

The Pit and the Pendulum: Why the Military Must Change Its Policy Regarding Successive State-Military Prosecutions

Major Charles L. Pritchard, Jr.¹

*It will be a desirous thing to extinguish from the bosom of every member of the community any apprehensions, that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled.*²

I. Introduction

In 1986, Timothy B. Hennis was convicted in a North Carolina state court of killing a woman and two of her daughters.³ Hennis spent three years on death row pending his appeals, which resulted in a new trial where he was acquitted of the murders.⁴ Seventeen years later, the Cumberland County, North Carolina District Attorney's Office opened Hennis's "cold case" and ran a DNA test which they believed implicated Hennis.⁵ The Double Jeopardy Clause of the Fifth Amendment prohibited North Carolina from prosecuting Hennis again.⁶ That constitutional protection did not stop the U.S. Army, however. The Army recalled Hennis to active duty—he was a sergeant at the time of the murders—to court-martial him for the same offenses.⁷

In 2002, David Tillery was acquitted by a North Carolina state court of a two year-old murder.⁸ Six months later, the Cumberland County, North Carolina Sheriff's Office convinced Staff Sergeant Tillery's Army commander at Fort Benning, Georgia⁹ to pursue the murder charge again.¹⁰ With the North Carolina record of trial in hand (literally)¹¹ and without any additional evidence,¹² the Army obtained the court-martial conviction.¹³ The difference? North Carolina has a unanimous jury verdict requirement; the military only has a two-thirds verdict requirement.¹⁴

In both cases, the Army was within the bounds of the law. The U.S. Supreme Court established the dual sovereignty doctrine in *United States v. Lanza*¹⁵ as an exception to the Double Jeopardy Clause, thereby permitting federal and state governments to prosecute successively for the same crime.¹⁶ The Hennis and Tillery cases are not aberrations either. The

¹ Judge Advocate, U.S. Army. This article was written in partial completion of the Master of Laws requirements of the 55th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Ctr. & Sch., U.S. Army, Charlottesville, Va. J.D., 1997, Mercer University School of Law; B.A., 1994, Mercer University. Previous assignments include Appellate Defense Counsel, Defense Appellate Division, Arlington, Va., 2004–2006; Brigade Judge Advocate, 1st Brigade, 3d Infantry Division (Mechanized), Fort Stewart, Ga. 2002–2004; Senior Trial Counsel, 3d Infantry Division (Mechanized), Fort Stewart, Georgia, 2001–2002; Defense Counsel, Fort Wainwright, Alaska, 2000–2001; Legal Assistance Officer, Fort Wainwright, Alaska, 1999–2000; Administrative and Operational Law Attorney, Fort Wainwright, Alaska, 1998–1999; Special Assistant U.S. Attorney, Fort Wainwright, Alaska, 1998–1999. Member of the bars of Georgia, the Army Court of Criminal Appeals, the Court of Appeals for the Armed Forces, and the Supreme Court of the United States. Thanks go to Major Nick Lancaster, Moe Lescault, and my Dad for their editorial assistance.

² CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST CONTINENTAL CONGRESS 152 (Helen E. Veit et al. eds., 1991) [hereinafter CREATING THE BILL OF RIGHTS] (quoting *The Congressional Register* for James Madison's comments during the Committee of the Whole House on 8 June 1789).

³ Nancy Bartley, *Accusations Again Pursue Suspect in 1985 Killings, Despite Acquittal*, SEATTLE TIMES, Oct. 6, 2006, available at http://seattletimes.nwsource.com/html/localnews/2003291530_oldmurder06m.html.

⁴ *Id.*

⁵ *Id.*

⁶ U.S. CONST. amend V.

⁷ Bartley, *supra* note 3.

⁸ Transcript of Record at 103–04, *United States v. Tillery*, No. 20030538 (Army Ct. Crim. App. 2003).

⁹ *Id.* at 960. Tillery was alleged to have driven from Fort Benning to North Carolina to commit the murders. *Id.*

¹⁰ *Id.* at 33.

¹¹ Brief on Behalf of Appellant at 70–71, *Tillery*, No. 20030538.

¹² Transcript of Record at 97, *Tillery*, No. 20030538.

¹³ *Id.* at 1757.

¹⁴ Compare N.C. GEN. STAT. § 15A-1201, with UCMJ art. 52(a)(2) (2005).

¹⁵ 260 U.S. 377 (1922).

¹⁶ *Id.* at 385.

military has engaged in similar dual sovereign prosecutions many times. Eighteen published cases alone show the military's willingness to invoke the dual sovereignty doctrine.¹⁷ But is this the right answer?

The Framers of the Constitution did not intend a dual sovereignty doctrine to undermine the fundamental protection against double jeopardy.¹⁸ The Supreme Court erred to the significant detriment of generations of Americans when it created the doctrine based on faulty reasoning and no precedent, and it continued that error as it entrenched the doctrine in American jurisprudence. While the federal government and a majority of states have significantly limited the doctrine, the military has taken advantage of it. While each of the military services has instituted a policy governing successive state-military prosecutions, the policies are disparate and ineffective.

This article demonstrates that the military should change its practice with regard to successive prosecutions. The military's insistence on getting its pound of flesh has put servicemembers in the predicament of Edgar Allen Poe's protagonist in *The Pit and the Pendulum*¹⁹—surviving one fate only means being thrown into another, equally horrible one. The military should seek an amendment to the Uniform Code of Military Justice (UCMJ) that prohibits courts-martial after states have prosecuted servicemembers for the same act or transaction. At a minimum, the Department of Defense (DOD) should immediately consolidate the military services' disparate policies governing successive state-military prosecutions into one unified policy that makes those prosecutions the exception rather than the norm.

In this article, section II.A. analyzes the origins of the Double Jeopardy Clause, Section II.B. attempts to divine the intent of the Framers of the Constitution. Section II.C. analyzes the judicial precedent and reasoning that led to the dual sovereignty doctrine and reviews the doctrine's application and its limitations including the sham prosecution exception. Section II.D. discusses the military's treatment of dual sovereign prosecutions, and Section III compares that treatment to that of the states, the Department of Justice, and U.S. treaties. Finally, Section IV balances the competing needs of the military and its servicemembers to reach a conclusion about the military's policy regarding successive state-military prosecutions.

II. What We *Can* Do

This section of the article traces the origin and development of the Double Jeopardy Clause from its inception, through its permutations, including the dual sovereignty doctrine and the sham prosecution exception, to its present status in the military. This discussion will form the foundation to analyze what other jurisdictions are doing and, from this comparison, to discuss what the military should do.

A. Early References to Double Jeopardy

"No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . ."²⁰ So says the Bill of Rights. But how did the nation get there, and what did it do in the years between the ratification of the Constitution and the adoption of the Bill of Rights?²¹ The Framers of the Constitution did not include any form of double jeopardy protection in the original document. They were primarily concerned with the creation and preservation of the United States as a federal entity.²² The Declaration of Independence had indicted King George III for abuses of his citizen-subjects;²³ the Constitution

¹⁷ See *In re Stubbs*, 133 F. 1012 (D. Wash. 1905); *United States v. Knudson*, 16 C.M.R. 16 (C.M.A. 1954); *United States v. Sinigar*, 20 C.M.R. 46 (C.M.A. 1955); *United States v. Cadenhead*, 34 C.M.R. 51 (C.M.A. 1963); *United States v. Borys*, 40 C.M.R. 259 (C.M.A. 1969); *United States v. Petro*, 44 C.M.R. 511 (A.C.M.R. 1971); *United States v. Marks*, 45 C.M.R. 55 (C.M.A. 1972); *United States v. Sponseller*, 10 M.J. 775 (A.F.C.M.R. 1980); *United States v. Miller*, 12 M.J. 836 (A.C.M.R. 1982); *United States v. Green*, 14 M.J. 461 (C.M.A. 1983); *United States v. Clark*, 1990 C.M.R. LEXIS 147 (N.M.C.M.R. Feb. 23, 1990); *United States v. Duncan*, 38 M.J. 476 (C.M.A. 1993); *United States v. Schneider*, 38 M.J. 387 (C.M.A. 1993); *United States v. Kohut*, 41 M.J. 565 (N-M. Ct. Crim. App. 1994); *United States v. Bordelon*, 43 M.J. 531 (A. Ct. Crim. App. 1995); *United States v. Hutchison*, 56 M.J. 684 (C.G. Ct. Crim. App. 2001); *United States v. Ragard*, 56 M.J. 852 (Army Ct. Crim. App. 2002); *United States v. Owens*, 2005 CCA LEXIS 182 (N-M. Ct. Crim. App. June 17, 2005).

¹⁸ See discussion *infra* pp. 4–6.

¹⁹ 4 Edgar Allen Poe, *The Pit and the Pendulum*, in *THE WORKS OF EDGAR ALLEN POE* 65 (Hovendon ed. n.d.).

²⁰ U.S. CONST. amend. V.

²¹ For ease of discussion, this article distinguishes between the Constitution (the base document) that was ratified in 1787 and the Bill of Rights (the first ten amendments) that was ratified in 1791.

²² John Jay, in arguing the importance of a federal government, said:

Nothing is more certain than the indispensable necessity of government, and it is equally undeniable, that whenever and however it is instituted, the people must cede to [the central government] some of their natural rights in order to vest it with requisite powers. It is

was the mechanism that replaced the tyrant with a system of democratic self-governance—the key that opened the door to individual rights.²⁴

Although the Framers' original focus was not on individual liberties,²⁵ they were cognizant of the need for a bill of rights.²⁶ James Madison and Governor Morris voiced concern about the evil of successive prosecutions during a debate regarding the federal government's power to proscribe and punish treason; a power later established in Article III, Section 3 of the Constitution.²⁷ In that context, they were concerned with the ability of both the federal government and state governments to prosecute a citizen for the same offense where both sovereigns were victimized.²⁸ They argued that, to avoid this, the federal government should be given sole jurisdiction over treason.²⁹ This was a bridge too far, however. Most debaters were wary of an all-powerful federal government and were reluctant to have the states cede too many rights to it.³⁰ This fear prevailed, and the states did not cede complete power to define and prosecute treason to the federal government.³¹

The Constitution brought with it few individual protections other than those derived from the collective protections it provided the citizenry in general, and the new U.S. citizens lingered for four years before the Bill of Rights sheltered them individually. Despite this significant gap in protections, citizens were not likely to have been subjected to double jeopardy (at least not the federal-state kind). Congress did not create federal courts inferior to the U.S. Supreme Court until it passed the Judiciary Act of 1789.³² Federal courthouses and federal prosecutors were few and far between.³³ Although federal prosecutors tried prosecuting federal crimes in state courts, they were largely unsuccessful.³⁴ Americans benefited from these problems of early federalism (they only had to worry about state prosecutions, because federal prosecutors were stymied by the foregoing problems). They were saved from this tentative reliance in 1791 when the Bill of Rights filled the gap the original Constitution had left open.

well worthy of consideration therefore, whether it would conduce more to the interest of the people of America that they should, to all general purposes, be one nation, under one federal government, or that they should divide themselves into separate confederacies, and give to the head of each the same kind of powers which they are advised to place in one national government.

1 THE FEDERALIST NO. 2, at 14 (John Jay) (M. Walter Dunne 1901).

²³ For example, the Declaration states, "He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people." THE DECLARATION OF INDEPENDENCE para. 7 (U.S. 1776).

²⁴ Alexander Hamilton made this point repeatedly in his arguments for a federal government. He said, "The vigor of government is essential to the security of liberty . . ." and "I am convinced that this [Constitution] is the safest course for your liberty, your dignity, and your happiness." 1 THE FEDERALIST NO. 1, at 11, 12 (Alexander Hamilton).

²⁵ There were a few individual liberties incorporated into the Constitution itself: the right to a trial by jury, habeas corpus, and privileges and immunities as well as prohibitions on ex post facto laws, bills of attainder, and religious tests. See 2 BERNARD SCHWARZ, THE ROOTS OF THE BILL OF RIGHTS 436 (Leon Friedman ed. 1980).

²⁶ Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 16 (1996). The ratification debates were rife with controversy about the propriety of the Constitution because of its lack of a national bill of rights. *Id.*

²⁷ *Id.* at 12.

²⁸ *Id.* Ironically, this is exactly what the U.S. Supreme Court permitted with the creation of the dual sovereignty doctrine. See discussion *infra* sec. II.C.

²⁹ Kurland, *supra* note 26, at 12.

³⁰ *Id.* See also STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 23 (2005) ("[M]uch post-revolutionary (pre-constitutional) American political thought was characterized by suspicion of government, hostility to the Executive Branch, and confidence in democracy as the best check upon government's oppressive tendencies.").

³¹ Kurland, *supra* note 26, at 12.

³² *Id.* at 16. "[T]he Framers were hesitant to establish a scheme whereby federal crimes could be prosecuted exclusively in federal court. This hesitance persisted even after Congress created inferior courts . . ." *Id.* This was due to a lingering fear of a powerful central government. The more the states allowed the federal government to do, the more that government would flex its muscles according to the Framers. *Id.* at 17.

³³ *Id.* at 16.

³⁴ *Id.* at 17. Although the Judiciary Act permitted this, state courts and the U.S. Supreme Court were reluctant to recognize such shared jurisdiction because of the vertical separation of powers requirement between state and federal courts. *Id.* See also *Jackson v. Rose*, 2 Va. Cas. 34 (1815); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *United States v. Lathrop*, 17 Johns. 4 (N.Y. 1819).

