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PREVIEW — Denezpi v. United States (2022). Double Jeopardy in Indian Country

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The Supreme Court of the United States scheduled oral arguments for February 22, 2022, beginning at 10:00 a.m. Arguments in *Denezpi v. United States* will be heard immediately following the conclusion of the first scheduled argument. The arguments will be presented in the United States Supreme Court Building in Washington, D.C. Solicitor General Elizabeth B. Prelogar will likely argue for the United States. Michael B. Kimberly will likely argue for Denezpi.

I. INTRODUCTION

The single issue before the Court in *Denezpi v. United States* is whether a Court of Indian Offenses constitutes a federal entity, and therefore, separate prosecutions in federal district court and a Court of Indian Offenses for the same act violates the Double Jeopardy Clause as prosecutions for the "same offense."[1] The United States Court of Appeals for the Tenth Circuit upheld Merle Denezpi's federal district court prosecution.[2] The court found the authority for his earlier Court of Indian Offenses guilty plea at Ute Mountain Ute Agency[3] stemmed from tribal inherent sovereignty, not federal authority.[4] As such, the 10th Circuit held that Denezpi's two convictions were prosecuted by separate sovereigns and the Double Jeopardy Clause does not apply.[5]

II. LEGAL BACKGROUND

The Double Jeopardy Clause of the Fifth Amendment protects individuals from successive punishments and prosecutions by declaring that no person shall be "twice put in jeopardy of life or limb" for the "same offense."[6] Under the so-called Blockburger test, if a second prosecution involves proving the exact same elements as the first, the two offences are the same and double jeopardy bars the second prosecution.[7]

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1. U.S. CONST. amend. V.
2. U.S. v. Denezpi, 18-CR-00267-REB-JMC, 2019 WL 295670 (D. Colo. Jan. 23, 2019).
3. Crim. Min. Order at 1, *United States v Denezpi*, No. 2017-703-CR. (Court of Indian Offenses Dec. 6, 2017).
4. United States v. Denezpi, 979 F.3d 777, 784 (10th Cir. 2020).
5. *Id.*
6. U.S. CONST. amend. V.
7. Blockburger v. United States, 284 U.S. 299, 304 (1932); United States v. Dixon, 509 U.S. 688, 696 (1993).

A significant exception to the Double Jeopardy Clause is the dual-sovereignty doctrine which provides "that two sovereigns, which derive their power from different sources, may individually or both prosecute an offender for an infraction arising from the same conduct which violates the laws of each."[8] The doctrine has been cemented into American jurisprudence and continually upheld by the Court,[9] including being applied to tribal courts.[10] In *United States v. Wheeler*,[11] the Court held that tribal "primeval sovereignty" was never taken away, and when tribes exercise their criminal jurisdiction they do so "as part of its retained sovereignty and not as an arm of the Federal Government." The court made clear that this decision did not encompass whether a Court of Indian Offense ("CFR Court") is "an arm of the Federal Government" or if it derives its power "from the inherent sovereignty of the tribe."[12]

While it is clear that the dual-sovereignty doctrine applies to tribal courts, it remains unclear if the dual-sovereignty exception applies to CFR Courts.[13] The Bureau of Indian Affairs ("BIA") established the CFR Courts in 1883 to assimilate tribes according to federal policy at the time.[14] The CFR Courts adjusted considerably over the next 140 years and today strive "to provide adequate machinery for the administration of justice for Indian tribes."[15] CFR Courts have jurisdiction over "any action" committed by an Indian in Indian Country, but those actions must be made a criminal offense under federal regulations or be a tribal law approved by the Assistant Secretary of Indian Affairs.[16] A CFR Court is usually limited to sentencing a defendant to a maximum of one year of incarceration, but some special circumstances allow for a maximum sentence of three years.[17]

Federal regulations also control appointments and funding for the CFR Courts. Prosecutors for CFR Courts are appointed by the superintendent of the jurisdiction.[18] Similarly, judges are appointed by the Assistant Secretary of Indian Affairs but must be confirmed by a majority of the tribal governing body.[19] Further, funding for CFR Courts derives from Congress and is funneled through the BIA's Tribal Justice Support

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8. Robert Matz, *Dual Sovereignty and the Double Jeopardy Clause: If at First You Don't Convict, Try, Try Again*, 24 FORDHAM URB. L.J. 353, 359 (1997).

9. *See, e.g.*, Heath v. Alabama, 474 U.S. 82, 89 (1985); Gamble v. United States, 139 S. Ct. 1960, 1967 (2019).

10. *See* United States v. Wheeler, 435 U.S. 313 (1978).

11. 435 U.S. 328 (1978).

12. *Id.*

13. *See generally, id.*

14. Justice Raymond D. Austin, *American Indian Customary Law in the Modern Courts of American Indian Nations*, 11 WYO. L. REV. 351, 355 (2011) (citing SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 175 (1994)).

15. 25 C.F.R. § 11.102 (2022).

