Touro Law Review

Volume 17 | Number 4 Article 6

March 2016

Wheeler for Two, Do You Have a Reservation? The Supreme Court's Inconsistent Treatment of Tribal Sovereignty

Fred Kantrow

WHEELER FOR TWO, DO YOU HAVE A RESERVATION? THE SUPREME COURT'S INCONSISTENT TREATMENT OF TRIBAL SOVEREIGNTY

Fred Kantrow[1]

I. INTRODUCTION

In 1978 the Supreme Court decided *United States v. Wheeler,*[2] where the Court held that the Double Jeopardy Clause of the Fifth Amendment[3] does not bar the prosecution of a Native American in a Federal District Court under the Federal Major Crimes Act,[4] even though the defendant had previously been convicted in a tribal court of a lesser included offense arising out of the same incident. The Court held that tribes act as independent sovereigns rather than as an arm of the federal government and therefore the doctrine of dual sovereignty applied.[5] The Court's decision in *Wheeler* is misplaced because the reasoning is flawed, and this paper will critique that decision.

To reach its decision in *Wheeler*, the Court relied on the historical developments in cases that examined the status of the Indian nation. This note examines the historical development of decisions involving Native Americans and the relationship between decisions made prior to and subsequent to *Wheeler* in an attempt to understand how the Supreme Court came to its ultimate conclusion in *Wheeler*. In addition, this note examines the applicability of the Double Jeopardy Clause to the prosecution of Native Americans in federal courts subsequent to prosecution in tribal courts.

As a starting point, I present a short overview of the doctrine of double jeopardy and how the Supreme Court has applied it. Next, a brief section outlines the Indian Civil Rights

---

[1] J.D. Candidate Touro Law Center 2003. The author wishes to express gratitude to Professor Jeffrey Morris for his guidance in interpreting the law and his tireless efforts on the author's behalf.

[2] 435 U.S. 313 (1978).

[3] U.S. CONST. amend. V., provides that "[n]or shall any person be subject for the same offence to be twice put in jropardy of life or limb . . . "

[4] Pub. L. No. 89-707, 80 Stat. 1100 (codified as 18 U.S.C. § 1153 (2001)).

[5] *Wheeler,* 435 U.S. at 332.

Act[6] and the Major Crimes Act.[7] That section is followed with the so-called trilogy of Marshall Cases, *Johnson v. McIntosh*,[8] *Cherokee Nation v. Georgia*[9] and *Worcester v. Georgia.*[10] These three cases combined to form the basis of the Court's understanding of tribal sovereignty. These cases are followed by a number of decisions that reflect the lower courts' decisions, as well as the Supreme Court's holdings as to the status of Native Americans today and how that status is determinative of whether double jeopardy applies. Next, an examination of the decision in *United States v. Wheeler* is presented. Finally, a review of the decision in *United States v. Weaselhead*[11] is explored and used as a basis for criticisms of the Supreme Court's decisions.

II. OVERVIEW OF DOUBLE JEOPARDY

The concept of protection from double jeopardy was recognized even before the Fifth Amendment was adopted.[12] Evidence supports a conclusion that at common law double jeopardy acted as a bar to successive prosecutions by different sovereigns.[13] The Fifth Amendment's Double Jeopardy Clause provides, "nor shall any person be subject for the same offense to

---

[6] Pub. L. No. 90-284, 82 Stat. 77, codified as 25 U.S.C. §§ 1301-1334 (2001).

[7] 18 U.S.C. § 1153.

[8] 21 U.S. 543 (1823).

[9] 30 U.S. 1 (1832).

[10] 31 U.S. 515 (1832).

[11] 156 F.3d 818 (8th Cir. 1998), *cert. denied*, 582 U.S. 829 (1999).

[12] Erin M. Cranman, Comment, *The Dual Sovereignty Exception to Double Jeopardy: A Champion of Justice or a Violation of a Fundamental Right?*, 14 EMORY INT'L L. REV. 1641, 1644 (2000). The concept of double jeopardy first appeared in Massachusetts where the doctrine was applied to both criminal and civil cases. The doctrine was subsequently adopted by neighboring colonies. A basic protection, it was soon incorporated as a standard provision in the constitution and case law of the colonies. The drafters of the federal constitution recognized the importance placed on the doctrine and soon incorporated it into the federal constitution.

[13] *See, e.g.*, Ronald J. Allen & John P. Ratnaswamy, *Heath v. Alabama: A Case Study of Doctrine and Rationality in the Supreme Court*, 76 J. CRIM L. & CRIMINOLOGY 801, 810 (1985).

be twice put in jeopardy of life or limb . . . . "[14] It is clearly understood that the same government (i.e. federal government or state government) shall not prosecute the same crime twice, against the same defendant.[15] However, the federal government may prosecute a criminal defendant under a federal statute, despite the fact that the same defendant had previously been prosecuted for the same crime under a state statute.[16]

The seminal case on double jeopardy, *Abbate v. United States,* provided a vehicle for the Supreme Court to settle the issue of the ability of the federal government to prosecute a criminal defendant after the same defendant had been previously tried under state law.[17] Abbate sought review of the United States Court of Appeals for the Fifth Circuit's opinion which affirmed that the federal prosecution of the petitioner in connection with a conspiracy to destroy property did not subject

---

[14] U.S. CONST. amend. V.

[15] Abbate v. United States, 359 U.S. 187, 194 (1959) ("The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the Federal Government, . . . and the double jeopardy therein forbidden is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority.").

[16] *Abbate* , 359 U.S. at 192.

> Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. . . . That either or both may (if they see fit) punish such an offender cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable.

[17] *Id.* The petitioners, with Shelby and McLeod, were previously indicted by the State of Illinois for violating an Illinois statute making it a crime to conspire to injure or destroy the property of another. The indictment describes the property as "communication facilities belonging to the Southern Bell Telephone & Telegraph Company" and "belonging to the American Telephone and Telegraph Company." The petitioners entered pleas of guilty to the indictment and were each sentenced to three months' imprisonment.

the petitioner to double jeopardy due to his previous convictions under Illinois state law for the same acts.[18]

A brief overview of the facts in *Abbate* reveals that Abbate was successfully prosecuted under Illinois law for conspiring to destroy telephone communication facilities belonging to the Southern Bell Telephone and Telegraph Company.[19] Subsequently, a federal indictment was returned in the United States District Court for the Southern District of Mississippi.[20] This indictment did not refer to the facilities as belonging to the telephone companies, but charged the offense of violating 18 U.S.C. 371,[21] telephone equipment located in the states of Mississippi, Tennessee and Louisiana. The equipment was considered to be essential and integral parts of a system of communication that was operated and controlled by the United States. McLeod confessed to his part in the conspiracy and testified at the federal trial to both the acts of his participation as well as Abbate's in the conspiracy. These same acts were the basis of the Illinois convictions.[22]

Justice Brennan delivered the opinion of the Court.[23] Fearing that federal law enforcement would necessarily be hindered if not for the federal government's ability to prosecute offenses against federal statutes, Justice Brennan reasoned that

---

[18] *Abbate*, 359 U.S. at 188.

[19] *Id.* at 187.

[20] *Id.* at 188 (The conspiracy originated in Chicago, Illinois, hence the violation of the Illinois statute, the property that was destroyed was located in Mississippi).

[21] 18 U.S.C. § 371 (2001), which provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

[22] *Abbate*, 359 U.S. at 188.

[23] *Id.* at 187.

state prosecutions could not preempt federal prosecutions based on the same acts.[24] Finally, Brennan concluded, "Unless the federal authorities could somehow ensure that there would be no state prosecutions for particular acts that also constitute federal offenses, the efficiency of federal law enforcement must suffer if the Double Jeopardy Clause prevents successive state and federal prosecutions."[25] The Court held that state prosecution does not act as a bar to federal prosecution.[26]

Several important points were raised by the dissent in *Abbate*, which was written by Justice Black.[27] Justice Black countered the majority opinion's concerns for the penalties imposed by a state statute, when a federal statute may impose a harsher penalty. He stated that, "It [the federal government] can take exclusive jurisdiction over the crime or, if it wishes to allow the States concurrent power, it can define the offense and set minimum penalties which would be applicable in both state and federal courts."[28] This is an important concept when examining the prosecution of Native Americans in tribal courts. In addition, Justice Black recognized that most free countries accept a prior conviction elsewhere as a bar to a second trial in their jurisdiction.[29] Perhaps the strongest language in Justice Black's dissent focused the Court's attention on the Double Jeopardy Clause as a safeguard. He offered, "The Bill of Rights' safeguard against double jeopardy was intended to establish a broad national policy against federal courts trying or punishing a man a second time after acquittal or conviction in *any court*."[30]

---

[24] *Id.* at 195.

[25] *Id.*

[26] *Id.*

[27] *Abbate*, 359 U.S. at 202 (Justices Black and Douglas, and Chief Justice Warren, dissenting).

[28] *Id.* at 202; *see also*, S. Grant, *The Lanza Rule of Successive Prosecutions*, 32 COL.L. REV. 1309 (1932); S. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. REV. 1 (1956).

[29] *Abbate*, 359 U.S. at 203 (Black, J., dissenting).