B. The Double Jeopardy Clause

In 1791, three-fourths of the states ratified the Fifth Amendment which, among other things, forbade multiple prosecutions for the same offense.³⁵ Based on the history of the Double Jeopardy Clause, however, its inclusion in the Bill of Rights was not a foregone conclusion. The rights contained in the Bill of Rights have been described as natural rights or “the true, ancient, and indubitable rights and liberties of the people.”³⁶ The Double Jeopardy Clause does not appear to have been one of these; it was not incorporated in the Magna Carta in 1215,³⁷ the English Petition of Right in 1628,³⁸ or the English Bill of Rights in 1689,³⁹ although these documents were the foundation of individual liberties in Great Britain. According to Blackstone’s Commentaries in the late eighteenth century, however, double jeopardy protections were provided by English common law, even to the extent of barring an English prosecution after a foreign prosecution for the same offense.⁴⁰

There was scant reference to double jeopardy protection in American colonial declarations and state constitutions. During the colonial period, only Massachusetts and Carolina included protections against double jeopardy. Article 42 of the Massachusetts Body of Liberties in 1641 stated, “No man shall be twice sentenced by Civill Justice for one and the same Crime, offense, or Trespasse.”⁴¹ Article 64 of the Fundamental Constitutions of Carolina in 1669 stated, “No cause shall be twice tried in any one court, upon any reason or pretense whatsoever.”⁴² Upon attaining unofficial statehood (a promotion from colonial status), nine of the former colonies adopted bills of rights. Only New Hampshire’s Bill of Rights of 1783 included a double jeopardy provision.⁴³ Article XVI stated, “No subject shall be liable to be tried after an acquittal, for the same crime or offence.”⁴⁴ This left twelve states without a constitutional prohibition on double jeopardy.⁴⁵

The first ten Amendments to the Constitution were primarily based on the states’ constitutions and bills of rights.⁴⁶ States were asked to propose changes to the Constitution after its ratification, and James Madison collected those submissions. Madison then culled the submissions and drafted a distinct set of articles that Congress could debate.⁴⁷ He believed the amendments that would go to the people should consist of an enumeration of “simple and acknowledged principles.”⁴⁸ The only state submission to contain a double jeopardy provision was New York’s. It proposed, “That no Person ought to be put twice in Jeopardy of Life or Limb for one and the same offence, nor unless in case of impeachment, be punished more than once for the same Offence.”⁴⁹ There are two striking features in this: First, New York did not prohibit double jeopardy in its own constitution; and second, New York’s proposal must have struck a cord with James Madison, because the Double Jeopardy Clause made it into the articles he presented to the House of Representatives. This is despite the fact that only one state (New Hampshire) had included the provision in its constitution and only one state (New York) had

³⁵ U.S. CONST. amend V.

³⁶ 1 SCHWARZ, *supra* note 25, at 44.

³⁷ *Id.* at 8.

³⁸ *Id.* at 19.

³⁹ *Id.* at 40.

⁴⁰ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 335 (1773). Blackstone stated,

[T]hat no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution, he may plead such acquittal in bar of any subsequent accusation for the same crime.

Id. The same was true for a former conviction. *Id.* See also *Rex v. Hutchinson* (1775) (not directly reported, but discussed in *Roche’s* case); 1 Leach C.L. 34 (4th ed. 1815); *Beak v. Thyrrwhit*, 87 Eng. Rep. 124 (English court dismissed a murder indictment because Hutchinson had already been acquitted by a Portuguese court for the same act); J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. REV. 1, 8 (1956).

⁴¹ 1 SCHWARZ, *supra* note 25, at 76.

⁴² *Id.* at 117.

⁴³ 2 *id.* at 375.

⁴⁴ *Id.* at 377.

⁴⁵ RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS 200 (2006).

⁴⁶ 2 SCHWARZ, *supra* note 25, at 435.

⁴⁷ CREATING THE BILL OF RIGHTS, *supra* note 2, at xiv, 11–14.

⁴⁸ *Id.* at 152 (quoting *The Daily Advertiser* for Madison’s comments during the Committee of the Whole House on 17 August 1789).

⁴⁹ *Id.* at 22.

recommended the provision as an amendment. Yet, the Double Jeopardy Clause piqued the interest of Congress and was ultimately presented to the states for ratification.

Congress altered the wording of the Clause several times. James Madison originally framed it as follows: “No person shall be subject, except in cases of impeachment, to more than one punishment, or one trial for the same offence.”⁵⁰ After the House passed it essentially unchanged,⁵¹ the Senate struck out the language, “except in case of impeachment, to more than one trial, or one punishment,” and substituted the phrase, “be twice put in jeopardy of life or limb.”⁵² More interesting is additional language proposed several times by Representative George Partridge (Massachusetts) in the debates of the Committee of the Whole House. He proposed adding after the words “same offence” the words “by any law of the United States.”⁵³ The House twice voted down the additional language.⁵⁴

Given this history, the question remains: What were the Framers concerned about? First, the Bill of Rights generally was seen as an attempt to limit the powers of the federal government. James Madison said that

the great object in view is to limit and qualify the powers of government, by excepting out of the grant of power those cases in which the government ought not to act, or to act only in a particular mode. They point these exceptions sometimes . . . against the majority in favor of the minority. The prescriptions in favor of liberty, ought to be leveled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power: But this is not found in either the executive or legislative departments of government, but in the body of the people, operating by the majority against the minority.⁵⁵

That is, the powers of the masses in governing themselves were to be sacrificed, to some extent, for the preservation of individual rights. In the words of Tench Coxe, a Philadelphia Federalist, the Amendments would “[heighten and strengthen] the barriers between necessary power and indispensable liberty.”⁵⁶ This focus on individual liberties at the expense of the government was apparent in the debates of the Committee of the Whole House regarding the Double Jeopardy Clause. Several of the Representatives were concerned that the Clause would divest individuals of their *right* to obtain a second trial if the first trial was proven to have been defective.⁵⁷ They therefore read the Clause consistent with its “human intention . . . to prevent more than one punishment.”⁵⁸ Representative Livermore summed up the sentiment of his brethren as follows:

The clause appears to me essential; if it is struck out, it will hold up the idea that a person may be tried more than once for the same offence. Some instances of this kind have taken place; but they have caused great uneasiness: It is contrary to the usages of law and practice among us; and so it is to those of that country from which we have adopted our laws.⁵⁹

Second, the Framers never raised the concern during the debates that the Clause would bind the federal government’s hands improperly. There was no discussion regarding the potential tension between the states and the federal government concerning the Clause. The tenor of the debates seems to indicate the representatives believed the Clause to be universal: If a person is tried once, that person may not be tried again (unless he wishes it) for the same offense regardless of the prosecuting entity. In fact, the response to Representative Partridge’s proposal for additional language supports this universal application of the Clause. Partridge sought to limit the applicability of the Clause by changing it to read “for the same offense by any law of the United States.”⁶⁰ This language indicated that the Clause would only apply to the federal

⁵⁰ *Id.* at 12.

⁵¹ *Id.* at 31. The House juxtaposed the phrases “one trial” and “one punishment” in the version it passed.

⁵² *Id.* at 39 n.14.

⁵³ *Id.* at 180, 187 (quoting *The Gazette of the United States*, 22 August 1789). See *infra* discussion pp. 5–6.

⁵⁴ *Id.*

⁵⁵ *Id.* at 81 (quoting *The Congressional Register* for statements made before the House of Representatives on 8 June 1789).

⁵⁶ LABUNSKI, *supra* note 45, at 211.

⁵⁷ CREATING THE BILL OF RIGHTS, *supra* note 2, at 186. Representatives Benson and Sherman believed that, “as the clause now stood, a person found guilty could not arrest the judgment, and obtain a second trial in his own favor” *Id.* If this reading of the Clause was accurate, Timothy Hennis would not have been able to challenge his original murder conviction and thereby obtain the new trial at which he was acquitted. See discussion *supra* p. 1.

⁵⁸ *Id.*

⁵⁹ *Id.* at 180 (quoting *The Gazette of the United States*, 22 August 1789).

⁶⁰ *Id.* at 180, 187.

sovereign's laws and prosecutions. Yet the proposal was voted down twice. A universal application of the Clause makes sense in the context of the state-federal dual sovereignty model. As stated above, the double jeopardy protection is not a "natural right," but one "resulting from the social compact which regulates the action of the community."⁶¹ The citizens of the several states comprise the society from which the compact is drawn. There are no citizens of the federal government distinct from the citizens of the states. If the benefit of the social compact belongs to the individual citizens, the limitation of power must be on both sovereigns because the individual belongs to both at the same time. To believe otherwise (that is, to reject the universal application of the Double Jeopardy Clause) would be to defeat the individual's sacred right through a combination of federal and state power—something the laws of each could not accomplish (and were not intended to accomplish) separately.⁶²

Yet, the U.S. Supreme Court believed otherwise and interpreted the Double Jeopardy Clause in just that manner.

C. The Dual Sovereignty Doctrine

In 1922, in *United States v. Lanza*,⁶³ the U.S. Supreme Court recognized an exception to the Double Jeopardy Clause where successive prosecutions are accomplished by separate sovereigns. This dual sovereignty doctrine relies on the notion that an accused whose conduct violates the laws of two sovereigns "has committed two different offenses by the same act, and [thus] a conviction by a court [of one sovereign] of the offense against that [sovereign] is not a conviction of the different offense against the [other sovereign] and so is not double jeopardy."⁶⁴ Yet, the foundation for the doctrine is based more on legal imagination than on legal precedent or reasoning.

1. Pre-Civil War Roots

The dual sovereignty doctrine had its roots in pre-Civil War soil.⁶⁵ In the 1852 case *Moore v. Illinois*, the Supreme Court set forth for the first time the principle that later became the dual sovereignty doctrine.⁶⁶ Moore was convicted in Illinois for harboring and secreting a slave.⁶⁷ Moore argued that the state statute was void because it conflicted with a federal constitutional provision that covered the same offense and therefore violated the Fifth Amendment's Double Jeopardy Clause.⁶⁸ The Court held that the state and federal laws were different and therefore no conflict existed.⁶⁹ The Court further stated that Moore's conduct did not violate the Constitution's prohibition.⁷⁰ Despite this holding, the Court delved into obiter dictum stating,

⁶¹ *Id.* at 81 (quoting *The Congressional Register* for Madison's statements to the House of Representatives on 8 June 1789).

⁶² The method of constitutional interpretation employed in pages 4–6 of this article is what U.S. Supreme Court Justice Antonin Scalia would call "textualism." This method seeks the original meaning of the text by analyzing the context in which it was written. This original meaning does not change as time progresses. See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38, 40 (1997). Justice Stephen Breyer has proposed an alternative method of constitutional interpretation in which constitutional provisions are analyzed in the context of active liberty (the ability of citizens to participate in government) and individual liberty (freedom of citizens from governmental intrusion). See BREYER *supra* note 30, at 3–5, 15. The analysis on pages 4–13 of this article is supported by this method as well. The question is whether the dual sovereignty doctrine promotes active or individual liberty or both or inhibits either. The doctrine inhibits both. If the backbone of active liberty is permitting the public to govern itself, the antithesis is "concentrating too much power in too few hands." *Id.* at 8. When the state and federal governments act toward a single goal, individually or cooperatively, they become like one entity that has double the power. This is the antithesis of active liberty. Further, the dual sovereignty doctrine clearly inhibits individual liberty because it permits citizens to be doubly subjected to governmental intrusion. Hence, under Justice Breyer's method of constitutional interpretation, the dual sovereignty doctrine does not promote liberty (active or modern) and it should be discarded. In its absence, the Double Jeopardy Clause does promote liberty.

⁶³ 260 U.S. 377 (1922).

⁶⁴ *Id.* at 382.

⁶⁵ See *Moore v. Illinois*, 55 U.S. 13 (1852); *Fox v. Ohio*, 46 U.S. 410 (1847).

⁶⁶ *Moore*, 55 U.S. at 15–16.

⁶⁷ *Id.* at 10.

⁶⁸ *Id.* Article IV, Section 2 of the Constitution required slaves who escaped into another state to be delivered back to their slave owners if the owners demanded it. This provision was later superseded by the Thirteenth Amendment. U.S. CONST. amend XIII.

⁶⁹ *Moore*, 55 U.S. at 11, 14–15.

⁷⁰ *Id.* at 14–15.

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 [State or federal government] 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. He could not plead the punishment by one in bar to a conviction by the other⁷¹

The Court cited *United States v. Marigold*⁷² and *Fox v. Ohio*,⁷³ neither of which supported such a proposition. *Marigold* dealt only with the federal government's ability to criminalize counterfeiting based on its constitutional power to coin money.⁷⁴ *Fox* was perhaps more closely related to the *Moore* dictum, but it did not support the proposition.

Mrs. Fox was convicted in Ohio for passing counterfeit money.⁷⁵ She argued to the Supreme Court that the Ohio criminal statute was unconstitutional because Article I, Section 8 of the Constitution vested the power to coin money in Congress.⁷⁶ The Court noted the difference between minting false money (which would offend the federal government) and passing or uttering false money (which would not offend it⁷⁷), and held that the state and federal governments were not operating in conflict because they were dealing with two different wrongs.⁷⁸ Interestingly, Ohio argued that if the state and federal government could both prosecute for the same act, it would violate the federal Double Jeopardy Clause.⁷⁹ This probably reflected the prevailing notion (established by English common law and perpetuated by the Constitution's Framers) that the Clause applied to successive prosecutions by the state and federal governments. The Court viewed the issue more as a preemption problem than a double jeopardy one.⁸⁰ The Court said the Clause was a restriction on federal power, "intended to prevent interference with the rights of the States, and of their citizens."⁸¹ Therefore, federal action would not prevent a state from acting to enforce its criminal laws. Although the Court avoided a double jeopardy analysis in *Fox*, it later relied on *Fox* to support its dictum in *Moore* regarding dual sovereignty. The problem with the *Moore* Court's reliance on *Fox* is that the *Fox* holding had nothing to do with double jeopardy and that the obiter dictum in *Fox* was devoid of citation to any authoritative precedent.⁸²

Both *Fox* and *Moore* drew strong condemnation from Supreme Court Justice McLean. In *Fox*, he argued the majority's holding established

a great defect in our system. . . . [T]o punish the same act by the two governments would violate, not only the common principles of humanity, but would be repugnant to the nature of both governments. . . .

