

June 19, 2019

***Gamble v. United States*: Supreme Court Upholds Double Jeopardy Clause's "Separate Sovereigns" Doctrine**

Advisory

By [Paul J. Fishman](#), [Murad Hussain](#), [Kirk Ogrosky](#), [Cole Kroshus](#)

On June 17, 2019, the US Supreme Court issued a 7-2 decision in *Gamble v. United States*,¹ reaffirming the Court's longstanding "separate sovereigns" doctrine under the Double Jeopardy Clause of the Fifth Amendment to the US Constitution. First announced more than 170 years ago,² the separate sovereigns doctrine permits the federal government and a state government to bring separate criminal prosecutions against the same person for the same conduct. Justice Alito's majority opinion relied on the Double Jeopardy Clause's text, which prohibits only duplicative prosecutions for "the same offence"—*i.e.*, the violation of a particular law. Because each sovereign can define its own offenses, the Court explained that a single act can qualify as two separate "offences," because a person can violate different sovereigns' laws at the same time.

The concurring and dissenting opinions presage future fights about *stare decisis*—*i.e.*, how much deference the Court should and will give its own precedents. Although Justice Thomas joined the majority, he also wrote a concurring opinion calling on the Court to reconsider precedent that it deems inconsistent with the "original understanding" of the relevant constitutional or statutory text. Justice Gorsuch similarly criticized the Court's *stare decisis* approach, but dissented because he would have rejected the separate sovereigns doctrine even under the existing *stare decisis* framework. Justice Ginsburg wrote a separate dissent that also noted how the rationale for *stare decisis* is weakest in cases concerning how procedural rules implicate fundamental constitutional protections.

Months ago, when the Court granted review in *Gamble*, commentators seized on how an end to the separate sovereigns doctrine could effectively expand the scope of presidential pardons, so that they would also protect defendants from state prosecution for the same crime.³ By upholding the *status quo* and leaving the separate sovereigns doctrine intact, the Court has kept alive the intrigue surrounding current events. And for companies and individuals facing increased regulatory enforcement by state attorneys general, *Gamble's* approach confirms that regulated entities should consider state and local prosecutorial priorities nationwide *before* agreeing to any pretrial resolution of federal criminal charges.

BACKGROUND

In 2008, Terance Gamble was convicted under Alabama law of second-degree robbery, a felony. Years after his release, an Alabama police officer pulled Gamble over for driving with a broken headlight. After smelling marijuana, the officer searched Gamble's car and found two baggies of marijuana, a digital scale, and a handgun. Gamble was arrested and charged in state court with violating, *inter alia*, Alabama's prohibition against felons in possession of firearms.⁴ Gamble pled guilty and was sentenced to one year in jail.

Soon after, the federal government also charged Gamble with violating the parallel federal prohibition on felons' possession of firearms.⁵ Gamble moved to dismiss the federal indictment, arguing that the dual prosecution violated the Double Jeopardy Clause, which provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."⁶

The trial court rejected the argument under controlling precedent because the separate sovereigns doctrine did not bar duplicative state and federal prosecutions.⁷ The court concluded that "unless and until the Supreme Court overturns" the

separate sovereign doctrine, it must reject Gamble's Double Jeopardy claim.⁸ The Eleventh Circuit affirmed in a short *per curiam* opinion, "based on Supreme Court precedent."⁹ The Supreme Court granted *certiorari* to consider "[w]hether the Court should overrule the 'separate sovereigns' exception to the Double Jeopardy Clause."¹⁰

ANALYSIS

Justice Alito's opinion for the Court began with the text of the Fifth Amendment.¹¹ He first clarified that the "separate sovereigns" doctrine is not an "exception" to the Double Jeopardy Clause, but rather flows from the explicit textual reference to an "offence."¹² The Court explained that, because the term "offence" was originally understood as the transgression or violation of a law, "'offence' is defined by a law, and each law is defined by a sovereign. So where there are two sovereigns, there are two laws, and two 'offences.'"¹³ The Court also expressed reluctance to reject its prior approach to this issue, writing that "even in constitutional cases, a departure from precedent demands special justification," and "that something more than ambiguous historical evidence is required before we will flatly overrule a number of major decisions of this Court."¹⁴

Not surprisingly, the Court emphasized that its reading of the Double Jeopardy Clause respects the possibility that two sovereigns could have different interests "in punishing the same act."¹⁵ But in doing so, the Court did not suggest that Alabama and the United States *actually* had different interests in prosecuting Gamble. Instead, the Court cited—among others—the more provocative and compelling example of "a prosecution in this country for crimes committed abroad."¹⁶ The Court suggested that if, as Gamble had argued, "only one sovereign may prosecute for a single act," then "no American court—state or federal—could prosecute conduct already tried in a foreign court." Yet, the Court wrote, "[t]he murder of a U.S. national is an offense to the United States as much as it is to the country where the murder occurred and to which the victim is a stranger. That is why the killing of an American abroad is a federal offense that can be prosecuted in our courts, and why customary international law allows this exercise of jurisdiction."¹⁷

Justice Thomas joined the Court's opinion on the merits, but also concurred separately to criticize the majority's view of *stare decisis*. While he "agree[d] that the historical record does not bear out [his] initial skepticism of the dual-sovereignty doctrine,"¹⁸ he faulted *stare decisis* for "elevat[ing] demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law."¹⁹ Instead, Justice Thomas proposed that "[w]hen faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it."²⁰ In other words, Justice Thomas parted company with Justice Alito's formulation for the majority that overruling prior precedent requires "special justification."

