

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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Pages: 1 through 73
Place: Washington, D.C.
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Petitioner,)

v.) No. 20-7622

UNITED STATES,)

Respondent.)

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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 20-7622, 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 I understand what you mean by the --
17 we have to take the prosecution, the source of
18 the prosecution into account, let's say, prior
19 to trial, the tribe charges Petitioner here and
20 -- on day one. On day two, the federal
21 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 on
13 -- for the same activity, just what we're
14 talking about here, but, before trial, the -- in
15 -- the federal prosecutor charges under federal
16 law just as you have here, but there is no trial
17 yet. Are those two separate offenses?

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

22 JUSTICE THOMAS: Exact same charge --

23 MR. KIMBERLY: Exact same charge --

24 JUSTICE THOMAS: -- as we have here.

25 MR. KIMBERLY: -- before jeopardy has

1 attached. It -- it sounds to me like those are
2 separate offenses to which the dual-sovereignty
3 doctrine would apply. I --

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

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

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

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

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

1 offense with at least in part a federal
2 character.

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

8 JUSTICE THOMAS: Thank you.

9 JUSTICE SOTOMAYOR: Is that your only
10 difference? Going back to our decision in
11 Wheeler, the Court in Wheeler went through quite
12 a number of ways in which the Navajo tribal
13 court at issue was subject to ultimate federal
14 control, and I want to know what you see as the
15 difference between the federal control
16 recognized by us in Wheeler and the federal
17 control at issue here in CF -- CRT -- CFR
18 courts?

19 MR. KIMBERLY: Well, I think the
20 question in Wheeler, Your Honor, was just
21 whether the tribes actually constitute separate
22 sovereigns for purposes of the dual-sovereignty
23 doctrine. And so, in undertaking that analysis,
24 the Court looked, as it later described it in
25 Sanchez Valle, as -- as the wellsprings of the

1 authority that the tribe has both to define and
2 punish crimes.

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

9 JUSTICE SOTOMAYOR: So tell me what
10 distinguishes it here.

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

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

1 authority to punish from the Code of Federal
2 Regulations and from the United States Code
3 authorizing those -- the promulgation of those
4 regulations.

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

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

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

23 MR. KIMBERLY: I -- if -- if --

24 JUSTICE SOTOMAYOR: CFR -- CFR courts
25 could continue so long as the prosecutor was

1 tribally controlled?

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

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

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

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

18 MR. KIMBERLY: Well, I think the
19 tribes --

20 JUSTICE SOTOMAYOR: The grants aren't
21 big enough.

22 MR. KIMBERLY: I --

23 JUSTICE SOTOMAYOR: They're not big
24 enough in light of 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? Sorry, Justice Gorsuch, I didn't --

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 -- a criminal offense of
22 another sovereign, it takes an exercise of
23 federal legal power to do that. And, again, we
24 have that at 25 C.F.R. 11.108, and that, in
25 effect, imbues -- does imbue for double jeopardy

1 purposes the 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 -- I do want to
9 follow up on this question. And I don't want to
10 revisit Gamble. I'm -- 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, 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
25 sovereign power, brought a -- under Bartkus a

1 charge for the same offense, and that is -- that
2 is the heartland of the Double Jeopardy Clause.
3 And -- and so I just don't see a distinction on
4 the 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 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. Well, you have read, as I have
12 read, the scholars' brief, and it says, sure,
13 there were a lot of tribal officials in 1883
14 appointed by the 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 I guess this -- this person is
19 meant to be a tribal official in the CFR -- it
20 was then CFO, I guess -- is meant to be tribal
21 in nature, just like the law is tribal in
22 nature.

23 Now, I mean, you've read all those
24 things.

25 MR. KIMBERLY: Sure.

1 JUSTICE BREYER: So what is your
2 response to that? Because we have on the other
3 side, on your side, he is appointed. And I take
4 it at that time maybe the police chief in the
5 tribe was appointed. I don't know. But,
6 anyway, go ahead.

7 MR. KIMBERLY: Well, I think there are
8 two responses to it.

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

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

22 MR. KIMBERLY: Well, and -- and,
23 respectfully, Your Honor, I just -- I think the
24 -- the more direct answer is to say that it
25 isn't -- that isn't the inquiry that the Court

1 makes under the Double Jeopardy Clause.

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

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

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

24 Every aspect of what the federal
25 officers in these courts do is an exercise of

1 federal power, as recognized by the BIA itself.

2 JUSTICE KAGAN: Well, I guess, Mr.
3 Kimberly, I think Justice Breyer was asking you
4 for examples of how it would matter.

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

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

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

25 MR. KIMBERLY: Well, and -- and this

1 is what I was driving at, Your Honor, with
2 recognition that a federal prosecutor answerable
3 to federal authorities will necessarily pursue
4 federal priorities.

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

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

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

24 And, I mean, you know, in a way, you
25 know, it's sort of like saying they're suffering

1 from false consciousness, what -- your -- your
2 argument.

3 MR. KIMBERLY: Well, I --

4 JUSTICE KAGAN: I mean, they believe
5 these are their courts.

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

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

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

24 Now that's why I'm puzzled, you see,
25 I'm actually puzzled, because you could look at

1 this individual that we're talking about and say
2 the origin of his authority is he's a tribal
3 official. And when the feds took over, they
4 decided they'd appoint a few tribal officials,
5 in which case both the law and the root of the
6 prosecution are tribal.