There is no principle better established by the common law, none more fully recognized in the federal and State constitutions, than that an individual shall not be put in jeopardy twice for the same offence. . . . [I]ts spirit applies with equal force against a double punishment, for the same act, by a State and a federal government.⁸³

⁷¹ *Id.* at 15–16.

⁷² 50 U.S. 560 (1850).

⁷³ 46 U.S. 410 (1847).

⁷⁴ *Marigold*, 50 U.S. at 567–68. *Marigold* was indicted pursuant to a federal statute proscribing importation and utterance of counterfeit currency. *Id.* at 556. *Marigold* argued that Congress did not have the authority to enact such a law because the Constitution specifically prohibited only counterfeiting itself. Therefore, anything beyond actual counterfeiting was reserved to the states. *Id.* at 568. The Court disagreed, stating that Congress' authority to enact the statute was inherent in its constitutional power to regulate commerce. *Id.* at 570.

⁷⁵ *Fox*, 46 U.S. at 432.

⁷⁶ *Id.* at 433.

⁷⁷ This was before the enactment of the federal statute at issue in *Marigold*.

⁷⁸ *Fox*, 46 U.S. at 433.

⁷⁹ *Id.* at 434.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *See id.* at 434–45.

⁸³ *Id.* at 439 (McLean, J., dissenting).

In *Moore*, Justice McLean repeated this theme more powerfully:

It is true, the criminal laws of the Federal and State Governments emanate from different sovereignties; but they operate upon the same people, and should have the same end in view. In this respect, the Federal Government, though sovereign within the limitations of its power, may, in some sense, be considered as the agent of the States, to provide for the general welfare, by punishing offenses under its own laws within its jurisdiction. It is believed that no government, regulated by laws, punishes twice criminally the same act. And I deeply regret that our government should be an exception to a great principle of action, sanctioned by humanity and justice.

It seems to me it would be as unsatisfactory to an individual as it would be illegal, to say to him that he must submit to a second punishment for the same act, because it is punishable as well under the State laws, as under the laws of the Federal Government. It is true that he lives under the aegis of both laws; and though he might yield to the power, he would not be satisfied with the logic or justice of the argument.⁸⁴

By 1852, the Supreme Court, in the *Moore* decision, had recognized a rudimentary form of the dual sovereignty exception to the Double Jeopardy Clause without any basis in law. It thereby created the potential for an invasion of an individual's constitutional right to be free from double jeopardy. This potential would become reality in 1922. Rather than recognizing *Fox* and *Moore* for their true value—limited holdings not dealing with double jeopardy issues—the Court in *United States v. Lanza*⁸⁵ relied on the unsupported obiter dicta in those cases to firmly establish a true exception to the Double Jeopardy Clause.

2. The Doctrine

Not only did Chief Justice Taft fail to recognize the limits of the Court's holdings in *Fox* and *Moore*, he relied on a string of similar cases (all of which had their foundation in those two cases) in *Lanza* to reinforce the façade of precedent.⁸⁶ By 1922, the First World War had been put to bed and Prohibition was alive and “flapping.” *Lanza* had been convicted of violating the National Prohibition Act⁸⁷ (which enforced the Eighteenth Amendment⁸⁸) as well as violating state law by manufacturing, transporting, and possessing alcohol.⁸⁹ *Lanza* successfully appealed to a Washington District Court, which dismissed the U.S. indictment.⁹⁰ Interestingly, the Washington statute proscribing *Lanza*'s acts predated the Eighteenth Amendment.⁹¹ The Amendment did not occupy the field; rather it permitted concurrent federal and state enforcement power.⁹² The United States appealed the district court's dismissal, and the Supreme Court reversed.⁹³ The Court held that “an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.”⁹⁴ Chief Justice Taft's logic, rationale, and reliance on “precedent,” however, were all flawed.

⁸⁴ *Moore v. Illinois*, 55 U.S. 13, 21 (1852) (McLean, J., dissenting).

⁸⁵ 260 U.S. 377 (1922).

⁸⁶ *Id.* at 384.

⁸⁷ Pub. L. No. 66-66, 1 Stat. 305 (1919). The Act implemented and provided penalties for the Eighteenth Amendment. See explanation of the Eighteenth Amendment *infra* note 86. The National Prohibition Act became inoperative by repeal of the Eighteenth Amendment. See U.S. CONST. amend XXI (1933); *Massey v. United States*, 291 U.S. 608 (1934).

⁸⁸ U.S. CONST. amend XVIII. The Eighteenth Amendment prohibited the manufacture, sale, and transportation (including importation) of intoxicating liquors in the United States and any of its territories. *Id.*

⁸⁹ *Lanza*, 260 U.S. at 378.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² U.S. CONST. amend XVIII, § 2.

⁹³ *Lanza*, 260 U.S. at 378, 385.

⁹⁴ *Id.* at 382.

a. *Logic?*

Chief Justice Taft said the purpose of the Eighteenth Amendment was to establish “prohibition as a national policy reaching every part of the United States and affecting transactions which are essentially local or intrastate.”⁹⁵ Even the Amendment itself sought state-federal cooperation to achieve this end.⁹⁶ Because of this unity of effort, there could only be one purpose and one goal. Yet, Chief Justice Taft stated that *Lanza*’s one act (or series of acts) really resulted in two harms:

Here the same act was an offense against the State of Washington . . . and also an offense against the United States The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that State is not a conviction of the different offense against the United States and so is not double jeopardy.⁹⁷

In essence, the logic was as follows: there was one purpose and goal, and there was one act (and therefore one harm) affecting that purpose and goal; but because there were two entities acting in unison to achieve the purpose and goal, each entity was entitled to its share of the “just” desserts. If ever there was a legal fiction, this was it.

b. *Rationale*

The Court explained its rationale as preventing a preemption of the federal government’s prosecution by a state’s prosecution where both entities had an interest in seeing justice done and the state’s punishment might be too lenient to satisfy the federal government’s desires.⁹⁸ Specifically, the Court said, “If a State were to punish the [crime] . . . by small or nominal fines, the race of offenders to the courts of that State to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect.”⁹⁹

Harkening back to original ideas of federalism, however, most of the Framers would likely have had difficulty envisioning a scenario where a person would violate the laws of the United States and a state by one act. James Madison set forth one of the first principles of federalism in *The Federalist No. 45*: “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”¹⁰⁰ Consequently, the areas of federal power—national protection from foreign powers and national preservation through taxes¹⁰¹—were distinct from state powers. The two areas where the Framers envisioned a dual sovereign application of criminal laws were treason and piracy.¹⁰² This is because the Framers wanted and expected the federal government to be limited in its authority and to stay in that lane.¹⁰³ Yet, the future would find the federal government expanding that lane into a major highway through a combination of the Commerce Clause and the Necessary and Proper Clause.¹⁰⁴ Even if the Framers intended the Double Jeopardy Clause to apply only to the federal government (as opposed to a universal application), that intent would have been founded upon the belief that the federal government’s power would be distinct and limited and that there would be little overlap with the states’ powers.¹⁰⁵ Had they foreseen the explosion of federal criminal

⁹⁵ *Id.* at 381.

⁹⁶ U.S. CONST. amend. XVIII, § 2.

⁹⁷ *Lanza*, 260 U.S. at 382.

⁹⁸ *Id.* at 385.

⁹⁹ *Id.*

¹⁰⁰ 1 THE FEDERALIST NO. 45, at 319 (James Madison).

¹⁰¹ Madison went on to explain that the federal government’s power “will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected.” *Id.*

¹⁰² Kurland, *supra* note 26, at 12.

¹⁰³ See, e.g., 1 THE FEDERALIST NO. 32, 206–07 (Alexander Hamilton) (noting that states would retain all rights of sovereignty that they did not exclusively delegate to the federal government); 1 THE FEDERALIST NO. 39, at 262 (James Madison) (stating that the jurisdiction of the proposed federal government would extend to “enumerated objects only”).

¹⁰⁴ Kurland, *supra* note 26, at 16 n.208.

¹⁰⁵ *Id.* at 9. The Constitutional Convention compromised on the issue of federal courts inferior to the U.S. Supreme Court in that the Constitution ultimately permitted but did not require them. This reflected the “practical principle that areas of ‘exclusive’ constitutional criminal authority would rarely result in mandatory preemption of state laws that criminalized the same act or transaction, even if those acts were technically denominated to be within an area of exclusive federal concern.” *Id.* at 31.

legislation, much of which overlaps state criminal jurisdiction, the debates regarding the Double Jeopardy Clause likely would have had a different flavor.

The *Lanza* opinion was silent regarding the Framers's intent for the Double Jeopardy Clause. It was not silent with regard to precedent, however.

c. "Precedent"

The Court relied heavily on *Fox* and *Marigold*,¹⁰⁶ which, as stated above, did not support the proposition that successive state-federal prosecutions were exempt from the Double Jeopardy Clause. Chief Justice Taft attempted to bolster his position with a long string of cases that failed to do just that.¹⁰⁷ He cited *Moore v. Illinois*,¹⁰⁸ *United States v. Cruikshank*,¹⁰⁹ *Pettibone v. United States*,¹¹⁰ *Ex parte Siebold*,¹¹¹ *Crossley v. California*,¹¹² *Gilbert v. Minnesota*,¹¹³ *Southern Railway Co. v. Railroad Commission of Indiana*,¹¹⁴ and *Cross v. North Carolina*.¹¹⁵ None of those cases involved double jeopardy or dual sovereignty issues. *Cruikshank* and *Pettibone* involved failure of the charges to state an offense.¹¹⁶ *Siebold* questioned whether Congress had the power to enact two particular statutes punishing misconduct of election judges.¹¹⁷ *Crossley*, *Gilbert*, and *Southern Railway Co.* all dealt with preemption issues.¹¹⁸ The defendants in those cases argued that the states could not prosecute them for state offenses that were also federal offenses because the federal government's interest in the crimes was preeminent.¹¹⁹

Cross came the closest to involving a double jeopardy/dual sovereignty issue. The defendant, a bank officer, forged a note (a state offense) and then separately entered false information into the bank's books based on the forgery (a federal offense).¹²⁰ The defendant argued that there was only one act and that the existence of the federal statute barred the state's ability to prosecute.¹²¹ The Court disagreed on both counts: there were two distinct acts—the forgery and subsequent entering of the false information—and the existence of the federal statute did not impede the state's ability to protect its interests.¹²² Further, there was no subsequent federal prosecution.¹²³ Therefore, the value of *Cross* (and all the other cited cases) as precedent for the holding in *Lanza*—i.e., that separate sovereigns could prosecute the same act/crime—was nonexistent.

The other main authority Chief Justice Taft cited was *Barron v. Mayor of Baltimore*,¹²⁴ where the Court held that the constitutional protections afforded by the first eight amendments applied only to proceedings by the federal government.¹²⁵

¹⁰⁶ *United States v. Lanza*, 260 U.S. 377, 382–83 (1922).

¹⁰⁷ *Id.* at 384.

¹⁰⁸ 55 U.S. 13 (1852); *see discussion supra* pp. 6–8.

¹⁰⁹ 92 U.S. 542 (1876).

¹¹⁰ 148 U.S. 197 (1893).

¹¹¹ 100 U.S. 371 (1880).

¹¹² 168 U.S. 640 (1898).

¹¹³ 254 U.S. 325 (1920).

¹¹⁴ 236 U.S. 439 (1915).

¹¹⁵ 132 U.S. 131 (1889).

¹¹⁶ *United States v. Cruikshank*, 92 U.S. 542, 548 (1876); *Pettibone v. United States*, 148 U.S. 197, 203 (1893).

¹¹⁷ *Ex parte Siebold*, 100 U.S. 371, 373 (1880).

¹¹⁸ *Crossley v. California*, 168 U.S. 640, 641 (1898); *Gilbert*, 254 U.S. at 329; *S. Ry. Co.*, 236 U.S. at 446.

¹¹⁹ *Crossley*, 168 U.S. at 641; *Gilbert*, 254 U.S. at 329; *S. Ry. Co.*, 236 U.S. at 446.

¹²⁰ *Cross*, 132 U.S. at 136.

¹²¹ *Id.* at 136–37.

¹²² *Id.* at 139.

¹²³ *Id.*

¹²⁴ 32 U.S. 243 (1833).

¹²⁵ *Id.* at 250.

The *Barron* decision meant that the Fifth Amendment's Double Jeopardy Clause did not apply to the states but applied only to "a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority."¹²⁶ Although *Barron* met its demise four decades later, the Supreme Court never reexamined the dual sovereignty doctrine in that light.

3. Entrenching the Doctrine

Barron's anti-incorporation theme carried the day for dual sovereignty for forty years after *Lanza*. Yet the Supreme Court should have heeded Justice McLean's warnings that the dual sovereignty doctrine would produce results antithetical to the Constitution's individual protections. His warnings would become reality in the silver platter doctrine and the arena of compelled self-incrimination.

a. Erosion of Individual Rights—The Silver Platter Doctrine and Compelled Self-Incrimination

In *Weeks v. United States*,¹²⁷ the Court created the silver platter doctrine¹²⁸ by holding that a state was not prohibited by the Fourth and Fourteenth Amendments from introducing evidence that had been obtained by federal agents through an unreasonable search and seizure.¹²⁹ The doctrine allowed state and federal agents to do, through a combination of their powers, what neither of them would be permitted to do alone in order to secure a conviction.