16. 25 C.F.R. § 11.114; 25 C.F.R. § 11.108.

17. 25 C.F.R. § 11.114; 25 U.S.C. § 1302 (b) (2022).

18. 25 C.F.R. § 11.204.

19. 25 C.F.R. § 11.210.

Office.[20] Currently only 16 tribes use CFR Courts, and many are extremely remote. For example, the Ute Mountain Ute CFR Court in Towaoc is 400 miles away from the nearest federal court.[21]

III. FACTUAL AND PROCEDURAL BACKGROUND

In July 2017, Merle Denezpi ("Denezpi") and a companion known as V.Y., both Navajo Nation members, drove from Teec Nos Pos, Arizona in the Navajo Nation to Towaoc, Colorado in the Ute Mountain Ute Indian Reservation.[22] There, Denezpi and V.Y. went into Denezpi's girlfriend's house where Denezpi used a 2x4 to barricade the door.[23] Denezpi then demanded that V.Y. have sex with him, and when she refused Denezpi threatened V.Y. and forced her to engage in non-consensual sex.[24] Later that night, after Denezpi had fallen asleep, V.Y. escaped and eventually reported the attack to tribal police.[25] V.Y. then underwent a Sexual Assault Nurse Exam that documented twenty-four injuries to her body.[26]

Tribal Police arrested Denezpi several days later and charged him in CFR Court with "assault and battery under 6 Ute Mountain Ute Code § 2, and with terroristic threats and false imprisonment under 25 C.F.R. §§ 11.402, 11.404."[27] Denezpi entered an *Alford* Plea[28] and was released from tribal custody "with credit for time served."[29]

In 2020, a federal grand jury indicted Denezpi for violating one count of aggravated sexual abuse in Indian Country.[30] Denezpi filed a motion to dismiss, contending that the indictment violated the Fifth Amendment's prohibition against double jeopardy because the CFR court he was convicted in was "clearly an arm of the Federal Government," and thus not subject to the dual-sovereignty doctrine.[31] The district court denied the motion to dismiss, holding that the CFR Court which convicted

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20. Chief Judge Gregory D. Smith & Bailee L. Plemmons, *The Court of Indian Appeals: America's Forgotten Federal Appellate Court*, 44 AM. INDIAN L. REV. 211, 222 (2020).

21. Br. Amici Curiae of the Ute Mountain Ute Tribe, Eastern Shawnee Tribe of Oklahoma, and Otoe-Missouria Tribe of Indians in Support of the United States at 2, Denezpi v. United States, No. 20-7622, (U.S. Jan. 18, 2022).

22. United States. v. Denezpi, No. 18-cr-00267-REB-JMC, 2019 WL 295670, at *1 (D. Colo. Jan. 23, 2019).

23. Gov't's Resp. to Def.'s Mot. to Dismiss at 2, United States v Denezpi, No. 18-cr-00267-REB-JMC (D. Colo. Jan. 15, 2019).

24. *Id.*

25. *Id.*

26. United States v. Denezpi, 979 F.3d 777, 780 (10th Cir. 2020).

27. *Id.*

28. *See generally*, North Carolina v. Alford, 400 U.S. 25 (1970) (the Court allowed for a guilty plea from the defendant while he maintained his innocence).

29. Gov't's Resp. to Def.'s Mot. to Dismiss at 2, *United States v. Denezpi*, No. 18-cr-00267-REB-DW (D. Colo. Jun 7, 2018).

30. Indictment at 1, United States v. Denezpi, No. 18-cr-00267-JMC (D. Colo. Jun. 7, 2018).

31. Mot. to Dismiss at 4, United States v. Denezpi, No. 18-cr-00267-REB-JMC. (D. Colo. Jan. 6, 2019).

Denezpi "was exercising the sovereign powers of the Ute Mountain Ute Tribe and is not an arm of the federal government."[32] Denezpi was tried, found guilty, and sentenced to 360 months in prison and ten years of supervised release.[33]

Denezpi appealed his verdict to the United States Court of Appeals for the Tenth Circuit.[34] The Tenth affirmed the district court's decision on October 28, 2020.[35] Denezpi petitioned for a writ of certiorari which was granted on October 18, 2021.[36]

IV. SUMMARY OF ARGUMENTS

The parties disagree on the single issue of whether the CFR Court in which Denezpi was indicted during his first prosecution is derived from federal authority. If so, Denezpi's second prosecution was therefore for the "same offence," and thus barred by double jeopardy.

