor was answerable to tribal
15 authorities, so that one could accurately say
16 that the prosecutorial discretion being
17 exercised, the decision what charges to bring,
18 what penalties to seek, what leniency to grant,
19 what plea deal to negotiate, were, in fact,
20 expressions of tribal sovereignty and tribal
21 authority, then I think the answer is we may
22 well be in a different situation, but we know --

23 JUSTICE SOTOMAYOR: So it would be an
24 easy fix if you were to win in this case?

25 MR. KIMBERLY: I -- if --

1 JUSTICE SOTOMAYOR: CFR -- CFR courts
2 could continue so long as the prosecutor was
3 tribally controlled?

4 MR. KIMBERLY: I -- I think that's
5 right. And I would say that I think there are
6 two easy fixes, Your Honor, both of which are
7 substantially more respectful of tribal
8 sovereignty than what happened here.

9 First, you could have a 638 contract
10 that allows the -- the tribe to control and
11 bring the prosecutions.

12 Beyond that, you could also just have
13 the simple administrative fix of reallocating
14 the resources for these CFR courts to grants to
15 the tribes to establish their own judicial
16 system.

17 JUSTICE SOTOMAYOR: There already are.
18 These tribes are too small to make use of those
19 grants.

20 MR. KIMBERLY: Well, I think the
21 tribes --

22 JUSTICE SOTOMAYOR: The grants aren't
23 big enough. They're not big enough in light of
24 the poverty of the tribes.

25 MR. KIMBERLY: Well, that's right, but

1 that -- so the suggestion is rather than the
2 federal government spending money on CFR courts,
3 the federal government can spend money to allow
4 these tribes to band together the -- the way
5 that they do under the CFR courts already to
6 create tribal judicial systems of their own.

7 In either event, either of those fixes
8 would be more respectful of tribal sovereignty
9 than forcing tribes to accept the federal
10 government's taking over of responsibility to
11 bring prosecutions on behalf of the tribes,
12 which necessarily federalizes the prosecutions
13 because, again, the prosecutors are, in this
14 case and in the Ute Mountain Ute Tribe CFR
15 court, are answerable to federal authorities.

16 JUSTICE BARRETT: Mr. Kimberly, do you
17 think -- well, let me ask you this. Why aren't
18 you making the argument that the tribal crimes
19 have been assimilated as federal crimes?

20 Because, if that were true, then you
21 have two federal crimes and you're just looking
22 at Blockburger, right, even under the
23 government's theory. Do you think that would be
24 a winning argument if you made it?

25 MR. KIMBERLY: I think it would be a

1 winning argument, Your Honor. And I think --
2 I -- I would feel comfortable analogizing to the
3 assimilation of state crimes under the
4 Assimilative Crimes Act or the Major Crimes Act.

5 I -- I think what's a little different
6 is, here, we know, for example, that Petitioner
7 was, in fact, charged with a violation of the
8 Ute Mountain Ute code. When an individual is
9 charged under an assimilative crime under
10 federal law, he or she is charged actually with
11 the federal crime --

12 JUSTICE GORSUCH: Well --

13 MR. KIMBERLY: -- it having --

14 JUSTICE BARRETT: So it's not
15 assimilated. So you think it's not the same
16 thing?

17 MR. KIMBERLY: Well, our -- I -- I'm
18 sorry. Our -- so, to be clear, our position is
19 that when a federal officer is exercising
20 federal authority in a federal court to
21 prosecute the -- a criminal offense of another
22 sovereign, it takes an exercise of federal legal
23 power to do that. And, again, we have that at
24 25 C.F.R. 11.108, and that, in effect, imbues --
25 does imbue for double jeopardy purposes the

1 offense with a federal --

2 JUSTICE BARRETT: But I -- I thought
3 that you were making an -- an act and enforce
4 argument. I -- I didn't understand you to be
5 disputing that this crime was a tribal crime. I
6 understood you to be seeing a distinction
7 between the regulatory crimes and the crimes
8 that were crimes that came from the wellspring
9 of the tribe's law.

10 I just want to -- that is an important
11 point to me, so I want to make sure I understand
12 your position on it.

13 MR. KIMBERLY: And -- and so I'm not
14 sure I understand the question. I'm sorry.

15 JUSTICE BARRETT: Are you seeing a
16 distinction between the federal regulatory
17 crimes and the tribal crimes, or are you arguing
18 that, say, you know, 25 C.F.R. 11.449
19 functionally assimilates the tribal crimes into
20 federal law like the assimilation act does for
21 some state crimes?

22 MR. KIMBERLY: We're not making a
23 formal assimilation argument. I think it would
24 be perfectly acceptable --

25 JUSTICE BARRETT: Okay.

1 MR. KIMBERLY: -- if the Court wants
2 to take that approach, but our -- our principal
3 position is that it doesn't matter and that for
4 double jeopardy purposes, there's no meaningful
5 distinction.

6 JUSTICE GORSUCH: Well, it may not --
7 may not make a -- a meaningful distinction here,
8 I -- I acknowledge that, but I do want to follow
9 up on this question. And I don't want to
10 revisit Gamble. I -- I -- I was in dissent
11 there, and so I must have been wrong.

12 But, here, am I correct that the --
13 that the tribal crimes are only enforceable in
14 CFR court with the assent of the Secretary of
15 Interior?

16 MR. KIMBERLY: That's exactly right,
17 Your Honor, and that comes from -- it's -- it's
18 duplicative of 25 C.F.R. 11.449. It's also
19 11.108, which is the provision that requires
20 approval of this --

21 JUSTICE GORSUCH: And, historically,
22 as I understand it, that was an important
23 feature of the law because the federal
24 government in its infinite wisdom didn't want
25 every tribal crime to be enforceable because

1 they thought some of them were not sufficiently
2 worthy or -- of -- of -- of federal respect, is
3 that right?

4 MR. KIMBERLY: I -- I think that's
5 part of it. If -- if I may supplement that --
6 that answer, Your Honor, I think it's also
7 because the BIA itself has always understood
8 that the CFR courts and prosecutions taking
9 place within them are fundamentally federal and,
10 therefore, must be consistent with federal law,
11 and, therefore, a review of tribal crimes to
12 ensure consistency with federal requirements for
13 the operation of federal instrumentalities were
14 recognized.

15 JUSTICE ALITO: Can a federal criminal
16 statute include a racial classification?

17 MR. KIMBERLY: It's a fair question,
18 Your Honor. I -- I -- I think there is a
19 serious constitutional equal protection question
20 about whether or not that's the case.

21 JUSTICE ALITO: So, if we were to hold
22 that this provision of the tribal code was
23 really federal law, we would have to confront
24 that question, wouldn't we?

25 MR. KIMBERLY: Well, I think you've

1 got to confront that -- one, I should be clear,
2 that isn't a question presented here. I think
3 the Court would have to confront that question
4 perhaps in a future case regardless because
5 there is a federal regulatory criminal code
6 adopted by the BIA independent of tribal laws,
7 and that too has the same racial classification
8 as a precondition to its application.

9 JUSTICE GORSUCH: And if I might
10 return to the -- what I think of as the Bartkus
11 exception argument that I -- I take you to be
12 making that -- that the Court recognized that
13 there are some instances where even if they are
14 nominally separate sovereigns, they function
15 hand in glove, to the point where we will -- we
16 will find double jeopardy violations to occur
17 even if -- even if they are nominally pursued by
18 separate sovereigns.

19 And the -- the -- the federal
20 government makes the argument here that the
21 Bartkus exception shouldn't apply because they
22 didn't really get two bites at the apple here,
23 that your client pled guilty and that,
24 therefore, there's no real worry, a double
25 jeopardy concern that we should attach to this

1 case.

2 Can you respond to that argument?

3 MR. KIMBERLY: Well, I -- this Court
4 in Green addressed the question whether it makes
5 any difference whether a criminal defendant is
6 acquitted or convicted and rejected that
7 distinction as relevant to the double jeopardy
8 question.