In *Feldman v. United States*,¹³⁰ the Court again used *Barron* to pierce the shield of individual constitutional protections in the context of the Fifth Amendment's protection against self-incrimination.¹³¹ *Feldman* was a judgment debtor who was immunized by the state and compelled to give testimony.¹³² Subsequently, the federal government prosecuted him and used his immunized state testimony against him.¹³³ The Court, relying on *Barron*'s anti-incorporation principle, held that the Fifth Amendment did not bind the states and that, consequently, a state could compel an individual to incriminate himself in a federal prosecution.¹³⁴ Once again, the state and federal governments could combine their powers to accomplish what neither could alone. The Supreme Court reinforced this theme repeatedly over the next two decades.

b. *Bartkus v. Illinois*¹³⁵ and *Abbate v. United States*¹³⁶

The theme of "combined sovereignty" to erode individual rights continued through the 1950s. In 1958, the Supreme Court solidified the dual sovereignty doctrine in *Bartkus v. Illinois*¹³⁷ and *Abbate v. United States*.¹³⁸ In *Bartkus*, the Court held that states were not barred by the Fourteenth Amendment from prosecuting an accused regarding the same offense for

¹²⁶ *United States v. Lanza*, 260 U.S. 377, 382 (1922). This language is strikingly similar to the proposed language for the Double Jeopardy Clause that the House of Representatives voted down twice during the debates regarding the amendments to the Constitution. See discussion *supra* pp. 5–6 and notes 53, 54, 60.

¹²⁷ 232 U.S. 383 (1914).

¹²⁸ See, e.g., Gerald H. Galler, *The Exclusion of Illegal State Evidence in Federal Courts*, 49 J. CRIM. L. & CRIMINOLOGY 455, 460 (1959); Alan C. Kohn, *Admissibility in Federal Court of Evidence Illegally Seized by State Officers*, 1959 WASH. U. L.Q. 229, 253.

¹²⁹ *Weeks*, 232 U.S. at 398.

¹³⁰ 322 U.S. 487 (1944).

¹³¹ See, e.g., Akhil Reed Amar & Jonathan L. Marcus, Article: *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 13–15 (1995); Steven J. Winger, *Supreme Court Review: Denying Fifth Amendment Protections to Witnesses Facing Foreign Prosecutions: Self-Incrimination Discrimination?*, 89 J. CRIM. L. & CRIMINOLOGY 1095, 1104–12 (1999).

¹³² *Feldman*, 322 U.S. at 488.

¹³³ *Id.*

¹³⁴ *Id.* at 493; see also *Knapp v. Schweitzer*, 357 U.S. 371, 380 (1958) (reaffirming this principle).

¹³⁵ 359 U.S. 121 (1959).

¹³⁶ 359 U.S. 187 (1959).

¹³⁷ *Bartkus*, 359 U.S. 121.

¹³⁸ *Abbate*, 359 U.S. 187.

which he had already been prosecuted by the federal government.¹³⁹ The Court reiterated, “We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such.”¹⁴⁰ The Court specifically referred to the “unquestioned precedent” of *Fox v. Ohio* and its progeny.¹⁴¹ In addition to its reliance on *Barron*, the Court resorted again to Chief Justice Taft’s reasoning in *Lanza* concerning the race to the courthouse.¹⁴² The Court provided an example:

In *Screws v. United States*, . . . defendants were tried and convicted in a federal court under federal statutes with maximum sentences of a year and two years respectively. But the state crime there involved was a capital offense. Were the federal prosecution of a comparatively minor offense to prevent state prosecution of so grave an infraction of state law, the result would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines. It would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States.¹⁴³

There are two problems with the *Bartkus* Court’s use of *Screws* as an example. First, the federal and state charges in *Screws* actually represented distinct acts. In the former, *Screws* was accused of denying a citizen of his right to trial based on racial considerations.¹⁴⁴ In the latter, *Screws* was accused of murdering that citizen.¹⁴⁵ Hence, the two sovereigns were not punishing the same act. Second, from a practical standpoint, the *Bartkus* majority’s concern was not realistic. If the Court held that the Double Jeopardy Clause prevents successive state and federal prosecutions, state and federal prosecutors would be on notice of this and would ensure that their respective interests were vindicated through a single trial by whichever sovereign could accomplish the greater governmental good.¹⁴⁶ For example, if the Clause prevented successive prosecutions at the time of *Screws*’s misconduct, surely the federal prosecutors would have deferred to the state’s prosecution which had the capability of yielding a greater sentence (that was also more commensurate with the crime). In other words, a federal prosecutor would not knowingly defeat the state’s prosecution and thereby allow *Screws* to “get away with murder” by only serving two years of confinement. Justice Brennan recognized this concept in his dissenting opinion in *Bartkus*: “cooperation between federal and state authorities in criminal law enforcement is to be desired and encouraged, for cooperative federalism in this field can indeed profit the Nation and the States in improving methods for carrying out the endless fight against crime.”¹⁴⁷

The *Bartkus* majority’s shortcomings were highlighted by Justice Black, who picked up where Justice McLean left off in *Fox v. Ohio*. Justice Black stated, “[D]ouble prosecutions for the same offense are so contrary to the spirit of our free country that they violate even the prevailing view of the Fourteenth Amendment”¹⁴⁸ First, he highlighted the scant precedent upon which the cases were based.¹⁴⁹ Then he excoriated the underpinnings of the majority opinion. He stated,

Implicit in the Court’s reliance on “federalism” is the premise that failure to allow double prosecutions would seriously impair law enforcement in both State and Nation. For one jurisdiction might provide minor penalties for acts severely punished by the other and by accepting pleas of guilty shield wrongdoers from justice. I believe this argument fails on several grounds. In the first place it relies on the unwarranted

¹³⁹ *Bartkus*, 359 U.S. at 132–33, 139. *Bartkus* had been acquitted by a federal district court of robbing a federal bank before being tried and convicted by the state for the same offense. *Id.* at 121–22.

¹⁴⁰ *Id.* at 124.

¹⁴¹ *Id.* at 129 (citing *Fox v. Ohio*, 46 U.S. 410 (1847)). Ironically, while the Court relied on this “precedent” which was based on pure dicta (*see* discussion *supra* sec. II.C.1), the Court simultaneously cautioned against the reliability of some state cases on the subject because “in some of them the language concerning double jeopardy is but offhand dictum.” *Id.* at 136.

¹⁴² *Id.* at 137.

¹⁴³ *Id.* (citing *Screws v. United States*, 325 U.S. 91 (1945)).

¹⁴⁴ *Screws*, 325 U.S. at 93.

¹⁴⁵ *Id.* at 93–94.

¹⁴⁶ *See* discussion *infra* p. 20 (noting that the Justice Department recognized this principle and voluntarily restricted itself from conducting successive prosecutions).

¹⁴⁷ *Bartkus*, 359 U.S. at 168–69 (Brennan, J., dissenting).

¹⁴⁸ *Id.* at 150–51 (Black, J., dissenting).

¹⁴⁹ Justice Black denounced the majority’s description of the “long, unbroken, unquestioned course of impressive adjudication,” as a “meager basis” that he contrasted with historical opposition to the practice of double prosecutions. *Id.* at 136, 162 (Black, J., dissenting).

assumption that State and Nation will seek to subvert each other's laws. It has elsewhere been persuasively argued that most civilized nations do not and have not needed the power to try people a second time to protect themselves even when dealing with foreign lands. . . .

The Court's argument also ignores the fact that our Constitution allocates power between local and federal governments in such a way that the basic rights of each can be protected without double trials. . . . If the States were to subvert federal laws in these areas by imposing inadequate penalties, Congress would have full power to protect the national interest, either by defining the crime to be punished and establishing minimum penalties applicable in both state and federal courts, or by excluding the States altogether.¹⁵⁰

Justice Black's abhorrence of the dual sovereignty exception, presumably shared by two other members of the Court,¹⁵¹ can be summed up as follows:

The Court apparently takes the position that a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State. Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp. If double punishment is what is feared, it hurts no less for two "Sovereigns" to inflict it than for one. If danger to the innocent is emphasized, that danger is surely no less when the power of State and Federal Governments is brought to bear on one man in two trials, than when one of these "Sovereigns" proceeds alone. In each case, inescapably, a man is forced to face danger twice for the same conduct.

. . . I have been shown nothing in the history of our Union, in the writings of its Founders, or elsewhere, to indicate that individual rights deemed essential by both State and Nation were to be lost through the combined operations of the two governments.¹⁵²

In *Abbate*, the mirror image of *Bartkus* and decided the same day, the Court held that the federal government is not barred from prosecuting individuals for the same offense for which they were previously tried in state court.¹⁵³ The Court reiterated the same flawed history of judicial dicta as *Lanza* and *Bartkus*—i.e., *Fox*, *Marigold*, and *Moore*.¹⁵⁴ It also trod on the same infertile ground of reasoning: "[I]f the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered."¹⁵⁵

The *Bartkus* opinion was decided on a five to four vote,¹⁵⁶ and the *Abbate* opinion was decided on a six to three vote.¹⁵⁷ Although the cases hinged on mirror issues, the difference in votes centered on Justice Brennan, the additional dissenter in *Bartkus*.¹⁵⁸ He added his voice to the *Bartkus* dissenters because he believed there was collusion between the federal and state law enforcement agencies that made the second (state) prosecution a sham: "What happened here was simply that the federal effort which failed in the federal courthouse was renewed a second time in the state courthouse across the street."¹⁵⁹ The Court's division with regard to the dual sovereignty doctrine really reflected a division on the application of *Barron*'s anti-incorporation doctrine. That tension would become more striking and tip in the opposite direction as Justice Frankfurter left the Court and his influence in applying *Barron* left with him.

¹⁵⁰ *Id.* at 156–57 (Black, J., dissenting).

¹⁵¹ Chief Justice Warren and Justice Douglas joined Justice Black's dissent without writing separately. *Id.* at 150. Justice Brennan wrote his own dissent for separate reasons. See discussion *infra*.

¹⁵² *Bartkus*, 359 U.S. at 155 (Black, J., dissenting).

¹⁵³ *Abbate v. United States*, 359 U.S. 187, 196 (1959).

¹⁵⁴ *Id.* at 190–93.

¹⁵⁵ *Id.* at 195.

¹⁵⁶ *Bartkus*, 359 U.S. at 121, 150, 164.

¹⁵⁷ *Abbate*, 359 U.S. at 187, 201.

¹⁵⁸ Chief Justice Warren and Justices Black and Douglas consistently dissented in both cases. *Bartkus*, 359 U.S. at 150; *Abbate*, 359 U.S. at 201.

¹⁵⁹ *Bartkus*, 359 U.S. at 169 (Brennan, J., dissenting). As will be discussed later, the *Bartkus* opinion and Justice Brennan's dissent, inadvertently gave birth to the sham prosecution exception to the dual sovereignty doctrine. See *infra* sec. II.C.4.

c. *Restoration of Individual Rights – Barron Rejected*

Justice Frankfurter was a significant proponent of *Barron* and, as such, authored *Feldman*, *Knapp v. Schweitzer*, *Screws*, and *Bartkus*. In Frankfurter's final years on the Court, however, *Barron's* influence, and Frankfurter's influence as its proponent, waned. In 1960, the Court applied the Fourth Amendment to the states through the Fourteenth Amendment in *Elkins v. United States*,¹⁶⁰ thereby repudiating *Barron* and overturning *Weeks* and the silver platter doctrine. The Court addressed the potential prohibitory effect on state and federal cooperation in law enforcement, a concern similar to that raised by Justice Frankfurter in *Bartkus*. Justice Frankfurter believed that a negation of the dual sovereignty doctrine would impair one of the sovereigns rather than encourage them to work together toward a common end.¹⁶¹ Justice Everett, writing for a five Justice majority in *Elkins*, reached the opposite conclusion:

If . . . it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered.¹⁶²

Hence, once the rule was known to the different sovereigns, they would cooperate to reach a common end. The tables had turned on Justice Frankfurter and the application of *Barron*. Rather than writing for a five member majority, as in *Bartkus*, Justice Frankfurter was now writing for a four member dissent in *Elkins*.¹⁶³ Justice Frankfurter retired from the Court in 1962,¹⁶⁴ and *Barron's* influence retired with him.

In 1964, the Court revisited the issue of compelled self-incrimination. In *Malloy v. Hogan*, the Court held that the Fourteenth Amendment applied the Fifth Amendment self-incrimination protection against the states.¹⁶⁵ During the same term, the Court overruled *Feldman* by holding that “the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law.”¹⁶⁶ The Court recognized that the dual sovereignty application in *Feldman* had permitted an accused to be “‘whipsawed into incriminating himself under both state and federal law even though’ the constitutional privilege against self-incrimination applied to each.”¹⁶⁷

By 1964, therefore, the abuses *Barron* occasioned through the combined powers of dual sovereigns had been extinguished, and *Barron's* influence was dwindling. In 1969, the Supreme Court pared *Barron* back further, this time in the context of double jeopardy.¹⁶⁸ In *Benton v. Maryland*, the Court held that the Fifth Amendment protection against double jeopardy was applicable to the states so that a state could not twice try a defendant for the same offense.¹⁶⁹ *Benton* therefore demolished one of the major pillars upon which the *Lanza* opinion rested—*Barron's* non-incorporation principle. Yet, the Supreme Court never revisited *Lanza*, *Bartkus*, or *Abbate* given this major development. Rather, it once again broadened the scope of the dual sovereignty doctrine in *Heath v. Alabama*.¹⁷⁰

¹⁶⁰ 364 U.S. 206, 223–24 (1960).

