

**SUPREME COURT  
OF THE UNITED STATES**

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IN THE SUPREME COURT OF THE UNITED STATES

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

Pages: 1 through 73

Place: Washington, D.C.

Date: February 22, 2022

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

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

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

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

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

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

11 MR. KIMBERLY: Mm-hmm.

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

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 --

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. They're not big enough in light of  
22 the poverty of the tribes.

23 MR. KIMBERLY: Well, that's right, but  
24 that -- so the suggestion is rather than the  
25 federal government spending money on CFR courts,

1 the federal government can spend money to allow  
2 these tribes to band together the -- the way  
3 that they do under the CFR courts already to  
4 create tribal judicial systems of their own.

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

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

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

23 MR. KIMBERLY: I think it would be a  
24 winning argument, Your Honor. And I think --  
25 I -- I would feel comfortable analogizing to the

1 assimilation of state crimes under the  
2 Assimilative Crimes Act or the Major Crimes Act.

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

10 JUSTICE GORSUCH: Well --

11 MR. KIMBERLY: -- it having --

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

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

25 JUSTICE BARRETT: But I -- I thought

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

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

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

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

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

23 JUSTICE BARRETT: Okay.

24 MR. KIMBERLY: -- if the Court wants  
25 to take that approach, but our -- our principal

1 position is that it doesn't matter and that for  
2 double jeopardy purposes, there's no meaningful  
3 distinction.

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

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

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

19 JUSTICE GORSUCH: And, historically,  
20 as I understand it, that was an important  
21 feature of the law because the federal  
22 government in its infinite wisdom didn't want  
23 every tribal crime to be enforceable because  
24 they thought some of them were not sufficiently  
25 worthy or -- of -- of -- of federal respect, is



1 that right?

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

13 JUSTICE ALITO: Can a federal criminal  
14 statute include a racial classification?

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

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

23 MR. KIMBERLY: Well, I think you've  
24 got to confront that -- one, I should be clear,  
25 that isn't a question presented here. I think

1 the Court would have to confront that question  
2 perhaps in a future case regardless because  
3 there is a federal regulatory criminal code  
4 adopted by the BIA independent of tribal laws,  
5 and that too has the same racial classification  
6 as a precondition to its application.

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

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

25 Can you respond to that argument?

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

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

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

21          That office with concurrent  
22          jurisdiction, exercising the exact same  
23          sovereign power, brought a -- under Bartkus a  
24          charge for the same offense, and that is -- that  
25          is the heartland of the Double Jeopardy Clause.

1 And -- and so I just don't see a distinction on  
2 the basis that he was convicted the first time.

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

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

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

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

22 JUSTICE BREYER: All right. And is it  
23 the case that the requirement there differs in  
24 any respect from the requirement of a prosecutor  
25 in what is tribal courts throughout the nation?

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

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

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

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

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

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

21                  JUSTICE BREYER: What is that?

22                  MR. KIMBERLY: -- that he is appointed  
23 by a federal official.

24                  JUSTICE BREYER: Wait a minute. What  
25 is that?

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

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

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

21                   Now, I mean, you've read all those  
22 things. So what is your response to that?  
23 Because we have on the other side, on your side,  
24 he is appointed. And I take it at that time  
25 maybe the police chief in the tribe was

1 appointed. I don't know. But, anyway, go  
2 ahead.

3 MR. KIMBERLY: Well, I think there are  
4 two responses to it.

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

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

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

23 The BIA, in promulgating the  
24 regulations that are presently enforceable in  
25 the CFR courts in 1993, dealt with a lot of

1 these same issues in comments during the notice  
2 and comment period and it rejected all of them.  
3 This is at 58 Federal Register 54,407.

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

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

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

23           JUSTICE KAGAN: Well, I guess, Mr.  
24 Kimberly, I think Justice Breyer was asking you  
25 for examples of how it would matter.



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

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

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

21           MR. KIMBERLY: Well, and -- and this  
22 is what I was driving at, Your Honor, with a  
23 recognition that a federal prosecutor answerable  
24 to federal authorities will necessarily pursue  
25 federal priorities.