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

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

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

22 I would point the Court also if I may
23 to United States against Lara, which presented
24 the question whether tribal courts -- tribal
25 prosecutors that were prosecuting non-member

1 Indians for tribal offenses were, in effect,
2 acting as federal prosecutors, in other words,
3 exercising delegated federal prosecutorial
4 authority or instead inherent tribal authority.

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

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

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

23 But I don't know why it's so -- so
24 surprising that here you would say to one
25 federal official, okay, we want you to represent

1 the interests of the Indian tribe in their
2 courts and their priorities, and that -- the
3 idea that he's the same as some -- a U.S.
4 Attorney with a different set of priorities, I'm
5 not sure that follows.

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

11 We're not aware of any other
12 circumstance --

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

1 tribal cases, you know, might have different
2 priorities to be applied on the reservation.

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

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

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

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

1 prosecution doesn't preclude by operation of the
2 Double Jeopardy Clause a -- a -- a subsequent
3 prosecution.

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

11 CHIEF JUSTICE ROBERTS: Thank you.

12 Justice Thomas, anything further?

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

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

1 issue that the Court has to deal with.

2 JUSTICE THOMAS: So, I mean -- but, if
3 we conclude from that that, well, there can't be
4 a conviction under an Article I court here, then
5 seems as though there would not be a double
6 jeopardy problem.

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

10 JUSTICE THOMAS: I know it, but those
11 are traditional. I mean, those are -- those are
12 military, and I think we've made exceptions for
13 that, as well as territorial.

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

25 JUSTICE THOMAS: Yeah, but I think

1 you're -- you're requiring us to accept an
2 assumption that this court is the -- almost the
3 equivalent either of a tribal court or another
4 federal court. I mean, we have to assume that
5 it has the authority to -- to convict this
6 particular -- the -- the Petitioner here.

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

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

11 Justice Alito?

12 Justice Sotomayor?

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

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

21 JUSTICE SOTOMAYOR: All right.

22 CHIEF JUSTICE ROBERTS: Justice Kagan?

23 Justice Gorsuch, anything further?

24 Justice Kavanaugh?

25 JUSTICE KAVANAUGH: Both the BIA

1 prosecutor and the AUSA are in the executive
2 branch, correct?

3 MR. KIMBERLY: That's correct,
4 ultimately answerable to the President.

5 JUSTICE KAVANAUGH: Yeah. Thank you.

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

8 Thank you, counsel.

9 Ms. Ross.

10 ORAL ARGUMENT OF ERICA L. ROSS

11 ON BEHALF OF THE RESPONDENT

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

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

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

25 The Court also has held that the

1 tribes and the federal government are separate
2 sovereigns for these purposes because they
3 derive their power to prescribe conduct from
4 different sources of authority.

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

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

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

24 And the Court has rejected similar
25 inquiries that would turn on a sovereign's

1 functional autonomy, explaining that they would
2 lead to unclear and inconsistent results.

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

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

17 I welcome the Court's questions.

18 JUSTICE THOMAS: Ms. Ross, just to,
19 for my purposes, clarify the underlying facts in
20 this case, could you just explain why the -- the
21 first trial winds up or the first proceeding
22 winds up with 140 month -- 140 days -- was it
23 140 days or 140 months?

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

1 JUSTICE THOMAS: For a sexual assault,
2 and the -- and then the ultimate federal case
3 winds up with -- is it 360?

4 MS. ROSS: I believe that's correct,
5 Your Honor. So -- so the reason why is because
6 --

7 JUSTICE THOMAS: I'm sorry, 360
8 months.

9 MS. ROSS: Yes.

10 JUSTICE THOMAS: Not 360 days.

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

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

1 apply --

2 JUSTICE THOMAS: But I guess my
3 question is more why spend time on that when
4 there's a more serious underlying offense?

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

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

22 CHIEF JUSTICE ROBERTS: Well --

23 JUSTICE THOMAS: Thank you.

24 CHIEF JUSTICE ROBERTS: -- or -- or
25 one reason to do is to get a dry run on the

1 federal trial, right? There's a lot at stake
2 here. The sentence shows that. You -- you want
3 to make sure you have as effective a prosecution
4 as you can, so, you know, run a prosecution
5 through the CFR court, see what evidence they
6 has, whatever, and then take -- take a much
7 stronger case when there's more at stake.

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

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

25 CHIEF JUSTICE ROBERTS: Well, I'm not

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

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

21 The other --

22 CHIEF JUSTICE ROBERTS: Well, you can
23 --

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

25 CHIEF JUSTICE ROBERTS: -- say that,

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

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

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

24 JUSTICE GORSUCH: Well, Ms. Ross,
25 these CFR courts have long been -- sit uneasily

1 with our separation of powers, as Justice Thomas
2 pointed out and the BIA has acknowledged for a
3 century. 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 you --

21 MS. ROSS: -- since Bartkus.

22 JUSTICE GORSUCH: -- the government
23 acknowledges that possibility exists?

24 MS. ROSS: No. No, Justice Gorsuch.
25 So -- so I would say that that possibility has

1 essentially just not borne fruit and it should
2 not be taken -- it was not a holding of --

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

6 MS. ROSS: So --

7 JUSTICE GORSUCH: -- lower -- lower
8 courts have applied that exception?

9 MS. ROSS: -- so the lower courts have
10 considered the -- the exception. To our
11 knowledge, there's no court of appeals decision
12 actually finding it satisfied.