[30] *Id.* (emphasis added).

The only exception to the double jeopardy guarantee is the doctrine of dual sovereignty, and it is of overwhelming import in the subsequent prosecution of Native Americans under the Federal Major Crimes Act.[31] The doctrine provides that two sovereigns, each of whom derives their power from alternate sources, are able to prosecute any individual whose criminal act violates the laws of both.[32] The argument promulgated by supporters of the exception alleges that although a defendant is facing Double prosecution, it is for two separate offenses, not one.[33]

Critics maintain that defendants are often subject to "capricious prosecutorial discretion" when courts allow subsequent prosecutions.[34] Moreover, the idea of allowing such prosecutions appears to offend our very notion of justice and fair play. After all, the founding fathers incorporated the very protection to ensure that defendants did not live in a continuing state of anxiety.[35] In reviewing the legislative history of the Fifth Amendment it seems plain the framers considered no exceptions to the Double Jeopardy Clause.[36] Specifically, the framers omitted the phrase "United States" as the prosecuting authority, thus suggesting that subsequent prosecutions were to be barred, regardless of the "identity or sovereignty of the prosecutor in the

---

[31] Cranman, *supra* note 12, at 1653.

[32] *Id.*

[33] *Id.*

[34] *Id.* at 1667. Dual sovereignty is highly criticized because it offends an individual's interest in finality and exposes defendants to capricious prosecutorial discretion. The protection against double jeopardy is among the most fundamental of rights provided by legal systems around the world. Our founding fathers embraced it to ensure that defendants were not made "to live in a continuing state of anxiety and insecurity." *See* Green v. United States, 355 U.S. 184, 187 (1957). Dual sovereignty most certainly destroys this protection. If an individual commits a crime involving many countries, he may spend the remainder of his life being prosecuted by the multiple governments, living in a constant state of fear and apprehension, always wondering when and where he might be arrested for the crime.

[35] Cranman, *supra* note 12, at 1668.

[36] Robert Matz, Note: *Dual Sovereignty and the Double Jeopardy Clause: If at First You Don't Convict, Try, Try, Again*, 24 FORDHAM URB. L.J. 353, 368 (1997).

initial prosecution."[37] The Fifth Amendment provisions do not invite balancing the needs of government against the rights of individuals.[38] These concepts all play an integral role in the examination of criminal prosecutions of Native Americans in federal courts, subsequent to the tribal court proceeding.

III. STATUTORY HISTORY OF THE INDIAN CIVIL RIGHTS ACT

The constitutional rights of Native Americans are enumerated in the Indian Civil Rights Act (ICRA) as amended in 1990.[39] The Statute details the sovereign status of the various Indian tribes as well as the powers delegated to the tribes to govern.[40] Specifically, the Act provides:

---

[37] *Id.* at 369.

[38] *Id.*

[39] 25 U.S.C. §§ 1301-1334. The Indian Civil Rights Act is a lengthy act that has been said to have little to do with civil rights. Title II of the Act, codified at 25 U.S.C. §§ 1301-1303 (placing constitutional-like restrictions on tribal governments for the benefits of "any person."), *see also* Ferguson, *infra* note 64, at 301.

[40] 25 U.S.C. § 1302 provides for who is entitled to "Constitutional Rights" and sets forth the limitations placed upon tribal governments in the area of civil rights:

> No Indian tribe in exercising powers of self-government shall (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances; (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized; (3) subject any person for the same offense to be twice put in jeopardy; (4) compel any person in any criminal offense to be witness against himself; (5) take any private property for a public use without just compensation; (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and the cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and

> [the] powers of self-government means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses. This includes the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.[41]

Further, the Act provides that,

> Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government; although no longer possessed of the full attributes of sovereignty. Native American Tribes remain separate people, with the power of regulating internal matters and social relations; Indian tribes have power to make their own substantive law in internal matters, and to enforce that law in their own forums.[42]

> at his own expense to have the assistance of counsel for his defense; (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishment, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both; (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law; (9) pass any bill of attainder or ex post facto law; or (1) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

[41] 25 U.S.C. § 1302.

[42] *Id.* The Indian Civil Rights Act contains most of the rights and liberties found within the Bill of Rights of the United States Constitution. There are some notable exceptions, however, which reflect Congress' attempt to avoid

Regarding the relationship between the ICRA and other laws and treaties, the Act provides that Indian law cannot be interpreted in isolation: ambiguities in interpretation are to be resolved in favor of weak and defenseless people who are wards of the nation.[43] The Act also addresses federal criminal prosecution and makes clear that the federal government and tribal governments are separate sovereigns.[44] It is also undisputed that Congress is empowered to "deal with the special problems of Indians" and to legislate on their behalf, using the authority under the ICRA.[45]

IV. STATUTORY HISTORY OF THE MAJOR CRIMES ACT

Prosecution of Native Americans in criminal cases in federal courts occurs under the authority of 18 U.S.C. § 1153.[46]

---

infringement upon the tribes' rights to preserve their identity and cultural autonomy. *See also* Alvin J. Ziontz, *After Martinez: Civil Rights Under Tribal Government*, 12 U.C. DAVIS L. REV. 1, 2 (1979). Section 1302 omits the establishment clause language of the first amendment in order to permit Indian theocratic government; the 2nd and 3rd amendment provisions dealing with the right to bear arms and protection against quartering of soldiers; and the 5th amendment grand jury indictment provisions. The 6th amendment right to counsel clause provides that counsel is at the expense of the defendant. Section 1302 further deletes the 7th amendment guaranty of jury trials in civil cases and authorizes a jury of only six members in criminal cases. Finally, the ICRA omits the 15th amendment prohibition against abridgement of voting rights on account of race or even color. *See also* Ferguson, *infra* note 64, at 301.

[43] *See* S. Rep. No. 841, at 6 (1967) (stating that the Indian Civil Rights Act arose from congressional desire to "protect individual Indians from arbitrary and unjust actions of tribal governments").

[44] 25 U.S.C. § 1301(2). The Act states that while Indian tribes are "recognized as possessing powers of state government," they are "subject to the jurisdiction of the United States.

[45] Morton v. Mancari, 417 U.S. 535, 551 (1974); *see also* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1988) (holding that the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs).

[46] Whether the Major Crimes Act vests exclusive jurisdiction over the enumerated offenses with the federal government is unclear. *See, e.g.*, United States v. Torres, 733 F.2d. 449, 460 (7th Cir. 1984), *cert. denied*, 469 U.S.

This law confers jurisdiction over twelve specific felonies committed by Native Americans within Indian country, to the Federal Courts.[47] Commonly referred to as the "Major Crimes Act," the law provides that the Fifth Amendment of the Constitution does not bar prosecution of Native Americans in Federal District Court[48] even if they may have been convicted in a tribal court of a lesser-included offense arising out of the same incident. The tribal court's authority to punish tribal offenders is part of the inherent tribal sovereignty, which is different from the

---

864 (1984) ("The tribal court may have concurrent jurisdiction if an Indian commits one of the enumerated crimes of the Major Crimes Act against another Indian."); United States v. John, 437 U.S. 634, 651 (1978), *remanded to* 587 F.2d 683 (1979), *cert denied,* 441 U. S. 925 (1979) ("We do not consider here the more disputed questions whether the Major Crimes Act also was intended to pre-empt tribal jurisdiction.").

[47] 18 U.S.C. § 1153 provides:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

Further, the United States Code defines Indian Country as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

[48] *See Wheeler*, 435 U.S. at 319 (holding that prosecution of tribal member by the tribe, and the federal government, for the same crime, did not violate the Double Jeopardy Clause of the 5th Amendment).

sovereignty delegated by Congress.[49] Double jeopardy is not violated because the tribe has acted as an independent sovereign.[50]

The authority for exercising jurisdiction over the tribes under the Act comes from two primary sources: the tribes' dependent status and the Indian Commerce Clause.[51] Emanating from the tribes' dependent status and the authority of Congress to regulate Indian affairs granted to Congress by the Indian Commerce Clause, the federal government is able to wield tremendous power over the tribes under a theory of protection.[52]

In developing the theory of protection, the Federal Major Crimes Act relied on the decision in *United States v. Kagama*.[53] The facts of *Kagama* were simple enough. The respondent was charged under with two counts of homicide on Indian Land under a precursor to the Federal Major Crimes Act. Kagama challenged the constitutionality of the law and the validity of the jurisdiction to try him.[54] The Supreme Court held the law

---

[49] *See* L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 815 (1996).

> The essential claim of tribal Indians that distinguishes them from other groups is their claim of sovereignty - the inherent right to promulgate and be governed by their own laws. A century and half ago, the Marshall Court decided that tribes posses the attributes of separate states. But in the years that followed, Congress often asserted its authority to limit tribal authority.

[50] *See Wheeler*, 435 U.S. at 328 (holding inherent tribal criminal jurisdiction over a tribe's own members, the Supreme Court specifically states, "We do not mean to imply that a tribe which was deprived of that right by statute or treaty then regained it by Act of Congress would necessarily be an arm of the Federal Government. That interesting question is not before us, and we express no opinion thereon"). This may suggest that if the tribe was an arm of the Federal Government a violation of double jeopardy might be realized.