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

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

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

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

24           MR. KIMBERLY: Well, I --

25           JUSTICE KAGAN: I mean, they believe

1 these are their courts.

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

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

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

20 Now that's why I'm puzzled, you see,  
21 I'm actually puzzled, because you could look at  
22 this individual that we're talking about and say  
23 the origin of his authority is he's a tribal  
24 official. And when the feds took over, they  
25 decided they'd appoint a few tribal officials,

1 in which case both the law and the root of the  
2 prosecution are tribal.

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

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

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

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

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

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

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

19           But I don't know why it's so -- so  
20    surprising that here you would say to one  
21    federal official, okay, we want you to represent  
22    the interests of the Indian tribe in their  
23    courts and their priorities, and that -- the  
24    idea that he's the same as some -- a U.S.  
25    Attorney with a different set of priorities, I'm

1 not sure that follows.

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

7 We're not aware of any other  
8 circumstance --

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

24 And I don't know that that would  
25 necessarily cause such great consternation in

1 the U.S. Attorney's Office.

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

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

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

25 There were charges here that could

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

7 CHIEF JUSTICE ROBERTS: Thank you.

8 Justice Thomas, anything further?

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

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

23 JUSTICE THOMAS: So, I mean -- but, if  
24 we conclude from that that, well, there can't be  
25 a conviction under an Article I court here, then



1 it seems as though there would not be a double  
2 jeopardy problem.

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

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

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

21 JUSTICE THOMAS: Yeah, but I think  
22 you're -- you're requiring us to accept an  
23 assumption that this court is the -- almost the  
24 equivalent either of a tribal court or another  
25 federal court. I mean, we have to assume that

1 it has the authority to -- to convict this  
2 particular -- the -- the Petitioner here.

3 MR. KIMBERLY: That's -- that's true,  
4 Your Honor. That's --

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

7 Justice Alito?

8 Justice Sotomayor?

9 JUSTICE SOTOMAYOR: Let me stop and --  
10 and backtrack. Are you saying that your win  
11 necessarily raises these questions, or are you  
12 saying how you win?

13 MR. KIMBERLY: No, I think these  
14 questions are implicated entirely independent of  
15 how the Court resolves the question presented  
16 here.

17 JUSTICE SOTOMAYOR: All right.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?

19 Justice Gorsuch, anything further?

20 Justice Kavanaugh?

21 JUSTICE KAVANAUGH: Both the BIA  
22 prosecutor and the AUSA are in the executive  
23 branch, correct?

24 MR. KIMBERLY: That's correct,  
25 ultimately answerable to the President.

1 JUSTICE KAVANAUGH: Yeah. Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Barrett, anything further?

4 Thank you, counsel.

5 Ms. Ross.

6 ORAL ARGUMENT OF ERICA L. ROSS

7 ON BEHALF OF THE RESPONDENT

8 MS. ROSS: Mr. Chief Justice, and may  
9 it please the Court:

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

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

21 The Court also has held that the  
22 tribes and the federal government are separate  
23 sovereigns for these purposes because they  
24 derive their power to prescribe conduct from  
25 different sources of authority.

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

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

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

20           And the Court has rejected similar  
21 inquiries that would turn on a sovereign's  
22 functional autonomy, explaining that they would  
23 lead to unclear and inconsistent results.

24           But even if the nature of the court or  
25 the prosecutor mattered, Petitioner would fail

1 his own test. The authority for Petitioner's  
2 first prosecution derived from the tribe's  
3 preexisting power to prosecute offenses between  
4 Indians, which the tribe still possesses today.

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

13 I welcome the Court's questions.

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

20 MS. ROSS: It was 140 days, Justice  
21 Thomas. And --

22 JUSTICE THOMAS: For a sexual assault,  
23 and the -- and then the ultimate federal case  
24 winds up with -- is it 360?