A. Petitioner's Argument

Denezpi argues that after his first prosecution in a CFR Court, the Fifth Amendment bars the United States from subsequently prosecuting him in federal district court. Denezpi argues that the dual-sovereignty doctrine does not apply because the CFR Court is an arm of the Federal Government.[37]

1. The History and Current Status of CFR Courts

Denezpi asserts this case is a "straightforward violation of the Double Jeopardy Clause," because the United States brought both criminal cases against Denezpi for the "same course of conduct and for offenses with entirely overlapping elements."[38] Denezpi contends the dual-sovereignty doctrine does not apply to the situation at hand because the CFR Courts and the district court derive their power to prosecute from the same source—the United States federal government.[39] Denezpi reasons this is so because the CFR Courts are Article I courts which "reside within the BIA," and the judges, staff, and prosecutors who bring criminal cases to the court "are all subject to exclusive federal control"; thus, the dual-sovereignty doctrine does not apply.[40]

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32. United States. v. Denezpi, 18-cr-00267-REB-JMC, 2019 WL 295670, at *4 (D. Colo. Jan. 23, 2019).
33. United States. v. Denezpi, 979 F.3d 777, 781 (10th Cir. 2020).
34. *Id.*
35. *Id.* at 779.
36. Denezpi v. United States, 142 S. Ct. 395 (2021).
37. Br. for Pet'r at 5, *Denezpi v United States*, No. 20-7622 (U.S. Dec 7, 2021).
38. *Id.* at 14.
39. *Id.* at 17.
40. *Id.*

Denezpi contends that CFR Courts were originally "constituted under the authority of federal regulations" to assimilate the tribes.[41] Thus, the "wellsprings" of the CFR Courts' power could not logically derive from tribal sovereignty."[42] Denezpi further contends that the CFR Courts were originally "run by the BIA Indian agent for each reservation,"[43] and BIA regulation required the appointment of judges whom "rejected tribal customs."[44] Accordingly, Denezpi argues, the CFR Courts were created as "purely federal instrumentalities to force federal law (and western cultural norms) on the tribes."[45] Thus, the "only possible source of power to prosecute crimes" is derived from federal sovereignty, not tribal.[46]

Denezpi then turns to the current operation of the CFR Courts, arguing the CFR Courts remain "federal instrumentalities," where federal prosecutors have exclusive federal prosecutorial discretion.[47] The BIA continues to maintain discretion over the appointment of judges, and prosecutors "work for and at the direction of the United States."[48] Denezpi argues that there is no conceivable way a tribe can exercise sovereignty in a CFR Court because a tribe retains little discretion to create or disband CFR Courts.[49] Denezpi also contends that orders and warrants issued by the CFR Courts are "in the name and under the laws of the United States" and do not require input from the tribes.[50] Further, defendants sentenced to a period of incarceration are remanded to federal custody, and fines are paid to the federal treasury.[51] Accordingly, the CFR Courts "remain federal instrumentalities," where federal prosecutors have exclusive federal prosecutorial discretion, and tribes "have no relevant role in the prosecution of crimes."[52] Therefore, the two prosecutions were both brought by the United States, a "straightforward violation" of double jeopardy, and the dual-sovereignty doctrine does not apply.[53]

2. CFR Courts' Source of Authority

41. *Id.* at 20.
42. *Id*.
43. *Id.* at 21 (quoting Federal Office of Child Support Enforcement, IM-07-03, *Tribal and State Jurisdiction to Establish and Enforce Child Support* 10 (Mar. 12, 2007), https://perma.cc/V2MX-BEAK (2007 FOCSE Memo))) (internal quotation marks omitted); Lindsay Cutler, *Tribal Sovereignty, Tribal Court Legitimacy, and Public Defense*, 63 UCLA L. REV. 1752, 1765 (2016).
44. Br. for Pet'r at 21, *Denezpi v United States*, No. 20-7622 (U.S. Dec 7, 2021) (quoting Office of Indian Affairs Annual report of the Commissioner of Indian Affairs, 28. (1892)).
45. *Id.*
46. *Id.* at 22.
47. *Id.* at 23.
48. *Id.* at 24 (citing 25 C.F.R. § 11.204 (2022)).
49. *Id.*
50. *Id.* at 24–25 (citing 25 U.S.C. § 2508(2)(A)).
51. *Id.* at 25.
52. *Id.* at 23.
53. *Id.* at 25.

Denezpi characterizes the Tenth Circuit's holding that CFR Courts "exercise tribal power" because they prosecute tribal crimes.[54] Denezpi contends this is a logical fallacy because tribes cannot exercise tribal sovereignty when federal prosecutions are undertaken in CFR Courts unilaterally by the BIA.