9 So I -- there -- there's no basis
10 certainly in this Court's cases or I think sort
11 of our general understanding of the purposes of
12 the Double Jeopardy Clause to say it makes any
13 difference whether he was convicted the first
14 time or acquitted.

15 You know, I -- I would say more
16 generally, of course, there's 25 U.S.C. 2810,
17 which calls on federal authorities to coordinate
18 these sorts of things. There's, I would submit,
19 no question that the BIA prosecutor is a federal
20 prosecutor. He's directed by Congress to
21 coordinate with the U.S. Attorney's Office with
22 concurrent jurisdiction.

23 That office with concurrent
24 jurisdiction exercising the exact same sovereign
25 power brought a -- under Bartkus a charge for

1 the same offense, and that is -- that is the
2 heartland of the Double Jeopardy Clause. And --
3 and so I just don't see a distinction on the
4 basis that he was convicted the first time.

5 JUSTICE BREYER: Is the prosecutor --
6 the prosecutor in the CFR court is appointed by
7 the federal government. And does he have to get
8 the federal government's approval for each case
9 that he brings under tribal law?

10 MR. KIMBERLY: In the sense that a
11 prosecutor has to get approval to bring
12 prosecutions, yes, he would seek it from the
13 federal government and not from the tribe.

14 JUSTICE BREYER: Well, I don't mean in
15 the sense of that. I mean, does -- you are --
16 imagine you are a CFR prosecutor, you've been
17 appointed by the federal government but
18 confirmed by the tribe, I take it, and now you
19 want to bring a case. Do you have to go to
20 Washington or somewhere or the U.S. Attorney and
21 say, can I do it?

22 MR. KIMBERLY: I -- I think -- I'm not
23 aware of any practical such requirement.

24 JUSTICE BREYER: All right. And is it
25 the case that the requirement there differs in

1 any respect from the requirement of a prosecutor
2 in what is tribal courts throughout the nation?

3 MR. KIMBERLY: In other words, does a
4 tribal prosecutor in tribal court have to get
5 tribal approval?

6 JUSTICE BREYER: Does the -- whatever
7 approval the individual needs, the CFR
8 prosecutor needs to get, if he has to get any --
9 now I think he doesn't have to get any. Does
10 his role differ in any way from a prosecutor in
11 a tribal court?

12 MR. KIMBERLY: I mean, not in --

13 JUSTICE BREYER: Is the only thing
14 there that he's appointed by, or is there
15 something else? He's appointed by with the --
16 with the confirmation by the tribe, he's
17 appointed by the federal government.

18 Is there any other way in which he
19 differs from a tribal court prosecutor that you
20 believe is important?

21 MR. KIMBERLY: Yes, and I think it
22 flows from the fact that he --

23 JUSTICE BREYER: What is that?

24 MR. KIMBERLY: -- that he is appointed
25 by a federal official.

1 JUSTICE BREYER: Wait a minute. What
2 is that?

3 MR. KIMBERLY: What it means is that
4 federal -- that the United States public --
5 public policy and public safety prerogatives and
6 priorities are what drive that individual's
7 prosecuting --

8 JUSTICE BREYER: Okay, I -- I've got
9 the same point. He's appointed by the
10 federal -- he's appointed by the federal
11 government. You have read, as I have read, the
12 scholars' brief and it says, sure, there were a
13 lot of tribal officials in 1883 appointed by the
14 federal government.

15 And, moreover, they quote from the
16 history and reports and so forth and so on, and
17 you've read them, and they all say the Bureau of
18 Indian Affairs have vested this -- this person
19 is meant to be a tribal official in the CFR --
20 it was then CFO, I guess -- is meant to be
21 tribal in nature, just like the law is tribal in
22 nature.

23 Now, I mean, you've read all those
24 things. So what is your response to that?
25 Because we have on the other side, on your side,

1 he is appointed. And I take it at that time
2 maybe the police chief in the tribe was
3 appointed. I don't know. But, anyway, go
4 ahead.

5 MR. KIMBERLY: Well, I think there are
6 two responses to it.

7 The first is, in any context, for
8 instance, a federal prosecutor working within,
9 you know, a large state will, of course, also be
10 a citizen of the state and, you know, have an
11 interest in the same sorts of --

12 JUSTICE BREYER: Well, that's not
13 quite what these quotes from the Bureau of
14 Indian Affairs say. In fact, they're
15 distinguishing. I mean, it's -- it's all in
16 this brief, and -- and I think it seems to be
17 quite different from what any U.S. Attorney
18 seemed to be. All right. But go ahead. I
19 interrupted you. Sorry.

20 MR. KIMBERLY: Well, and -- and,
21 respectfully, Your Honor, I just -- I think the
22 -- the more direct answer is to say that it
23 isn't -- that isn't the inquiry that the Court
24 makes under the Double Jeopardy Clause.

25 The BIA, in promulgating the

1 regulations that are presently enforceable in
2 the CFR courts in 1993, dealt with a lot of
3 these same issues in comments during the notice
4 and comment period and it rejected all of them.
5 This is at 58 Federal Register 54,407.

6 And I'll read just a -- a -- a couple,
7 and this is all -- scattered all throughout the
8 preamble to this rule. It says: One comment
9 recommended deletion of secretarial approval of
10 tribal ordinances. This recommendation was not
11 adopted because Courts of Indian Offenses are
12 federal instrumentalities, and, therefore, the
13 laws they enforce cannot be inconsistent with
14 federal law.

15 Several commenters objected to the
16 role that the -- the Assistant Secretary plays
17 in appointing judges. These recommendations
18 were not adopted because Courts of Indian
19 Offenses are federal instrumentalities and not
20 tribal bodies. Federal supervision is,
21 therefore, mandatory.

22 Every aspect of what the federal
23 officers in these courts do is an exercise of
24 federal power as recognized by the BIA itself.

25 JUSTICE KAGAN: Well, I guess, Mr.

1 Kimberly, I think Justice Breyer was asking you
2 for examples of how it would matter.

3 I mean, it -- it seems to me you're in
4 a strange kind of position here. You're in a --
5 a -- a sort of halfway house. On -- on the one
6 hand, the government has the formal argument on
7 its side. Look, you know, this is not the same
8 offense because it's a -- because the laws are
9 different. So you want to say, well, you
10 shouldn't adopt that formal reading.

11 But then, on the other hand, you want
12 to not think about the practicalities of the
13 situation. So, when Justice Breyer says how
14 does it matter, you says -- you say it doesn't
15 matter how it matters.

16 But I think you have to think it
17 matters, you know, that -- you know, not just
18 that there's a formal way in which the
19 prosecutor is a federal official but, in fact,
20 that that makes a difference on the ground
21 because, otherwise, why not just go back to the
22 government's formal position?

23 MR. KIMBERLY: Well, and -- and this
24 is what I was driving at, Your Honor, with
25 recognition that a federal prosecutor answerable

1 to federal authorities will necessarily pursue
2 federal priorities.

3 So, for example, it may be a
4 prosecutorial priority to charge drug crimes,
5 but maybe the tribe doesn't actually care about
6 prosecution of drug crimes. They really want to
7 focus prosecutorial resources on other issues,
8 like sexual assault crimes. Those sorts of
9 decisions in the system that has been set up by
10 the BIA are necessarily federal.

11 Now, you know, as a matter of comity,
12 of course, it's true that federal officials can
13 take into account the interests expressed by
14 tribes, but, nonetheless, those priority-setting
15 decisions are inherently federal and may reflect
16 different values --

17 JUSTICE KAGAN: The tribe seems to
18 think of these courts as very tribal. You know,
19 I mean, there's a tribal brief, and the tribal
20 brief is on the government's side and it says
21 these are our courts.

22 And, I mean, you know, in a way, you
23 know, it's sort of like saying they're suffering
24 from false consciousness, what -- your -- your
25 argument.