25 MS. ROSS: I believe that's correct,

1 Your Honor. So -- so the reason why is because

2 --

3 JUSTICE THOMAS: I'm sorry, 360  
4 months.

5 MS. ROSS: Yes.

6 JUSTICE THOMAS: Not 360 days.

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

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

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

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

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

18 CHIEF JUSTICE ROBERTS: Well --

19 JUSTICE THOMAS: Thank you.

20 CHIEF JUSTICE ROBERTS: -- or -- or  
21 one reason to do is to get a dry run on the  
22 federal trial, right? There's a lot at stake  
23 here. The sentence shows that. You -- you want  
24 to make sure you have as effective a prosecution  
25 as you can, so, you know, run a prosecution

1 through the CFR court, see what evidence they  
2 have, whatever, and then take -- take a much  
3 stronger case when there's more at stake.

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

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

21 CHIEF JUSTICE ROBERTS: Well, I'm not  
22 suggesting any -- anything happened like that  
23 here, but it certainly is a possibility. And  
24 I'm not suggesting there's anything wrong with  
25 it. I mean, that's how the Double Jeopardy



1 Clause works with respect to state prosecutions.  
2 But -- but I -- I guess I share, if it was  
3 Justice Thomas's concern, that it seems unusual  
4 that you waste time on a serious offense with  
5 such a small possibility -- small possible  
6 sentence when there's a lot more at stake in  
7 what would follow?

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

17 The other --

18 CHIEF JUSTICE ROBERTS: Well, you can  
19 --

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

21 CHIEF JUSTICE ROBERTS: -- say that,  
22 but I suppose the tribe if -- it may be more  
23 interested, or somebody, in the fact that the  
24 guy is going away for 30 years as opposed to 140  
25 days, if I've got the math right. And, I mean,

1 yes, the 140 days, or, really, it was time  
2 served, might show that the tribe has these  
3 particular interests, but I suspect their  
4 interests are being more served by the 30-year  
5 sentence in the other forum.

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

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

20 JUSTICE GORSUCH: Well, Ms. Ross,  
21 these CFR courts have long been -- sit uneasily  
22 with our separation of powers, as Justice Thomas  
23 pointed out and the BIA has acknowledged for a  
24 century. But we can avoid all that, it seems to  
25 me, if we -- if we apply our existing double

1 jeopardy jurisprudence under Bartkus.

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

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

15 JUSTICE GORSUCH: Okay. But you --  
16 you --

17 MS. ROSS: -- since Bartkus.

18 JUSTICE GORSUCH: -- the government  
19 acknowledges that possibility exists?

20 MS. ROSS: No. No, Justice Gorsuch.  
21 So -- so I would say that that possibility has  
22 essentially just not borne fruit and it should  
23 not be taken -- it was not a holding of --

24 JUSTICE GORSUCH: Well, it's actually  
25 been applied in the lower courts, right? I mean

1 --

2 MS. ROSS: So --

3 JUSTICE GORSUCH: -- lower -- lower  
4 courts have applied that exception?

5 MS. ROSS: -- so the lower courts have  
6 considered the -- the exception. To our  
7 knowledge, there's no court of appeals decision  
8 actually finding it satisfied.

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

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

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

20 And so --

21 JUSTICE GORSUCH: Okay. Okay. Let's  
22 -- so let's assume it exists then. At least  
23 it's a possibility you're not asking us to  
24 reject it. That's how I'll take your answer.

25 Why wouldn't this circumstance qualify

1 if -- and if it doesn't, maybe nothing would, I  
2 guess, is my question to you.

3 MS. ROSS: So -- so --

4 JUSTICE GORSUCH: You have --

5 MS. ROSS: Sorry.

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

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

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

23 MS. ROSS: Certainly. So I don't  
24 think this would qualify and it's for many of  
25 the reasons that I was providing to the Chief

1 Justice. There is no coordination on the  
2 ground. There's no suggestion that there has  
3 been any attempt to circumvent anything here.  
4 Really, the tribal prosecutor or the BIA  
5 prosecutor is enforcing the tribe's interest in  
6 having its own law enforced, and the federal  
7 prosecutor is looking at whether federal  
8 interests have still been vindicated under  
9 federal law.

10 JUSTICE GORSUCH: Can you imagine --

11 JUSTICE KAGAN: So --

12 JUSTICE GORSUCH: Can you imagine --

13 I'm sorry.

14 JUSTICE KAGAN: No, please.

15 JUSTICE GORSUCH: Just one last  
16 question. Can you imagine a circumstance in  
17 which that Bartkus exception would apply?