Denezpi argues that the source of the law applied in a prosecution is irrelevant to a double jeopardy analysis; only the source of the sovereign's authority matters.[55] To Denezpi, CFR Court prosecutions are "federal, regardless of the substantive law applied,"[56] because BIA prosecutions in CFR Courts are grounded in federal sovereignty.[57] Denezpi argues this is the case because the BIA's power to prosecute "derives from the United States Code and the Code of Federal Regulations."[58] Furthermore, Denezpi makes the argument that a federal court does not "morph into an instrumentality" of a tribe every time it enforces the substantive law of the tribe.[59] Denezpi argues this is common place in the civil context, in which federal district courts often apply state civil codes in cases brought pursuant to diversity jurisdiction.[60] In such cases, Denezpi argues, the federal court does not "assume" state sovereign power, but instead "exercises its own independent power." The same applies to state courts when they enforce federal law.[61] Denezpi contends that there is no difference when a federal court is "called upon" to enforce a tribe's criminal laws, and dual-sovereignty precedent has "consistently required not only two offenses defined by separate sovereigns, but also two prosecutions undertaken by separate sovereigns."[62] Thus, it is unlikely in this case that "these truisms" will play out differently, as the Court's dual-sovereignty jurisprudence has required both two offenses defined by separate sovereigns and subsequently two prosecutions by separate sovereigns.

3. The Consequences of the Tenth Circuit's Decision

Denezpi argues that the Tenth Circuit's decision is not supported by the practical purposes of the dual-sovereignty doctrine.[63] One of these purposes is to prevent a faster moving prosecutor from winning the "sprint" to the courthouse and filing an indictment before a slower moving

54. *Id.* at 25 (internal omissions and quotation marks omitted).

55. *Id.* at 25–26 (there is "no case to support the proposition that a single sovereign may prosecute a defendant twice in its own name and in its own courts—first for a violation of another sovereign's laws, and then a second time for a substantively identical violation of its own laws").

56. *Id.* at 26.

57. *Id.*

58. *Id.* at 27 (citing Puerto Rico v. Sanchez Valle, 579 U.S. 59, 66 (2016)).

59. *Id.*

60. *Id.* (citing 28 U.S.C. § 1332 (2021)).

61. *Id.* (citing Claflin v. Houseman, 93 U.S. 130, 136–137 (1876)).

62. *Id.*

63. *Id.* at 28.

sovereign does.[64] Denezpi contends this consideration is irrelevant here because "the decision to prosecute both criminal cases is made by the same sovereign," as Congress has directed the U.S. Attorney's Office to coordinate with the BIA."[65] This interagency cooperation eliminates the "sprint" to the courthouse that would validate an exception to the traditional double jeopardy.[66]

Denezpi then contends the interests of the two sovereigns in punishing the same act should not be of concern because the federal government is making the "unilateral decision" to charge defendants in both the CFR Courts and the district courts.[67] Denezpi reasons that a tribal prosecution in CFR Court likely does "not fully express the tribe's true interest in condemning the crime," and many tribes would prefer federal prosecutions under the Major Crimes Act to draw a harsher sentence.[68] Thus, not recognizing the dual-sovereignty doctrine in this context does not prevent the tribes from "vindicating their sovereign interest."[69]

Last, Denezpi argues that the Tenth Circuit's rationale would authorize states "to pursue successive prosecutions by the same prosecuting entities, in the same courts, for legally and factually identical offenses."[70] Denezpi reasons that states could assert the first prosecution was for a state offense reflecting state sovereignty and that a second prosecution, for the same federal offense, was reflecting federal sovereignty.[71] Similarly, Denezpi argues, the federal government could also "assume" the power to prosecute state criminal codes and then prosecute the defendant twice in federal court for a substantively similar federal crime.[72]

Denezpi concludes, that a single sovereign should only "'get one bite at the apple, not more'";[73] anything less subjects a defendant to "continued 'embarrassment, expense and ordeal' and 'compel[s] him to live in a continuing state of anxiety and insecurity,' in violation of one of the most basic precepts of fairness in criminal procedure."[74]

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64. *Id.* (citing Heath v. Alabama, 474 U.S. 82, 93 (1985)) ("To deny a State its power to enforce its criminal laws because another State has won the race to the courthouse 'would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines.'") (quoting Bartkus v. People of State of Ill., 359 U.S. 121, 137 (1959)).

65. *Id.* at 28 (citing 25 U.S.C. § 2810(b)(1), (8) (2021)).

66. *Id.* at 29.

67. *Id.*

68. *Id* at 30.

69. *Id.*

70. *Id.*

71. *Id.* at 30–31.

72. *Id.* at 31.

73. *Id.* at 32 (quoting Benton v. Maryland, 395 U.S. 784, 796 (1969)).

74. *Id.* (citing *Benton*, 395 U.S. at 796); (quoting Green v. United States, 355 U.S. 184, 187 (1957)).