1 MR. KIMBERLY: Well, I --

2 JUSTICE KAGAN: I mean, they believe
3 these are their courts.

4 MR. KIMBERLY: They believe -- it --
5 it is certainly true that they rely on these
6 courts to enforce their criminal laws. There's
7 no question about that. But -- and -- and a
8 tribe can make the sovereign decision to
9 allocate responsibility for enforcement of their
10 laws to the United States. But, when they do
11 that, that is, so far as the Double Jeopardy
12 Clause is concerned, that is so far as their
13 exercise of sovereignty goes.

14 JUSTICE BREYER: Why? Why? Why? I
15 mean, look, if -- if we just look to what the
16 law is, I think it's -- the law is a tribal law.

17 Now, if we go back to 1400, tribal
18 laws were enforced by tribal officials. Now we
19 jump to 1800 and they're still enforced by
20 tribal -- oh, oh, wait, there are some tribal
21 officials that the government wants to appoint.

22 Now that's why I'm puzzled, you see,
23 I'm actually puzzled, because you could look at
24 this individual that we're talking about and say
25 the origin of his authority is he's a tribal

1 official. And when the feds took over, they
2 decided they'd appoint a few tribal officials,
3 in which case both the law and the root of the
4 prosecution are tribal.

5 Or you could say, no, we have a new
6 official, it's going to be a fed official, and
7 they're going to really -- and there's some
8 evidence of this -- that we're really going to
9 get the tribe to be like Kansas City or
10 something, you know.

11 And so how do I do the -- how -- do
12 you see where I'm driving at? How do I do this?

13 MR. KIMBERLY: I do, Your Honor, and
14 I'm -- I'm -- I guess I'm sympathetic to the
15 consideration. What I would say is the easy fix
16 here is just to allow the tribes actually to do
17 the job of appointing prosecutors to exercise
18 tribal authority directly and in an unambiguous
19 way. That is not what's happening here.

20 I would point the Court also if I may
21 to United States against Lara, which presented
22 the question whether tribal courts -- tribal
23 prosecutors that were prosecuting non-member
24 Indians for tribal offenses were, in effect,
25 acting as federal prosecutors, in other words,

1 exercising delegated federal prosecutorial
2 authority or instead inherent tribal authority.

3 The premise of the question presented
4 in that case was that if the tribally appointed
5 prosecutors were -- even -- even the tribally
6 appointed prosecutors could be exercising
7 federal powers so as to preclude a later federal
8 prosecution.

9 CHIEF JUSTICE ROBERTS: Counsel, I
10 don't understand why it's such -- so problematic
11 to have different federal officials with
12 different perspectives on a particular matter
13 and why that necessarily means that their --
14 they should be regarded -- why that is pertinent
15 on the double jeopardy question.

16 You know, in the federal government,
17 the EPA and the Army Corps of Engineers often
18 have very different ideas about environmental
19 matters, and, yes, at the end of the day, they
20 answer to one authority and that's controlling.

21 But I don't know why it's so -- so
22 surprising that here you would say to one
23 federal official, okay, we want you to represent
24 the interests of the Indian tribe in their
25 courts and their priorities, and that -- the

1 idea that he's the same as some -- a U.S.
2 Attorney with a different set of priorities, I'm
3 not sure that follows.

4 MR. KIMBERLY: Well, I -- I -- it
5 would be, I think, an unusual situation where a
6 federal official were made answerable to some
7 other government in his exercise of federal
8 authority.

9 We're not aware of any other
10 circumstance --

11 CHIEF JUSTICE ROBERTS: Well,
12 answerable, I suppose, I mean, but it's a rare
13 situation, I would think, when the U.S. Attorney
14 comes in and he's got a set of priorities and
15 they can prosecute those priorities in their
16 office, but to then say to the official officer,
17 the officer who is handling matters for the
18 tribe, is that you've got to follow these same
19 priorities and just because the tribe has -- in
20 other words, it seems to me you can sort of
21 separate out the particular areas there and the
22 -- you know, the tribal officer or the officer
23 assigned to the tribal cases, you know, might
24 have different priorities to be applied on the
25 reservation.

1 And I don't know that that would
2 necessarily cause such great consternation in
3 the U.S. Attorney's Office.

4 MR. KIMBERLY: As a matter of
5 practicalities, Your Honor, I think I agree. As
6 a matter -- the BIA prosecutor you might say
7 serves sort of a different role than the
8 prosecutor in the U.S. Attorney's Office. And
9 the BIA prosecutor may take more heed of Indian
10 federal comity in the decisions that he or she
11 makes.

12 CHIEF JUSTICE ROBERTS: Well, that's
13 much more concisely presented than I did, but
14 that's my point, yes.

15 MR. KIMBERLY: But -- but, Your Honor,
16 that's exactly why Congress has 25 U.S.C. 2810.
17 It requires these prosecuting entities to
18 coordinate, not necessarily to -- to stand for
19 the proposition that they must all be, you know,
20 rowing in the same direction on the -- on the
21 public safety priorities that are driving their
22 prosecutorial decisions, but it's to ensure
23 coordination so that, for example, a CFR court
24 prosecution doesn't preclude by operation of the
25 Double Jeopardy Clause a -- a -- a subsequent

1 prosecution.

2 There were charges here that could
3 have been brought that would have resulted in
4 the same sentence that did not violate the
5 Blockburger rule with respect to the later Major
6 Crimes Act prosecution. And if that sort of
7 coordination had taken place, we wouldn't be
8 here today.

9 CHIEF JUSTICE ROBERTS: Thank you.

10 Justice Thomas, anything further?

11 JUSTICE THOMAS: It seems that your
12 argument with respect to the CFR court, that it
13 is basically federal, a federal entity, wouldn't
14 we -- if -- if we bought -- if we accept that
15 argument, wouldn't we have to then ask what
16 authority, what appears to be an Article I
17 court, has over criminal laws or the enforcement
18 of criminal laws?

19 MR. KIMBERLY: I -- I think that is a
20 subsequent question, just like Justice Alito's
21 question about the racial or nationalistic
22 categorization of the sorts of defendants who
23 can be brought before these courts would be an
24 issue that the Court has to deal with.

25 JUSTICE THOMAS: So, I mean -- but if

1 we conclude from that that, well, there can't be
2 a conviction under an Article I court here, then
3 it seems as though there would not be a double
4 jeopardy problem.

5 MR. KIMBERLY: Well, undeniably, there
6 was a conviction in this case, and courts
7 martial are also Article I courts --

8 JUSTICE THOMAS: I know, but those are
9 those are traditional. I mean, those are --
10 those are military, and I think we've made
11 exemptions for that, as well as territorial.

12 MR. KIMBERLY: That may be so.
13 Nevertheless, it is precedent for an Article I
14 court entering a -- a criminal judgment.
15 Whether -- whether -- you know, these sort of
16 broader structural constitutional questions
17 about these courts, I think, are ultimately
18 distinct questions from the -- the more limited
19 question that's presented here, which, I think,
20 turns simply on the idea that the federal
21 government is responsible for the first
22 prosecution and the second prosecution.

23 JUSTICE THOMAS: Yeah, but I think
24 you're -- you're requiring us to accept an
25 assumption that this court is the -- almost the

1 equivalent that -- either of a tribal court or
2 another federal court. I mean, we have to
3 assume that it has the authority to -- to
4 convict this particular -- the -- the Petitioner
5 here.

6 MR. KIMBERLY: That's -- that's true,
7 Your Honor. That's --

8 CHIEF JUSTICE ROBERTS: Justice
9 Breyer, anything further?

10 Justice Alito?

11 Justice Sotomayor?

12 JUSTICE SOTOMAYOR: Let me stop and --
13 and backtrack. Are you saying that your win
14 necessarily raises these questions or are you
15 saying how you win?

16 MR. KIMBERLY: No, I think these
17 questions are implicated entirely independent of
18 how the Court resolves the question presented
19 here.

20 JUSTICE SOTOMAYOR: Okay.

21 CHIEF JUSTICE ROBERTS: Justice Kagan?
22 Justice Gorsuch, anything further?

23 Justice Kavanaugh?

24 JUSTICE KAVANAUGH: Both the BIA
25 prosecutor and the AUSA are in the executive

1 branch, correct?