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

1 JUSTICE GORSUCH: So --

2 MS. ROSS: -- doctrine.

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

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

13 JUSTICE SOTOMAYOR: Ms. Ross?

14 MS. ROSS: Yes.

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

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

25 And I read Bartkus as basically

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

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

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

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

22           The first is that, you know, I -- I  
23 certainly acknowledge that this Court has talked  
24 about the power to prosecute at times. I think  
25 that was in cases where, as is often true, the



1 power to prosecute and the power to prescribe  
2 ran together and traveled together.

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

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

8 MS. ROSS: Well --

9 JUSTICE SOTOMAYOR: You have to have  
10 both, as he says, a source of law and a source  
11 of prosecution that are different.

12 MS. ROSS: So I think --

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

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

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

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

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

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

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

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

1 prosecution or the identity of the prosecutor.

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

7 JUSTICE SOTOMAYOR: So how does --

8 MS. ROSS: -- for federal offenses.

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

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

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

1 JUSTICE SOTOMAYOR: No, no, no.

2 MS. ROSS: It then has --

3 JUSTICE SOTOMAYOR: Does the tribe  
4 decide -- have any input into the charges the  
5 federal prosecution brings?

6 MS. ROSS: Yes, Justice Sotomayor.

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

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

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

22 JUSTICE SOTOMAYOR: Where do I look --

23 JUSTICE KAGAN: So --

24 JUSTICE SOTOMAYOR: -- to see that?

25 MS. ROSS: I'm sorry?

1 JUSTICE SOTOMAYOR: Where do I look at  
2 to see that?

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

9 JUSTICE SOTOMAYOR: I cede my time to  
10 --

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

19 I mean, suppose you had a case in  
20 which the prosecutors for this Court were all  
21 detailed from the regular U.S. Attorney's Office  
22 for a period of a year, had established  
23 relationships with the U.S. Attorney's Office,  
24 there was, you know, a practice of every week  
25 the prosecutor would come in and talk to the

1 U.S. Attorney about what was going on in the  
2 trial court, there was a list of tribal laws  
3 that the U.S. Attorney was comfortable about  
4 enforcing and a list that the tribe -- that the  
5 U.S. Attorney was not comfortable about  
6 enforcing, that the tribe really had no say in  
7 this whatsoever, that it was top to bottom a  
8 U.S. Attorney-run decisionmaking as to which  
9 tribal laws would be applied in what ways.

10 I mean, would you still be here saying  
11 the same thing?

12 MS. ROSS: So -- so, Justice Kagan, I  
13 take the -- the hypothetical to suggest that the  
14 regulations would have changed tremendously  
15 because that -- none of that would be possible  
16 under the current regulations.

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

23 In the hypothetical world of  
24 regulations that -- that I think you're  
25 imagining, I think we would still be making the

1 same argument, and I think that that argument  
2 just comes down to the text of the Double  
3 Jeopardy Clause, but --

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

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

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

24 JUSTICE GORSUCH: But that code only  
25 pertains to the extent that an Assistant

1 Secretary of the Department of Interior says it  
2 pertains, right?

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

7 JUSTICE GORSUCH: But that's right?

8 MS. ROSS: -- or, excuse me, a tribal  
9 court.

10 JUSTICE GORSUCH: That -- that's true,  
11 correct?

12 MS. ROSS: I'm sorry?

13 JUSTICE GORSUCH: That is true, that  
14 it's up to the Secretary of the Interior or the  
15 Assistant Secretary of the Interior?

16 MS. ROSS: So it is true that there  
17 has to be a tribal -- that there has to be  
18 Assistant Secretary approval. I believe it's  
19 under 11.449. But, again, that was equally true  
20 in Wheeler, and this Court said and I think it  
21 reemphasized --

22 JUSTICE GORSUCH: So let's -- let's --  
23 let's just take Justice Kagan's hypothetical,  
24 which wasn't so hypothetical, and the Assistant  
25 Secretary says, I find many of these tribal laws



1 to be savage and we will not enforce them. And,  
2 instead, we're going to enforce only our written  
3 code, written by bureaucrats at the Department  
4 of Interior, enforced by an executive officer  
5 who may report fully to the U.S. Attorney's  
6 Office before -- and another executive employee  
7 who happens to be the "judge" in the case.

