

High Court's 'Separate Sovereigns' Ruling Is Good For Tribes

By **Steven Gordon and Philip Baker-Shenk** (June 19, 2019)

In *Gamble v. U.S.*, the U.S. Supreme Court reaffirmed Monday the longstanding “separate sovereigns” doctrine that allows state and federal governments to prosecute an individual for the same conduct despite the U.S. Constitution’s ban on double jeopardy.[1] This decision has important ramifications for criminal prosecutions in Indian Country because tribes, like states, are sovereigns that are separate from the federal government.

The case before the court involved Terance Gamble, who said his constitutional rights were violated when he was charged under both Alabama and federal law for possessing a gun as a convicted felon. He pleaded guilty to the state charges, then sought to have his federal indictment dismissed.

The Fifth Amendment provides that no one shall “be subject for the same offence to be twice put in jeopardy of life or limb.” The separate sovereigns doctrine is often considered an exception to the double-jeopardy clause. The court’s decision rejected this conception of the doctrine, stating that it “is not an exception at all.” Instead, the conclusion that the double-jeopardy clause is inapplicable “follows from the [constitutional] text that defines [the double-jeopardy] right in the first place.”

“An ‘offence’ is defined by a law, and each law is defined by a sovereign,” the court said. “So where there are two sovereigns, there are two laws, and two ‘offences.’”

The separate sovereigns doctrine has been the source of some controversy for many years because of the perceived unfairness of both a state and the federal government prosecuting an individual successively for state and federal offenses based on the same conduct. Justice Hugo Black argued that “[i]t is just as much an affront to human dignity and just as dangerous to human freedom for a man to be punished twice for the same offense, once by a State and once by the United States, as it would be for one of these two Governments to throw him in prison twice for the offense.”[2]

In order to ameliorate the practical impact of the separate sovereigns doctrine, the U.S. Department of Justice has long followed a self-imposed policy designed to minimize the number of successive prosecutions that it brings. This policy requires federal prosecutors who wish to bring a federal prosecution following a state prosecution based on the same conduct to obtain approval from an assistant attorney general after showing that the prior prosecution has failed to vindicate a substantial federal interest.

In recent decades, federal prosecutors have invoked the separate sovereigns doctrine to prosecute federal civil rights charges against people who have been acquitted of state criminal charges. For example, two Los Angeles police officers were convicted of federal charges in the beating of Rodney King after they had already been acquitted of state charges.

The separate sovereigns doctrine also applies to successive prosecutions by tribes and the



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federal government, although this application of the doctrine has attracted far less attention. The Supreme Court has ruled that, when an Indian tribe prosecutes a tribe member for violating tribal law, the tribe acts as an independent sovereign, and not as an arm of the federal government. Thus, since tribal and federal prosecutions are brought by separate sovereigns, the double jeopardy clause does not bar one when the other has occurred.[3]

The separate sovereigns doctrine has important practical consequences for serious crimes committed in Indian Country because of the large disparity between the punishments that tribal courts and federal courts can impose. The Indian Civil Rights Act limits the sentence that a tribal court can impose for any single offense to imprisonment for a term of one year.[4] This limit is increased to three years if the defendant (1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or (2) is being prosecuted for an offense comparable to an offense that would be punishable by more than one year of imprisonment if prosecuted by the United States or any of the states.[5]

As a result, the Supreme Court noted years ago, an Indian “defendant will often face the potential of a mild tribal punishment and a federal punishment of substantial severity” and so, if “tribal prosecution [were] held to bar the federal one, important federal interests in the prosecution of major offenses on Indian reservations would be frustrated.”[6]

Although senior Justice Department approval is required before federal prosecutors can prosecute a defendant following a state prosecution, no such approval is required to undertake a successive federal prosecution after a tribal prosecution.[7] Federal prosecutors are simply instructed to consider whether federal interests have already been satisfied by the tribal prosecution, given the limitations on tribal sentencing power measured against the seriousness of the offense.

In addition to major crimes, federal prosecutors have utilized the separate sovereigns doctrine in recent years to help “stem the tide of domestic violence experienced by Native American women.”[8] While tribes are generally limited to prosecuting domestic abusers only for a misdemeanor, federal authorities can prosecute a recidivist domestic abuser for a felony under federal law.[9]

The importance of the separate sovereigns doctrine to law enforcement in Indian Country was emphasized by the federal government during oral arguments before the Supreme Court in *Gamble’s* case. Government counsel noted that federal prosecutions following tribal prosecutions constitute about two-thirds of the several hundred successive prosecutions that the Justice Department brings each year.

From the perspective of Indian Country, there has not been a problem with federal prosecutors unfairly “piling on” defendants after tribal prosecutions. Instead, the problem is how infrequently federal authorities prosecute serious offenses, including murder, rape and domestic violence, that occur in Indian Country, with the result that these crimes too often go unpunished or insufficiently punished.

Had the Supreme Court repudiated the separate sovereigns doctrine, it would have complicated tribal law enforcement because a tribal prosecution, whether or not successful, would have created a double jeopardy bar to a subsequent federal prosecution. Tribal prosecutors who seek federal prosecution of a serious offense in Indian Country would have been forced to stay their hand and take no action against an offender for weeks or months while awaiting a prosecution decision from federal prosecutors. (Once tribal charges are

filed, a defendant could promptly plead guilty and thereby secure double jeopardy protection against a more serious federal offense). And friction between tribal and federal prosecutors would likely result in cases where a prompt tribal prosecution later precluded the federal prosecutors from pursuing more serious federal charges.

The court's reaffirmation of the separate sovereigns doctrine preserves the autonomy of tribal prosecutors and their ability to respond promptly to offenses in Indian Country without the need to worry about the legal repercussions on a federal prosecution for the same conduct. From the perspective of Indian Country, and especially the tribal leaders, police officers and courts who strive daily to maintain public safety in tribal communities, this is a good result.

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[1] *Gamble v. United States*, --- S.Ct. ----, 2019 WL 2493923 (June 17, 2019).

[2] *Abbate v. United States*, 359 U.S. 187, 203 (1959) (Black, J., dissenting).

[3] *United States v. Wheeler*, 435 U.S. 313 (1978).

[4] 25 U.S.C. § 1302(b).

[5] 25 U.S.C. § 1302(a)(7)(D).

[6] *United States v. Wheeler*, 435 U.S. at 330-31.

[7] Justice Manual, Criminal Resource Manual § 682.

[8] *United States v. Bryant*, 136 S. Ct. 1954, 1960 (2016).

[9] 18 U.S.C. 117(a).