2 MR. KIMBERLY: That's correct.

3 Ultimately answerable to the President.

4 JUSTICE KAVANAUGH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett, anything further?

7 Thank you, counsel.

8 Ms. Ross.

9 ORAL ARGUMENT OF ERICA L. ROSS

10 ON BEHALF OF THE RESPONDENT

11 MS. ROSS: Mr. Chief Justice, and may
12 it please the Court:

13 Petitioner's violent sexual assault
14 violated the laws of both the Ute Mountain Ute
15 Tribe and the federal government. Petitioner
16 thus committed two offenses, and the Double
17 Jeopardy Clause poses no bar to two
18 prosecutions.

19 For nearly two centuries, this Court
20 has recognized that the clause only prohibits
21 two prosecutions for the same offense and that
22 violating the law of one sovereign is not the
23 same offense as violating the law of another.

24 The Court also has held that the
25 tribes and the federal government are separate

1 sovereigns for these purposes, because they
2 derive their power to proscribe conduct from
3 different sources of authority.

4 Indeed, there's no question in this
5 case that if Petitioner had been convicted of
6 his tribal offense in a tribally operated court,
7 his double jeopardy claim would fail, no matter
8 how much assistance that -- that tribally
9 operated court received.

10 Petitioner argues for a different
11 result here, only because the Ute Mountain Ute
12 Tribe made the sovereign choice for its tribal
13 code to be enforced in a Court of Indian
14 Offenses. But the Double Jeopardy Clause
15 focuses on the offense, and it is silent as to
16 the form of prosecution or the identity of the
17 prosecutor.

18 Reflecting the clause's texts, this
19 Court's decisions have likewise focused on the
20 ultimate source of authority for the offense,
21 which here is unquestionably tribal, as I take
22 Petitioner to concede.

23 And the Court has rejected similar
24 inquiries that would turn on a sovereign's
25 functional autonomy, explaining that they would

1 lead to unclear and inconsistent results.

2 But even if the nature of the court or
3 the prosecutor mattered, Petitioner would fail
4 at his own test. The authority for Petitioner's
5 first prosecution derived from the tribe's
6 preexisting power to prosecute offenses between
7 Indians, which the tribe still possesses today.

8 The tribe has simply made the
9 sovereign choice for the time being, which it
10 can change, to use a Court of Indian Offenses to
11 help enforce its laws. That exercise of the
12 tribe's sovereignty warrants respect under the
13 Double Jeopardy Clause, as every relevant
14 sovereign, including the tribe itself, has
15 argued to this Court.

16 I welcome the Court's questions.

17 JUSTICE THOMAS: Ms. Ross, just to,
18 for my purposes, clarify the underlying facts in
19 this case, could you just explain why the -- the
20 first trial winds up or the first proceeding
21 winds up with 140 month -- 140 days -- was it
22 140 days or 140 months?

23 MS. ROSS: It was 140 days, Justice
24 Thomas. And --

25 JUSTICE THOMAS: For a sexual assault,

1 and the -- and then the ultimate federal case
2 winds up with -- is it 360?

3 MS. ROSS: I believe that's correct,
4 Your Honor. So -- so the reason why --

5 JUSTICE THOMAS: I'm sorry, 360
6 months.

7 MS. ROSS: Yes.

8 JUST THOMAS: Not 360 days.

9 MS. ROSS: Yes, Justice Thomas, 360
10 months. And the reason why is because, as this
11 Court recognized in Wheeler, because it's
12 equally true, to go to some of Justice
13 Sotomayor's questions with respect to
14 tribally-operated courts, Congress has limited
15 the sentence that can be imposed in either a
16 Court of Indian Offenses or a tribally-operated
17 court. It has, in fact, defined Indian courts
18 for purposes of the Indian Civil Rights Act to
19 include Courts of Indian Offenses.

20 So in either forum, the -- the cap
21 applies. That's generally one year, and I
22 believe it's a \$5,000 fine. It can be a little
23 bit higher in some circumstances. But those
24 apply --

25 JUSTICE THOMAS: But I guess my

1 question is why spend time on that, when there's
2 a more serious underlying offense?

3 MS. ROSS: Oh. Certainly, Justice
4 Thomas. So I think because, as some of the
5 questions suggested earlier, the -- the Court of
6 Indian Offenses is concerned with violations of
7 tribal law and offenses between Indians on the
8 reservation, and -- and so because the tribe
9 still has a sovereign interest as expressed
10 through the criminalization of this conduct, I
11 think, you know, the fact that a lesser sentence
12 is available doesn't necessarily mean that there
13 isn't an interest to be served there.

14 I would also point out that the -- the
15 Court of Indian Offenses prosecution in this
16 case happened much more quickly, and so that --
17 that prosecution also provided immediate
18 incapacitation in a way that a federal
19 prosecution that comes later may not.

20 JUSTICE THOMAS: Thank you.

21 CHIEF JUSTICE ROBERTS: Or -- or one
22 reason to do is to get a dry run on the federal
23 trial. I think there's a lot at stake here.
24 The sentence shows that. You -- you want to
25 make sure you have as effective a prosecution as

1 you can.

2 So, you know, run a prosecution
3 through the CFR court, see what evidence they
4 have, whatever, and then take it -- take a much
5 stronger case when there's more at stake.

6 MS. ROSS: So, respectfully, Mr. Chief
7 Justice, I don't think there's any suggestion or
8 evidence that that happened either in this case
9 or more generally. I would point the Court --
10 and I think this is responsive to some of the
11 questions from Justice Kagan and Justice
12 Sotomayor and others about how this works on the
13 ground.

14 I'd point the Court to page 5 of the
15 former United States attorneys' brief, where
16 those former United States attorneys who had
17 jurisdiction over districts that include crime
18 -- Courts of Indian Offenses make very clear
19 that they did not supervise BIA prosecutions and
20 they did not -- to their knowledge, none of the
21 AUSAs did either. There just simply isn't this
22 commingling --

23 CHIEF JUSTICE ROBERTS: Well, I'm not
24 suggesting any -- anything happened like that
25 here, but it certainly is a possibility. And

1 I'm not suggesting there's anything wrong with
2 it. I mean, that's how the Double Jeopardy
3 Clause works with respect to state prosecutions.
4 But -- but -- I -- I guess I share, if it was
5 Justice Thomas's concern, that it seems unusual
6 that you waste time on a serious offense with
7 such a small possibility -- small possible
8 sentence when there's a lot more at stake in
9 what would follow?

10 MS. ROSS: So -- so, respectfully, I
11 don't think it's a waste of time from the
12 tribe's perspective. This tribe has
13 criminalized this conduct. This Court
14 recognized that the tribe still has the power to
15 criminalize this conduct. And so that
16 expression of the tribe's displeasure with this
17 conduct and condemnation of this conduct, I
18 think, is a significant aspect of sovereignty
19 itself.

20 The other --

21 CHIEF JUSTICE ROBERTS: Well, you
22 could --

23 MS. ROSS: -- point I would make --

24 CHIEF JUSTICE ROBERTS: -- say that,
25 but I suppose the tribe if -- it may be more

1 interested, or somebody, in the fact that the
2 guy is going away for 30 years as opposed to 140
3 days, if I've got the math right. And, I mean,
4 yes, the 140 days, or really it was time served,
5 might show that the tribe has these particular
6 interests, but I suspect their interests are
7 being more served by the 30-year sentence in the
8 other forum.

9 MS. ROSS: So -- so, again, because
10 the same limitations on sentences apply in
11 tribally-operated courts, precisely the same
12 thing happened in Wheeler, when the limits were,
13 in fact, even lower on tribal prosecutions.
14 There was an initial tribal prosecution with a
15 limited sentence because of that limitation and
16 then a subsequent federal prosecution with a
17 greater sentence.