8 No double jeopardy then?

9 MS. ROSS: There would be double  
10 jeopardy then, Justice Gorsuch, because the key  
11 difference there is that the federal government  
12 has defined the offense using its own sovereign  
13 authority.

14 The difference, and what I took to be  
15 Justice Kagan's hypothetical, was that you still  
16 have a choice of the tribe to use a tribal court  
17 or, excuse me --

18 JUSTICE GORSUCH: So then --

19 MS. ROSS: -- a Court of Indian  
20 Offenses for --

21 JUSTICE GORSUCH: -- so then, if  
22 that's true, your -- your -- your concerns about  
23 administrability rear their ugly head again,  
24 don't they, because now double jeopardy turns on  
25 whether the offense being charged comes from the

1 Assistant Secretary's choice of a tribal law or  
2 his own criminal code.

3 MS. ROSS: I don't think that raises a  
4 -- an administrability problem, Your Honor, any  
5 more than the fact that, you know, state law  
6 versus federal law raises an administrability  
7 problem.

8 JUSTICE GORSUCH: Well --

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

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

16 MS. ROSS: Yes, Justice Gorsuch.

17 JUSTICE GORSUCH: Okay.

18 MS. ROSS: And that flows from the  
19 text.

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

24 MS. ROSS: Because each of those  
25 offenses is still an exercise of the tribe's own

1 authority. I want to be clear I don't think  
2 this is actually happening on the ground, that  
3 the Assistant Secretary is saying, well, you  
4 know, I don't like this ordinance, so I'm not  
5 going to allow its enforcement.

6 But I think either way that it's still  
7 the tribe's own sovereign authority in enacting  
8 that.

9 JUSTICE GORSUCH: But just so I'm  
10 clear, the -- the Assistant Secretary can curate  
11 the tribal code and there would be no double  
12 jeopardy problem according to the government?

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

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

24 I think one important point here is  
25 that this tribe actually used to have a -- its

1 own tribally operated court. It chose to opt  
2 into the Court of Indian Offenses. It could  
3 equally choose tomorrow to opt out of the Court  
4 of Indian Offenses, and that's because this is a  
5 prosecutorial power, to those who think that  
6 that is significant here, that resides with the  
7 tribe, just as it has, as Sanchez Valle notes in  
8 Footnote, I believe it's 5, from sort of  
9 primeval times.

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

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

17 MS. ROSS: The -- the judge is  
18 federally appointed.

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

21 MS. ROSS: Mm-hmm.

22 JUSTICE BREYER: And you said at one  
23 point, I thought, that they can decide who the  
24 prosecutor will be, and I thought you said they  
25 could decide whether this prosecution would go

1 forward. Are either of those things true?

2 MS. ROSS: So the first one is true,  
3 Justice Breyer. 11.204, I believe it is,  
4 provides for the --

5 JUSTICE BREYER: And that's in your  
6 brief?

7 MS. ROSS: Yes. Provides for --

8 JUSTICE BREYER: Okay. Anything else?  
9 Okay. Go ahead.

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

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

17 MS. ROSS: Yes. So there are sort of  
18 the broad prosecutorial priorities that I  
19 mentioned earlier from the regulations.

20 JUSTICE BREYER: How?

21 MS. ROSS: They can also --

22 JUSTICE BREYER: How do they set the  
23 priorities?

24 MS. ROSS: So I think there's two  
25 ways. There's one, there's just sort of

1 conversations, but two, of course, because the  
2 tribe maintains the ability both to rewrite the  
3 law and to pull the prosecutor function if it  
4 wants to contract for that instead entirely, it  
5 does exercise a fair amount of control over the  
6 prosecutor him or herself.