13 And I think that combined with the
14 fact that the Court itself has not cited Bartkus
15 for this proposition and that it sets -- sits
16 uneasily with the -- the remaining very --

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

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

24 And so --

25 JUSTICE GORSUCH: Okay. Okay. Let --

1 so let's assume it exists then. At least it's a
2 possibility you're not asking us to reject it.
3 That's how I'll take your -- your answer.

4 Why wouldn't this circumstance qualify
5 if -- and if it doesn't, maybe nothing would, I
6 guess, is my question to you.

7 MS. ROSS: So -- so --

8 JUSTICE GORSUCH: You have --

9 MS. ROSS: Sorry.

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

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

24 JUSTICE GORSUCH: Okay. But, if we --
25 if we -- if we disagree with you about that and

1 we take our language in Bartkus seriously.

2 MS. ROSS: Certainly. So I don't
3 think this would qualify and it's for many of
4 the reasons that I was providing to the Chief
5 Justice. There is no coordination on the
6 ground. There's no suggestion that there has
7 been any attempt to circumvent anything here.
8 Really, the tribal prosecutor or the BIA
9 prosecutor is enforcing the tribe's interest in
10 having its own law enforced, and the federal
11 prosecutor is looking at whether federal
12 interests have still been vindicated under
13 federal law.

14 JUSTICE GORSUCH: Can you imagine --

15 JUSTICE KAGAN: So --

16 JUSTICE GORSUCH: Can you imagine --

17 I'm sorry.

18 JUSTICE KAGAN: No, please.

19 JUSTICE GORSUCH: Just one last
20 question. Can you imagine a circumstance in
21 which that Bartkus exception would apply?

22 MS. ROSS: No, Your Honor. I think
23 the better -- the better way to handle that
24 would be to use what this Court has developed
25 since Bartkus, namely the -- the Ashe versus

1 Swenson Doctrine when you have a prior acquittal
2 giving that collateral estoppel effect. And I
3 think the reason why is because Ashe is already
4 a very fact-intensive --

5 JUSTICE GORSUCH: So --

6 MS. ROSS: -- doctrine.

7 JUSTICE GORSUCH: -- two convictions
8 can -- can never implicate Bartkus?

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

17 JUSTICE SOTOMAYOR: Ms. Ross?

18 MS. ROSS: Yes.

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

24 So we have a long history of over 100
25 years of recognizing that it's not just the

1 source of the power, the law, but the power to
2 prosecute it, which is what your -- your
3 plaintiff is saying.

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

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

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

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

1 The first is that, you know, I -- I
2 certainly acknowledge that this Court has talked
3 about the power to prosecute at times. I think
4 that was in cases where, as is often true, the
5 power to prosecute and the power to prescribe
6 ran together and traveled together.

7 And so I don't read those decisions to
8 necessarily adopt a second test in the way that
9 Petitioner suggests. I think that's
10 particularly clear if you look at --

11 JUSTICE SOTOMAYOR: No, it's one test.

12 MS. ROSS: Well --

13 JUSTICE SOTOMAYOR: You have to have
14 both, as he says, a source of law and a source
15 of prosecution that are different.

16 MS. ROSS: So I think --

17 JUSTICE SOTOMAYOR: If you have the
18 same, then you're going to have a double
19 jeopardy problem.

20 MS. ROSS: I think the problem with
21 that understanding, Justice Sotomayor, though I
22 do want to get to why I think we would win even
23 under that understanding, but I think the
24 problem with that understanding is that
25 Petitioner has not even tried to find a -- a

1 hook for the prosecutorial power prong in the
2 text of the Double Jeopardy Clause.

3 As this Court explained most recently
4 in Gamble when it was asked to reconsider and,
5 in fact, reaffirm the -- the dual-sovereignty
6 doctrine, the -- the doctrine is based on the
7 word "offense."

8 JUSTICE SOTOMAYOR: Except Bartkus
9 focused in on it by noting the exception. So it
10 understood that double jeopardy had something to
11 do both with offense and who's enforcing it. Is
12 it the federal government or is it the state?

13 And, here, we have a hybrid situation
14 and we're being asked to figure out who's
15 enforcing the law, the tribe or the federal
16 prosecutor? And, here, let's not forget that
17 the federal prosecutor charged this as a federal
18 crime, the U.S. versus this defendant. He
19 didn't charge it as the tribe versus the
20 defendant.

21 MS. ROSS: So, Justice Sotomayor, I'd
22 like to take one more run at sort of the first
23 half of the question and then pivot to the
24 second half.

25 I think, on the first half, there's

1 just nothing in the text of the clause that
2 speaks to the power to prosecute. It's phrased
3 in the passive voice. It's focusing on the
4 offense. It says nothing about the form of the
5 prosecution or the identity of the prosecutor.

6 I think that's particularly
7 significant because it's common ground here that
8 at the time of the framing, it was entirely
9 possible that state courts would, in fact, be
10 the form of prosecution --

11 JUSTICE SOTOMAYOR: So how does --

12 MS. ROSS: -- for federal offenses.

13 JUSTICE SOTOMAYOR: -- the tribe here
14 -- does the tribe have any voice in what charges
15 -- tribal charges the tribe brings?