18 I think that's sort of the common fact
19 pattern and, indeed, is a reason why having the
20 -- the federal prosecution not be barred by the
21 prosecution for a tribal offense is a good
22 thing, not a bad thing.

23 JUSTICE GORSUCH: Well, Ms. Ross,
24 these CFR courts have long been -- sit on easily
25 with our separation of powers as Justice Thomas

1 pointed out and the BIA has acknowledged for a
2 century.

3 But we can avoid all that, it seems to
4 me, if we -- if we apply our existing double
5 jeopardy jurisprudence under Bartkus.

6 And -- and my first question to you
7 is: Does the government -- does the government
8 acknowledge that there is what -- what I've
9 called the Bartkus exception, that though there
10 may be nominally two separate sovereigns
11 involved, even in those circumstances, sometimes
12 double jeopardy can be implicated?

13 MS. ROSS: So, Your Honor, I -- I
14 think Bartkus left open what Justice Ginsburg
15 described as I think the possibility or -- or
16 the -- the possibility of that exception. I
17 don't think that's borne out in the last 60
18 years of precedents --

19 JUSTICE GORSUCH: Okay, but you --

20 MS. ROSS: Since Bartkus.

21 JUSTICE GORSUCH: -- the government
22 acknowledges that possibility exists.

23 MS. ROSS: No, Justice Gorsuch. So --
24 so I would say that that possibility has
25 essentially just not borne fruit. And it should

1 not be --

2 JUSTICE GORSUCH: Well, it's actually
3 been applied in the lower courts, right? I
4 mean, lower -- lower courts have applied that
5 exception?

6 MS. ROSS: So the lower courts have
7 considered the -- the exception. To our
8 knowledge, there's no Court of Appeals decision
9 actually finding it satisfied.

10 And I think that combined with the
11 fact that the Court itself has not cited Bartkus
12 for this proposition and that it sits uneasily
13 with the remaining --

14 JUSTICE GORSUCH: Are you asking us to
15 overturn that language in Bartkus or reject it?

16 MS. ROSS: So -- so I don't think it
17 would require an overturning. I think it wasn't
18 a holding at the time. And in fact, Justice
19 Brennan in dissent noted that if the facts there
20 didn't qualify, nothing would.

21 And so --

22 JUSTICE GORSUCH: Okay. Okay, let's
23 -- so let's assume it exists then, at least its
24 possibility, you're not asking us to reject it.
25 And that's how I take your answer.

1 Why wouldn't this circumstance
2 qualify, and if it doesn't, maybe nothing would,
3 I guess, is my question to you.

4 MS. ROSS: So -- so.

5 JUSTICE GORSUCH: You have --

6 MS. ROSS: Sorry.

7 JUSTICE GORSUCH: You have a law that
8 has to be approved by a federal executive
9 officer, a federal prosecutor before a federal
10 forum. And as I believe you pointed out, this
11 initial prosecution, if it isn't strictly
12 speaking a dry run or a hand-in-glove sort of
13 thing provides for immediate incapacitation in a
14 way that might not be possible in federal court.

15 If -- if this doesn't qualify, would
16 anything?

17 MS. ROSS: So respectfully, Justice
18 Gorsuch, I actually think that the Bartkus,
19 quote, unquote, "exception" does not exist as --
20 as a matter of sort of binding law. I don't
21 think --

22 JUSTICE GORSUCH: Okay. But if we --
23 if we -- if we disagree with you about that and
24 we take our language in Bartkus seriously.

25 MS. ROSS: Certainly. So I don't

1 think this would qualify and it's for many of
2 the reasons I was providing to the Chief
3 Justice. There is no coordination on the
4 ground. There's no suggestion that there has
5 been any attempt to circumvent anything here,
6 really the tribal prosecutor or the BIA
7 prosecutor is enforcing the tribe's interest in
8 having its own law enforced and the federal
9 prosecutor is looking at whether federal
10 interests have still been vindicated under
11 federal law.

12 JUSTICE GORSUCH: Can you imagine --

13 JUSTICE KAGAN: So --

14 JUSTICE GORSUCH: I'm sorry.

15 JUSTICE KAGAN: No, please.

16 JUSTICE GORSUCH: One last question.

17 Can you imagine a circumstance in which that
18 Bartkus exception would apply?

19 MS. ROSS: No, Your Honor. I think
20 the better -- the better way to handle that
21 would be to use what this Court developed since
22 Bartkus, namely the Ashe versus Swenson Doctrine
23 when you have a prior acquittal giving that
24 collateral estoppel effect. And I think the
25 reason why is because Ashe is already a --

1 JUSTICE GORSUCH: So --

2 MS. ROSS: -- very fact intensive
3 doctrine.

4 JUSTICE GORSUCH: -- two convictions
5 can never implicate Bartkus?

6 MS. ROSS: I think that's right, Your
7 Honor. I think that's consistent with this
8 Court's decision in Dixon where Justice Scalia
9 explained that so long as you have two separate
10 offenses as we think you clearly do here under
11 the text of the Double Jeopardy Clause, you
12 would be able to bring two separate
13 prosecutions. The government --

14 JUSTICE SOTOMAYOR: Ms. Ross.

15 MS. ROSS: Yes.

16 JUSTICE SOTOMAYOR: I count at least
17 five or six Supreme Court cases that emphasize
18 not over the power -- not only the power to
19 enact criminal law but also the power to enforce
20 it, to prosecute it.

21 So we have a long history of over 100
22 years of recognizing that it's not just the
23 source of the power, the law, but the power to
24 prosecute it, which is what your Plaintiff is
25 saying.

1 And I read Bartkus as basically
2 acknowledging that, that the Bartkus exception
3 was borne on the presumption that the Double
4 Jeopardy Clause doesn't want one prosecutor to
5 decide the sequence of prosecution to give
6 itself an advantage in the way that Justice
7 Roberts pointed out.

8 Here we have one federal prosecutor
9 deciding whether or not to give itself the
10 potential of a pre-run of a case by choosing a
11 lesser crime to preview the criminal prosecution
12 and then sequentially that same prosecutor, a
13 federal prosecutor, could decide to prosecute a
14 federal crime.

15 And so that's where I'm having my
16 problem, which is you want a reading of the
17 Double Jeopardy Clause that takes away a century
18 of decisions that say it's not just the source
19 of law, it's a source of who's prosecuting it.

20 MS. ROSS: So Justice Sotomayor, I
21 think there's a lot in that question and I'd
22 like to sort of try to get to all of the points.

23 The first is that, you know, I
24 certainly acknowledge that this Court has talked
25 about the power to prosecute at times. I think

1 that was in cases where, as is often true, the
2 power to prosecute and the power to proscribe
3 ran together and traveled together.

4 And so I don't read those decisions to
5 necessarily adopt a second test in the way that
6 Petitioner suggests. I think that's
7 particularly clear.

8 JUSTICE SOTOMAYOR: No, it's one test.
9 You have to have both, as he says, a source of
10 law and a source of prosecution that are
11 different.

12 MS. ROSS: I think --

13 JUSTICE SOTOMAYOR: If you have the
14 same, then you're going to have a double
15 jeopardy problem.

16 MS. ROSS: I think the problem with
17 that understanding, Justice Sotomayor, though I
18 do want to get why I think we would win even
19 under that understanding, but I think the
20 problem with that understanding is that
21 Petitioner has not tried to find a -- a hook for
22 the prosecutorial power prong in the text of the
23 Double Jeopardy Clause.

24 As this Court explained most recently
25 in Gamble when it was asked to reconsider and,

1 in fact, reaffirm the double -- the
2 dual-sovereignty doctrine, the doctrine is based
3 on the word --

4 JUSTICE SOTOMAYOR: Except Bartkus
5 focussed in on it by noting the exception. So
6 it understood that double jeopardy had something
7 to do both with offense and who's enforcing it.
8 Is it the federal government or is it the state?