[51] Warren Stapleton, Note and Comment, *Indian Country, Federal Justice: Is the Exercise of Federal Jurisdiction Under the Major Crimes Act Constitutional?*, 29 ARIZ. ST. L.J. 337, 338 (1997).

[52] *Id.* at 339.

[53] 118 U.S. 375, 376 (1886). Within one year of enacting the Federal Major Crimes Act, it was challenged in *Kagama*.

[54] *Kagama*, 118 U.S. at 376.

constitutional.[55] In doing so, the Court determined that Indian tribes required the protection of the federal government. Along with the need to protect the Native Americans came an equal duty to protect the tribes.[56]

The Court reasoned that the tribes were wards of the nation, and communities dependent on the United States for among other things, their daily food and their political rights.[57] From this very weakness and helplessness, due largely to the Native Americans' course of dealing with the Federal Government, treaties arose. In these treaties arose the duty of protection, and with it the Federal Government's power over Native American tribes.[58] Thus, the Supreme Court validated the Federal Government's right to both prosecute and exercise jurisdiction over a people that the same government had granted sovereignty to.[59]

In 1970, the policy towards the tribes changed dramatically with the adoption of a self-determination policy.[60] In an attempt to strengthen tribal autonomy and promote the tribes' ability to govern themselves, the federal government relaxed control over the Indian nations. Evident in the Supreme Court's decision in *McClanahan v. Arizona State Tax Commission,*[61] the Supreme Court limited Congress' authority to regulate Indian affairs to Congress' treaty making powers and

---

[55] *Id.* at 385.

[56] *Id.* at 383-84.

[57] *Id.* at 384. Tribes were no longer to be considered independent nations. The tribes were wards of the federal government, subject to the control of the federal government. Moreover, the tribes were dependent upon the federal government for its protection. *See also* Gould, *supra* note 49, at 828.

[58] *Kagama,* 118 U.S. at 384.

[59] *See Kagama*, 118 U.S. at 382. The Court went on to state:

> Congressional power to regulate the internal affairs of tribes, if not derived expressly from the constitution, must exist, because it never has existed anywhere else, because the theatre of its existence is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

[60] Stapleton, *supra* note 51, at 340.

[61] 411 U.S. 164 (1972).

those powers granted under the Commerce Clause of the Constitution.[62] This was a significant change in the Court's approach to Indian self-government, but it did not overturn *Kagama*. Thus the holding in *Kagama* continues to be good law.[63]

V. CASE LAW HISTORY LEADING TO WHEELER

In the early 1800's the Marshall Court rendered three important decisions that helped shape the concept of tribal sovereignty.[64] Clearly, the relationship between the tribes and the federal government can be considered unusual, for the circumstances are unusual. In *Johnson v. McIntosh*, Marshall wrote for a unanimous Court and held that Indians "were to be treated as dependent, diminished sovereigns whose rights and status in their lands were determined solely by the invading European colonizers."[65] This was the so-called "Discovery Doctrine" and the Court in so holding made the federal government the grantor of rights to the conquered natives.[66]

In a key case that would, in effect, shape the field of Indian relations vis-à-vis the federal government, Marshall addressed tribal sovereignty and concluded that Indians are "a distinct political society, separated from others, capable of managing its own affairs and governing itself."[67] In *Cherokee Nation v. Georgia*, Marshall clarified that Indian tribes may not be "denominated foreign nations;" rather their relationship to the

---

[62] *Id.* at 172.

[63] *See* Gould, *supra* note 49, at 828 ("After *Kagama* congressional authority over Indians was virtually unlimited.")

[64] Christina D. Ferguson, Comment: *Martinez v. Santa Clara Pueblo: A Modern Day Lesson on Tribal Sovereignty,* 46 ARK. L. REV. 275, 279 (1993).

[65] *Johnson,* 21 U.S. at 587 (holding that, While tribal Indians retained a "title of occupancy" to their lands, absolute, or "complete ultimate title vested in the United States." This circumstance followed from the principle that discovery of this country by Europeans gave title to the government by whose subject it was made); *see also* Gould, *supra* note 49, at 816.

[66] The Doctrine of Discovery held that the "discoverer" alone had the right to acquire lands from the tribes and to establish settlements.

[67] Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

federal government more closely resembles that of a ward to his guardian.[68]

To complete Marshall's trilogy, in *Worcester v. Georgia* the Court held that while the Cherokee Nation's physical territorial bounds were inside the State of Georgia, the state lacked the authority to exercise jurisdiction over the tribe's inhabitants.[69] While this decision may appear to have solidified the tribe's ability to govern, it in fact limited the basic concept of tribal sovereignty.[70] Federal statutes limit tribal powers of self-government by terms of treaties with the federal government, and by restraints implicit in the protectorate relationship itself.[71] Chief Justice Marshall's decisions clearly depicted the problem that pervades the relationship between the federal government and the Indian tribes, a problem that persists today. It is difficult to reconcile the dichotomy between the theories that Indian tribes remain sovereign while at the same time occupy the status of a dependent child.[72] This conflicting relationship was a major factor

---

[68] *Id.* at 17; *see* Gould, *supra* note 49, at 817. The Cherokee Nation sought to enjoin the State of Georgia from enforcing its laws in tribal territory. At issue was whether the Cherokee could maintain an original action in the Court, a matter that depended on whether the Cherokees were a foreign state. Justice Marshall decided they were not. Although the Cherokees were a distinct and separate political society capable of self-government, they were also under the sovereignty and dominion of the United States.

[69] 31 U.S. 557 (1832) (where the Court imposed limits on the power of the state. Samuel Worcester, a white missionary, was tried and sentenced to four years at hard labor because he refused to obtain a state license before entering Cherokee territory. Georgia contended that it could require the license because its original charter from the British crown gave it title to the lands occupied by the Cherokees. The Court, however, decided that while the Cherokees had no authority to make treaties with foreign states, their lands were not within the jurisdiction of the United States); *see also* Gould, *supra* note 49, at 817.

[70] Ferguson, *supra* note 64, at 282.

[71] FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945).

[72] Ferguson, *supra* note 64, at 282. One commentator has written that "at one and the same time, the federal government is sovereign over the tribes . . . and the tribes are sovereign over themselves . . . "; *see also* Robert C. Jeffrey, Jr., *The Indian Civil Rights Act and the Martinez Decision: A Reconsideration,* S.D. LAW REV. 355 (1990).

in the development of the Double Jeopardy Clause as it applies to Native Americans, and figures prominently in the Supreme Court's decision in *Wheeler v. United States*.

Prior to *Wheeler*, in 1977, the Untied States Court of Appeals for the Eighth Circuit decided *United States v. Walking Crow*.[73] Walking Crow, a Rosebud Sioux, robbed another Rosebud Sioux. He entered a plea of guilty in tribal court and was punished for a misdemeanor.[74] Subsequently, he was indicted under the Federal Major Crimes Act by a federal grand jury for the crime of robbery.[75] Walking Crow filed a motion to dismiss the indictment claiming that as he had been convicted of the same offense in tribal court, the Fifth Amendment of the Constitution prohibited any further prosecution.[76]

The Court of Appeals, recognizing that criminal defendants are not protected from prosecution for the same offense in the courts of separate sovereigns applied the test of *Abbate*.[77] The Court simply had to determine whether the United States and the Indian Tribes were separate sovereigns. The Court held that a tribal court administering its residual jurisdiction is not acting as an adjudicatory arm of the federal government, and it is not simply an inferior court in the federal judicial system.[78]

---

[73] 560 F.2d 386, 387 (8th Cir. 1977), *cert. denied*, 435 U.S. 953 (1978). On January 27, 1976 at Mission, South Dakota, which is located on the Rosebud Sioux Indian Reservation, John Walking Crow, a member of the Rosebud Sioux Tribe, robbed Thomas Standing Soldier, another member of the Tribe, of certain money or personal property. A charge of simple theft was filed against him in the tribal court of the Tribe on February 4, 1976; he entered a plea of guilty and presumably received misdemeanor punishment. In March, 1976 the federal grand jury for the District of South Dakota indicted appellant for the crime of robbery under the Indian Major Crimes Act.

[74] *Id.* at 387.

[75] *Id.*

[76] *Id.* at 388.

[77] *Id.* ("It is well established that if the same act constitutes an offense against two sovereigns such as the United States and a state of the Union, the double jeopardy clause does not protect him from prosecution for the same offense in the courts of both sovereigns."); *see also Abbate* 359 U.S. at 187.

[78] *Walking Crow*, 560 F2.2d at 389.

VI. UNITED STATES V. WHEELER[79]

In 1978 the Supreme Court decided an important double jeopardy case as it applied to Native Americans. *United States v. Wheeler* dealt with a member of the Navajo Tribe who had pleaded guilty and had been sentenced in tribal court for contributing to the delinquency of a minor.[80] A federal grand jury subsequently indicted Wheeler for statutory rape arising out of the same incident for which he had pleaded guilty.[81] Wheeler moved in the District Court for a dismissal of the indictment, claiming that the federal prosecution was barred by the proceeding in the tribal court.[82] The District Court granted his motion.[83] The Court of Appeals affirmed the dismissal, holding that "since tribal courts and federal district courts are not arms of separate sovereigns, the Double Jeopardy Clause of the Fifth Amendment barred Wheeler's federal trial."[84]

The Supreme Court, in a unanimous opinion[85] authored by Justice Stewart, relied on the decision in *Abbate v. United States,*[86] and reiterated what it termed the "well-established" principle that federal prosecutions are not barred despite a state's previous prosecution for the same offense.[87] Wheeler's argument

---

[79] 435 U.S. 313.