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

25 So, to -- to -- to talk about how this

1 actually works in practice, the tribe has the
2 decision in the first instance whether to have a
3 Court of Indian Offenses or whether to use its
4 own tribally operated court.

5 JUSTICE SOTOMAYOR: No, no, no.

6 MS. ROSS: It then has --

7 JUSTICE SOTOMAYOR: Does the tribe
8 decide -- have any input into the charges the
9 federal prosecution brings?

10 MS. ROSS: Yes, Justice Sotomayor.

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

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

24 So the tribe can say, you know, yes,
25 we want DUI prioritized. Yes, we want --

1 JUSTICE SOTOMAYOR: Where do I look --

2 JUSTICE KAGAN: So --

3 JUSTICE SOTOMAYOR: -- to see that?

4 MS. ROSS: I'm sorry?

5 JUSTICE SOTOMAYOR: What do I look at
6 to see that?

7 MS. ROSS: So that last point I think
8 is just simply an absence of any evidence in the
9 -- the regulations to the contrary. I mean, I
10 have been informed that that is how this works.
11 I think it's also clear from the tribe's own
12 brief.

13 JUSTICE SOTOMAYOR: I cede my time to
14 --

15 JUSTICE KAGAN: I mean, Ms. -- Ms.
16 Ross, what would happen if the facts were
17 different? I -- I mean, I think you -- you --
18 you have a good case that -- and the -- the
19 tribe backs you up on this, that the tribe seems
20 to think that this is a quite tribal enterprise
21 at its heart, but -- but I see nothing to
22 prevent it from turning into something entirely
23 different.

24 I mean, suppose you had a case in
25 which the prosecutors for this Court were all

1 detailed from the regular U.S. Attorney's Office
2 for a period of a year, had established
3 relationships with the U.S. Attorney's Office,
4 there was, you know, a practice of every week
5 the prosecutor would come in and talk to the
6 U.S. Attorney about what was going on in the
7 trial court, there was a list of tribal laws
8 that the U.S. Attorney was comfortable about
9 enforcing and a list that the -- that the U.S.
10 Attorney was not comfortable about enforcing,
11 that the tribe really had no say in this
12 whatsoever, that it was top to bottom a U.S.
13 Attorney-run decisionmaking as to which tribal
14 laws would be applied in what ways.

15 I mean, would you still be here saying
16 the same thing?

17 MS. ROSS: So -- so, Justice Kagan, I
18 take the -- the hypothetical to suggest that the
19 regulations would have changed tremendously
20 because that -- none of that would be possible
21 under the current regulations.

22 So, you know, I just want to be clear
23 that under the current regulations, the tribe
24 can pull out of the system, the tribe can
25 appoint the prosecutor, it can pull its own

1 ordinances out, et cetera. It has a lot of
2 control.

3 In the -- the hypothetical world of
4 regulations that -- that I think you're
5 imagining, I think we would still be making the
6 same argument, and I think that that argument
7 just comes down to the text of the Double
8 Jeopardy Clause, but --

9 JUSTICE GORSUCH: Isn't -- isn't that
10 a problem, I mean, and, in fact, isn't
11 historically -- I mean, historically, these
12 courts have not always been so friendly to
13 tribes. They were not created to be friendly to
14 tribes. And the hypothetical Justice Kagan
15 posited was, in fact, true for much of our
16 history.

17 So why should our double jeopardy
18 analysis turn on the graces of the government's
19 regulations today? And on what basis do you
20 really want to make the argument that double
21 jeopardy wouldn't attach, say, a hundred years
22 ago the way these courts were operated?

23 MS. ROSS: So, Justice Gorsuch, I
24 think the -- the reason why we would make that
25 argument is because, so long as the tribe still

1 had the authority to say yes, you know, we're
2 adopting a criminal code, and that code is being
3 enforced --

4 JUSTICE GORSUCH: But that code only
5 pertains to the extent that an Assistant
6 Secretary of the Department of Interior says it
7 pertains, right?

8 MS. ROSS: So, Justice Gorsuch, that
9 was equally true in Wheeler. The -- the tribe
10 there had to have its tribal code approved
11 before it could have a Court of Indian --

12 JUSTICE GORSUCH: But that's right?

13 MS. ROSS: -- or, excuse me, a tribal
14 court.

15 JUSTICE GORSUCH: I'm -- that --
16 that's true, correct?

17 MS. ROSS: I'm sorry?

18 JUSTICE GORSUCH: That -- that is
19 true, that it's up to the Secretary of the
20 Interior or the Assistant Secretary of the
21 Interior?

22 MS. ROSS: So it is true that there
23 has to be tribal -- that there has to be
24 Assistant Secretary approval. I believe it's
25 under 11.449. But, again, that was equally true

1 in Wheeler, and this Court said and I think it
2 reemphasized --

3 JUSTICE GORSUCH: So let's -- let's --
4 let's just take Justice Kagan's hypothetical,
5 which wasn't so hypothetical, and the Assistant
6 Secretary says, I find many of these tribal laws
7 to be savage and we will not enforce them. And,
8 instead, we're going to enforce only our written
9 code, written by bureaucrats at the Department
10 of Interior, enforced by an executive officer
11 who may report fully to the U.S. Attorney's
12 Office before -- and another executive employee
13 who happens to be the "judge" in the case.