9 And here we have a hybrid situation
10 and we're being asked to figure out who's
11 enforcing the law, the tribe or the federal
12 prosecutor? And here, let's not forget that the
13 federal prosecutor charged this as a federal
14 crime, the U.S. versus this defendant.

15 He didn't charge it as the tribe
16 versus the defendant.

17 MS. ROSS: So Justice Sotomayor, I'd
18 like to take one more run at sort of the first
19 half of the question and then pivot to the
20 second half.

21 I think on the first half, there's
22 just nothing in the text of the clause that
23 speaks to the power to prosecute. It's phrased
24 in the passive voice. It's focusing on the
25 offense. It says nothing about the form of the

1 prosecution or the identity of the prosecutor.

2 I think that's particularly
3 significant because it's common ground here that
4 at the time of the framing, it was entirely
5 possible that state courts would, in fact, be --

6 JUSTICE SOTOMAYOR: So how does --

7 MS. ROSS: -- the form of prosecution
8 for federal offenses.

9 JUSTICE SOTOMAYOR: -- the tribe here
10 -- does the tribe have any voice in what
11 charges, tribal charges the tribe brings?

12 MS. ROSS: Absolutely, Justice
13 Sotomayor. And that gets to the second half of
14 the question. I want to emphasize the many ways
15 in which the tribe does have control here. And
16 I think this brings up the administrability
17 problems that were discussed earlier, because I
18 take it on Petitioner's view, any time one of
19 those levers was switched in a different
20 direction, you would need a new analysis.

21 So to -- to -- to talk about how this
22 actually works in practice, the tribe has the
23 decision in the first instance whether to have a
24 court of Indian offenses or whether to use its
25 own tribally-operated court.

1 JUSTICE SOTOMAYOR: No, no, no. Does
2 the tribe decide -- have any input into the
3 charges the federal prosecution brings?

4 MS. ROSS: Yes, Justice Sotomayor.

5 JUSTICE SOTOMAYOR: Does it say yes,
6 you can charge this individual with this crime?

7 MS. ROSS: So I do not -- there's
8 nothing in the regulations on this. My sense is
9 that this is not done on a charge-by-charge
10 basis. It is done at a broader level of
11 generality so the tribe can choose to have its
12 ordinance enforced in the first place. It can
13 obviously change the way its ordinance is
14 written if it thinks being implied in --
15 improperly and it can convey just the sorts of
16 prosecutorial priorities that I think my friend
17 stated it could not.

18 So the tribe can say, you know, yes,
19 we want DUI prioritized.

20 JUSTICE SOTOMAYOR: Where do I look --

21 JUSTICE KAGAN: So --

22 JUSTICE SOTOMAYOR: -- at to see that?

23 MS. ROSS: I'm sorry?

24 JUSTICE SOTOMAYOR: Where do I look at
25 to see that?

1 MS. ROSS: So that last point I think
2 is just simply an absence of any evidence in the
3 -- the regulations to the contrary. I mean, I
4 have been informed that that is how this works.
5 I think it's also clear from the tribe's own --

6 JUSTICE SOTOMAYOR: I cede my time.

7 JUSTICE KAGAN: Ms. Ross, what would
8 happen if the facts were different? I mean, I
9 think you -- you -- you have a good case and the
10 tribe backs you up on this, that the tribe seems
11 to think that this is a quite tribal enterprise
12 at its heart, but -- but I see nothing to
13 prevent it from turning into something entirely
14 different.

15 I mean, suppose you had a case in
16 which the prosecutors for this Court were all
17 detailed from the regular U.S. Attorney's Office
18 for a period of a year, had established
19 relationships with the U.S. Attorney's Office,
20 there was, you know, a practice of every week,
21 the prosecutor would come in and talk to the
22 U.S. Attorney about what was going on in the
23 trial court, there was a list of tribal laws
24 that the U.S. Attorney was comfortable about
25 enforcing, and a list that the tribe -- that the

1 U.S. Attorney was not comfortable about
2 enforcing, that the tribe really had no say in
3 this whatsoever, that it was top to bottom a
4 U.S. Attorney-run decisionmaking as to which
5 tribal laws would be applied in what ways.

6 I mean, would you still be hearing
7 saying the same thing?

8 MS. ROSS: So -- so, Justice Kagan, I
9 take the -- the hypothetical to suggest that the
10 regulations would have changed tremendously
11 because that -- none of that would be possible
12 under the current regulation.

13 So, you know, I just want to be clear
14 that under the current regulations the tribe can
15 pull out of the system, the tribe can appoint
16 the prosecutor, it can pull its own ordinances
17 out, et cetera. It has a lot of control.

18 In the hypothetical world of
19 regulations that -- that I think you're
20 imagining, I think we would still be making the
21 same argument, and I think that that argument
22 just comes down to the text of the Double
23 Jeopardy Clause, but --

24 JUSTICE GORSUCH: Isn't -- isn't that
25 a problem, I mean, and, in fact, isn't

1 historically -- I mean, historically, these
2 courts have not always been so friendly to
3 tribes. They were not created to be friendly to
4 tribes. And the hypothetical Justice Kagan
5 posited was, in fact, true for much of our
6 history.

7 So why should our double jeopardy
8 analysis turn on the graces of the government's
9 regulations today? And on what basis do you
10 really want to make the argument that double
11 jeopardy wouldn't attach, say, a hundred years
12 ago the way these courts were operated?

13 MS. ROSS: So, Justice Gorsuch, I
14 think the -- the reason why we would make that
15 argument is because, so long as the tribe still
16 had the authority to say yes, you know, we're
17 adopting a criminal code, and that code is being
18 enforced --

19 JUSTICE GORSUCH: But that code only
20 pertains to the extent that an Assistant
21 Secretary of the Department of Interior says it
22 pertains, right?

23 MS. ROSS: So, Justice Gorsuch, that
24 was equally true in Wheeler. The -- the tribe
25 there had to have its tribal code approved

1 before it could have a Court of Indian --

2 JUSTICE GORSUCH: That's right?

3 MS. ROSS: -- or, excuse me, a tribal
4 court.

5 JUSTICE GORSUCH: That -- that's true,
6 correct?

7 MS. ROSS: I'm sorry?

8 JUSTICE GORSUCH: That is true, that
9 it's up to the Secretary of the Interior or the
10 Assistant Secretary of the Interior?

11 MS. ROSS: So it is true that there
12 has to be a tribal -- that there has to be
13 Assistant Secretary approval. I believe it's
14 under 11.449, but, again, that was equally true
15 in Wheeler, and this Court said and I think it
16 reemphasized --

17 JUSTICE GORSUCH: So let's -- let's --
18 let's just take Justice Kagan's hypothetical,
19 which wasn't so hypothetical, and the Assistant
20 Secretary says, I find many of these tribal laws
21 to be savage and we will not enforce them.

22 And, instead, we're going to enforce
23 only our written code, written by bureaucrats at
24 the Department of Interior, enforced by an
25 executive officer who may report fully to the

1 U.S. Attorney's Office, before -- and another
2 executive employee who happens to be the "judge"
3 in the case.

4 No double jeopardy then?

5 MS. ROSS: There would be double
6 jeopardy then, Justice Gorsuch, because the key
7 difference there is that the federal government
8 has defined the offense using its own sovereign
9 authority.

10 The difference, and what I took to be
11 Justice Kagan's hypothetical, was that you still
12 have a choice of the tribe to use a tribal court
13 or, excuse me --

14 JUSTICE GORSUCH: So then --

15 MS. ROSS: -- a Court of Indian
16 Offenses --

17 JUSTICE GORSUCH: -- so then, if
18 that's true, your -- your -- your concerns about
19 administrability rear their ugly head again,
20 don't they, because now double jeopardy turns on
21 whether the offense being charged comes from the
22 Assistant Secretary's choice of a tribal law or
23 his own criminal code.

24 MS. ROSS: I don't think that raises a
25 -- an administrability problem, Your Honor, any

1 more than the fact that, you know, state law
2 versus federal law raises an administrability
3 problem.