B. Respondent's Argument

The United States argues that the Court should affirm Denezpi's convictions. The United States contends that the dual-sovereignty doctrine applies to this type of double prosecution as Denezpi violated two sovereigns' laws. The United States believes that the focus of the Court should be on the source of the authority to prosecute Denezpi, not the forum in which he was prosecuted. Further, the government contends that holding otherwise would cause confusion in lower courts, potentially leading to public safety concerns on reservations.[75]

1. Dual Sovereignty and Inherent Sovereignty

The United States points out that both the federal government and the Ute Mountain Ute Tribe have criminalized sexual assault, and both the tribe and the federal government maintain their "primeval sovereignty" to prosecute an individual for breaking those laws.[76] The United States disputes Denezpi's contention that the CFR Courts are transformed into an entity of the federal government only because the BIA created them.[77] Instead, the United States contends that the Ute Mountain Ute prosecution of Denezpi in a CFR Court was vindicating its interest in maintaining order, tribal customs, traditions, and relations among members.[78] Similarly, the federal government was vindicating its interests by prosecuting Denezpi in federal district court.[79] Thus, the United States reasons the "logic" in *Wheeler* shows that the ultimate source of authority of a prosecution by a tribal government in CFR Court derives from the "the inherent sovereignty of the tribe that enacted and defined the crime."[80] Therefore, both sovereigns, the federal government and Ute Mountain Utes, were only able to vindicate each of their interests through prosecuting Denezpi for the offense he committed against each of them.[81]

Next, The United States contends the only relevant factor for a dual-sovereignty inquiry is the "sovereign's authority for the criminal prohibition," and criterion such as "[t]he degree to which an entity . . . submit[s] to outside direction" do not factor into the analysis.[82] Thus, because the Ute Mountain Ute Tribe "has the 'primeval' power to prescribe laws and punish infractions of them," it is a separate sovereign from the United States.[83] The United States contends it is insignificant if

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75. Br. for the U.S. at 16–17, Jan. 11, 2022, No. 20 7622.
76. *Id.* at 22–23 (quoting United States v. Wheeler, 435 U.S. 313, 328 (1978)).
77. *Id.* at 24.
78. *Id.* at 23–24.
79 *Id.* at 23.
80. *Id.* at 22–23.
81. *Id.*
82. Id. at 26 (quoting Puerto Rico v. Sanchez Valle, 579 U.S. 59, 67 (2016)).
83. *Id.* at 26–27; *see* United States v. Wheeler, 435 U.S. 313, 328 (1978).

the Ute Mountain Ute Tribe relies on "the machinery" of the CFR Courts to prosecute crimes against the tribe.[84] Instead, the United States argues that without the Ute Mountain Ute's tribal laws, there would be no prosecution for a violation of the underlying law nor would the tribe use a CFR Court to enforce the law, which are both exercises of the Tribe's own authority.[85]

The United States then contends that Denezpi's interpretation that double jeopardy would bar "successive prosecutions by the same sovereign's prosecutors," is unfounded.[86] The United States argues that double jeopardy only bars prosecutors "from failing once . . . learn[ing] from their mistakes, [and] trying again to secure a conviction."[87] The United States furthers that while some lower courts have "suggested" a potentially narrow exception exits in which one sovereign "manipulates" another sovereign into bringing an indictment, it does not apply here. Even if it did apply, the United States argues, the exception would not preclude the federal prosecution in this case because nothing suggests the "Tribe's decision to utilize the Court of Indian Offenses for the enforcement of its tribal ordinances 'was so dominated, controlled, or manipulated . . . that it did not act of its own volition.'"[88]

2. CFR Courts Source of Authority

The United States asserts that all branches of the government recognize that the CFR Courts exercise tribal sovereignty.[89] Furthermore the early CFR Courts were "understood to exercise the tribes' own authority," as tribes still enacted their own code as part of their retained sovereignty and the CFR Courts did nothing to divest the tribes of that heritage.[90]

Next, the United States explains that tribes have the authority to establish their own tribal judicial system or administer their justice through CFR Courts, but that choice is an "exercise of the tribe's inherent sovereignty."[91] When a tribe decides to retain a CFR Court, the United States argues, the BIA only provides "adequate machinery for the administration of Justice"[92] while the tribe may select ordinances eligible for enforcement, have a role selecting and removing judges, and have control over other functions of the CFR Courts.[93]

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84. *Id.* at 27.
85. *Id.* at 29.
86. *Id.* at 30.
87. *Id.*
88. *Id.* at 32 (quoting United States v. Baptista-Rodriguez, 17 F.3d 1354, 1361 (11th Cir. 1994)).
89. *Id.* at 33.
90. *Id.* at 35–36.
91. *Id.* at 36.
92. *Id.* (quoting 25 C.F.R. 11.102 (2022)).
93. *Id.* at 36–37.