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

16           JUSTICE KAGAN: Who are these  
17 prosecutors?

18           MS. ROSS: So I -- I -- I -- I'm not  
19 sure if I'm understanding the question  
20 correctly.

21           JUSTICE KAGAN: I mean, you know, how  
22 do they get picked?

23           MS. ROSS: So --

24           JUSTICE KAGAN: You know, you can  
25 imagine a couple of different systems. You

1 know, one is very tribe-centric. The tribe  
2 gives a list to the BIA and the BIA says those  
3 look like good people. Or, on the other hand,  
4 you could imagine a world in which they were all  
5 detailed from the U.S. Attorney's Office. Or  
6 you could imagine things in between.

7 What are they?

8 MS. ROSS: So, per regulation, Your  
9 Honor, they have to be approved by a vote of  
10 two-thirds of the tribal council. And so I  
11 think, you know, I apologize I don't know  
12 exactly the details. My sense is that it  
13 probably does differ between different Courts of  
14 Indian Offenses because these are spread out,  
15 you know, a little bit.

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

23 And I think, just to take Petitioner's  
24 concession that, you know, that would make a  
25 difference here, I think that sort of brings up

1 precisely the administrability points that you  
2 noted in your opinion for the Court in Sanchez  
3 Valle in Footnote 3 that, you know, the historic  
4 analysis allows us to classify what this Court  
5 referred to as broad classes of governments for  
6 purposes of the Double Jeopardy Clause, whereas,  
7 on Petitioner's view, I think you would need a  
8 new analysis not only for every Court of Indian  
9 Offenses but for every time they changed  
10 something like the prosecutor, perhaps, you  
11 know, like the --

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

22 And in order to forestall those  
23 dangers, we just have one simple rule, which is  
24 that the tribe has to pick the prosecutor. I  
25 mean, that's a perfectly administrable rule.



1                   Why not?

2                   MS. ROSS:  So -- so I think the why  
3                   not is really the text of the clause.  I think  
4                   that the -- the Double Jeopardy Clause does not  
5                   protect against everything that one could  
6                   envision as a jeopardy in theory.  It protects  
7                   against double jeopardy for this -- or -- or two  
8                   prosecutions for the same offense.

9                   JUSTICE KAGAN:  Right.  But that  
10                  really makes your argument just like here is  
11                  what the text says.  The text is all about law.  
12                  It's all -- it's all about law.  It doesn't  
13                  really matter what the facts are, what the  
14                  dangers are, whether every one of these  
15                  prosecutions becomes a dress rehearsal for the  
16                  next bigger prosecution.  We just close our eyes  
17                  to all of that and it's just like is it the same  
18                  law?

19                  MS. ROSS:  So I -- I do think that  
20                  that is a perfectly appropriate way to resolve  
21                  the case.  To take the very -- the much more  
22                  practical concern about the prosecutor, you  
23                  know, I think, if you had a rule in which the  
24                  tribe, as long as it selected the prosecutor, it  
25                  was fine to have these two separate offenses

1 prosecuted separately, you know, I think there  
2 are good reasons why tribes choose not to have  
3 -- choose not to appoint the prosecutor  
4 themselves. That is a choice that's available  
5 to them under the regulations.

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

9 If I could -- if I could make one  
10 other point with respect to sort of the -- the  
11 animating principles of the clause here, I think  
12 it's important to think about this case in the  
13 context of other criminal defendants and public  
14 safety and victims.

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

24 And so I think what Petitioner is  
25 asking for here is really a different rule based

1 on the happenstance that he went to the  
2 reservation of a tribe that uses a different  
3 form of tribal court. And -- and I don't think  
4 that there's anything --

5 JUSTICE ALITO: Suppose someone -- you  
6 mentioned that the defendant is a -- I'm sorry,  
7 the Petitioner is a member of the Navajo Nation.  
8 Suppose someone who is of Indian ancestry has  
9 not associated at all with a tribe and says, I  
10 don't -- I don't identify as an Indian. Can  
11 that person be tried before a CFR court?

12 MS. ROSS: I apologize, Justice Alito.  
13 I'm not sure the answer to that question. I  
14 think it goes to how the code defines an Indian.  
15 And I just -- I haven't sort of run that because  
16 it hasn't been presented in this case.