Justice Gorsuch dissented on the merits, concluding that the separate sovereigns doctrine should be rejected even under the Court's current *stare decisis* standard. However, he also took aim at *stare decisis* and the majority's view. He acknowledged that in "close cases," the Court "rightly pay[s] heed to the considered views of those who have come before us."²¹ But he declared that *stare decisis* "has never been an inexorable command, and it is at its weakest when we interpret the Constitution."²²

Justice Ginsburg also dissented on the grounds that *stare decisis* is "weakest in cases concerning procedural rules that implicate fundamental constitutional protections. Gamble's case fits that bill."²³ On the merits, Justice Ginsburg's opinion essentially reasoned that states and the federal government are part of "one whole,"²⁴ and that these "parts of the whole United States should not be positioned to prosecute a defendant a second time for the same offense."²⁵

IMPLICATIONS

Whatever the Justices' various views of *stare decisis* portend for future hot-button cases, *Gamble* leaves intact the Double Jeopardy Clause's jurisprudence. Part of that *status quo* is that half of all states already bar re-prosecution of conduct previously prosecuted in federal court. One of those states is New York,²⁶ whose legislature recently passed a bill narrowing the state's double jeopardy protections due to concerns over potential abuses of the presidential pardon power.²⁷ That bill awaits the Governor's signature.

More broadly, *Gamble* reaffirms that individuals and companies who are exposed to both federal and state enforcement should consider how their approaches to resolving enforcement actions with one sovereign might affect their interactions with another. Multiple separate enforcement actions by federal, state, and local authorities remain permissible, notwithstanding the US Department of Justice's current policy of discouraging "piling on" through excessive overlapping penalties.²⁸ And for regulated entities in particular, the risk of dual prosecution is on the rise, because state attorneys general are increasingly pursuing state law remedies in areas—such as healthcare, life sciences, and antitrust—where federal enforcement has historically been the primary governmental concern. As a result, companies that find themselves

in controversial headlines should continue to be mindful of the risks in pursuing non-global resolutions of potential criminal charges.

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¹ No. 17-646, 2019 WL 2493923 (June 17, 2019).

² *Fox v. Ohio*, 5 How. 410 (1847).

³ See, e.g., Randall Eliason, [Supreme Court to Hear Double Jeopardy Case with Implications for Mueller](#), Sidebars Blog, July 11, 2018; Natasha Bertrand, [A Supreme Court Case Could Liberate Trump to Pardon His Associates](#), The Atlantic, Sep. 25, 2018.

⁴ Ala. Code §§ 13A-11-70(2), 13A-11-72(a).

⁵ 18 U.S.C. § 922(g)(1).

⁶ U.S. Const. amend. V.

⁷ *United States v. Gamble*, No. 16-00090-KD-B, 2016 WL 3460414, at *2 (S.D. Ala. June 21, 2016).

⁸ *Id.* at *3.

⁹ *United States v. Gamble*, 694 F. App'x 750, 750 (11th Cir. 2017).

¹⁰ [Question Presented](#), *United States v. Gamble*, No. 17-646 (June 28, 2018).

¹¹ *Gamble v. United States*, No. 17-646, 2019 WL 2493923 (June 17, 2019).

¹² *Id.* at *3.

¹³ *Id.*

¹⁴ *Id.* at *6 (quotation marks and citations omitted).

¹⁵ *Id.* at *4.

¹⁶ *Id.*

¹⁷ *Id.* (citation omitted).

¹⁸ *Gamble*, 2019 WL 2493923, at *16 (Thomas, J., concurring).

¹⁹ *Id.* at *17.

²⁰ *Id.* at *20.

²¹ *Id.* at *37 (Gorsuch, J., dissenting).

²² *Id.* (quotation marks and footnotes omitted).

²³ *Id.* at *27 (Ginsburg, J., dissenting) (quotation marks and citations omitted).

²⁴ *Id.* at *25 (capitalization omitted).

²⁵ *Id.* at *29 (capitalization omitted).

²⁶ N.Y. Crim. Proc. Law § 40.20.

²⁷ See S. 4572, 2019-2020 Leg. (N.Y. 2018).

²⁸ See Rod Rosenstein, Deputy Att'y Gen., *Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute* (May 9, 2018).