14 No double jeopardy then?

15 MS. ROSS: There would be double
16 jeopardy then, Justice Gorsuch, because the key
17 difference there is that the federal government
18 has defined the offense using its own sovereign
19 authority.

20 The difference, and what I took to be
21 Justice Kagan's hypothetical, was that you still
22 have a choice of the tribe to use a tribal court
23 or, excuse me --

24 JUSTICE GORSUCH: So then --

25 MS. ROSS: -- a Court of Indian

1 Offenses for --

2 JUSTICE GORSUCH: -- so then, if
3 that's true, your -- your -- your concerns about
4 administrability rear their ugly head again,
5 don't they, because now double jeopardy turns on
6 whether the offense being charged comes from the
7 Assistant Secretary's choice of a tribal law or
8 his own criminal code.

9 MS. ROSS: I don't think that raises a
10 -- an administrability problem, Your Honor, any
11 more than the fact that, you know, state law
12 versus federal law raises an administrability
13 problem.

14 JUSTICE GORSUCH: Well --

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

16 JUSTICE GORSUCH: -- okay, okay. So
17 you -- so it does, though. You'd say that in
18 those cases where we have federal law, the
19 Assistant Secretary's personal code that he's
20 written, that's a double jeopardy problem,
21 right?

22 MS. ROSS: Yes, Justice Gorsuch.

23 JUSTICE GORSUCH: Okay.

24 MS. ROSS: And that flows from the
25 text.

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

5 MS. ROSS: Because each of those
6 offenses is still an exercise of the tribe's own
7 authority. I want to be clear I don't think
8 this is actually happening on the ground, that
9 the Assistant Secretary is saying, well, you
10 know, I don't like this ordinance, so I'm not
11 going to allow its enforcement.

12 But I think either way that it's still
13 the tribe's own sovereign authority in enacting
14 that.

15 JUSTICE GORSUCH: But just so I'm
16 clear, the -- the Assistant Secretary can curate
17 the tribal code and there would be no double
18 jeopardy problem according to the government?

19 MS. ROSS: I think that's correct,
20 Your Honor. Of course, the tribe could still
21 have the authority to pull out of the Court of
22 Indian Offenses altogether, to pull its offenses
23 out.

24 And so, again, this just goes and I
25 think does go to the administrability problem on

1 Petitioner's rule that, in each of these ways,
2 the tribe has authority here to sort of
3 calibrate how much or how little of a role it
4 wants to have.

5 I think one important point here is
6 that this tribe actually used to have a -- its
7 own tribally operated court. It chose to opt
8 into the Court of Indian Offenses. It could
9 equally choose tomorrow to opt out of the Court
10 of Indian Offenses, and that's because this is a
11 prosecutorial power, to those who think that
12 that is significant here, that resides with the
13 tribe, just as it has, as Sanchez Valle notes in
14 Footnote, I believe it's 5, from sort of
15 primeval times.

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

17 JUSTICE BREYER: You were going to
18 list some others -- you were going to list some
19 others in -- when Justice Sotomayor was talking
20 to you, other respects in which the tribe can
21 control either the presence of the prosecutor
22 and the judge -- who appoints the judge?

23 MS. ROSS: The -- the judge is
24 federally appointed.

25 JUSTICE BREYER: Federal, okay. So

1 the prosecutor, they can opt in or out.

2 MS. ROSS: Mm-hmm.

3 JUSTICE BREYER: And you said at one
4 point, I thought, that they can decide who the
5 prosecutor will be, and I thought you said they
6 could decide whether this prosecution would go
7 forward. Are either of those things true?

8 MS. ROSS: So the first one is true,
9 Justice Breyer.

10 JUSTICE BREYER: Yeah.

11 MS. ROSS: 11.204, I believe it is,
12 provides for the --

13 JUSTICE BREYER: And that's in your
14 brief?

15 MS. ROSS: Yes. Provides for --

16 JUSTICE BREYER: Okay. Anything else?
17 Okay. Got that, go ahead.

18 MS. ROSS: So I -- I want to clarify.
19 I -- I am not aware of it being true on the
20 ground that the prosecutor would -- or that the
21 tribe would say we don't want you to prosecute
22 Mr. X or we do want you to prosecute Mr. Y.

23 JUSTICE BREYER: Okay, not that. Is
24 there anything else you want to bring up they
25 can do?

1 MS. ROSS: Yes. So there are sort of
2 the broad prosecutorial priorities that I
3 mentioned earlier from the regulations.

4 JUSTICE BREYER: How?

5 MS. ROSS: They can also --

6 JUSTICE BREYER: How do they set the
7 priorities?

8 MS. ROSS: So I think there's two
9 ways. There's one, there's just sort of
10 conversations, but two, of course, because the
11 tribe maintains the ability both to rewrite the
12 law and to pull the prosecutor function if it
13 wants to contract for that instead entirely, it
14 does exercise a fair amount of control over the
15 prosecutor him or herself.

16 The others that I would note, you
17 know, they can contract for the clerks here,
18 they contract for the public defender service
19 and a bunch of other administrative
20 capabilities. They also decide whether, as I
21 was mentioning earlier, tribal law is enforced
22 in this forum at all. And, of course, they
23 always have the option to -- to choose to have a
24 tribally operated court.

25 JUSTICE KAGAN: Who are these

1 prosecutors?