¹⁶¹ *Bartkus*, 359 U.S. at 137 (citing *Screws v. United States*, 325 U.S. 91, 93 (1945)).

¹⁶² *Elkins*, 364 U.S. at 222.

¹⁶³ *Id.* at 233.

¹⁶⁴ SUPREME CT. OF THE U.S., MEMBERS OF THE SUPREME COURT OF THE UNITED STATES 2, available at <http://www.supremecourtus.gov/about/members.pdf> (last visited Jan. 13, 2008).

¹⁶⁵ 378 U.S. 1, 6 (1964).

¹⁶⁶ *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 77–78 (1964), overruled in part by *United States v. Balsys*, 524 U.S. 666, 688 (1998) (stating *Murphy* Court went too far in applying Fifth Amendment protections to incrimination under foreign law).

¹⁶⁷ *Id.* at 55 (quoting *Knapp v. Schweitzer*, 357 U.S. 371, 385 (1958)).

¹⁶⁸ *Benton v. Maryland*, 395 U.S. 784 (1969).

¹⁶⁹ *Id.* at 787.

¹⁷⁰ 474 U.S. 82 (1985).

d. *Heath v. Alabama* – *Expanding the Doctrine and Paving the Way for a Limitation*

Twenty-six years after the Supreme Court decided *Bartkus* and *Abbate*, it again expanded the applicability of the dual sovereignty doctrine. In *Heath v. Alabama*, the Court permitted a state to prosecute an individual for the same offense that another state had already prosecuted.¹⁷¹ In deciding the issue, the Court simply assumed the “precedent” from *Moore*, *Lanza*, *Bartkus*, and *Abbate* was correct without any further analysis, especially in light of the impact *Benton* necessarily had on *Lanza*.¹⁷² In Justice Marshall’s dissent, he highlighted the dichotomy between the Court’s previous narrowing of the dual sovereignty doctrine with regard to the silver platter doctrine and compelled self-incrimination and the Court’s current expansion of the dual sovereignty doctrine in *Heath*.¹⁷³ He stated,

Even where the power of two sovereigns to pursue separate prosecutions for the same crime has been undisputed, this Court has barred both governments from combining to do together what each could not constitutionally do on its own. See *Murphy v. Waterfront Comm'n* [compelled self-incrimination]; *Elkins v. United States* [silver platter doctrine]. And just as the Constitution bars one sovereign from facilitating another's prosecution by delivering testimony coerced under promise of immunity or evidence illegally seized, I believe that it prohibits two sovereigns from combining forces to ensure that a defendant receives only the trappings of criminal process as he is sped along to execution.¹⁷⁴

Despite its fallibility and vigorous and pointed dissents by several Supreme Court Justices, the dual sovereignty doctrine survived with one exception—the sham prosecution.

4. *The Sham Prosecution Exception*

As the Supreme Court simultaneously narrowed the reach of the dual sovereignty doctrine (by eliminating the silver platter doctrine and compelled self-incrimination) and expanded its application (in *Heath*), the Court unwittingly carved out an exception. The Court in *Bartkus* had examined the collaboration of the Illinois prosecutors and the federal government and stated, “It does not sustain a conclusion that the state prosecution was a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution.”¹⁷⁵

Hence, the “sham prosecution” exception¹⁷⁶ to the dual sovereignty doctrine was born. Justice Brennan dissented separately in *Bartkus* stating, “[T]he record before us shows that the extent of participation of the federal authorities here constituted this state prosecution actually a second federal prosecution”¹⁷⁷ The jury in the federal trial acquitted *Bartkus* because they apparently believed his alibi witness more than the two co-conspirator witnesses the government prosecutor presented.¹⁷⁸ Justice Brennan succinctly synopsisized the evidence of the second, sham prosecution as follows:

The federal authorities were highly displeased with the jury’s resolution of the conflicting testimony, and the trial judge sharply upbraided the jury for its verdict. . . . The federal authorities obviously decided immediately after the trial to make a second try at convicting *Bartkus*, and since the federal courthouse was barred to them by the Fifth Amendment, they turned to a state prosecution for that purpose. It is clear that federal officers solicited the state indictment, arranged to assure the attendance of key witnesses, unearthed additional evidence to discredit *Bartkus* and one of his alibi witnesses, and in general prepared and guided the state prosecution.¹⁷⁹

¹⁷¹ *Id.* at 93.

¹⁷² *Id.* at 88–89.

¹⁷³ *Id.* at 102 (Marshall, J., dissenting).

¹⁷⁴ *Id.* (Marshall, J., dissenting) (internal citations omitted).

¹⁷⁵ *Bartkus v. Illinois*, 359 U.S. 121, 123–24 (1959).

¹⁷⁶ See, e.g., Michael A. Dawson, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 296–98 (1992); Erin M. Cranman, *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, 1669–70, 1674–75 (2000).

¹⁷⁷ *Bartkus*, 359 U.S. at 165–66 (Brennan, J., dissenting).

¹⁷⁸ *Id.* at 164–65 (Brennan, J., dissenting).

¹⁷⁹ *Id.* at 165 (Brennan, J., dissenting).

Justice Brennan said the test to determine whether a second prosecution by a different sovereign was merely a sham to allow the first sovereign to rout the Fifth Amendment,

[M]ust be fashioned to secure the fundamental protection of the Fifth Amendment “that the . . . [Federal Government] with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity”¹⁸⁰

After this, every federal circuit recognized the exception.¹⁸¹ The Supreme Court has not faced a sham prosecution claim after *Bartkus*, but it has tacitly endorsed that exception in subsequent cases. In *Heath*, Justice Marshall was concerned with the possibility that the dual sovereignty doctrine could be undermined by a collusive prosecution between two sovereigns. He stated that “[e]ven where the power of two sovereigns to pursue separate prosecutions for the same crime has been undisputed, this Court has barred both governments from combining to do together what each could not constitutionally do on its own.”¹⁸² Justice Marshall also noted that the “courts should not be blind to the impact of combined federal-state law enforcement on an accused’s constitutional rights.”¹⁸³

In *United States v. Balsys*,¹⁸⁴ the Court dealt with dual sovereignty applications with respect to the United States and a foreign government. The Court stated,

This is not to say that cooperative conduct between the United States and foreign nations could not develop to a point at which . . . an argument could be made that the Fifth Amendment should apply based on fear of foreign prosecution simply because that prosecution was not fairly characterized as distinctly “foreign.” The point would be that the prosecution was as much on behalf of the United States as of the prosecuting nation, so that the division of labor between evidence-gatherer and prosecutor made one nation the agent of the other¹⁸⁵

Hence, the sham prosecution exception has become a well recognized limit on the dual sovereignty doctrine. Although widely recognized, the sham prosecution defense has rarely succeeded.¹⁸⁶ Yet, the exception is in its relative infancy. As it becomes a ubiquitous issue in dual sovereign prosecutions, the rate of its successful application is sure to rise. The military is particularly susceptible to conducting sham prosecutions because military criminal investigators typically work very closely with state investigators when crimes involve both jurisdictions. Take as examples the two cases at the beginning of this article.¹⁸⁷ In *Hennis*’s case, the state did all the investigative work and seems to have turned to the Army as its agent in carrying out the second trial only because it is constitutionally barred from doing so.¹⁸⁸ What special interest does the Army have in prosecuting someone who was no longer in the military for a twenty-one year old crime, especially when the Army did not pursue a court-martial when the crime occurred? In *Tillery*’s case, the state similarly did all the investigative work and handed the cases to the Army six months after *Tillery*’s acquittal and two and a half years after the crime.¹⁸⁹ The Army retried the state’s case with the same witnesses, no additional investigation, and with the state’s record of trial in the Army

¹⁸⁰ *Id.* at 168 (Brennan, J., dissenting) (quoting *Green v. United States*, 355 U.S. 184, 187 (1957)).

¹⁸¹ See *United States v. Guzman*, 85 F.3d 823, 827 (1st Cir. 1996); *United States v. 38 Whaler’s Cove Drive*, 954 F.2d 29, 38 (2d Cir. 1991); *United States v. Berry*, 164 F.3d 844, 845 (3d Cir. 1999); *In re William M. Kunstler*, 914 F.2d 505, 517 (4th Cir. 1990); *United States v. Moore*, 958 F.2d 646, 650 (5th Cir. 1992); *United States v. Carr*, 1996 U.S. App. LEXIS 8118 (6th Cir. 1996); *United States v. Lopez*, 915 F. Supp. 891, 897 (D. Mich. 1996); *United States v. Tirrell*, 120 F.3d 670, 677 (7th Cir. 1997); *United States v. Moore*, 822 F.2d 35, 38 (8th Cir. 1987); *United States v. Bernhardt*, 831 F.2d 181, 182–83 (9th Cir. 1987); *United States v. Trammell*, 133 F.3d 1343, 1350 (10th Cir. 1998); *United States v. Perchitti*, 955 F.2d 674, 677 (11th Cir. 1992); *United States v. Liddy*, 542 F.2d 76, 79 (D.C. Cir. 1976).

¹⁸² *Heath v. Alabama*, 474 U.S. 82, 102 & n.3 (1985) (Marshall, J., dissenting).

¹⁸³ *Id.* at 102 n.3 (Marshall, J., dissenting).

¹⁸⁴ 524 U.S. 666 (1998). The Department of Justice sought testimony from *Balsys* regarding his wartime activities during World War II and his subsequent immigration to the United States. *Balsys* refused, claiming Fifth Amendment protection on the ground that his testimony might incriminate him in a foreign court. *Id.* at 669. The Court held that the Self-Incrimination Clause does not apply to foreign prosecutions. *Id.*

¹⁸⁵ *Id.* at 698–99.

¹⁸⁶ See, e.g., *supra* note 181.

¹⁸⁷ See discussion *supra* p. 1.

¹⁸⁸ *Id.*

¹⁸⁹ See discussion *supra* p. 1.

prosecutor's hands.¹⁹⁰ Did the Army truly have a special interest separate from the state's, or was this a thinly veiled attempt by the state to prosecute Tillery again by using the Army to avoid the Double Jeopardy Clause? Whether the sham prosecution defense is successful or not in these cases, they prompt the question whether the military had a significant interest separate from the state that justified subjecting those individuals to successive prosecutions.

Military double jeopardy jurisprudence has parroted Supreme Court jurisprudence without addressing whether the dual sovereignty doctrine is necessary to vindicate a separate military interest. Because of this, the military has had little hesitation in conducting successive prosecutions as seen in the following section.¹⁹¹

D. Military Applications

1. *The Clause, the Doctrine, and the Exception Applied*

As early as 1907, the Supreme Court recognized that servicemembers were protected from double jeopardy by the Fifth Amendment.¹⁹² In *Grafton v. United States*, the Court said,

[T]he United States cannot withhold from an officer or soldier of the Army the full benefit of [the double jeopardy] guaranty . . . Congress, by express constitutional provision, has the power to prescribe rules for the government and regulation of the Army, but those rules must be interpreted in connection with the prohibition against a man's being put twice in jeopardy for the same offense. The former provision must not be so interpreted as to nullify the latter.¹⁹³

In 1950, with the creation of the UCMJ came Article 44¹⁹⁴ which codified the double jeopardy guarantee for servicemembers. The Article stated, "No person shall, without his consent, be tried a second time for the same offense."¹⁹⁵

Adopting Supreme Court precedent, military courts have tempered the Fifth Amendment protection by applying the dual sovereignty doctrine to military jurisprudence *carte blanche*.¹⁹⁶ The Court of Appeals for the Armed Forces (CAAF) has a duty, regardless of Supreme Court precedent, to "consider the extent to which [a] constitutional provision applies to the military justice system."¹⁹⁷ Yet, CAAF failed to do just that in *United States v. Stokes*.¹⁹⁸ In one sentence, it adopted the dual sovereignty doctrine without analysis: "Undoubtedly [Article 44] was not intended to abolish the dual-sovereignties rule that had been applied in interpreting the constitutional guarantee against successive trials for the same offense."¹⁹⁹ In light of this, military litigation regarding the dual sovereignty doctrine has been scant.²⁰⁰ Similarly, there are no published decisions from the military courts dealing with the sham prosecution exception.

¹⁹⁰ *Id.*

¹⁹¹ See also *supra* p. 2 and note 17.

¹⁹² See *Grafton v. United States*, 206 U.S. 333, 351–52 (1907).

¹⁹³ *Id.* at 352; see also *United States v. Chavez*, 6 M.J. 615 (A.C.M.R. 1978).

¹⁹⁴ 10 U.S.C. § 844 (1950).

¹⁹⁵ *Id.* The Article was later amended to replace the word "shall" with the word "may." 10 U.S.C. § 844(a) (1956).

¹⁹⁶ See, e.g., *United States v. Stokes*, 12 M.J. 229, 231 (C.M.A. 1982).

¹⁹⁷ H.F. "Sparky" Gierke, *The Use of Article III Case Law in Military Jurisprudence*, ARMY LAW., Aug. 2005, at 25, 26 (citing *United States v. Marcum*, 60 M.J. 198 (2004) as an example). Chief Judge Gierke served as a judge at CAAF from 1991 to 2004, when he became the Chief Judge of the CAAF. His term expired in 2006. Judges of the CAAF, <http://www.armfor.uscourts.gov/Judges.htm> (last visited Feb. 28, 2007).

¹⁹⁸ *Stokes*, 12 M.J. 229. In 1994, the Court of Military Appeals was redesignated the CAAF. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924(c)(4B), 108 Stat. 2663, 2832 (1994).