Next, the United States argues Congress is not the source of tribal government but merely regulates parts of tribal government.[94] Thus, while the federal government does fund and regulate sections of the CFR court, it is the tribes that are the source of the CFR Courts' power.[95] The United States contends that while the first prosecution was brought in the name of the U.S., this is not determinative of which sovereign was the wellspring for the power to bring that charge.[96] Further, the United States contends the caption of the pleadings is not determinative of a double jeopardy inquiry and prosecutions are often brought in the name of the tribe.[97]

The United States then contends that ruling the dual-sovereignty doctrine does not apply in this case would have negative and disruptive effects on the judicial system throughout America.[98] The United States argues that if this carve out was implemented, courts would apply the *Blockburger* test to "assess whether a tribal and federal crime are the 'same offence.'"[99] The United States reasons the *Blockburger* test has proved particularly difficult to administer and would become even more difficult if courts were required to apply the test to the elements of tribal offenses and federal crimes.[100]

3. The Consequences of Overturning the Tenth Circuit's Decision

Finally, the United States argues that ruling for Denezpi would damage tribal sovereignty and further harm one of the "most dangerous places in the United States:" Indian Country.[101] The United States argues the consequences would include creating a two-tiered system among the tribes, the first tier being the tribes who have created their own judicial system and the other being the tribes that utilize the CFR Courts. The United States argues that this approach would worsen crime in Indian Country, and defendants like Denezpi, who was sentenced to only 140 days in prison, would get far milder sentences than needed.[102] The United States concludes by asking the Court to affirm the court of appeals.

V. ANALYSIS

This case involves a determination of whether CFR Courts, which are the main source of judicial power for 16 tribes, derive their power from the federal government or the tribes themselves. While the issue of whether double jeopardy applies to subsequent prosecutions in tribal and

94. *Id.* at 38 (citing United States. v. Wheeler, 435 U.S. 313, 328 (1978)).
95. *Id.* at 38–39.
96. *Id.* at 41.
97. *Id.*
98. *Id.* at 42.
99. *Id.* (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)).
100. *Id*. at 43.
101. *Id.* (quoting Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell, 729 F.3d 1025, 1028, 1030 (9th Cir. 2013)).
102. *Id.* at 44–45.

federal court has been soundly decided in *Wheeler,* the *Wheeler* court was explicit in not deciding if the same applies to CFR Courts.[103]

The Court is likely to examine the historical nature of the CFR Courts and whether they are an arm of the federal government. The Court is then likely to determine that the federal government's and CFR Courts' "powers derive from the same 'ultimate source," and Denezpi was put twice in jeopardy.[104]

1. The Historical Significance of the Courts of Indian Affairs

The Court is likely to begin its analysis by looking towards the "ultimate source" of power that CFR Courts derive their power from.[105] In order to accomplish this goal the Court "asks a narrow, historically focused question," to determine the origins of the jurisdictions in question.[106] While traditional tribal dispute mechanisms long pre-dated European colonialism in North America,[107] efforts to "assimilate" Native Americans did not became federal policy in the United States until 1883.[108] The Secretary of the Interior at the time, Henry Teller, recommended the BIA create a set of civil and criminal rules "for use on Indian reservations to end the Indians' 'savage and barbarous practices,' which were 'a great hindrance to [their] civilization.'"[109] The result of this directive was the creation of the CFR Courts by the BIA in 1883.[110] At the CFR Courts inception, they unquestionably derived their power from federal sovereignty as they were used to assimilate Native Americans "with the majority white culture" in the United States.[111] At their peak, CFR Courts operated in about two-thirds of "reservations districts," and continued to punish conduct that "resisted acculturation and assimilation."[112]

With the passage of the Indian Reorganization Act in 1934, the federal policies of allotment and assimilation were replaced with a new policy of tribal self-determination.[113] After the Indian Reorganization Act

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103. United States v. Wheeler, 435 U.S. 313, 328 n. 26 (1978) ("CFR Courts, still exist on approximately 30 reservations . . . we need not decide today whether such a court is an arm of the Federal Government or, like the Navajo Tribal Court, derives its powers from the inherent sovereignty of the tribe.").

104. Puerto Rico v. Sanchez Valle, 579 U.S. 59, 62 (2016) (quoting *Wheeler*, 435 U.S. at 320.

105. *Wheeler,* 435 U.S. at 328.

106. *Sanchez Valle*, 579 U.S. at 62.

107. Vincent C. Milani, *The Right to Counsel in Native American Tribal Courts: Tribal Sovereignty and Congressional Control*, 31 AM. CRIM. L. REV. 1279, 1280 (1994).

108. Austin, *supra* note 14, at 354.

109. *Id.* at 355 (quoting AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN" 1880-1900, at 296 (Francis Paul Prucha ed., 1973)).

110. *Id.*

111. Smith &. Plemmons, *supra* note 20 at 221.

112. Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law; Indian Law Symposium*, 24 N.M.L. REV. 225, 235 (1994).

113. *Id.*

was passed, CFR Courts still remained and were considered to be interim courts until tribes could "authorize and operate their own courts."[114] This policy has persisted and the current purpose of the federal regulations exist to "provide adequate machinery for the administration of justice for Indian tribes."[115] Almost every tribe in the nation has opted to create their own tribal court system and currently only 16 tribes have CFR Courts.[116] The Indian Reorganization Act policy is the crux of the United States' argument that the Ute Mountain Utes are now in fact exercising their tribal sovereignty and acting within their own tribal interests by prosecuting Denezpi. The United States, however, seems to ignore the historic founding of the CFR Courts, which is undoubtedly federal.[117] CFR Courts are no longer meant to be the prominent form of justice on tribal land, but instead a "stop-gap measure allowing a tribe to have a judicial branch until that tribe elects to create its own court system."[118] From their inception CFR courts were considered "blunt tools of assimilation wielded by the federal government under the guise of federal regulation" to civilize tribal governments.[119] While neither Denezpi nor the United States dispute that the CFR Courts have changed considerably since their inception, it is clear that the CFR Courts' historic creation was federal in nature and founded with for the purpose of exercising federal authority.