[80] *Id.*

[81] *Id.*

[82] United States v. Wheeler, 545 F.2d 1255,1256 (1976), *rev'd*, *Wheeler*, 435 U.S. at 313.

[83] *Id.*

[84] *Wheeler*, 545 F.2d at 1258

> Indian tribal courts and United States district courts are not arms of separate sovereigns. Indian tribes are not states. Thus, the defendant in the instant case could not be tried in federal district court for the same offense that he was previously convicted of in Navajo tribal court without violating the Double Jeopardy Clause of the Fifth Amendment.

[85] Justice Brennan took no part in the decision.

[86] 359 U.S. 187.

[87] *Wheeler*, 435 U.S. at 317 ("The basis for the doctrine is that prosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment, subject the defendant for the same offense to be twice put in

in the Supreme Court raised an important distinction in allowing subsequent prosecutions under the concept of "dual sovereignty."[88] The Court of Appeals held previously that the dual sovereignty concept did not apply to subsequent prosecutions of Indians in federal courts because Indian Tribes are not themselves sovereign.[89] Moreover, it found, the power to punish Indians in a tribal court proceeding is derived from the federal government.[90]

The Court of Appeals relied on the undisputed fact that Congress has plenary authority to legislate for Indian tribes in all matters, including their form of government.[91] Wheeler successfully argued in the Court of Appeals that this all-encompassing federal power merely made the tribes arms of the federal government. Wheeler's brief in the case before the Supreme Court contended that the tribes "owe their existence and

---

jeopardy."); *see also* Bartkus v. Illinois, 359 U.S.121, 132 (1959). (standing for the idea that successive prosecutions do not violate the Double Jeopardy Clause of the Fifth Amendment).

[88] *Wheeler*, 435 U.S. at 319.

> Wheeler contended and the Court of Appeals held, that the "dual sovereignty" concept should not apply to successive prosecutions by an Indian tribe and the United States because the Indian tribes are not themselves sovereigns, but derive their power to punish crimes from the Federal Government. This argument relies on the undisputed fact that Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government. Because of this all-encompassing federal power, the respondent argues that the tribes are merely "arms of the federal government, "which, in the words of his brief," owe their existence and vitality solely to the political department of the federal government.

[89] *Wheeler*, 545 F.2d at 1257 ("Indian tribes do maintain a 'semi-independent position' within the borders of the United States. But, at the same time, they clearly do not have the sovereign status of a state.") (internal citations omitted).

[90] *Id.* ("The federal government has complete, plenary control over the criminal jurisdiction of tribal courts.")

[91] *See, e.g.*, Winton v. Amos, 255 U.S. 373, 391-392 (1921); *In re* Heff, 197 U.S. 488, 498-499 (1905).

vitality solely to the political department of the federal government."[92]

Justice Stewart concluded that Wheeler's argument, accepted by both the District Court and the Court of Appeals, was nonetheless, misaaplied.[93] While Justice Stewart conceded that the territories are ultimately subject to the control of Congress, it is not the extent of the control exercised by one prosecuting authority over the other, but the ultimate source of the power under which each of the prosecutions take place that is determinative.[94] Through a detailed analysis that allowed Justice Stewart to compare and contrast the tribal nation with the

---

[92] *Wheeler*, 435 U.S. at 319; *see also* Colliflower v. Garland, 342 F.2d 369, 379 (1965).

> In spite of the theory that for some purposes an Indian tribe is an independent sovereignty, we think that, in the light of their history, it is pure fiction to say that the Indian courts functioning in the Fort Belknap Indian community are not in part, at least, arms of the federal government. Originally they were created by the federal executive and imposed upon the Indian community, and to this day the federal government still maintains a partial control over them.

[93] *Wheeler*, 435 U.S. at 319.

> We think that the respondent and the Court of Appeals, in relying on federal control over Indian tribes, have misconceived the distinction between those cases in which the "dual sovereignty" concept is applicable and those in which it is not. It is true that Territories are subject to the ultimate control of Congress, and cities to the control of the State which created them. But that fact was not relied upon as the basis for the decisions in Grafton, Shell Co., and Waller. What differentiated those cases from Bartkus and Abbate was not the extent of control exercised by one prosecuting authority over the other, but rather the ultimate source of the power under which the respective prosecutions were undertaken.

[94] *Id.* at 319-20 (stating that the precedent established in *Abbate* and *Bartkus*, and relied upon in the instant case rests upon the "basic structure of our federal system, in which States and National Government are separate political communities").

divisions of states and even cities, the Justice was able to conclude that a tribal nation is something very different.[95]

Justice Stewart wrote, "Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain a separate people."[96] However, the power the tribes have to punish Indians convicted in tribal courts is power that the tribes have held as part of their inherent sovereignty, and not power granted by the federal government.[97] The conclusion was therefore apparent. Tribal courts do not act as a so-called arm of the federal government. Therefore, for Justice Stewart and the Court, the Double Jeopardy Clause was not violated.[98]

The Supreme Court did not ignore the important underlying policy considerations discussed in the *Abbate* decision.[99] Noting that Wheeler argued that the concept of dual sovereignty be limited to successive state and federal prosecutions, and therefore may be narrowly applied so as to bar prosecutions subject to tribal court proceedings, the Court rejected the argument that gave rise to concern for such undesirable consequences that such application would otherwise cause.[100] The same concerns that surfaced in the Supreme Court's decision in *Abbate* were those the Court grappled with in *Wheeler*.[101] Justice Stewart wrote, "Were the tribal prosecution held to bar the federal one, important federal interests in the

---

[95] *Wheeler*, 435 U.S. at 321.

[96] *Id.* at 322.

[97] *Id.* at 329.

[98] *Id.*

[99] *Abbate*, 359 U.S. at 187.

[100] *Wheeler*, 435 U.S. at 330 (holding that Tribal courts can impose no punishment in excess of six months' imprisonment or a $500 fine. On the other hand, federal jurisdiction over crimes committed by Indians includes many major offenses. Thus, when both a federal prosecution for a major crime and a tribal prosecution for a lesser included offense are possible, the defendant will often face the potential of a mild tribal punishment and a federal punishment of substantial severity). The $500 fine has been amended as noted earlier.

[101] *Id.* at 331.

prosecution of major offenses on Indian reservations would be frustrated."[102]

Reflected in the Court's opinion was what appeared to be a somewhat self-serving statement, which was evident in a discussion Justice Stewart elected to include with regard to the ability to solve the problem of subsequent prosecutions. He suggested that Congress could, in its exercise of plenary powers, choose to strip the tribes of their ability to exercise jurisdiction over criminal offenses of tribal members.[103] He quickly reversed his own thinking and determined that such an act might be considered undesirable, as Indians are distinct political communities with their own mores and laws.[104] Moreover, Justice Stewart did recognize that tribal law and procedures are often influenced by tribal custom and can differ greatly from our own.[105] If the Justice's statements are to be considered true, does it not greatly contradict the Court's ultimate holding and reversal of both the District Court and the Court of Appeals on this issue?

If statements such as Justice Stewart's are not enough to cast doubt on the Court's ultimate decision in *Wheeler*, consider if the following pronouncements do not contradict the decision: "Tribal courts are important mechanisms," and "Federal preemption of a tribe's jurisdiction to punish . . . would detract

---

[102] *Id.*

[103] *Id.* at 331 (suggesting that Congress could "chose to deprive them [Indian tribes] of criminal jurisdiction altogether").

[104] *Id.*

> The Indian tribes are distinct political communities with their own mores and laws, which can be enforced by formal criminal proceedings in tribal courts as well as by less formal means. They have a significant interest in maintaining orderly relations among their members and in preserving tribal customs and traditions, apart from the federal interest in law and order on the reservation. Tribal laws and procedures are often influenced by tribal custom and can differ greatly from our own.

see also Worcester v. Georgia, 31 U.S. 515, 557; *Ex Parte* Crow Dog, 109 U.S. 556, 571 (1883).

[105] *Wheeler*, 435 U.S. at 331-32.

substantially from tribal self-government."[106] Can it not be said that these statements lend credibility to Wheeler's argument that by subjecting him to double jeopardy, has the Court not in fact rendered all of the tribes' so called power, powerless?[107]

Even though the Supreme Court rejected Wheeler's argument, the decision rendered in the Court of Appeals merits consideration. The argument offered by the Court of Appeals is essentially the critique of the Supreme Court's analysis. Starting again with the simple, yet compelling, guarantee of the Fifth Amendment, the prohibition against double jeopardy was considered essential by the framers, and absent some compelling reason to violate it, the guarantee must be protected.[108] Couple this with a more favorable interpretation of the dual sovereignty doctrine, and any court would find it difficult to permit subsequent prosecutions of Native Americans in a federal court once a tribal court has heard the case. The Ninth Circuit reasoned this way, "In the instant case we are faced by a dual trial situation that does not fit neatly into either the "single sovereign" or "dual sovereign" categories."[109] The Court considered the fact that Indian tribes maintain a "semi-independent position" within the borders of the United States.[110]

The Court of Appeals offered another compelling argument that demands consideration. In offering an analogous situation to the double jeopardy and dual sovereignty question, the Court selected the operation of the territorial courts, which are prohibited from trying an individual for the same offense for which he already had been convicted in a United States military

---

[106] *Id.* at 332.