¹⁹⁹ *Stokes*, 12 M.J. at 231. *Stokes* was convicted by court-martial of distribution of and conspiracy to distribute drugs while he was in Spain. *Id.* at 229. Prior to his court-martial, he faced action in two different Spanish courts for the same acts. *Id.* at 230. At his court-martial, *Stokes* moved to dismiss on double jeopardy grounds. *Id.* After reviewing the U.S.-Spain treaty provision barring successive prosecutions, the court found that the two remaining Spanish courts were not criminal or quasi-criminal and therefore were not covered by the treaty. *Id.* at 233.

²⁰⁰ See generally *Stokes*, 12 M.J. 229; *United States v. Wilmot*, 29 C.M.R. 777, 783 (C.M.A. 1960) (noting the dual sovereignty doctrine's relationship to the authority to exercise legislative power); *United States v. Murphy*, 21 C.M.R. 158, 162–63 (C.M.A. 1958) (discussing *Feldman* and the application of its compelled self-incrimination rule to the military); *United States v. Duncan*, 34 M.J. 1232, 1241 (A.C.M.R. 1992) (noting that a court-martial and a federal district court are not dual sovereigns); *United States v. Cuellar*, 27 M.J. 50 (C.M.A. 1989) (noting that the NATO Status of Forces Agreement eliminates the dual sovereignty doctrine).

For this reason, or because of the more practical need to manage the use of and conserve military assets, the Secretaries of the military departments implemented policies regarding successive state-military prosecutions.

2. Department of Defense Limitations

Each of the military services has a different policy regarding successive state-military prosecutions. The Army policy states, “A person subject to the UCMJ who has been tried in a civilian court may, but ordinarily will not, be tried by court-martial . . . for the same act over which the civilian court has exercised jurisdiction.”²⁰¹ The approval authority for a successive prosecution is the general court-martial convening authority; typically this is the Soldier’s commanding general, who must only determine that punitive action is essential to maintain discipline in the command.²⁰² The Air Force policy states,

Only [the Secretary of the Air Force] may approve initiation of court-martial . . . action against a member previously tried by a state or foreign court for substantially the same act or omission [Secretary of the Air Force] approval will be granted in only the most unusual cases, when the ends of justice and discipline can be met in no other way.²⁰³

The Navy and Marine Corps policy is more detailed than either the Army or Air Force policies.²⁰⁴ It states, generally,

When a person in the naval service has been tried in a state or foreign court, whether convicted or acquitted, or when a member’s case has been “diverted” out of the regular criminal process for a probationary period, or has been adjudicated by juvenile court authorities, military charges shall not be referred to a court-martial . . . for the same act or acts, except in those unusual cases where trial by court-martial . . . is considered essential in the interests of justice, discipline, and proper administration within the naval service.²⁰⁵

The approval authority for successive prosecutions in the naval services is the Navy Judge Advocate General.²⁰⁶ Further, the policy limits those cases for which the Judge Advocate General may approve successive prosecutions to the following:

- (1) Cases in which punishment by civil authorities consists solely of probation, and local practice, or the actual terms of probation, do not provide rigid supervision of probationers, or the military duties of the probationer make supervision impractical.
- (2) Cases in which civilian proceedings concluded without conviction for any reason other than acquittal after trial on the merits.
- (3) Other cases in which the interests of justice and discipline are considered to require further action under the UCMJ (e.g., where conduct leading to trial before a state or foreign court has reflected adversely upon the naval service or when a particular and unique military interest was not or could not be adequately vindicated in the civilian tribunal).²⁰⁷

This last category seems to swallow the rule, because virtually every crime reflects adversely upon the military. Further, it fails to define “unique military interest.”

²⁰¹ U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 4-2 (16 Nov. 2005) [hereinafter AR 27-10].

²⁰² *Id.* para. 4-3. For example, Tillery’s GCMCA testified that he felt punitive action was necessary, giving no further explanation. Transcript of Record at 221, United States v. Tillery, No. 20030538 (Army Ct. Crim. App. 2003).

²⁰³ U.S. DEP’T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE 14–15 (21 Dec. 2007) [hereinafter AFI 51-201].

²⁰⁴ U.S. DEP’T OF NAVY, JAG INSTR. 5800.7D, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) para. 0124 (15 Mar. 2004) [hereinafter JAGMAN].

²⁰⁵ *Id.* para. 0124a.

²⁰⁶ *Id.* para. 0124c(1).

²⁰⁷ *Id.* para. 0124b(1)-(3).

The Coast Guard policy²⁰⁸ states,

No person in the Coast Guard may be tried for the same acts that constitute an offense against state or foreign law, and for which the accused has been tried or is pending trial by the state or foreign country, without first obtaining authorization from the Chief Counsel. Letter requests for authorization shall contain complete justification as to why deviation from the general policy against second trials . . . is appropriate.²⁰⁹

Although the Coast Guard policy requires “complete justification” for a successive prosecution, it does not detail what the justification should include or what types of cases or circumstances might justify a successive prosecution.

With that backdrop, the following applications are clear: (1) servicemembers are protected by the Fifth Amendment’s Double Jeopardy Clause; (2) the dual sovereignty doctrine permits the states and the military to try servicemembers successively for the same act; and (3) a military prosecution following a state prosecution must be approved by different levels of authority and with different justifications depending on the branch of service. These applications raise several questions. How does the military’s treatment of successive prosecutions compare to other jurisdictions? Why are there different policies regarding successive prosecutions among the several military services? Finally, are the military’s policies good policies? The following sections attempt to answer these questions.

III. What Others Are Doing

Although the Supreme Court has entrenched the dual sovereignty doctrine in American jurisprudence, many jurisdictions have placed limits on their own sovereignty. These jurisdictions have recognized that our unique system of federalism, where one person is subject to the dictates of two sovereigns, can result in an unduly harsh application of the laws of both. Further, because one person is a citizen of both state and nation, the punishment of the person’s crime by either when both sovereigns have a stake in the outcome serves a common end. Consequently, these jurisdictions have willingly sacrificed part of their sovereignty to save citizens from double punishment.

A. The States

Well before the Supreme Court applied the Fifth Amendment’s Double Jeopardy Clause to the states in *Benton v. Maryland*,²¹⁰ forty-five states had double jeopardy provisions in their own constitutions.²¹¹ By 1996, twenty-four states had sacrificed part of their sovereignty by legislating bars to dual sovereign prosecutions.²¹² By 2007, three more states had followed suit thereby putting in the majority those states that abrogated the dual sovereignty doctrine.²¹³ Additionally, three other states reached the same result through judicial fiat.²¹⁴ The statutes are basically broken down into two types: those barring successive prosecution for the same act and those barring successive prosecution for the same offense.²¹⁵ The former examine the overall transaction and determine whether the acts charged by the different sovereigns are essentially the same.²¹⁶ The latter focus on the actual offenses charged and employ an analysis similar to the Supreme Court’s *Blockburger*

²⁰⁸ The Coast Guard is included here even though it is a division of the Department of Homeland Security and not currently a military service within DOD, because this policy existed when the Coast Guard was a military service.

²⁰⁹ U.S. COAST GUARD, COMMANDANT INSTR. M5810.1D, MILITARY JUSTICE MANUAL para. 3.B.4 (17 Aug. 2000).

²¹⁰ 395 U.S. 784, 787 (1969). See discussion *supra* p. 14.

²¹¹ Michael J. Hagburg, *Statutory Bars to Dual Sovereign Prosecutions: The Minnesota and North Dakota Approaches Compared*, 72 N.D. L. REV. 583, 585 & n.20 (1996).

²¹² *Id.* at 590. See also App. A (listing these state statutes). These bars are not absolute in the sense that the statutes that promulgated them are subject to challenge and judicial interpretation like all statutes. Yet, the end result is that successive prosecutions are the exception rather than the accepted rule.

²¹³ See App. A (listing these state statutes).

²¹⁴ See *Commonwealth v. Cepulonis*, 373 N.E.2d 1136 (Mass. 1978); *People v. Cooper*, 247 N.W.2d 866 (Mich. 1976); *State v. Hogg*, 385 A.2d 844 (N.H. 1978).

²¹⁵ Compare, e.g., ALASKA STAT. 12.20.010 (2006), and ARK. CODE ANN. § 5-1-114 (2006), with COLO. REV. STAT. § 18-1-303 (2006), and DEL. CODE ANN. tit. 11, § 209 (2006). The former two focus on the act or conduct that is charged while the latter two focus on the offense charged.

²¹⁶ See, e.g., *North Dakota v. Mayer*, 356 N.W.2d 149, 151–52 (N.D. 1984) (permitting a state prosecution after a federal prosecution despite North Dakota’s statutory bar because the conspiracy charged by the federal government was a different “act” than the concomitant possession and distribution of drugs charged by the state).

v. *United States*²¹⁷ elements test.²¹⁸ The driving force behind both types of statutory bars on successive prosecutions is the idea that, although they are different sovereigns, the state and federal government are cooperative entities and essentially have the same goal with respect to criminal justice.²¹⁹ The department of Justice has agreed in principle (although not in method of execution) with the three-fifths majority of states.

B. The Department of Justice

Following the Supreme Court's opinion in *Bartkus*,²²⁰ and specifically addressing its concern with a potential sham successive prosecution, the Department of Justice (DOJ) implemented the *Petite* policy.²²¹ The policy "precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same acts or transactions" unless the prior prosecution has left a "substantial federal interest . . . demonstrably unvindicated."²²² The policy also notes that statutory bars against successive prosecutions exist for certain federal crimes.²²³ The DOJ seemingly recognized the natural²²⁴ exploitative and excessive nature of a second prosecution for the same offense.²²⁵ It applied the policy for the first time within months of the *Bartkus* and *Abbate* opinions.²²⁶ After the policy's institution, the DOJ strictly adhered to the policy and consistently dismissed any federal convictions obtained in violation of it.²²⁷ The Supreme Court joined the DOJ in this endeavor and vacated judgments obtained in violation of the policy ten times in the two decades after the policy was instituted.²²⁸

In the DOJ press release establishing the policy, Attorney General Rogers offered an explanation that would have turned Chief Justice Taft's "race to the courthouse" reasoning in *Lanza* on its head.²²⁹ He stated,

Cooperation between federal and state prosecutive officers is essential if the gears of the federal and state systems are to mesh properly. We should continue to make every effort to cooperate with state and local authorities to the end that the trial occur[s] in the jurisdiction, whether it be state or federal, where the public interest is best served. If this [is] determined accurately, and is followed by efficient and intelligent cooperation of state and federal law enforcement authorities, then consideration of a second prosecution very seldom should arise.²³⁰

²¹⁷ 284 U.S. 299 (1932).

²¹⁸ See, e.g., COLO. REV. STAT. § 18-1-303(1)(a)(I) (2006) ("The offense for which the defendant was formerly convicted or acquitted requires proof of a fact not required by the offense for which he is subsequently prosecuted"); see also *Blockburger v. United States*, 284 U.S. 299 (1932) (if each offense contains an element not contained in the other, they are not the same offense for double jeopardy purposes); *United States v. Dixon*, 509 U.S. 688 (1993).

²¹⁹ See, e.g., *New Jersey v. Sessoms*, 455 A.2d 595, 601 (N.J. Super. Ct. Law Div. 1982) (discussing the requirement for the federal and state offenses to share a similar intent to prevent harm); *Schmidt v. Roberts*, 548 N.E.2d 1284, 1289 (N.Y. 1989) (discussing the common design between the federal crime of interstate transportation of stolen property and the state crime of larceny); *People v. Cooper*, 247 N.W.2d 866 (Mich. 1976) (stating the statutory bar applies when the state and federal laws are framed to protect the same societal interests).

²²⁰ *Bartkus* was decided on 30 March 1959. 359 U.S. 121, 121 (1959). Exactly one week later, via press release on 6 April 1959, the Justice Department implemented its policy against successive state-federal prosecutions. See *Rinaldi v. United States*, 434 U.S. 22, 24 n.5, 28 (1977).

²²¹ UNITED STATES ATTORNEYS' MANUAL § 9-2.031 (July 2007) [hereinafter USAM], available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm. The policy derives its name from *Petite v. United States*, 361 U.S. 529, 531 (1960), where the Supreme Court first recognized the policy.

²²² USAM, *supra* note 221, § 9-2.031A.

²²³ *Id.* § 9-2.031A. The policy lists the following crimes: 18 U.S.C. §§ 659 (embezzlement and theft), 660 (same), 1992 (wrecking trains), 2101 (riots), 2117 (robbery and burglary of carrier facilities), and 15 U.S.C. §§ 80a-36 (larceny and embezzlement of registered investment companies) and 1282 (destruction of property of common or contract carriers moving in interstate commerce—repealed).

²²⁴ This is as opposed to the fiction under which the dual sovereignty doctrine operates—i.e., that one offense somehow is transformed into two offenses if two sovereigns have an interest to protect.

²²⁵ See *Petite*, 361 U.S. at 530–31.

²²⁶ *Id.*

²²⁷ *Rinaldi v. United States*, 434 U.S. 22, 30 n.16 (1977).

²²⁸ *Thompson v. United States*, 444 U.S. 248, 250 (1980).

²²⁹ *Rinaldi*, 434 U.S. at 27 n.13.

²³⁰ *Id.* (quoting Press Release, Dep't of Justice 3 (Apr. 6, 1959)).