2 MS. ROSS: So I -- I -- I -- I'm not
3 sure if I'm understanding the question
4 correctly, but --

5 JUSTICE KAGAN: I mean, you know, how
6 do they get picked?

7 MS. ROSS: So --

8 JUSTICE KAGAN: You know, you could --
9 you could imagine a couple of different systems.
10 You know, one is very tribe-centric. The tribe
11 gives a list to the BIA and the BIA says those
12 look like good people. Or, on the other hand,
13 you could imagine a world in which they were all
14 detailed from the U.S. Attorney's Office. Or
15 you could imagine things in between.

16 What are they?

17 MS. ROSS: So, per regulation, Your
18 Honor, they have to be approved by a vote of
19 two-thirds of the tribal council. And so I
20 think, you know, I apologize I don't know
21 exactly the details. My sense is that it
22 probably does differ between different Courts of
23 Indian Offenses because these are spread out,
24 you know, a -- a little bit.

25 But the -- the tribe has to give its

1 approval through a two-thirds vote. And I think
2 it -- it seems as though, you know, given that
3 that there is a fair amount of discussion about
4 -- about these things. And, of course, again,
5 the -- the prosecutor can be chosen by the tribe
6 if the tribe elects to contract for that
7 function.

8 And I think, just to take Petitioner's
9 concession that, you know, that would make a
10 difference here, I think that sort of brings up
11 precisely the administrability points that you
12 noted in your opinion for the Court in Sanchez
13 Valle in Footnote 3 that, you know, the historic
14 analysis allows us to classify what this Court
15 referred to as broad classes of governments for
16 purposes of the Double Jeopardy Clause, whereas,
17 on Petitioner's view, I think you would need a
18 new analysis not only for every Court of Indian
19 Offenses but for every time they changed
20 something like the prosecutor, perhaps, you
21 know, like the --

22 JUSTICE KAGAN: But, I -- I mean, it
23 strikes me that the Petitioner has a fairly
24 simple administrable rule, and it would go
25 something like this. You know, with respect to

1 these courts, you know, they all differ on the
2 ground and maybe some of them are functioning
3 perfectly, maybe all of them are functioning
4 perfectly, but -- but there are dangers here,
5 you know, of the kinds that I was trying to
6 suggest in the hypothetical I gave you.

7 And in order to forestall those
8 dangers, we just have one simple rule, which is
9 that the tribe has to pick the prosecutor. I
10 mean, that's a perfectly administrable rule.

11 Why not?

12 MS. ROSS: So -- so I think the why
13 not is really the text of the clause. I think
14 that the -- the Double Jeopardy Clause does not
15 protect against everything that one could
16 envision as a jeopardy in theory. It protects
17 against double jeopardy for this -- or -- or two
18 prosecutions for the same offense.

19 JUSTICE KAGAN: Right. But that
20 really makes your argument just like here is
21 what the text says. The text is all about law.
22 It's all -- it's all about law. It doesn't
23 really matter what the facts are, what the
24 dangers are, whether every one of these
25 prosecutions becomes a dress rehearsal for the

1 next bigger prosecution. We just close our eyes
2 to all of that and it's just like is it the same
3 law?

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

17 And I think, you know, the fact that
18 this tribe has chosen not to do that is itself a
19 sovereign choice that warrants respect.

20 If I could -- if I could make one
21 other point with respect to sort of the -- the
22 animating principles of the clause here, I think
23 it's important to think about this case in the
24 context of other criminal defendants and public
25 safety and victims.

1 If Petitioner -- Petitioner is a
2 member of the Navajo Nation, as was his victim.
3 If Petitioner had stayed on the Navajo Nation
4 reservation and committed this sexual assault,
5 there's no question that he would be subject to
6 one prosecution for a tribal offense and one
7 prosecution for a federal offense. That's
8 essentially the facts of Wheeler with a slightly
9 different crime.

10 And so I think what Petitioner is
11 asking for here is really a different rule based
12 on the happenstance that he went to the
13 reservation of a tribe that uses a different
14 form of tribal court. And -- and I don't think
15 that there's anything --

16 JUSTICE ALITO: Suppose someone -- you
17 mentioned that the defendant is a -- I'm sorry,
18 the Petitioner is a member of the Navajo Nation.
19 Suppose someone who is of Indian ancestry has
20 not associated at all with a tribe and says, I
21 don't -- I don't identify as an Indian. Can
22 that person be tried before a CFR court?

23 MS. ROSS: I apologize, Justice Alito.
24 I'm not sure the answer to that question. I
25 think it goes to how the code defines an Indian.

1 And I just -- I haven't sort of run that because
2 it hasn't been presented in this case.

3 JUSTICE SOTOMAYOR: Counsel, I am -- I
4 am a little concerned with your answer to
5 Justice Kagan because I understand, 1999, 2000,
6 the United States took the position with a --
7 not this tribe but another tribe that it could
8 unilaterally establish a CFR court without the
9 tribe's permission and appoint a magistrate
10 without any need for confirmation by the tribal
11 governing body.

12 I've been looking for it in my notes
13 and just forgotten, but assume that that example
14 does exist. Your answer leads me to believe
15 that Justice Kagan's simple rule is much more
16 administrable than us writing an opinion today
17 that says because -- and I'm not even sure we
18 have enough facts to say this -- all of these
19 things exist, the tribe has enough control over
20 these CFR decisions or being a part of this
21 process, that having a prosecutor in this case
22 is okay. That seems to be the opinion we'd have
23 to write if you're maintaining that the U.S.
24 could do what it did at the -- at the turn of
25 this -- a few years ago.