4 JUSTICE GORSUCH: Well --

5 MS. ROSS: That's sort of always true.

6 JUSTICE GORSUCH: -- okay, okay. So
7 you -- so it does, though. You'd say that in
8 those cases when we have federal law, the
9 Assistant Secretary's personal code that he's
10 written, that's a double jeopardy problem,
11 right?

12 MS. ROSS: Yes, Justice Gorsuch.

13 JUSTICE GORSUCH: Okay.

14 MS. ROSS: And that flows from the
15 text.

16 JUSTICE GORSUCH: And if that's -- if
17 that's true, then why isn't his selection of
18 which tribal offenses shall be enforceable and
19 which shall not be subject to the same rule?

20 MS. ROSS: Because each of those
21 offenses is still an exercise of the tribe's own
22 authority. I want to be clear I don't think
23 this is actually happening on the ground, that
24 the Assistant Secretary is saying, well, you
25 know, I don't like this ordinance, so I'm not

1 going to allow its enforcement.

2 But I think either way that it's still
3 the tribe's own sovereign authority in enacting
4 that.

5 JUSTICE GORSUCH: But just so I'm
6 clear, the -- the Assistant Secretary can curate
7 the tribal code and there would be no double
8 jeopardy problem according to the government?

9 MS. ROSS: I think that's correct,
10 Your Honor. Of course, the tribe could still
11 have the authority to pull out of the Court of
12 Indian Offenses altogether, to pull its offenses
13 out.

14 And so, again, this just goes and I
15 think does go to the administrability problem on
16 Petitioner's rule that, in each of these ways,
17 the tribe has authority here to sort of
18 calibrate how much or how little of a role it
19 wants to have.

20 I think one important point here is
21 that this tribe actually used to have a -- its
22 own tribally operated court. It chose to opt
23 into the Court of Indian Offenses. It could
24 equally choose tomorrow to opt out of the Court
25 of Indian Offenses, and that's because this is a

1 prosecutorial power, to those who think that
2 that is significant here, that resides with the
3 tribe, just as it has, as Sanchez Valle notes in
4 Footnote, I believe it's 5, from sort of
5 primeval times.

6 JUSTICE KAGAN: I mean, Ms. Ross --

7 JUSTICE BREYER: You were going to
8 list some others -- you were going to list some
9 others in -- when Justice Sotomayor was talking
10 to you, other respects in which the tribe can
11 control either the presence of the prosecutor
12 and the judge who appoints the judge.

13 MS. ROSS: The -- the judge is
14 federally appointed.

15 JUSTICE BREYER: Federal, okay. So
16 the prosecutor, they can opt in or out.

17 MS. ROSS: Mm-hmm.

18 JUSTICE BREYER: And you said at one
19 point, I thought, that they can decide who the
20 prosecutor will be, and I thought you said they
21 could decide whether this prosecution would go
22 forward. Are either of those things true?

23 MS. ROSS: So the first one is true,
24 Justice Breyer. 11.204, I believe it is,
25 provides for the --

1 JUSTICE BREYER: And that's in your
2 brief?

3 MS. ROSS: Yes. Provides for --

4 JUSTICE BREYER: Okay. Anything else?
5 Okay. Go ahead.

6 MS. ROSS: So I want to clarify. I --
7 I am not aware of it being true on the ground
8 that the prosecutor would -- or that the tribe
9 would say we don't want you to prosecute Mr. X
10 or we do want you to prosecute Mr. Y.

11 JUSTICE BREYER: Okay, not that. Is
12 there anything else you want to bring up?

13 MS. ROSS: Yes. So there are sort of
14 the broad prosecutorial priorities that I
15 mentioned earlier from the regulations.

16 JUSTICE BREYER: How?

17 MS. ROSS: They can also --

18 JUSTICE BREYER: How do they set the
19 priorities?

20 MS. ROSS: So I think there's two
21 ways. There's one, there's just sort of
22 conversations, but two, of course, because the
23 tribe maintains the ability both to rewrite the
24 law and to pull the prosecutor function if it
25 wants to contract for that instead entirely, it

1 does exercise a fair amount of control over the
2 prosecutor him or herself.

3 The others that I would note, you
4 know, they can contract for the clerks here,
5 they contract for the Public Defender service
6 and a bunch of other administrative
7 capabilities. They also decide whether, as I
8 was mentioning earlier, tribal law is enforced
9 in this forum at all. And, of course, they
10 always have the option to -- to choose to have a
11 tribally operated court.

12 JUSTICE KAGAN: Who are these
13 prosecutors?

14 MS. ROSS: So I -- I -- I -- I'm not
15 sure if I'm understanding the question
16 correctly.

17 JUSTICE KAGAN: I mean, you know, how
18 do they get picked? You know, you can imagine a
19 couple of different systems. You know, one is
20 very tribe-centric. The tribe gives a list to
21 the BIA and the BIA says those look like good
22 people. Or, on the other hand, you could
23 imagine a world in which they were all detailed
24 from the U.S. Attorney's Office. Or you could
25 imagine things in between.

1 What are they?

2 MS. ROSS: So, per regulation, Your
3 Honor, they have to be approved by a vote of
4 two-thirds of the tribal counsel. And so I
5 think, you know, I apologize I don't know
6 exactly the details. My sense is that it
7 probably does differ between different Courts of
8 Indian offenses because these are spread out,
9 you know, a little bit.

10 But the -- the tribe has to give its
11 approval through a two-thirds vote. And I think
12 it -- it seems as though, you know, given that
13 that there is a fair amount of discussion about
14 -- about these things. And, of course, again,
15 the prosecutor can be chosen by the tribe if the
16 tribe elects to contract for that function.

17 And I think, just to take Petitioner's
18 concession that, you know, that would make a
19 difference here, I think that sort of brings up
20 precisely the administrability points that you
21 noted in your opinion for the Court in Sanchez
22 Valle in Footnote 3 that, you know, the historic
23 analysis allows us to classify what this Court
24 referred to as broad classes of governments for
25 purposes of the Double Jeopardy Clause, whereas,

1 on Petitioner's view, I think you would need a
2 new analysis not only for every Court of Indian
3 Offenses but for every time they changed
4 something like the prosecutor, perhaps, you
5 know, like the --

6 JUSTICE KAGAN: But, I mean, it
7 strikes me that the Petitioner has a fairly
8 simple administrable rule, and it would go
9 something like this. You know, with respect to
10 these courts, you know, they all differ on the
11 ground and maybe some of them are functioning
12 perfectly, maybe all of them are functioning
13 perfectly, but -- but there are dangers here,
14 you know, of the kinds that I was trying to
15 suggest in the hypothetical I gave you.

16 And in order to forestall those
17 dangers, we just have one simple rule, which is
18 that the tribe has to pick the prosecutor. I
19 mean, that's a perfectly administrable rule.

20 Why not?

21 MS. ROSS: So -- so I think the why
22 not is really the text of the clause. I think
23 that the -- the Double Jeopardy Clause does not
24 protect against everything that one could
25 envision as a jeopardy in theory. It protects

1 against double jeopardy for this -- or -- or two
2 prosecutions for the same offense.

3 JUSTICE KAGAN: Right. But that
4 really makes your argument just like here is
5 what the text says. The text is all about law.
6 It's all -- it's all about law. It doesn't
7 really matter what the facts are, what the
8 dangers are, whether every one of these
9 prosecutions becomes a dress rehearsal for the
10 next bigger prosecution.

11 We just close our eyes to all of that
12 and it's just like is it the same law?

13 MS. ROSS: So I -- I do think that
14 that is a perfectly appropriate way to resolve
15 the case. To take the very -- the much more
16 practical concern about the prosecutor, you
17 know, I think, if you had a rule in which the
18 tribe, as long as it selected the prosecutor, it
19 was fine to have these two separate offenses
20 prosecuted separately, you know, I think there
21 are good reasons why tribes choose not to have
22 -- choose not to appoint the prosecutor
23 themselves. That is a choice that's available
24 to them under the regulations.