[107] *Id.* (Stewart suggests that this detraction would be similar in nature to the federal government preempting state criminal jurisdiction and trampling on important state interests).

[108] Matz, *supra* note 36, at 355-56 (The prohibition against double jeopardy is also found in the constitution or jurisprudence of every state in the Union and the common law tradition of the colonies).

[109] *Wheeler,* 545 F.2d at 1257.

[110] *Id.*; *see also* McClanahan v. Arizona, 411 U.S. 164, 172-73.

court.[111] In addition, the Court found support in *Colliflower v. Garland,*[112] where the circuit court did a long and careful historical overview of the relationship of the Navajo courts and the courts of the United States. The Circuit court held that, "Indian tribal courts and United States district courts are not arms of separate sovereigns", thus to continue the subsequent prosecution would be a violation of the Double Jeopardy Clause.[113]

VII. THE COURT'S DISPARATE TREATMENT OF SIMILAR CASES

In 1972, *McClanahan v. Arizona State Tax Commission* reached the United States Supreme Court. When the Court made its ruling, it left the door open for those who sought to argue that double jeopardy applied in cases involving tribal courts.[114] The holding in *McClanahan* reaffirmed the thesis that the Court had from time to time entertained that Indian tribes have not been treated as independent sovereigns. In *McClanahan*, which dealt with treaties and statutes in a tax case, the Supreme Court held in a unanimous opinion authored by Justice Marshall, that Indians "were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty."[115] Clearly, the most telling part of the statement

---

[111] *Wheeler*, 545 F.2d at 1258; *see, e.g.*, Grafton v. United States 206 U.S. 333 (1907).

[112] *Colliflower*, 342 F.2d at 378 (holding that Indian Tribal Courts are at least in part arms of the Federal Government).

[113] *Wheeler*, 545 F.2d at 1258.

[114] *McClanahan*, 411 U.S. 164 at 172. This case required the Court to once again reconcile the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations. In this instance, the problem arose in the context of Arizona's efforts to impose its personal income tax on a reservation Indian whose entire income derives from reservation sources.

[115] *Id.* at 173.

> They were, and always have been, regarded as having a semi-independent position when they preserved their tribal

is that the Court did not consider Indians as "possessed of the full attributes of sovereignty."[116] Applying that reasoning to the line of cases examined herein, could we not say that the concept of dual sovereignty must ultimately be rejected? If that cannot be stated with conviction, than it must alternatively be stated that the Supreme Court's reasoning in *McClanahan* is misplaced. Yet *McClanahan* remains good law. Of course, that leads to the following unaswered question: Why the difference between the holding in the criminal cases, and the holding in *McClanhan*?

In 1989, the United States Court of Appeals for the Ninth Circuit considered a challenge to the decision in *United States v. Wheeler,* on grounds that the dual sovereignty doctrine should not apply to juveniles.[117] A seventeen-year-old girl had been convicted in Tribal Court of driving under the influence and of recklessly endangering another person.[118] What appears to be somewhat curious in this case was the manner in which the federal prosecutor handled the federal government's interest in prosecuting the offense. The Bureau of Indian Affairs (BIA), as well as the United States Attorney's Office for the District of Oregon investigated the accident.[119] After a conference among the Warm Springs Chief Tribal Judge, an FBI agent and the BIA agent, the Assistant United States Attorney acquiesced in the tribal prosecution.[120]

> relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

[116] *Id.*

[117] United States v. Juvenile Female, 869 F.2d 458, 460 (1989).

[118] *Id.* at 459. Appellant, a juvenile female and member of an Indian tribe, while driving under the influence of alcohol was involved in an accident that claimed the life of a passenger in another car. She was charged in a tribal court, entered a plea and was sentenced. After she had completed a diversion program and fulfilled the terms of probation imposed by the tribal court, the United States Attorney charged her in the district court with the juvenile offense of involuntary manslaughter for the same conduct.

[119] *Id.*

[120] *Id.*

After serving the sentence imposed by the Tribal Court, the United States Attorney then charged the young woman in the District Court with the offense of involuntary manslaughter for the same offense.[121] In her appeal, the appellant argued that that charge violated the Double Jeopardy Clause, and, as mentioned earlier, attempted to argue that juveniles are exempt from the dual sovereignty doctrine.[122] Her argument was structured on the public policy desire to rehabilitate juveniles rather than a desire to punish juveniles in the criminal justice system.[123] Additionally, she argued that the Juvenile Justice and Delinquency Prevention Act[124] stood as a bar to subsequent prosecutions once a juvenile entered a plea of guilty or evidence had been taken with respect to the alleged crime committed.[125]

The Court of Appeals was not persuaded by her arguments, stating that, "Given the well-established rule that the double jeopardy clause does not bar successive prosecutions by separate sovereigns, it is unlikely that Congress would have undertaken such a radical change in state-federal relations in the juvenile context without some more explicit indication of its intent."[126]

In *United States v. Lester* the Court of Appeals for the Eighth Circuit considered the government's argument to reverse the decision of the District Court of North Dakota to dismiss an

---

[121] *Id.* at 459.

[122] *Id.* at 460.

[123] *Id.* Appellant attempted to distinguish *Wheeler* from her own case by arguing that the dual sovereignty doctrine should not apply to proceedings involving juveniles. She pointed to the unique emphasis that the juvenile system places on rehabilitation rather than punishment to support her argument that juveniles treated under a tribal system should be protected against subsequent proceedings in federal court.

[124] Pub. L. No. 93-415, 88 Stat. 1109 (codified at 18 U.S.C. §§ 4351-4353, 5031-5042 (2001)) (Once a juvenile has entered a plea of guilty or the proceeding has reached the stage that evidence has begun to be taken with respect to a crime or an alleged act of juvenile delinquency subsequent criminal prosecution or juvenile proceedings based upon such alleged act of delinquency shall be barred).

[125] *Id.*

[126] *Juvenile Female*, 869 F.2d at 461.

indictment charging Lester with aggravated sexual assault.[127] Lester, a Native American, allegedly raped his victim on the Standing Rock Sioux Indian Reservation in North Dakota.[128] The Standing Rock Sioux Tribal Court convicted Lester of the rape charge and sentenced him to a term of six months.[129]

A Federal investigation occurred while the Tribal Court's proceedings were underway, and had been continuing for some time, ultimately leading to a federal grand jury indictment for juvenile delinquency in the commission of involuntary manslaughter.[130] Lester entered a plea of not guilty and subsequently moved to dismiss the indictment on Double Jeopardy grounds.[131] The government opposed the motion, arguing that the Double Jeopardy Clause was inapplicable and did not protect Native Americans from prosecution because of the separate sovereigns doctrine.[132] The government also argued that the Petite policy of the Department of Justice[133] was inapplicable, stating the policy fails to create substantive rights for criminal

---

[127] 992 F.2d 174, 175 (8th Cir. 1993). In November 1990, Lester, a Native American, allegedly raped C.R. Because the alleged rape occurred within the boundaries of the Standing Rock Sioux Indian Reservation in North Dakota, Bureau of Indian Affairs officers and Federal Bureau of Investigation agents immediately conducted an investigation. While the federal investigation was still in progress, the Standing Rock Sioux Tribal Court convicted appellee of the November 1990 rape and simple assault of C.R., and sentenced him to a term of six months on the rape charge and thirty days for the simple assault.

[128] *Id.*

[129] *Id.*; *see* 25 U.S.C. § 1302 (7) (Tribal courts may only sentence a convicted defendant to a term of one year or less).

[130] *Lester,* 992 F.2d at 175.

[131] *Id.*

[132] *Id.*

[133] A firmly established policy under which United States Attorneys are forbidden to prosecute any person previously prosecuted by another sovereign for the same offense conduct. *See* Thompson v. United States, 444 U.S. 248 (1980)

> This Court will vacate the Court of Appeals' judgment and remand the case for that court's reconsideration in light of the Government's present position, rather than, as requested by the Government, vacate the Court of Appeals' judgment and remand the case to the District Court with instructions to grant the Government's motion to dismiss the indictment.

defendants.[134] In rendering its opinion, the District Court did not discuss the Double Jeopardy issue, and based its dismissal solely on the Petite policy.[135]

In June of 2001 the Court of Appeals for the Ninth Circuit handed down a decision in *United States v. Enas,* in which Enas had been twice prosecuted for assault with a deadly weapon and assault with intent to cause serious bodily injury.[136] Enas pleaded guilty to the crimes in Tribal Court, was sentenced to a term of 180 days in jail and paid a small fine.[137] Subsequent to the guilty plea in Tribal Court a federal grand jury returned an indictment for what both parties agreed was the same charge.[138]

Naturally, Enas moved to dismiss the federal indictment claiming a violation of the protection against Double Jeopardy. The District Court dismissed, holding that the Tribe's prosecution of Enas was by virtue of the powers granted by Congress to the tribe and was consequently that of the same sovereign as the United States.[139] The Circuit Court took this case *en banc* and reviewed it *de novo* on the various questions of law presented.