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

3 JUSTICE SOTOMAYOR: Yes.

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

17 So you just simply wouldn't get that
18 situation from this case.

19 JUSTICE THOMAS: I have no questions.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 No questions?

23 Justice Breyer, anything further?

24 Justice Alito?

25 Justice Sotomayor?

1 Justice Gorsuch?

2 JUSTICE GORSUCH: So I -- I just want
3 to make sure I understand your -- your position,
4 that the Assistant Secretary could create his
5 own court, appoint his own prosecutor, tell him
6 to report to the Department of Justice, appoint
7 the judge, and then curate the tribal code and
8 choose which tribal offenses can be prosecuted,
9 and there would be no double jeopardy problem,
10 right?

11 MS. ROSS: I think that is right,
12 Justice Gorsuch, with a very serious and
13 substantial caveat, that it would depend on
14 whether the tribe retained the authority to not
15 have a tribal code that is enforceable in the
16 Court of Indian Offenses.

17 JUSTICE GORSUCH: And then I -- I take
18 it the government does agree, though, that under
19 the Assimilative Crimes Act, when it assimilates
20 a state law, state -- that becomes federal law
21 and double jeopardy attaches, right?

22 MS. ROSS: That's correct, Your Honor,
23 for precisely the reasons that Petitioner
24 provided, that does become an offense under
25 federal law.

1 JUSTICE GORSUCH: And then, finally,
2 there was a -- a Judge Calabresi opinion, United
3 States versus All Assets, in which he did find
4 the Bartkus exception potentially applied and
5 remanded because the state would receive certain
6 assets in forfeiture. Do you think that case is
7 wrongly decided?

8 MS. ROSS: Your Honor, you know, I --
9 I think it sort of holds out the prospect of
10 there being a Bartkus exception. I'm not sure
11 that --

12 JUSTICE GORSUCH: No, it found a
13 Bartkus exception and it remanded to see whether
14 it applied on the facts of that case.

15 MS. ROSS: So -- so, to the --

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

18 MS. ROSS: So, to the extent that it
19 would mean that there would be a Bartkus
20 exception which would bar the second
21 prosecution, then, yes, I think it's incorrectly
22 decided.

23 JUSTICE GORSUCH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Kavanaugh?

1 Justice Barrett?

2 Thank you, counsel.

3 MS. ROSS: Thank you.

4 CHIEF JUSTICE ROBERTS: Mr. Kimberly,
5 rebuttal?

6 REBUTTAL ARGUMENT OF MICHAEL B. KIMBERLY

7 ON BEHALF OF THE PETITIONER

8 MR. KIMBERLY: Thank you, Mr. Chief
9 Justice. Just a few clarifications.

10 First, our position, to Justice
11 Kagan's question, is, indeed, that if the tribe
12 controls the prosecutor, we don't have this
13 problem. To be clear, it's not just the
14 appointment, but it's also that the prosecutor
15 in turn is controlled by and answerable to the
16 tribe so that the prosecution properly can be
17 called a tribal prosecution. In the words of
18 Sanchez Valle, that the prosecuting entity
19 derives its power from the tribe.

20 That manifestly did not happen here
21 because the prosecutor is answerable to federal
22 authorities under the Code of Federal
23 Regulations and the United States Code.

24 There was some attention in my
25 friend's presentation to whether or not these

1 tribes have the authority to pull out from these
2 CFR courts, and both factually and legally, they
3 really don't.

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

10 Beyond that, the Assistant Secretary
11 for Indian Affairs has to approve, under the Ute
12 Mountain Ute Code's constitution, any ordinance
13 that the Ute Mountain Ute Tribe purports to
14 adopt. And so, in order for it to adopt the
15 kind of judicial system that would be necessary
16 to do away with the CFR courts, it would require
17 the BIA's approval.

18 And beyond that, in any event, we have
19 at page 8 of the tribe's brief and page 9 of the
20 United States' brief an observation that these
21 courts really are only made available to the --
22 the tribes and Pueblos that cannot afford
23 judicial systems of their own. Just as a
24 factual matter, they don't really have a choice
25 to do away with these courts.

1 And so, as I said in my opening
2 presentation, far more respectful of tribal
3 sovereignty would be simply to allow the tribes
4 to appoint their own prosecutors to act in these
5 courts in the interests and exercising the
6 sovereign authority of these tribes or otherwise
7 just to give them the resources necessary to
8 establish their own systems.

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

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel. The case is submitted.

13 (Whereupon, at 12:41 p.m., the case
14 was submitted.)