25 And I think, you know, the fact that

1 this tribe has chosen not to do that is itself a
2 sovereign choice that warrants respect.

3 If I could -- if I could make one
4 other point with respect to sort of the -- the
5 animating principles of the clause here, I think
6 it's important to think about this case in the
7 context of other criminal defendants and public
8 safety and victims.

9 If Petitioner -- Petitioner is a
10 member of the Navajo Nation, as was his victim.
11 If Petitioner had stayed on the Navajo Nation
12 reservation and committed this sexual assault,
13 there's no question that he would be subject to
14 one prosecution for a tribal offense and one
15 prosecution for a federal offense. That's
16 essentially the facts of Wheeler with a slightly
17 different crime.

18 And so I think what Petitioner is
19 asking for here is really a different rule based
20 on the happenstance that he went to the
21 reservation of a tribe that uses a different
22 form of tribal court. And -- and I don't think
23 that there's anything --

24 JUSTICE ALITO: Suppose someone -- you
25 mentioned that the defendant is -- I'm sorry,

1 the Petitioner is a member of the Navajo Nation.
2 Suppose someone who is of Indian ancestry has
3 not associated at all with a tribe and says, I
4 don't -- I don't identify as an Indian. Can
5 that person be tried before a CFR court?

6 MS. ROSS: I apologize, Justice Alito.
7 I'm not sure the answer to that question. I
8 think it goes to how the Code defines an Indian.
9 And I just -- I haven't sort of run that because
10 it hasn't been presented in this case.

11 JUSTICE SOTOMAYOR: Counsel, I am -- I
12 am a little concerned with your answer to
13 Justice Kagan because I understand, 1999, 2000,
14 the United States took the position with not
15 this tribe but another tribe that it could
16 unilaterally establish a CFR court without the
17 tribe's permission and appoint a magistrate
18 without any need for confirmation by the tribal
19 governing body.

20 I've been looking for it in my notes
21 and just forgotten, but assume that that example
22 does exist. Your answer leads me to believe
23 that Justice Kagan's simple rule is much more
24 administrable than us writing an opinion today
25 that says because -- and I'm not even sure we

1 have enough facts to say this -- all of these
2 things exist, the tribe has enough control over
3 these CFR decisions or being a part of this
4 process, that having a prosecutor in this case
5 is okay. That seems to be the opinion we'd have
6 to write if you're maintaining that the U.S.
7 could do what it did at the -- at the turn of
8 this -- a few years ago.

9 MS. ROSS: So, Justice Sotomayor, that
10 example in the brief is the Kewa Pueblo.

11 JUSTICE SOTOMAYOR: Yes.

12 MS. ROSS: And what happened there
13 actually doesn't implicate the issues in this
14 case at all because that court, when it was
15 constituted by the Secretary of the Interior --
16 because the tribe was unable to provide the
17 basic due process rights required by the Indian
18 Civil Rights Act, that court could not apply the
19 tribe's own law. So the Secretary did waive the
20 requirement for the -- the institution of a
21 Court of Indian Offenses and the -- the
22 selection of the magistrate, but not with
23 respect to the ability to -- to prosecute the
24 tribe's own offenses.

25 So you just simply wouldn't get that

1 situation from this case.

2 JUSTICE THOMAS: I have no questions.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 No questions?

6 Justice Breyer, anything further?

7 Justice Alito?

8 Justice Sotomayor?

9 Justice Gorsuch?

10 JUSTICE GORSUCH: So I -- I just want
11 to make sure I understand your -- your position,
12 that the Assistant Secretary could create his
13 own court, appoint his own prosecutor, tell him
14 to report to the Department of Justice, appoint
15 the judge, and then curate the tribal code and
16 choose which tribal offenses can be prosecuted,
17 and there would be no double jeopardy problem,
18 right?

19 MS. ROSS: I think that is right,
20 Justice Gorsuch, with a very serious and
21 substantial caveat, that it would depend on
22 whether the tribe retained the authority to not
23 have a tribal code that is enforceable in the
24 Court of Indian Offenses.

25 JUSTICE GORSUCH: And then I take it

1 the government does agree, though, that under
2 the Assimilative Crimes Act, when it assimilates
3 a state law, state prosecution -- that becomes
4 federal law and double jeopardy attaches, right?

5 MS. ROSS: That's correct, Your Honor,
6 for precisely the reasons that Petitioner
7 provided, that does become an offense under
8 federal law.

9 JUSTICE GORSUCH: And then, finally,
10 there was a -- a Judge Calabresi opinion, United
11 States versus All Assets, in which he did find
12 the Bartkus exception potentially applied and
13 remanded because the state would receive certain
14 assets in forfeiture. Do you think that case is
15 wrongly decided?

16 MS. ROSS: Your Honor, you know, I --
17 I think it sort of holds out the prospect of
18 there being a Bartkus exception. I'm not sure
19 that --

20 JUSTICE GORSUCH: No, it found a
21 Bartkus exception and it remanded to see whether
22 it applied on the facts of that case.

23 MS. ROSS: So -- so to the --

24 JUSTICE GORSUCH: And I'm just asking,
25 do you think it's correctly decided?

1 MS. ROSS: So, to the extent that it
2 would mean that there would be a Bartkus
3 exception which would bar the second
4 prosecution, then, yes, I think it's incorrectly
5 decided.

6 JUSTICE GORSUCH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh?

9 Justice Barrett?

10 Thank you, counsel.

11 MS. ROSS: Thank you.

12 CHIEF JUSTICE ROBERTS: Mr. Kimberly,
13 rebuttal?

14 REBUTTAL ARGUMENT OF MICHAEL B. KIMBERLY
15 ON BEHALF OF THE PETITIONER

16 MR. KIMBERLY: Thank you, Mr. Chief
17 Justice. Just a few clarifications.

18 First, our position, to Justice
19 Kagan's question, is, indeed, that if the tribe
20 controls the prosecutor, we don't have this
21 problem. To be clear, it's not just the
22 appointment, but it's also that the prosecutor
23 in turn is controlled by and answerable to the
24 tribe so that the prosecution properly can be
25 called a tribal prosecution. In the words of

1 Sanchez Valle, that the prosecuting entity
2 derives its power from the tribe.

3 That manifestly did not happen here
4 because the prosecutor is answerable to federal
5 authorities under the Code of Federal
6 Regulations and the United States Code.

7 There was some attention in my
8 friend's presentation to whether or not these
9 tribes have the authority to pull out from these
10 CFR courts, and both factually and legally, they
11 really don't.

12 First, as a factual matter, Justice
13 Sotomayor, as you -- as you noted -- and this is
14 cited on page 8 of our blue brief -- is the Kewa
15 Pueblo was required to assume jurisdiction under
16 a CFR court, and that was in 2020, just 18
17 months ago. It was very, very recent.

18 Beyond that, the Assistant Secretary
19 for Indian Affairs has to approve, under the Ute
20 Mountain Ute Code's constitution, any ordinance
21 that the Ute Mountain Ute Tribe purports to
22 adopt. And so, in order for it to adopt the
23 kind of judicial system that would be necessary
24 to do away with the CFR courts, it would require
25 the BIA's approval.

1 And beyond that, in any event, we have
2 at page 8 of the tribe's brief and page 9 of the
3 United States' brief an observation that these
4 courts really are only made available to the --
5 the tribes and pueblos that cannot afford
6 judicial systems of their own. Just as a
7 factual matter, they don't really have a choice
8 to do away with these courts.

9 And so, as I said in my opening
10 presentation, far more respectful of tribal
11 sovereignty would be simply to allow the tribes
12 to appoint their own prosecutors to act in these
13 courts in the interests and exercising the
14 sovereign authority of these tribes or otherwise
15 just to give them the resources necessary to
16 establish their own systems.

17 If the Court doesn't have any further
18 questions, I'm happy to rest on our briefs.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel. The case is submitted.

21 (Whereupon, at 12:41 p.m., the case
22 was submitted.)

23
24
25

Official - Subject to Final Review

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