---

[134] *Lester*, 992 F.2d. at 175.

[135] *Id.* (The Court of Appeals considered the applicability of the Petite policy and relied on prior holdings of the Court indicating that the policy did not grant any substantive rights to criminal defendants. The appellee cited two cases that supported the position that the Petite policy was based on the inherent fairness to the criminal defendant. The appellee argued unsuccessfully from the holding in Rinaldi v. United States, 434 U.S. 22, 27 (1977), "It [the Petite policy] also serves the more important purpose of protecting the citizen from any unfairness that is associated with successive prosecutions based on the same conduct").

[136] 255 F.3d 662, 665 (9th Cir. 2001), *cert. denied,* 122 S. Ct. 925 (2002) ("The parties do not dispute that the indictment charged the same conduct for which Enas had already been prosecuted, convicted, and sentenced by the tribal court.").

[137] *Id.* at 664. The Tribe charged Enas with assault with a deadly weapon, and assault with intent to cause serious bodily injury, violations of Tribal Code sections 2.4 and 2.6. One day after the assaults, Enas pled guilty to the former charge, and was sentenced to 180 days in jail and fined $1180. About two weeks later, while on a work-release program, Enas failed to return to custody.

[138] *Id.*

[139] *Id.*

The Ninth Circuit clearly recognized that the Double Jeopardy Clause was a bar to subsequent prosecutions, but it also held that it simultaneously allowed for subsequent prosecutions when carried out by distinctly separate sovereigns.[140] For the first time, a court provided satisfactory rationale behind the exception. "At common law, a crime was defined as an offense against the sovereignty of the government."[141] Applying the rationale yields an interpretation that allows for the violation of the Double Jeopardy Clause provided the threshold question of separate sovereigns has been answered in the affirmative.

Clearly the Court recognized the application of the exception, and proceeded to examine the dual sovereignty represented by the Indian Tribe, on one side, and the previously called guardian, the United States, on the other. This Court's understatement, "Indian tribes pose special concerns in the context of double jeopardy" may well be one of the most important recognitions the courts have given to the examination of the Double Jeopardy Clause as it relates to the prosecution of Native Americans.[142] The difficulty, the Court states, arises,

---

[140] *Id.* at 667. This dichotomy between inherent and delegated power has important implications for double jeopardy. When a tribe exercises inherent power, it flexes its own sovereign muscle, and the dual sovereignty exception to double jeopardy permits federal and tribal prosecutions for the same crime. By contrast, when a tribe exercises power delegated to it by Congress, the Double Jeopardy Clause prohibits duplicative tribal and federal prosecutions. The Supreme Court has been consistent in maintaining the distinction between inherent and delegated power, and in holding that these two forms of power have different consequences for double jeopardy.

[141] *Enas*, 255 F.3d at 666. Thus, a single act that violates the laws of two sovereigns constitutes two separate crimes. As a result, successive prosecutions by multiple Sovereigns for that single act do not violate the Double Jeopardy Clause; *see also* Heath v. Alabama, 474 U.S. 82, 88 (1985), *cert. denied,* 502 U.S. 1077 (1992) ("The dual sovereignty doctrine is founded on the common-law conception of crime as an offense against the sovereignty of the government. When a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct offences [sic].") (internal citations omitted).

[142] *Id.* at 667. Indian tribes pose special concerns in the context of double jeopardy. The difficulty arises because Indian tribes exercise multiple forms of power, stemming from different sources, that have different implications for

"because Indian tribes exercise multiple forms of power, stemming from different sources."[143] The Court considered that on one hand, the tribes appear to be sovereign entities, acting on their own, in an autonomous manner.[144] However, and of equal if not greater import, as the Court notes, "tribal autonomy is not sovereignty in the ordinary sense."[145]

The question that seems appropriate to ask is what will happen next? Can the Indian tribes be considered a sovereign, separate, autonomous nation, and at the same time, lack the necessary autonomy to be considered just a part of the United States? These questions are critical in determining the applicability of the Double Jeopardy Clause. This Court recognized these questions, and recognized the distinction that creates the friction.[146] "The controlling question in this case is the source of this power to punish tribal offenders."[147]

To decide the issue, this Court relied on the decision in *Wheeler*. The inherent power to punish offenses against tribal law was a part of the so-called primeval sovereignty of the tribe, not taken from the tribe, not delegated to the tribe.[148] Once the

---

double jeopardy. On the one hand, the tribes are autonomous sovereigns. As such, they retain all power that is not "inconsistent with their status" as "conquered and dependent" nations. *See also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978), *remanded to,* 573 F.2d 1137 (1978).

[143] *Id.*

[144] *Id.*

[145] *Id.* ("[Tribal autonomy] exists only at the sufferance of Congress and is subject to complete defeasance."); *see also Wheeler*, 435 U.S. at 323. Congress can limit tribal power and, conversely, can add to it. When Congress bestows additional power upon a tribe--augments its sovereignty, one might say--this additional grant of power is referred to as "delegation." Duro v. Reina, 495 U.S. 676, 687 (1990); *see also Wheeler*, 435 U.S. at 328; *Oliphant* 435 U.S. at 208.

[146] United States v. Enas, 255 F.3d 662, 667.

[147] *Id.*

[148] *Wheeler*, 435 U.S. at 328. The power to punish offenses against tribal law committed by Tribe members, which was part of the Navajos' primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority. It follows that when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal

Court adopted the view so adopted in *Wheeler*, the decision was simple, the tribe can only be considered sovereign and as such the subsequent prosecution does not violate the Double Jeopardy Clause.

VIII. THE WEASELHEAD ANALYSIS

United States v. Weaselhead supports a conclusion that the Double Jeopardy Clause bars subsequent prosecution under circumstances consistent with those discussed earlier. *Weaselhead* offered the Court of Appeals an opportunity to consider the application of double jeopardy in a criminal sexual assault case.[149] Weaselhead negotiated a plea arrangement with the Tribal Court.[150] The same day the plea bargain was accepted a federal grand jury handed down an indictment on a charge of engaging in a sexual act with a juvenile.[151] Weaselhead entered a plea of not guilty to the federal charge, and simultaneously

---

Government. The Department of Interior, charged by statute with the responsibility for "the management of all Indian affairs and of all matters arising out of Indian relations, clearly is of the view that tribal self-government is a matter of retained sovereignty rather than congressional grant. Department of the Interior, Federal Indian Law 398 (1958); *see also* 1 Final Report of the American Indian Policy Review Commission 99-100, 126 (1977); *Powers of Indian Tribes*, 55 I.D. 14, 56 (1934).

[149] 156 F.3d 818 (8th Cir. 1998). In the early months of 1997, Weaselhead, then nineteen years old, entered into a sexual relationship with his fourteen-year-old girlfriend, a member of the Winnebago Tribe. This relationship was brought to the attention of tribal authorities. On March 20, 1997, Weaselhead was arraigned in Winnebago Tribal Court on charges of sexual assault, contributing to the delinquency of a minor, criminal trespass, and child abuse. Although the tribe was apparently aware that Weaselhead and the girl had engaged in sexual acts on more than one occasion, the indictment only charged conduct alleged to have occurred on March 15, 1997. Weaselhead's attorney negotiated a plea agreement with the tribal prosecutor. Pursuant to that agreement, Weaselhead pled no contest to one count of first degree sexual assault. The remaining charges were then dismissed. *Id.* at 819.

[150] *Id.* at 819. The tribal court entered a judgment of conviction and sentenced Weaselhead to 280 days in jail, 100 of which were suspended.

[151] *Id.*

moved for a dismissal of the indictment as a violation of the Double Jeopardy Clause.[152]

The Magistrate Judge dismissed the indictment holding that "the dual prosecution of the defendant by both the tribal court and now the federal government does not implicate separate prosecutions by separate sovereigns."[153] The District Court, on objection by the government, reversed the dismissal.[154] The analysis by the United States Court of Appeals for the Eighth Circuit began with an examination of the Double Jeopardy Clause, and the decision in *Abbate*.[155] Dual sovereignty, the Court suggested, allows multiple and separate prosecutions because, "each sovereign derives its power from a different constitutional source."[156] Contrastingly, the principle is inapplicable when "the authority of two entities to prosecute an individual emanates from the same overriding sovereign."[157]

The Court of Appeals had to carefully balance the violation of the Double Jeopardy Clause, which the Court recognized to be a "vital safeguard" that is nothing less than "fundamental to the American scheme of justice", against the government's desire to prosecute offenders like Weaselhead.[158] In addition, the Court addressed the notion that Congress possesses what the Court termed, "sweeping, plenary power" to

---

[152] *Id.*

[153] *Id.* at 820. The magistrate judge submitted a report recommending that the motion be granted and the indictment dismissed on double jeopardy grounds, concluding that: the dual prosecution of the defendant by both the tribal court and now the federal government does not implicate separate prosecutions by separate sovereigns. Rather, the tribal court was exercising jurisdiction over the defendant which flowed from a delegation of power from Congress and a subsequent prosecution by the federal government for the same offense is barred by the Fifth Amendment.