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8 36:21 39:1 53:7 tribal ^[86] 4:5,9 6:10 7:17, 23 8:5,12 9:23,23 10:12,18, 18 11:5 12:6,8,18 14:5,17, 19 15:13,25 16:11,22 17:6 19:9 20:2,4,4,5,11,19 21: 13,19,20,21 23:12,22 25: 20,21,22 26:18,19,20,22, 22 27:2,4,6,20,24,24 28:1, 4 29:25 30:1 33:3 35:7,13, 22 38:9 41:14,15,22 45:8 50:15 52:20 53:7,13 55:10, 13,23 56:6,22 57:7 58:3,17 61:21 62:19 66:6,14 67:10 69:7,8,15 71:17 73:2 tribally ^[11] 11:1 28:6,7 35: 7,9 37:15,18 41:12 51:4 59:7 61:24 tribe ^[76] 5:19 6:5,8,20 8:5 9:1,21 10:6,7,11 11:8 12: 14 19:13,18 20:16 22:5 25: 7,19 26:10 27:11 29:1,20, 22 34:16 35:13 36:8,9,15 38:10 40:14,16 41:1,6 49: 15,19 50:13,14,15,19 51:1, 7,17,24 52:19,19 53:11,23, 24 54:25 55:9 56:22 58:20 59:2,6,13,20 60:21 61:11 62:10,25 63:5,6 64:9 65:9, 18 66:13,20 67:7,7,19 68:8 69:14 71:11,16,19 72:13 tribe's ^[13] 14:9 36:6,13 40: 14,18 45:9 52:11 58:6,13 67:9 68:11,16 72:19 tribe-centric ^[1] 62:10 tribes ^[21] 8:21 9:4,7,13 11: 13,16,19,24 12:4,9,11 25: 16 27:18 35:1 54:13,14 65: 13 72:1,22 73:3,6 tried ^[3] 7:6 48:25 66:22 true ^[18] 12:20 25:14 26:7 33:7 37:14 48:4 54:15 55: 9,16,19,22,25 57:3,15 58:2 60:7,8,19 try ^[1] 47:25 trying ^[1] 64:5 Tuesday ^[1] 1:11 turn ^[4] 35:25 54:18 67:24 71:15 turning ^[1] 52:22 turns ^[2] 32:22 57:5 two ^[26] 3:12,19,21 5:20,22 6:17 7:10,10,12 9:15 11:4 12:21 17:22 22:8 34:17,18, 20,22 42:10 46:7,12,15 61: 8,10 64:17 65:11 two-thirds ^[2] 62:19 63:1	ugly ^[1] 57:4 ultimate ^[3] 8:13 35:21 37: 2 ultimately ^[2] 32:20 34:4 unable ^[1] 68:8 unambiguous ^[1] 27:20 unclear ^[1] 36:2 undeniably ^[1] 32:7 under ^[26] 4:4 6:9,15 12:5, 22 13:3,9,9 18:25 19:9 23: 1 32:4 36:13 42:5 45:12 46:13 48:23 53:21,23 55: 25 65:15 69:18,24 71:22 72:7,11 underlying ^[2] 36:19 38:4 understand ^[8] 5:16 14:4, 11,14 15:22 28:12 67:5 69: 3 understanding ^[7] 6:18 8: 4 18:11 48:21,23,24 62:3 understood ^[3] 14:6 16:7 49:10 undertakes ^[1] 5:11 undertaking ^[1] 8:23 undoes ^[1] 7:5 uneasily ^[2] 41:25 43:16 unilaterally ^[1] 67:8 UNITED ^[16] 1:1,6,15 3:5 7: 18 9:14 10:2 21:4 26:12 27:23 39:17,18 67:6 70:2 71:23 72:20 unquestionably ^[1] 35:22 unusual ^[2] 29:7 40:7 up ^[10] 15:9 25:11 36:21,22 37:3 50:20 52:19 55:19 60: 24 63:10 uses ^[1] 66:13 using ^[1] 56:18 Ute ^[14] 9:20,21 12:14,14 13:8,8 34:15,15 35:12,12 72:11,12,13,13	wants ^[4] 15:1 26:23 59:4 61:13 warrants ^[2] 36:13 65:19 Washington ^[4] 1:10,19, 22 19:20 waste ^[2] 40:8,13 way ^[16] 7:13 12:4 20:10,18 24:20 25:24 27:21 38:20 44:17 45:23 47:9 48:8 51: 19 54:22 58:12 65:5 ways ^[6] 7:12 8:12 50:18 53:14 59:1 61:9 week ^[1] 53:4 welcome ^[2] 5:14 36:17 wellspring ^[1] 14:8 wellsprings ^[1] 8:25 whatever ^[2] 20:6 39:6 whatsoever ^[1] 53:12 Wheeler ^[9] 8:11,11,16,20 37:13 41:13 55:9 56:1 66: 8 whereas ^[1] 63:16 Whereupon ^[1] 73:13 whether ^[22] 3:19,21 5:12 8:21 16:20 18:4,5,13 27: 24 32:17,17 45:11 47:12 51:2,3 57:6 60:6 61:20 64: 24 69:14 70:13 71:25 who's ^[3] 47:22 49:11,14 will ^[6] 17:15,16 22:11 25:3 56:7 60:5 win ^[4] 10:22 33:14,16 48: 22 winds ^[3] 36:21,22 37:3 winning ^[2] 12:24 13:1 wisdom ^[1] 15:24 within ^[2] 16:9 22:10 without ^[2] 67:8,10 word ^[2] 4:19 49:7 words ^[4] 20:3 28:2 29:22 71:17 working ^[1] 22:10 works ^[4] 39:14 40:5 51:1 52:10 world ^[2] 54:3 62:13 worry ^[1] 17:24 worthy ^[1] 16:2 write ^[1] 67:23 writing ^[1] 67:16 written ^[4] 51:20 56:8,9 57: 20 wrongly ^[1] 70:7
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