The policy itself states its purpose is to “protect persons charged with criminal conduct from the burdens associated with multiple prosecutions and punishments for substantially the same act(s) or transaction(s).”²³¹ The Supreme Court endorsed the policy, saying it serves the “important purpose of protecting the citizen from any unfairness that is associated with successive prosecutions based on the same conduct.”²³² The Court noted that the policy brings into balance the competing interests of individual rights and governmental sovereignty that the dual sovereignty doctrine had tipped in favor of the governments.²³³ Consequently, the Court offered the following guidance: “In light of the parallel purposes of the Government’s *Petite* policy and the fundamental constitutional guarantee against double jeopardy, the federal courts should be receptive, not circumspect, when the Government seeks leave to implement that policy.”²³⁴

An exception to the policy may only be had with the permission of an Assistant Attorney General when three “substantive prerequisites” are met: “first, the matter must involve a substantial federal interest; second, the prior prosecution must have left that interest demonstrably unvindicated; and third, applying the same test that is applicable to all federal prosecutions, the government must believe that the defendant’s conduct constitutes a federal offense.”²³⁵ Further, the policy requires federal prosecutors to consult with their state counterparts in matters of overlapping federal and state interest, “to determine the most appropriate *single* forum in which to proceed to satisfy the substantial federal and state interests involved.”²³⁶ The policy is applicable in the case of either a prior state conviction or acquittal.²³⁷

With regard to the three substantive prerequisites for an exception, the policy is very detailed. In defining “substantial federal interest,” the policy points to four pages in the U.S. Attorney’s Manual describing relevant considerations. These considerations include: federal law enforcement priorities; the nature and seriousness of the offense; the deterrent effect of prosecution; the person’s culpability in connection with the offense; the person’s criminal history; the person’s willingness to cooperate with law enforcement; and the probable sentence.²³⁸ The definition section for “substantial federal interest” focuses heavily on the first consideration—federal law enforcement priorities. The priorities are published as part of DOJ’s five-year strategic goals, and progress thereon is reported annually in DOJ’s Performance and Accountability Report.²³⁹ The 2006 report listed, for example, three specific focus areas under the strategic goal of enforcing federal laws.²⁴⁰ The *Petite* policy states that crimes falling within the “national investigative or prosecutorial priorities” are more likely to be a “substantial federal interest” than others.²⁴¹

Once a U.S. Attorney makes the determination that a particular crime involves a substantial federal interest, however, he must still show that the prior state prosecution left that interest demonstrably unvindicated.²⁴² This is a difficult proposition according to the policy: “In general, [DOJ] will presume that a prior prosecution, regardless of result, has vindicated the relevant federal interest.”²⁴³ The policy states this presumption may be overcome and lists factors to consider. If a conviction was not achieved, the factors include the following: incompetence, corruption, intimidation, undue influence, court or jury nullification, unavailability of significant evidence, and failure of the state prosecutor to prove an element of a state offense that is not an element of the contemplated federal offense.²⁴⁴ If a conviction was achieved, the factors include the following:

²³¹ USAM, *supra* note 221, § 9-2.031A.

²³² *Rinaldi*, 434 U.S. at 27.

²³³ *Id.* at 29.

²³⁴ *Id.*

²³⁵ USAM, *supra* note 221, § 9-2.031A.

²³⁶ *Id.* (emphasis added).

²³⁷ *Id.* § 9-2.031C.

²³⁸ *Id.* § 9-27.230A.

²³⁹ See DEP’T OF JUSTICE, FY 2006 PERFORMANCE AND ACCOUNTABILITY REPORT I-2, available at http://www.usdoj.gov/ag/annualreports/pr2006/P1/p01_.pdf.

²⁴⁰ *Id.* These were violent crime, drugs, and white collar and cyber crime.

²⁴¹ USAM, *supra* note 221, § 9-2.031D.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

[F]irst, if the prior sentence was manifestly inadequate in light of the federal interest involved and a substantially enhanced sentence . . . is available through the contemplated federal prosecution, or second, if the choice of charges, or the determination of guilt, or the severity of the sentence in the prior prosecution was affected by [any of the factors applicable when a conviction was not achieved by the state].²⁴⁵

Not only has the federal government restricted its sovereignty with respect to the states, but it has similarly done so with respect to foreign governments.

C. Federal Foreign Relations

The United States has sacrificed part of its sovereignty many times with regard to its ability to prosecute after a foreign prosecution.²⁴⁶ In fact, this limitation reaches back to 1889 when the U.S. Senate ratified an extradition treaty with Germany.²⁴⁷ The language of that treaty would be repeated (with minor alterations) in every other extradition treaty the United States entered into afterwards.²⁴⁸ The United States and Germany agreed that if one of them prosecuted and convicted or acquitted a person, the other would be barred from doing the same for the same crime or offense.²⁴⁹ The United States agreed on a similar provision when it ratified the North Atlantic Treaty Organization Status of Forces Agreement in 1953:

Where an accused has been tried in accordance with the provisions of this Article by the authorities of one Contracting Party and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offence within the same territory by the authorities of another Contracting Party.²⁵⁰

If the federal government and the states are willing to limit their sovereignty in recognition of the cooperative nature of their criminal jurisdictions, why does the military stand alone on this issue? The following section will address whether the military has a legitimate reason for doing so.

IV. What We *Should* Do

The Framers intended the Double Jeopardy Clause to provide the widest possible protections to the American people, who, with the creation of the federal government, had been imbued with a unique, bifurcated citizenship. The protection from double prosecutions for the same act, whether by two sovereigns or one, was embedded in American (and English) culture. This was apparent from English common law: Britain would not prosecute a British citizen for an act that was the subject of a foreign prosecution.²⁵¹ The Constitutional Convention debates showed a similar intent.²⁵²

The universal double jeopardy protection intended by the Framers was abandoned with no thought or justification, not by the legislature but by the Supreme Court. Beginning with *Fox v. Ohio* and continuing through *Bartkus v. Illinois* and *Abbate v. United States*, the Supreme Court diluted the Double Jeopardy Clause by its creation of the dual sovereignty doctrine with no analysis of the Framers' intent and no true legal precedent.²⁵³ Despite the fact that the Court erred so often and so significantly in this area, it has, in more recent years, indicated that the "established" doctrine of dual sovereignty may not

²⁴⁵ *Id.*

²⁴⁶ See, e.g., Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces art. VII, para. 8, June 19, 1951, 4 U.S.T. 1792 [hereinafter NATO SOFA]. See also App. B for a list of other U.S. treaties with double jeopardy provisions.

²⁴⁷ A Treaty for the Extradition of Fugitives from Justice Between the United States of America and Germany art. V, U.S.-F.R.G., June 2, 1889, 1887 U.S.T. LEXIS 17.

²⁴⁸ See App. B.

²⁴⁹ See *supra* note 246.

²⁵⁰ NATO SOFA, *supra* note 247, art. VII, para. 8.

²⁵¹ See *supra* p. 4 and note 40. During the debates regarding the Bill of Rights, Representative Livermore said successive prosecutions were "contrary to the usages of law and practice among us; and so it is to those of that country from which we have adopted our laws." CREATING THE BILL OF RIGHTS, *supra* note 2, at 180 (quoting *The Gazette of the United States*, 22 August 1789).

²⁵² See discussion *supra* pp. 4-6.

²⁵³ See *supra* sec. II.C.

comport with notions of fairness. In *Rinaldi v. United States*, the Court discussed its “continuing sensitivity to the fairness implications of the multiple prosecution power.”²⁵⁴

The federal government has limited its own sovereignty through the *Petite* policy and through treaties and agreements with foreign nations. It has recognized that the dual sovereignty doctrine produces harsh results for individual citizens. Although each citizen owes allegiance to two sovereigns in our federalist system, DOJ recognized that there is still only one public interest and that the two sovereigns could protect that interest together through one trial.²⁵⁵ A majority of the states have come to the same conclusion and have taken one step further by legislating statutory (as opposed to policy) bars to successive prosecutions.²⁵⁶

The military has not kept pace, and, as a result, servicemembers have suffered. Does the military need the dual sovereignty doctrine? To answer this question, we must balance the military’s needs against servicemembers’ rights as citizens.

A. The Military Need—Good Order and Discipline

The Supreme Court has called the military a “specialized society separate from civilian society.”²⁵⁷ The Court said further that “the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty.”²⁵⁸ In *Parker v. Levy*, the Court determined that,

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.²⁵⁹

The Supreme Court hit on that which makes the military a special community—the need to maintain good order and discipline.²⁶⁰ *Parker v. Levy* is not particularly helpful to the question presented here, because it involved a constitutional right that, if fully exercised, would have justified Parker in undermining good order and discipline. The question here is whether the military’s need to preserve good order and discipline can justify a second prosecution and punishment. In other words, is the military’s need really different than the public interest in deterring and punishing the particular crime that is committed? In the context of *Parker v. Levy* and its progeny, the military has sought (successfully) to justify practices that would be denounced in the civilian sector as clear violations of constitutional rights, because such practices were necessary to maintain good order and discipline and thereby accomplish its mission.²⁶¹

In this context, how is the military’s interest in good order and discipline furthered by the ability to prosecute a servicemember a second time? The military’s best argument centers on general deterrence. In short, if the military cannot prosecute the servicemember in a military courtroom on a military base, it cannot demonstrate to the military community what is right and wrong and what the consequences of doing wrong are. Further, if the dual sovereignty doctrine did not apply, the military would be forced to consult with state agencies and work in concert with them where the two jurisdictions overlap. This would hinder the military’s ability to ensure that good order and discipline are preserved in a timely fashion. The military’s mission is to fight and win wars, and it should not have to defer to state agencies in accomplishing that mission.

²⁵⁴ 434 U.S. 22, 28 (1977).

²⁵⁵ *Id.* at 27 n.13.

²⁵⁶ *See supra* notes 212, 213 and App. A.

²⁵⁷ *Parker v. Levy*, 417 U.S. 733, 743 (1974).

²⁵⁸ *Id.* at 744 (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953)).

²⁵⁹ *Id.* at 758.

²⁶⁰ *See also* UCMJ art. 134 (2005) (criminalizing acts that prejudice good order and discipline).

²⁶¹ *See, e.g.*, *Brown v. Glines*, 444 U.S. 348, 353–58 (1980) (holding First Amendment did not prohibit commander from requiring prior approval for any serviceman soliciting signatures for a petition while in uniform); *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (holding disparate treatment of female officers did not violate the Equal Protection Clause); *Rostker v. Goldberg*, 453 U.S. 57, 72–83 (1981) (holding male-only draft registration did not violate the Equal Protection Clause).

Against the military's need must be balanced the rights of servicemembers. Although servicemembers willingly subordinate some of their constitutional rights to the military's "overriding demands of discipline and duty,"²⁶² they are still citizens who sacrifice more (including their lives) than any other for the guarantees set forth in the Constitution. In examining double jeopardy issues in the military, the differences between servicemembers and civilians deserve consideration.

B. The Servicemember Need – "The Great Rights of Mankind"

Servicemembers are unique creatures in the law because they are subjected to the most comprehensive application of criminal laws. Servicemembers can be prosecuted as civilians by states. They can also be prosecuted as civilians in federal courts for federal crimes. For example, a servicemember can be prosecuted by a U.S. Attorney for robbing a federally insured bank. A servicemember can be prosecuted as a civilian in federal courts for state crimes under the Federal Assimilative Crimes Act (FACA).²⁶³ Finally, servicemembers can be prosecuted under the UCMJ by the military by virtue of their military status.

The military's criminal reach over a servicemember is almost boundless. The military can prosecute a servicemember for violations of the enumerated punitive articles of the UCMJ. The military can prosecute a servicemember for state offenses pursuant to the FACA, assuming the offenses are committed on federal territory. The military can prosecute a servicemember for violations of federal law not found in Title 10 of the U.S. Code by virtue of Article 134, UCMJ, Clause 3.²⁶⁴ Finally, by virtue of Clauses 1²⁶⁵ and 2²⁶⁶ of Article 134, military prosecutors can create new offenses as long as the offenses are either "directly prejudicial to good order and discipline"²⁶⁷ or have "a *tendency* to bring the service into disrepute or [tend] to lower it in public esteem."²⁶⁸

Servicemembers are to the criminal law world what the New Zealand Tuatara²⁶⁹ is to the reptile world—unique and highly susceptible to attack. Courts have recognized this. In *United States v. Borys*,²⁷⁰ Chief Judge Quinn wrote, "[T]he legislation for service persons is markedly different from that of the generality of the population. . . . Congress, in my opinion, has constitutional power to govern service persons differently from the generality of the population."²⁷¹ In focusing on the special nature of servicemembers, Chief Judge Quinn said,

If the accused had been a civilian, he would not have violated any Federal law and his act would not have been cognizable as a crime in any Federal civilian court. Stated differently, the accused's conduct is a Federal crime only because the Uniform Code of Military Justice defines it as a crime and he, as a military person, is subject to its provisions.²⁷²

The case of *Solorio v. United States* embodies the ubiquitous exposure of servicemembers to criminal laws.²⁷³ *Solorio* gave the military subject matter jurisdiction over any crime committed by servicemembers simply because they have military status.²⁷⁴ Justice Marshall, uncomfortable with this seemingly limitless exposure, wrote, "members of the Armed Forces may

²⁶² *Parker*, 417 U.S. at 744 (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953)).

²⁶³ 18 U.S.C. § 13 (LexisNexis 2008).

²⁶⁴ Crimes and offenses not capital. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 60c(4) (2005) [hereinafter MCM].

²⁶⁵ *Id.* pt. IV, ¶ 60c(2).

²⁶⁶ *Id.* pt. IV, ¶ 60c(3).

²⁶⁷ *Id.* pt. IV, ¶ 60c(2)(a).

²⁶⁸ *Id.* pt. IV, ¶ 60c(3) (emphasis added).