[154] *Id.*

[155] *Weaselhead*, 156 F.3d at 818.

[156] *Id.* at 820.

[157] *Id.; see, e.g.*, Waller v. Florida, 397 U.S. 387, 393-395, (1970), *cert. denied;* 414 U.S. 945 (1973) (holding that city and state in which it was political subdivision could not bring successive prosecutions for same unlawful conduct despite fact that state law treated them as separate sovereigns).

[158] *Weaselhead*, 156 F.3d at 820.

control Indians under the Indian Commerce Clause, the sole limitation on the use of such powers being the Constitution.[159] Yet the Court ultimately held that the power to prosecute Weaselhead, and other Indian offenders, are not derived from separate sources, stating, the federal court and the tribal court, "do not draw their authority to punish the offender from distinct sources of power, but from the identical source,"[160] which is the federal government of the United States. The Court of Appeals held that the Double Jeopardy Clause bars federal prosecution of Weaselhead, and reversed the motion to dismiss granted by the Circuit Court.[161]

IX. CRITICISMS AND ANALYSIS

This comment does not attempt to argue the merits of whether Native American tribes should be considered a completely sovereign and separate power, but rather, the hypothesis contemplated is that under the current interpretation of the status of Native American's by the Supreme Court, it is impossible to argue that they are a sovereign and independent nation. History supports a conclusion that the federal government never contemplated the intention of allowing the Native Americans complete autonomy. Accepting that hypothesis, dual sovereignty would never arise, and any attempt to prosecute criminal defendants in federal court subsequent to a tribal court, would be a violation of Double jeopardy.

There appear to be inherent difficulties in determining whether to proceed with a federal indictment in seeming violation of the Double Jeopardy Clause. In so doing, courts may be forcing prosecutions by employing the Supreme Court's

---

[159] *Id.* at 824.

[160] *Id.*

[161] *Id.* (holding that the power of the Winnebago Tribe to punish those who are not its members emanates solely from congressionally delegated authority, the tribal court that convicted Weaselhead and the federal court in which a second conviction is now sought to be secured do not "draw their authority to punish the offender from distinct sources of power" but from the identical source).

reasoning that the Indian nation is a completely autonomous and a separate entity that does not rely on Congress for its authority. In contrast to the idea also articulated by the Court, that the Indian nation is nothing more than a sub-division looking to Congress for its very existence. The holdings in *Weaselhead*, and *McClanahan*, along with the holding in the Circuit Court of Appeals in *Wheeler,* make valid points that beg to be considered. Yet in *Wheeler* the Supreme Court in considering the application of the dual sovereignty doctrine, decided that the doctrine applied, and that the separate sovereign status of the Indian nations made the prosecution proper.[162]

The Indian Commerce Clause, similar in nature to the Interstate Commerce Clause, covers a broad range of activities involving the Indians, and its historical antecedent derives from the Articles of Confederation.[163] The intent of the Continental Congress was to have "the sole and exclusive right of power of regulating trade and managing all affairs with the Indians."[164] This right has been cited in such cases as *Kagama* wherein the Ninth Circuit upheld the validity of prosecuting Indians under the Federal Major Crimes Act.[165] The Ninth Circuit also recognized

---

[162] *Wheeler*, 435 U.S. at 329 ("The existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States.")

[163] *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 62 (1996). The Court went on to state:

> The Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes.

see also Robert N. Clinton, *The Dormant Indian Commerce Clause,* 27 CONN. L. REV. 1055, 1156-64 (1995). This article provides a superb history of the Indian Commerce Clause with particular emphasis on its negative implications for the States.

[164] Articles of Confederation of 1781, art. IX.

[165] *Kagama*, 118 U.S. at 383. The Court went on to state:

> The statute [major crimes] itself contains no express limitation upon the powers of a State or the jurisdiction of its

the notion that Congress traditionally held "plenary and exclusive power" over such areas as the Federal Major Crimes Act.[166] What the Ninth Circuit did not say is that Indian's have the power to prosecute non-Indians in tribal courts.[167] Why not? To be sure, allowing Indians the power to prosecute non-Indians would in essence confirm their sovereignty. "The tribes ought to be free to exercise their sovereign rights to regulate major crimes", writes Warren Stapelton in his review of federal jurisdiction over Indians under the Major Federal Crimes Act.[168]

In *Oliphant v. Suquamish Indian Tribe,* the Supreme Court was faced with deciding whether Indian tribes could prosecute non-Indian offenders.[169] If the Court were to allow

---

> courts. If there be any limitation in either of these, it grows out of the implication arising from the fact that Congress has defined a crime committed within the State, and made it punishable in the courts of the United States. But Congress has done this, and can do it, with regard to all offences relating to matters to which the Federal authority extends.

[166] *See* United States v. Lomayaoma, 86 F.3d 142, 145 (9th Cir. 1996), *cert. denied*, 519 U.S. 909 (1996). The Court went on to state:

> Congress has held plenary authority to regulate Indian affairs. This power to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl. 3, provides Congress with the power to 'regulate Commerce . . . with the Indian Tribes,' and thus, to this extent, singles Indians out as a proper subject for separate legislation.

[167] *See, e.g., Wheeler*, 435 U.S. at 322 ("Indian tribes have power to enforce their criminal laws against tribe members. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain 'a separate people, with the power of regulating their internal and social relations.'") (internal citations omitted).

[168] Stapleton, *supra* note 51, at 346.

[169] 435 U.S. at 195 (1978). Petitioner Mark David Oliphant was arrested by tribal authorities during the Suquamish's annual Chief Seattle Days celebration and charged with assaulting a tribal officer and resisting arrest. After arraignment before the tribal court, Oliphant was released on his own recognizance. Petitioner Daniel B. Belgarde was arrested by tribal authorities after an alleged high-speed race along the Reservation highways that only ended when Belgarde collided with a tribal police vehicle. Belgarde posted bail and was released. Six days later he was arraigned and charged under the tribal Code with "recklessly endangering another person" and injuring tribal

Indian tribes jurisdiction in this area then a determination of certain and complete sovereignty would have to be conceded. However, the Court was unwilling to make such a determination.[170] In writing for the majority, Justice Rehnquist (now Chief Justice) concluded, "Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States."[171] In this regard, is Justice Rehnquist not admitting what has always been widely known; the federal government will exercise its control over the "sovereign" nations of the Indian tribes as the federal government sees fit?

Considering the numerous reasons Justice Rehnquist cited in support of his conclusion that Indian tribes do not maintain complete autonomy nor enjoy the status of a sovereign nation,[172] it appears difficult at best to conclude otherwise. Moreover, Justice Rehnquist adopted the language from *Cherokee Nation v. Georgia,*[173] stating that Indian tribes are "completely under the sovereignty and dominion of the United States."[174] What conclusions may be drawn from the Court's decision in *Oliphant*? It is important to remember that the question before the Supreme Court was not the question of double jeopardy and its application in cases against Indians. The sole question considered was whether Indian tribal courts could maintain jurisdiction over non-

---

property. Petitioners argued that the Suquamish Indian Provisional Court does not have criminal jurisdiction over non-Indians. In separate proceedings, the District Court disagreed with petitioners' argument and denied the petitions. On August 24, 1976, the Court of Appeals for the Ninth Circuit affirmed the denial of habeas corpus in the case of petitioner Oliphant. The Supreme Court granted *certiorari* to decide if Indian tribes have jurisdiction over non-Indians.

[170] *Id.* at 211 ("Such an exercise of jurisdiction over non-Indian citizens of the United States would belie the tribes' forfeiture of full sovereignty in return for the protection of the United States.")

[171] *Id.*

[172] *See, e.g., Oliphant*, 435 U.S. at 209 ("Indian reservations are a part of the territory of the United States. Indian tribes hold and occupy the reservations with the assent of the United States, and under their authority.")

[173] 30 U.S. 515.

[174] *Oliphant*, 435 U.S. at 208.

Indians.[175] What is logical to conclude is the broad proposition that Indian tribes may retain some sovereignty, "however, the Court may divest tribal sovereignty whenever the finding that exercise of sovereignty is inconsistent with the tribe's status."[176] Did *Oliphant* signal the "downfall" of tribal sovereignty by refusing to vest the tribe with the power to exercise criminal jurisdiction over non-Indians? Clearly yes, argues both Christina D. Ferguson and M. Allen Core.[177]

X. PROPOSALS

There are various possibilities that would remedy the seeming inconsistencies between *Wheeler* and *Oliphant*. In order to explore these possibilities we must examine the underlying policy that drove the Supreme Court to hold, over and over again, that the federal government's subsequent prosecutions of Indians was not barred by the Double Jeopardy Clause.

First we must consider the application of the Federal Major Crimes Act and its intended purpose. As you recall, the Supreme Court in *Kagama* held the Act to be constitutional.[178] However, that decision was rendered over one hundred years ago and numerous changes have occurred to the tribes over the course

---

[175] *Id.* at 197. The case before the Supreme Court was concerned only with the criminal jurisdiction of tribal courts. The effort by Indian tribal courts to exercise criminal jurisdiction over non-Indians, however, is a relatively new phenomenon. And where the effort has been made in the past, it was held that the jurisdiction did not exist.