2. Jurisprudence Demonstrates that CFR Courts Should be Considered Federal Entities

The Court is likely to find that recent jurisprudence shows the CFR Courts should be considered federal entities. In *Puerto Rico v. Sanchez Valle* the court made clear that when determining "whether two prosecuting authorities are different sovereigns for double jeopardy purposes, this Court asks a narrow, historically focused question."[120] In making this determination the Court does not ask how autonomous the second entity is, but "whether the prosecutorial powers of the two jurisdictions have independent origins—or, said conversely, whether those powers derive from the same 'ultimate source.'"[121] Thus, it is likely the

114. *Id.* at 236.

115. 25 C.F.R. § 11.102 (2022).

116. United States Department of the Interior, COURT OF INDIAN OFFENSES, https://perma.cc/TE47-W2G9 (last visited February 10, 2022).

117. *See* Smith &. Plemmons, *supra* note 20, at 119. ("The United States Department of the Interior created the Court of Indian Offenses' jurisdiction through federal Executive Branch regulation in the Code of Federal Regulations"); Cutler, *supra* note 43, at 1795 ("These courts were blunt tools of assimilation wielded by the federal government under the guise of federal regulation for the purpose of "civiliz[ing]" the tribes."); Austin, *supra* note 14, at 357 ("the Court of Indian Offenses, despite its name, was not a court at all but a program established by the federal government to "civilize" the Indians").

118. Smith &. Plemmons, *supra* note 20, at 122.

119. Cutler, *supra* note 43, at 1765.

120. Puerto Rico v. Sanchez Valle, 579 U.S. 59, 62 (2016).

121. *Id.* (quoting United States v. Wheeler, 435 U.S. 313, 320 (1978)).

Court will embark on a similar analysis as they did in *Sanchez Valle*, where it held that Puerto Rico and the United States may not "successively prosecute a single defendant for the same criminal conduct . . . because the oldest roots of Puerto Rico's power to prosecute lie in federal soil."[122]

The Court is likely to find that the CFR Courts are arms of the federal government and thus the dual-sovereignty exception does not apply. When examining the creation of the CFR Courts in 1883, it is abundantly clear that they were created by the federal government with the purpose of deteriorating tribal sovereignty. In *McGirt v. Oklahoma*[123] the Court held that even though the state of Oklahoma had been operating in such a way that would suggest various reservations had been disestablished, this could only be done with by an express act of Congress. Here, there was no act of Congress that created the CFR Courts, instead the Secretary of the Interior directed a federal agency, the BIA, to create these courts to "civilize the Indians."[124] BIA agents subsequently issued rules within the CFR Courts barring certain practices, such as participating in dances and feasts or acting as medicine men.[125] The CFR Courts may have evolved over time and no longer have the objective of assimilation but the correct test is to look "at the deepest wellsprings, not the current exercise, of prosecutorial authority."[126]

It is clear that CFR Courts do not fall within the scope of an Article III court,[127] and it is understood that CFR Courts exercise some degree of tribal authority.[128] However, these courts are considered to be a "'bare bones' stop-gap measure allowing a tribe to have a judicial branch until that tribe elects to create its own court system."[129] In *Sanchez Valle*, the Court found that the dual-sovereignty doctrine did not apply to Puerto Rico, because its authority to "enact and enforce criminal law ultimately comes from Congress."[130] States, for example, "exercise autonomous control over criminal law . . . we treat them as separate sovereigns because they possessed such control as an original matter, rather than deriving it from the Federal Government."[131] Similarly, "tribal prosecution, like a State's, is 'attributable in no way to any delegation ... of federal

122. *Id.*

123. 140 S. Ct. 2452, 2467 (2020).

124. Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003, 1033 (1995); *see* Austin, *supra* note 14, at 351; Weber, *supra* note 112, at 225.

125. Newton, *supra* note 124, at 1033–34 (1995).

126. Puerto Rico v. Sanchez Valle, 579 U.S. 59, 68 (2016).

127. *See* U.S. CONST. art. III, § 1.

128. *See* Tillett v. Lujan, 931 F.2d 636, 640 (10th Cir. 1991) ("CFR courts, however, also function as tribal courts; they constitute the judicial forum through which the tribe can exercise its jurisdiction until such time as the tribe adopts a formal law and order code."); Smith &. Plemmons, *supra* note 20, at 221 ("CFR Courts are "now viewed as a vehicle for the exercise of tribal jurisdiction.").

