

American students “must know and love the laws, this knowledge should be diffused by means of schools and newspapers, and an attachment to the laws may be formed by early impressions on the mind.”

Fifth Amendment Rights: CFR Courts and Denezpi v. United States

By Lonnie Moon (The Browning School)

Introduction:

The Fifth Amendment protects criminals from being prosecuted for the same offense twice. The 2022 case *Denezpi v. United States*¹ wrestles with the meaning of the Fifth Amendment’s Double Jeopardy Clause in context of Indian law: Is the Clause violated by successive prosecutions in a CFR Court and federal court?

For context, *Denezpi* dealt with this question in the context of Merle Denezpi and V. Y., both members of the Navajo Nation. While the two were alone at a house belonging to Denezpi’s friend within the Ute Mountain Ute Reservation in Colorado, Denezpi barricaded the door, threatened V. Y., and forced her to have sex with him.”² Mr. Denezpi was charged with three crimes for his actions: assault and battery, terroristic threats, and false imprisonment. Mr. Denezpi entered an Alford Plea on the count of assault and battery in exchange for the prosecutor dismissing the other charges.³ The plea was accepted and Denezpi sentenced to 140 days of incarceration in federal prison and was released on December 6th, 2017.

In June, 2018, a federal grand jury in the District of Colorado indicted Mr. Denezpi on the count of aggravated sexual abuse under 18 U.S.C. §§ 2241(a)(1)-(2) and 1153(a).. Mr. Denezpi moved to dismiss the indictment, claiming he had been convicted twice of the same conduct in violation of the Fifth Amendment. He argued he had already been prosecuted once by the CFR Court, and thus the indictment in federal district court should trigger the Fifth Amendment. Mr. Denezpi requested dismissal of his charges on the grounds the indictment violates the Double Jeopardy Clause. The District Court denied the motion on the grounds that CFR Courts do not have the same authority as Article III courts. The Court of Appeals Tenth Circuit affirmed, explaining in its opinion:

¹*Denezpi v. United States*, 596 U. S. ____ (2022).

²*Id.*

³An Alford Plea is when a person “registers a formal admission of guilt towards charges in criminal court while the defendant simultaneously expresses their innocence toward those same charges.”

“Mr. Denezpi asserts that the CFR’s power is derived from a dual wellspring of both federal and tribal power. He claims the Courts of Indian Appeals decisions “acknowledge tribal sovereignty, [but] also recognize that the CFR Courts operate under the authority of the federal government, not just the tribes.” Aplt. Br. at 16. But Mr. Denezpi misses the point. Because it has never been withdrawn, the “‘ultimate source’ of the power undergirding” the CFR prosecution of Mr. Denezpi is the Ute Mountain Ute Tribe’s inherent sovereignty. Sanchez Valle, 136 S. Ct. at 1871. Therefore, the subsequent prosecution of Mr. Denezpi in the federal district court did not violate the Fifth Amendment’s prohibition against Double Jeopardy.”⁴

The Court makes it clear that CFR’s power lies in the tribe itself, not the federal government. If the Ute Tribe’s CFR law comes from the authority of the tribe and not the federal government, it does not violate the Double Jeopardy Clause as there is no successive prosecution under one sovereign.

Dealing with Threshold Issues:

What is a CFR Court? CFR Courts, also known as Court of Indian offenses are courts to try members of an Indian tribe to rule violations. In 1883, CFR Courts were established for nearly every Indian tribe by the Commissioner of Indian Affairs. The establishment of CFR Courts would lead to the creation of rules for Indians on reservations. In the Report of the Secretary of the Interior, the report explains the purpose of CFR court by saying:

“If it is the purpose of the Government to civilize the Indians, they must be compelled to desist from the savage and war-barous practices that are calculated to continue them in savagery, no matter what exterior influences are brought to bear on them. Very many of the progressive Indians have become fully alive to the pernicious influences of these heathenish practices indulged in by their people, and have sought to abolish them; in such

⁴*United States of America v. Merle Denezpi* 10th Circuit No. 19-1213 (2020).

efforts they have been aided by their missionaries, teachers, and agents, but this has been found impossible even with the aid thus given.”⁵

CFR Courts were created to civilize the Indians, as they were seen as an inferior race who needed to be educated to refrain from savage and barbarous acts. The Report of the Secretary of the Interior expands by explaining that “He will not advance if the Government supply all his wants and demands nothing from him; and no greater injury can be done him than to supply his wants and allow him to live in idleness. If allowed to continue in idleness, he will continue in vice and savagery. He must be taught to labor and care for himself, by persuasion if possible, by compulsion if necessary.”⁶The claims made by the Secretary further this idea that Indians can not live in a world with white neighbors as they are not as advanced, but posits that the Indians are a community that must be nurtured by the Americans.