[176] Ferguson, *supra* note 64, at 275.

[177] *Id.* at 294; *see also* M. Allen Core, *Tribal Sovereignty: Federal Court Review of Tribal Court Decisions - Judicial Intrusion Into Tribal Sovereignty*, 13 AM. INDIAN L. REV. 175, 187 (1989).

[178] *See* Stapleton, *supra* note 51, at 346. The Federal Major Crimes Act was enacted under the Indian Commerce Clause. Like the Interstate Commerce Clause and the cases decided under it, a "jurisdictional hook" is required. It has been argued that the crimes enumerated in the act may not have a substantial impact on federal-tribal commerce and would therefore be outside the reach of Congress under the Commerce Clause.

of time.[179] The tribes have continued to evolve; each tribe with its own government. Most of the tribes have their own police force and their own court system.[180] Many of the tribes have sufficient resources to investigate and prosecute those tribal members who would face prosecution otherwise under the Act.[181] These factors speak directly to the notion that the tribes remain dependent on the federal government for their very existence.[182] Could we not conceive of the possibility that the tribes would simply be better off if left alone to investigate and prosecute offenders as any other sovereign would? It has been suggested that the slow response time of federal law enforcement coupled with an unresponsive and unwilling United States Attoney's office to prosecute tribal crimes has created the absolute need to allow the tribes the power to handle matters by themselves without interference from the federal government.[183]

The restrictions placed on the tribal courts with regard to the sentences the tribal courts may impose on convicted defendants is a source of contention as to why subsequent criminal prosecutions should be conducted by the federal government.[184] It is true that the Indian Civil Rights Act restricts the tribal courts to prosecuting offenders of even "major crimes" as misdemeanors, however the remedy here is a repeal of the

---

[179] *See* Ferguson, *supra* note 64, at 301 ("History reflects the ever changing attitude of courts and legislatures with respect to Indians and Indian tribes. While the language of the Supreme Court paints an existence of inherent tribal sovereignty, over the years the Court has cut deep into the power of tribal courts, the mainstay of tribal sovereignty.")

[180] Christopher B. Chaney, *The Effect of the United States Supreme Court's Decisions During the Last Quarter of the Nineteenth Century on Tribal Criminal Jurisdiction*, 14 BYU J. PUB. L. 173, 184 (2000).

[181] *Id.*

[182] *See* Chaney, *supra* note 180, at 188 (saying tribes have been forced into a difficult situation by the effects of the *Oliphant* decision. *Oliphant* has prevented tribes from protecting their members).

[183] *See* Stapleton, *supra* note 51, at 346 (The exercise of jurisdiction over the Indian Tribes under the Federal Major Crimes Act conflicts with the tribe's inherent sovereign powers to define and punish criminal offenses).

[184] As stated earlier, punishment in tribal courts is limited.

Act's prohibition against other forms of punishment.[185] Recognizing the ultimate goal of the Federal Major Crimes Act is to ensure adequate and consistent punishment being imposed on convicted defendants, could the same goal not be achieve by enabling the tribes the power to punish accordingly? The tribes are in need of greater sentencing authority, not only to adequately protect themselves from the offenders prosecuted, but also to place the tribes on equal footing and in turn eliminate the need for subsequent prosecution in a federal court.

Consider that in the Indian Tribal Justice Act, Congress stated, "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments."[186] Clearly, the tribal police are in a position to effectively investigate crime and the offenders equally, if not more extensively than outside police forces, resulting in quicker arrests by virtue of their knowledge of the situation. This argument also tends to defeat any argument that the tribes still exhibit some attributes of dependency upon the federal government as the "protector" of the Indian.

Another theory that has been offered in support of the need to prosecute Indian offenders in federal courts centers on the inability of tribal police forces in investigating potential crimes.[187] However, tribal policing powers are greatly improved and Indian police have done at the very least an adequate job in investigating and arresting offenders.[188] Considering that the Indian police are local to the alleged crime and are more familiar with the offenders, are these police not in a better position to conduct investigations?

---

[185] Congress has the power to revise the ICRA.

[186] 25 U.S.C. § 3601(5) (1994).

[187] *But see* United States Bureau of Justice Statistics, Census of State and Local Law Enforcement Agencies (1996) (attesting to the number of tribal police officers now working); *see also* Report of the Executive Committee for Indian Country Law Enforcement Improvements - Final Report to the Attorney General and the Secretary of the Interior, 8 (10/31/97) (detailing the number of criminal investigators from the Federal Bureau of Indian Affairs).

[188] Chaney, *supra* note 180, at 187.

Law enforcement efforts on tribal lands have made tremendous advances and these advances are evident in the number of agents now employed to investigate. Over two-thousand tribal police officers were employed by the middle of the 1990s.[189] These law enforcement agents serve over 1.4 million Native Americans and patrol approximately 56 million acres of tribal lands.[190] Because of the proximity these agents have to the tribal lands, they are often the first law enforcement agents to respond to crime scenes.[191]

And what of the tribal courts; are they not just as capable of prosecuting defendants as any federal court? If they are, then we must ask why there is such a pressing policy to prosecute defendants in federal courts subsequent to tribal court prosecutions. Today, tribal courts resemble state courts in their organization, and feature at least one, and often two, levels of appellate level courts.[192]

Christopher Chaney[193] has suggested the *Wheeler* Court encouraged the further development of tribal judicial systems.[194] At the time the *Wheeler* decision was handed down, there were 127 tribal courts in operation.[195] By 1995 there were 254 tribal courts in operation.[196] Former Attorney General Janet Reno stated, "While the federal government has a significant responsibility for law enforcement in Indian country, tribal justice systems are ultimately the most appropriate institutions for maintaining order in tribal communities. They are local institutions closest to the people they serve . . . . "[197] And Supreme Court Justice Sandra Day O'Connor stated: "The role

---

[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] Chaney, *supra* note 180, at 173.
[194] *Id.* at 181.
[195] *Id.* at 182.
[196] *Id.* (of these tribal courts, many operate complete with appellate level mechanisms).
[197] Janet Reno, *A Federal Commitment to Tribal Justice Systems*, JUDICATURE, 113 (Nov.—Dec. 1995).

of tribal courts continue to expand, and these courts have an increasingly important role to play in the administration of the laws of our nation."[198]

Coupled with the growth of the tribal court system, there has been an even greater development of tribal statutory as well as case law.[199] Moreover, the Indian Civil Rights Act affords criminal defendants substantially similar protections as those offered by the Bill of Rights.[200] Tribal defendants also have federal habeas corpus rights.[201] Federal courts offer all of the protections of the Bill of Rights, and there are those who have voiced concerns over the ability of the tribal courts to offer such protections. In the case of the Navajo tribal courts, it must be noted that the criminal defendant is afforded even more protections.[202] When tribal courts are in a position to offer at least the same, and in some cases more protections to the criminal defendant, as compared to a federal court, it would be arguably more appropriate for tribal members to be tried in tribal courts only.

XI. CONCLUSION

Through an analysis of the important Supreme Court decisions dealing with tribal sovereignty and the Double Jeopardy Clause we have seen conflicting decisions. Clearly, cases decided at the District Court level and in various Courts of Appeal, we have seen a rejection of the government's argument to allow subsequent prosecution of criminal defendants once prosecuted in tribal court. We have seen the Supreme Court reverse these decisions but at the same time we have seen the

---

[198] Sandra Day O'Connor, *Lessons From the Third Sovereign: Indian Tribal Courts*, THE TRIBAL RECORD, 12, 14 (Fall 1996).

[199] *See Oliphant*, 435 U.S. at 210 (where the Court suggested, "present day Indian tribal courts embody dramatic advances over their historical antecedents").

[200] 25 U.S.C. § 1302; *see supra* note 40 for full text of the statute.

[201] 25 U.S.C. § 1303; *see also* Santa ClaraPueblo v. Martinez, 436 U.S. 49, 58 (1978).

[202] Except for the case of class "A" misdemeanors.

Supreme Court fail to allow Indians the right to try non-Indians in tribal court because the Court expressed a view that would lead to a conclusion that Indians were never thought to be "truly sovereign."

If Congress were to act to allow Indians to impose sentences that are commensurate with those imposed by Federal Courts for the same or similar offenses the pressing need to prosecute in Federal Courts could be alleviated. As Chaney suggested in his article, "Congress should continue to find ways to make federal criminal laws that apply in Indian country responsive to the needs of the Indian communities that these laws are designed to serve."[203] If the Court's motivation is driven by a need to see stricter punishment imposed against Indian defendants for crimes that non-Indians would receive greater punishment for in federal courts, Congress has the power to remedy the situation.[204] Moreover, if the Supreme Court is going to continue to find Indians sovereign in some areas and not in others then Indians will continue to be considered wards of the Federal Government and will lack that which sovereigns rely on; the ability to govern.

---

[203] Chaney, *supra* note 180, at 181.

[204] 25 U.S.C. § 1302 provides that "Indians may not impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both."