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

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

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

17                         JUSTICE SOTOMAYOR: Yes.

18                 MS. ROSS: And what happened there  
19                 actually doesn't implicate the issues in this  
20                 case at all because that court, when it was  
21                 constituted by the Secretary of the Interior --  
22                 because the tribe was unable to provide the  
23                 basic due process rights required by the Indian  
24                 Civil Rights Act, that court could not apply the  
25                 tribe's own law. So the Secretary did waive the

1 requirement for the -- the institution of a  
2 Court of Indian Offenses and the -- the  
3 selection of the magistrate, but not with  
4 respect to the ability to -- to prosecute the  
5 tribe's own offenses.

6 So you just simply wouldn't get that  
7 situation from this case.

8 JUSTICE THOMAS: I have no questions.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 No questions?

12 Justice Breyer, anything further?

13 Justice Alito?

14 Justice Sotomayor?

15 Justice Gorsuch?

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

25 MS. ROSS: I think that is right,

1 Justice Gorsuch, with a very serious and  
2 substantial caveat, that it would depend on  
3 whether the tribe retained the authority to not  
4 have a tribal code that is enforceable in the  
5 Court of Indian Offenses.

6 JUSTICE GORSUCH: And then I take it  
7 the government does agree, though, that under  
8 the Assimilative Crimes Act, when it assimilates  
9 a state law, state prosecution -- that becomes  
10 federal law and double jeopardy attaches, right?

11 MS. ROSS: That's correct, Your Honor,  
12 for precisely the reasons that Petitioner  
13 provided, that does become an offense under  
14 federal law.

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

22 MS. ROSS: Your Honor, you know, I --  
23 I think it sort of holds out the prospect of  
24 there being a Bartkus exception. I'm not sure  
25 that --

1 JUSTICE GORSUCH: No, it found a  
2 Bartkus exception and it remanded to see whether  
3 it applied on the facts of that case.

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

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

7 MS. ROSS: So, to the extent that it  
8 would mean that there would be a Bartkus  
9 exception which would bar the second  
10 prosecution, then, yes, I think it's incorrectly  
11 decided.

12 JUSTICE GORSUCH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Kavanaugh?

15 Justice Barrett?

16 Thank you, counsel.

17 MS. ROSS: Thank you.

18 CHIEF JUSTICE ROBERTS: Mr. Kimberly,  
19 rebuttal?

20 REBUTTAL ARGUMENT OF MICHAEL B. KIMBERLY  
21 ON BEHALF OF THE PETITIONER

22 MR. KIMBERLY: Thank you, Mr. Chief  
23 Justice. Just a few clarifications.

24 First, our position, to Justice  
25 Kagan's question, is, indeed, that if the tribe

1 controls the prosecutor, we don't have this  
2 problem. To be clear, it's not just the  
3 appointment, but it's also that the prosecutor  
4 in turn is controlled by and answerable to the  
5 tribe so that the prosecution properly can be  
6 called a tribal prosecution. In the words of  
7 Sanchez Valle, that the prosecuting entity  
8 derives its power from the tribe.

9 That manifestly did not happen here  
10 because the prosecutor is answerable to federal  
11 authorities under the Code of Federal  
12 Regulations and the United States Code.

13 There was some attention in my  
14 friend's presentation to whether or not these  
15 tribes have the authority to pull out from these  
16 CFR courts, and both factually and legally, they  
17 really don't.

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

24 Beyond that, the Assistant Secretary  
25 for Indian Affairs has to approve, under the Ute



1 Mountain Ute Code's constitution, any ordinance  
2 that the Ute Mountain Ute Tribe purports to  
3 adopt. And so, in order for it to adopt the  
4 kind of judicial system that would be necessary  
5 to do away with the CFR courts, it would require  
6 the BIA's approval.

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

15           And so, as I said in my opening  
16 presentation, far more respectful of tribal  
17 sovereignty would be simply to allow the tribes  
18 to appoint their own prosecutors to act in these  
19 courts in the interests and exercising the  
20 sovereign authority of these tribes or otherwise  
21 just to give them the resources necessary to  
22 establish their own systems.

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

25           CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 12:41 p.m., the case  
3 was submitted.)

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