The Federal Government implemented cultural assimilation laws in the early 1800s and held that the only way Native Americans could be incorporated with the rest of the U.S. was by forcefully requiring adherence to western standards. At this time, Native Americans were seen as barbarians with the capabilities to be as advanced as the rest of society but without the technological capabilities to adapt. The federal government assumed that some sort of legal system would aid in the assimilation and integration of the Indians into society. The government also expressed the futility of re-educating the Native Americans and a need to implement a court to hold Native Indians accountable for their actions. In the government’s view, this was the only way to stop the Indians from living a life of barbarity.

Over time, many tribes started to establish their own judicial systems, systems that valued their community first which resulted in the decline of CFR Courts. Today, only five CFR Courts remain in Albuquerque, Southern Plains, Western Region, Eastern Oklahoma, and South West Region.. These CFR Courts have limited jurisdiction in its reservations which are criminal offenses and the creation of laws that are enforceable in CFR Courts.⁷ CFR Courts’ role today is to give Indian tribes the power of jurisdiction over their people on all matters that arise on tribal lands including criminal cases.

⁵H.R. Exec. Doc. No. 1, 48th Cong., 1st Sess. (1883).

⁶*Id.*

⁷ECFR Title 25. <https://www.ecfr.gov/current/title-25/chapter-I/subchapter-B/part-11/subpart-D?toc=1>.

Analyzing Justice Gorsuch's Dissent:

Justice Gorsuch filed the dissenting opinion along with Justice Sotomayor and Justice Kagan. Justice Gorsuch conceptualized the case as one in which the CFR Courts charged Mr. Denezpi for violating a federal law and the federal court charged Mr. Denezpi again with an overlapping federal law. Justice Gorsuch views the overlap as a clear violation of the Double Jeopardy Clause in the Fifth amendment as Mr. Denezpi was charged for the same crime under the same federal government. As an avowed originalist, Justice Gorsuch relies on primary source evidence regarding the implementation of CFR Courts to bolster his argument:

“The Secretary instructed the Commissioner of Indian Affairs to promulgate ‘certain rules’ to establish a new “tribunal” and to define new ‘offences of which it was to take cognizance.’ *Id.*, at XII. [...] The Department’s new criminal code also assimilated ‘the laws of the State or Territory within which the reservation may be located,’ and instructed that sentences for assimilated offences should match those imposed by state or territorial law.”⁸

The law in the Court of Indian offenses was created to reflect the federal justice system and federal agencies. Therefore, Justice Gorsuch took the position that historical context demonstrated that these CFR Courts functioned as federal courts and the Department of Justice. The CFR court sentenced Mr. Denezpi and oversaw the time served in prison. This opinion expresses how the Justice Department may have considered the punishment under CFR Courts as insufficient and sentenced Mr. Denezpi to a much longer sentence. This longer sentence did not consider the tribal judgements on their own members.

Justice Gorsuch viewed the conviction of assault and battery as an included offense of aggravated sexual abuse. Therefore, the second conviction is a violation of the Double Jeopardy Clause. In this dissent, Justice Gorsuch emphasizes that there is a possibility that CFR Courts could be used as a temporary measure to allow federal courts to prepare a federal statutory crime. He quotes the *Proceedings of the Eighth Annual Meeting of the Lake Mohonk Conference* which says “a federal officer might “tak[e] up” a Native American who might then “spen[d] two or

⁸1 Report of the Secretary of the Interior at XII (June 30, 1883).

three days in the agency lockup” pursuant to federal regulatory charges, and “then for the same offence [might] be brought before [a federal district] court,” using this example as a comparison to the actual case. Mr. Denezpi was convicted by the CFR court, sentenced and served time in prison. This sentencing bought time for the federal court to prepare a case against Mr. Denezpi which was the concern. The concern became a reality in this case.

Additionally, Justice Gorsuch’s dissent explains how the Ute Mountain Ute’s tribal offense of assault and battery was approved by the Assistant Secretary for assimilation into federal regulations. This means that Mr. Denezpi was prosecuted for a federal regulatory crime, as the CFR court prosecuted under federal, not tribal law. He notes that this conclusion is further backed by the fact that Federal Authorities took a part in every step of the way: The jail he spent 140 days in, in the CFR court, and in the Federal court. CFR Courts are controlled by the federal government, historically and in practice which leads Justice Gorsuch to conclude that both prosecutions were by a federal court, violating the Double Jeopardy Clause.