129. Smith &. Plemmons, *supra* note 20, at 222 (quoting MacArthur v. San Juan Cty., 391 F. Supp. 2d 895, 966 (D. Utah 2005)).

130. *Sanchez Valle*, 579 U.S. at 77.

131. *Id*. at 74.

authority.'"[132] CFR Courts, however, are undoubtedly "attributable" to federal authority;[133] all one needs to look towards is the creation of these Courts by the Office for Indian Affairs for the distinct reason of controlling the "behavior and morals of Native Americans through criminal misdemeanor charges and civil jurisdiction."[134]

3. Related Statutory and Administrative Provisions

Current statutory provisions also tend to show us that CFR Courts are attributable to federal authority. The BIA's regulations governing CFR Courts rejected recommendations of having only a tribal role in appointing of judges because "Courts of Indian Offenses are Federal instrumentalities and not tribal bodies. Federal supervision is therefore mandatory."[135] Further, it is the BIA who maintains control over appointments of judges and prosecutors in CFR Courts.[136] In Denezpi's original pleadings in the CFR Court, the caption stated "United States of America, Plaintiff v. Merle Denezpi, Defendant"; the same caption was used in his district court pleadings.[137]

While there is no formal congressional act establishing the CFR Courts, Congress has implicitly approved of their creation. The Department of the Interior created the CFR Courts' "jurisdiction through federal Executive Branch regulation in the Code of Federal Regulations."[138] Some evidence of Congress' approval of the creation of the CFR Courts "is a [federal] statute that specifically funds training for judges of this court."[139] While the CFR Courts certainly address tribal matters, "the records of the court are federal property, not tribal property."[140]

The foundational factor in determining if the dual-sovereignty doctrine applies is whether the "prosecutorial powers of the two jurisdictions have independent origins—or . . . whether those powers derive from the same 'ultimate source.'"[141] Contrary to the government's

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132. *Id.* at 70 (quoting United States v. Wheeler, 435 U.S. 320–28 (1978)).

133. *Wheeler*, 435 U.S. 320.

134. Smith &. Plemmons, *supra* note 20, at 218.

135. 25 C.F.R. § 11.100 (2022).

136. 25 C.F.R. § 11.201-04.

137. Sentencing Order, United States v Denezpi, No. 2017-703-CR. (Court of Indian Offenses Dec. 06, 2017); Crim. Min. Order, United States v Denezpi, No. 2017-703-CR. (Court of Indian Offenses Dec. 6, 2017); Arraignment Hr'g Min. Order, United States v Denezpi, No. 2017-703-CR (Court of Indian Offenses Jul. 20, 2017).

138. Smith &. Plemmons, *supra* note 20, at 219.

139. *Id*.; *see* 25 U.S.C. § 1311 (2012).

140. *Id*. (citing United States v. Red Lake Band of Chippewa Indians, 827 F.2d 380, 383-84 (8th Cir. 1987)); United States v. Story City., Iowa, 28 F. Supp. 3d 861, 870 (S.D. Iowa 2014)).

141. Puerto Rico v. Sanchez Valle, 579 U.S. 59, 62 (2016) (quoting United States v. Wheeler, 435 U.S. 313, 320 (1978)).

desire to "vindicate" its interests, the Court has been clear that vindication is not the test but instead it is whether the power to prosecute a defendant derives from federal authority.[142] In the case at hand, it is hard to see how a federally appointed prosecutor going before a federally appointed judge in a federally created and funded CFR Court to charge a defendant with a crime under a federal code[143] derives its authority from anything other than the federal government. Thus, it seems likely that the Court will find that the power in this case arose from the same origins, the United States.

VI. CONCLUSION

Ultimately, the Double Jeopardy Clause was not created to determine whose sovereignty prevailed or which sovereign was permitted to prosecute an individual; it was created to protect the citizens of the United States from being punished twice for the same offense. The Court will likely find that Denezpi was put in jeopardy twice for the same offense and the dual-sovereignty exception does not apply. If this is the case it is likely that some of the CFR Courts will be replaced with tribal courts to allow tribes to prosecute defendants. Also, the federal government would most likely have to assist tribes to expedite this process and Congress may have to pass legislation to allow states to enter into prosecutorial agreements with tribes.[144] Ultimately, the Courts decision will help clarify the extent of the dual-sovereignty doctrine and the protections Americans enjoy from the Double Jeopardy Clause.

142. *Wheeler*, 435 U.S. at 320–28.

143. Denezpi was charged under in CFR Court under 25 C.F.R. §§ 11.402, 11.404.

144. *See generally,* The Cherokee Nation and Chickasaw Nation Criminal Jurisdiction Compacting Act of 2021, H.R. 3091, 117th Cong. (2021-2022) (After McGirt v. United States, Congress began the process of passing a bill to allow for Oklahoma and the Cherokee and Chickasaw to enter into a prosecutorial agreement).