Parting Ways with Justice Barrett:

The Court’s majority opinion, written by another avowed originalist, Justice Barrett, affirms the decision of the United States Court of Appeals for the 10th Circuit that the Fifth amendment’s Double Jeopardy Clause is not violated as the Dual Sovereignty Doctrine which is that “an offense defined by one sovereign is necessarily different from an offense defined by another, even when the offenses have identical elements.” Justice Barrett explains the CFR court’s source of power originates under the sovereignty of the Ute Mountain Ute Tribe. Her opinion draws on *United States v. Wheeler* 435 U. S. 313 (1978) where Mr. Wheeler, a member of the Navajo Nation, was convicted under the tribal court, then again in federal court. The Supreme Court rejected the defendant’s argument. The only difference between *United States v. Wheeler* and this case is the fact that one was tried in a tribal court and the other was in a CFR court. Yet, Justice Barrett claims:

“Instead, he presents the dual-sovereignty doctrine as “a carveout to the rule against Double Jeopardy” and argues that the carveout does not extend to successive prosecutions by a single sovereign...But Denezpi is wrong to treat the dual-sovereignty

doctrine as an exception to the Clause. Gamble was very clear on this point: “Although the dual-sovereignty rule is often dubbed an ‘exception’ to the Double Jeopardy right, it is not an exception at all.”⁹

She focuses on the term offense itself. She cites *Gamble v. United States* which establishes that “the term “[o]ffence’ was commonly understood in 1791 to mean ‘transgression,’ that is, ‘the Violation or Breaking of a Law.’”¹⁰ Therefore, a single act can violate two separate offenses which in this case is assault and battery along with aggravated sexual abuse. Arguing against this approach, Gorsuch’s dissenting opinion makes two primary points.

1. Firstly, the dissent points out that in *United States v. Wheeler*, the case was held first in a tribal court and the conviction held in the tribal court differed from the conviction by the federal court.
2. Secondly, Justice Gorsuch writes “As this Court expressly acknowledged in *Gamble*, the application of the dual-sovereignty doctrine does not turn solely on “the formal difference between two distinct criminal codes.” It also turns on “the substantive differences between the interests that two sovereigns can have in punishing the same act.” Accordingly, the Double Jeopardy Clause would be violated regardless of which legal code, Ute Mountain Ute Code and United States Code, Mr. Denezpi was tried under as the source of power is the U.S. Federal Government. The clause would also be violated if CFR Courts rebranded the federal government’s laws as their own.

Of note may be the Trust Relation that has been recognized as a factor in cases involving the Native Indian tribes. The Trust Relation in Indian Law is a principle that ensures that the Native Indians would be recognized with the highest moral obligations. Justice Barrett protects tribal sovereignty by setting a clear line between CFR Courts and the federal government. Despite their racist historical background, CFR Courts are a tool for Indian tribes who do not have the resources to establish their own systems of justice.

⁹*Denezpi v. United States*, 596 U. S. ____ (2022).

¹⁰*Gamble v. United States* 587 US _ (2019).

Examining Rhetoric:

Both the dissent and majority opinion shed light on two different images. The dissent portrays Mr. Denezpi as a guilty man who served his time and was convicted again of the same actions. This opinion justifies the history of CFR Courts and its connection to the federal government as the main reason why the CFR court and the district court are one body. The opinion also justifies how the conviction of assault and battery made by the CFR court is included in the offense of aggravated sexual abuse.

The Majority, on the other hand, portrays Mr. Denezpi as a guilty man who served his time but only for his conviction of assault and battery and not aggravated sexual abuse. This opinion centers around the fact that assault and battery is not aggravated sexual abuse. The Double Jeopardy Clause prohibits successive prosecutions for the same offense but not different offenses. Barrett cites Founding-Era dictionaries, specifically the *Dictionarium Britannicum* (Bailey ed. 1730) and *R. Burn & J. Burn, A New Law Dictionary* (1792) for the proposition that an offense defined by one sovereign is necessarily different from that of another sovereign because the sovereign source of a law is a feature of the law itself. Under this logic, Denezpi could be sentenced in both federal district court and the CFR Court because the different legal proscriptions against his same conduct derived from different sovereign authorities.

The controversy demonstrates the intersection of two areas of constitutional doctrine: the Double Jeopardy Clause in Article V of the U.S. Constitution and tribal sovereignty principles. Paradoxically, the historical background of these CFR Courts is that they were designed to forcibly assimilate indigenous populations, but now work to give power to disadvantaged tribes who cannot otherwise afford to establish their own judicial systems. While Mr. Denezpi was convicted of grotesque crimes, it is important not to let his horrible conduct blur the discussion of the broader tribal sovereignty issues at play. After all, the Court's ruling and its impact on tribal sovereignty impacts much more than just Mr. Denezpi's future with four additional CFR Courts spanning across the American West.