²⁶⁹ The Tuatara is the only remnant of the family of beak-headed reptiles dating back 200 million years. The Tuatara spent millions of years isolated in the New Zealand islands with few predators. The advent of man inevitably brought a host of predators to New Zealand, including rats, dogs, ferrets, pigs, and cats, and the Tuatara population was decimated and scattered to outlying islands. ARTHUR HORNBLow & MICHAEL K. FRITH, REPTILES DO THE STRANGEST THINGS 6–7 (1970). See also SandiegoZoo.org, *Reptiles: Tuatara*, <http://www.sandiegozoo.org/animalbytes/t-tuatara.html> (last visited Jan. 14, 2008).

²⁷⁰ 40 C.M.R. 259 (C.M.A. 1969).

²⁷¹ *Id.* at 270 (Quinn, C.J., dissenting).

²⁷² *Id.*

²⁷³ 483 U.S. 435 (1987).

²⁷⁴ *Id.* at 450–51.

be subjected virtually without limit to the vagaries of military control.”²⁷⁵ The Supreme Court has artificially balanced the scales of justice in favor of the state and federal governments. The weight of history (including the English roots of the Double Jeopardy Clause, the Framers’ intent, and the nature and purpose of the United States’ distinct form of federalism) and the importance of individuals’ rights dictates that the scales be rebalanced in favor of servicemember-citizens.

C. Necessary Course of Action

Servicemembers, comprising that segment of the population that is the most vulnerable to prosecution, need the greatest protections that can be afforded them consistent with the military’s mission. The military’s need to preserve good order and discipline through general deterrence and the ability to do so free from state involvement cannot stand in the face of an individual’s (even a servicemember’s) historical and necessary possession of “the great rights of mankind.”²⁷⁶ Therefore, DOD should seek legislation to amend Article 44, UCMJ, to bar courts-martial after a state has prosecuted for the same conduct. Doing so will fulfill the Framers’ intent,²⁷⁷ state the Supreme Court’s reservations,²⁷⁸ avoid issues of sham prosecutions,²⁷⁹ align DOD with the federal government and a majority of the states,²⁸⁰ and reinvest servicemembers with an inherent right they never should have lost.

Even if the military’s need for resort to the dual sovereignty doctrine is viewed as paramount to the servicemember’s “indispensable liberty,”²⁸¹ its policies are not appropriately drafted to balance the two and it should revise them as stated below.

D. Interim Course of Action

The DOD is one agency, and each of its services are equal to one another. Yet, each service has a different policy regarding successive prosecutions. The Navy has the most restrictive requirements, the Air Force has the highest level of approval, and the Army is comparatively lax in both areas. Why does the successive prosecution of a Soldier require the local commanding general’s assent while the same action for a Marine requires the Navy Judge Advocate General’s assent and for an Airman the Secretary of the Air Force’s assent? Why is the successive prosecution of a Soldier permitted after the mere determination that punitive action is essential to maintain discipline in the command²⁸² while the same action for an Airman is permitted “only in the most unusual circumstances when the ends of justice and discipline can be satisfied in no other way,”²⁸³ and the same action for a Sailor is permitted in limited cases that meet specific criteria?²⁸⁴

There is no justification for this disparate treatment. This seems to indicate that DOD views these policy limitations as unimportant. At the very least, DOD should have one policy similar to DOJ’s *Petite* policy, should incorporate those parts of the Air Force and Navy policies that benefit servicemembers, and should rest approval authority for exceptions with the service secretaries.²⁸⁵ The DOD policy should “[preclude] the initiation or continuation of a [court-martial] following a prior state or federal prosecution based on substantially the same act(s) or transaction(s).”²⁸⁶ Permission for an exception to the

²⁷⁵ *Id.* at 467 (Marshall, J., dissenting).

²⁷⁶ CREATING THE BILL OF RIGHTS, *supra* note 2, at 78 (quoting *The Congressional Register* for James Madison’s speech to the House of Representatives on 8 June 1789).

²⁷⁷ See discussion *supra* pp. 4-6.

²⁷⁸ See *infra* p. 21 and note 232.

²⁷⁹ See *infra* sec. II.C.4.

²⁸⁰ See *infra* sec. III.

²⁸¹ Tench Coxe, a Federalist from Philadelphia, wrote to James Madison that the Bill of Rights would heighten and strengthen the “barriers between necessary power and indispensable liberty.” LABUNKSI, *supra* note 45, at 24.

²⁸² AR 27-10, *supra* note 201, para. 4-3.

²⁸³ AFI 51-201, *supra* note 203, para. 2.6.3.

²⁸⁴ JAGMAN, *supra* note 204, para. 0124b.

²⁸⁵ The service secretaries would be an equivalent level, hierarchically, with the Assistant Attorneys General, who are approval authorities for exceptions to the *Petite* policy.

²⁸⁶ USAM, *supra* note 221, § 9-2.031A.

policy should “be granted in only the most unusual cases when the ends of justice can be satisfied in no other way.”²⁸⁷ An exception to the policy should only be permitted if two substantive prerequisites are met: “first, the matter must involve a substantial [military] interest; second, the prior prosecution must have left that interest demonstrably unvindicated.”²⁸⁸ The substantial military interest prerequisite should require military prosecutors to show a “particular and unique military interest”²⁸⁹ that directly affects the unit’s mission. The DOD policy should presume “that a prior prosecution, regardless of result, has vindicated the relevant [military] interest.”²⁹⁰ The DOD policy should adopt factors similar to the DOJ policy to consider whether this presumption may be overcome.²⁹¹ Then, once the DOD policy is established, DOD should strictly comply with its policy as the DOJ has done.²⁹²

V. Conclusion

After analyzing Supreme Court and military case law and reviewing the DOD policy limitations, we know the military can prosecute a servicemember after a state prosecution for the same offenses/acts, regardless whether the end result was a conviction or acquittal. We know the DOD policy limitations are varied among the services and are not particularly difficult to circumvent, especially in the Army’s case. We also know that the military has no hesitation in availing itself of the dual sovereignty doctrine to engage in a successive prosecution and that such prosecutions may be viewed as shams for a second state prosecution. But is the military’s policy and practice consistent with history, with the concerns of the Supreme Court, or with the prevailing practice in this country? The resounding answer is no.

The ability of the military to avail itself of the dual sovereignty doctrine to avoid the Fifth Amendment’s Double Jeopardy Clause does not mean that it is necessary or wise to do so. The Supreme Court has made this point on several occasions. In *Gilbert v. Minnesota*,²⁹³ the Court said

Cold and technical reasoning in its minute consideration may indeed insist on a separation of the sovereignties and resistance in each to any cooperation from the other, but there is opposing demonstration in the fact that this country is one composed of many and must on occasions be animated as one and that the constituted and constituting sovereignties must have power of cooperation against the enemies of all.²⁹⁴

More recently, Justice Brennan made a similar point: “The lesson of the history which wrought the Fifth Amendment’s protection has taught us little if that shield may be shattered by reliance upon the requirements of federalism and state sovereignty”²⁹⁵ to abrogate individual rights.

It is time for the military to ensure that servicemembers are protected by the constitutional rights they preserve through their constant sacrifices. It can do this without sacrificing its mission by providing servicemembers the full protections of the Double Jeopardy Clause intended by the Framers of the Constitution and by restraining itself from prosecuting after a state has done so for the same act or transaction.

²⁸⁷ AFI 51-201, *supra* note 203, para. 2.6.3.

²⁸⁸ USAM, *supra* note 221, § 9-2.031A.

²⁸⁹ JAGMAN, *supra* note 204, para. 0124b(3).

²⁹⁰ USAM, *supra* note 221, § 9-2.031D.

²⁹¹ *See id.*

²⁹² *See Rinaldi v. United States*, 434 U.S. 22, 30 n.16 (1977).

²⁹³ 254 U.S. 325 (1920).

²⁹⁴ *Id.* at 329.

²⁹⁵ *Bartkus v. Illinois*, 359 U.S. 121, 169 (1959) (Brennan, J., dissenting).

Appendix A

State Statutes Barring Dual Sovereign Prosecutions

The following is a list of the state statutes barring prosecutions after another jurisdiction (state or federal) has prosecuted for the same act, transaction, or offense.

By 1996

ALA. CODE § 15-3-8 (2006)
ALASKA STAT. 12.20.010 (2006)
ARK. CODE ANN. § 5-1-114 (2006)
CAL. PENAL CODE § 793 (Deering 2006)
DEL. CODE ANN. tit. 11, § 209 (2006)
GA. CODE ANN. § 16-1-8 (2006)
HAW. REV. STAT. § 701-112 (LexisNexis 2006)
IDAHO CODE ANN. § 19-315 (2006)
720 ILL. COMP. STAT. 5/3-4 (2006)
IND. CODE ANN. § 35-41-4-5 (LexisNexis 2006)
KY. REV. STAT. ANN. § 505.050 (LexisNexis 2006)
MINN. STAT. ANN. § 609.045 (2005)
MISS. CODE ANN. § 99-11-27 (2006)
MONT. CODE ANN. § 46-11-504 (2005)
NEV. REV. STAT. ANN. § 171.070 (LexisNexis 2006)
N.J. REV. STAT. § 2C:1-11 (2007)
N.Y. CRIM. PROC. LAW § 40.20 (Consol. 2006)
N.D. CENT. CODE § 29-03-13 (2006)
OKLA. STAT. ANN. tit. 22, § 130 (LexisNexis 2006)
18 PA. CONS. STAT. § 111 (2006)
UTAH CODE ANN. § 76-1-404 (2006)
VA. CODE ANN. § 19.2-294 (2006)
WASH. REV. CODE ANN. § 10.43.040 (LexisNexis 2006)
WIS. STAT. § 939.71 (2006).

By 2007

COLO. REV. STAT. § 18-1-303 (2006)
KAN. STAT. ANN. § 21-3108 (2006)
MO. REV. STAT. § 99-11-27 (2006).

Appendix B

Treaties with Double Jeopardy Provisions

The following is an alphabetical list of treaties in which the United States has included double jeopardy provisions:

- Extradition Treaty with Argentina, art. V, U.S.-Arg., Jun. 10, 1997, 1997 U.S.T. LEXIS 94
- Extradition Treaty with the Bahamas, art. V, U.S.-Bah., Mar. 9, 1990, 1990 U.S.T. LEXIS 223
- Extradition Treaty with Belgium, art. 5, U.S.-Belg., Apr. 27, 1987, 1987 U.S.T. LEXIS 203
- Extradition Treaty with Belize, art. 5, U.S.-Belize, Mar. 30, 2000, 2000 U.S.T. LEXIS 59
- Extradition Treaty with Bolivia, art. V(2), U.S.-Bol., Jun. 27, 1995, 1995 U.S.T. LEXIS 221
- Extradition Treaties with the Organization of Eastern Caribbean States, art. 5, U.S.-Ant. & Barb., U.S.-Dominica, U.S.-Gren., U.S.-St. Lucia, U.S.-St. Kitts & Nevis, U.S.-St. Vincent & The Grenadines, Jun. 3, Oct. 10, May 30, Apr. 18, Sep. 18, Aug. 15, 1996, 1996 LEXIS 57
- Extradition Treaty with the Republic of Columbia, art. 5, U.S.-Colum., Sep. 14, 1979, 1979 U.S.T. LEXIS 199
- Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Costa Rica, art. VI, U.S.-Costa Rica, Dec. 4, 1982, 1982 U.S.T. LEXIS 224
- Extradition Treaty with Cyprus, art. 5, U.S.-Cyprus, Jun. 17, 1996, 1996 U.S.T. LEXIS 50
- Extradition Treaty with France, art. 8, U.S.-Fr., Apr. 23, 1996, 1996 U.S.T. LEXIS 53
- A Treaty for the Extradition of Fugitives from Justice Between the United States of America and Germany, art. V, U.S.-F.R.G., Jul. 11, 1889, 1887 U.S.T. LEXIS 17
- Agreement with Hong Kong on Mutual Legal Assistance in Criminal Matters, art. 3, U.S.-H.K., Apr. 15, 1997, 1997 U.S.T. LEXIS 115
- Extradition Treaty with Hungary, art. V, U.S.-Hung., Dec. 1, 1994, 1994 U.S.T. LEXIS 206
- Extradition Treaty with India, art. 6, U.S.-India, Jun. 25, 1997, 1997 U.S.T. LEXIS 97
- Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Italy, art. VI, U.S.-Italy, Sep. 24, 1984, 1984 U.S.T. LEXIS 153
- Treaty on Extradition Between the United States of America and Japan, art. IV, U.S.-Japan, Mar. 26, 1980, 1980 U.S.T. LEXIS 301
- Extradition Treaty with Jordan, art. 5, U.S.-Jordan, Mar. 28, 1995, 1995 U.S.T. LEXIS 215
- Extradition Treaty with Korea, art. 5, U.S.-S. Korea, Jun. 9, 1998, 1998 U.S.T. LEXIS 168
- Extradition Treaty with Luxembourg, art. 6, U.S.-Lux., Oct. 1, 1996, 1996 U.S.T. LEXIS 51
- Extradition Treaty with Malaysia, art. 5, U.S.-Malay., Aug. 3, 1995, 1995 U.S.T. LEXIS 203
- Extradition Treaty Between the United States of America and the United Mexican States, art. 6, U.S.-Mex., May 4, 1978, 1978 U.S.T. LEXIS 317
- Extradition Treaty with the Kingdom of the Netherlands, art. 6, U.S.-Neth., Jun. 24, 1980, 1980 U.S.T. LEXIS 133
- Treaty with Panama on Mutual Assistance in Criminal Matters, art III, U.S.-Pan., Apr. 11, 1991, 1991 U.S.T. LEXIS 174

Extradition Treaty with Paraguay, art. V, U.S.-Para., Nov. 9, 1998, 1998 U.S.T. LEXIS 205

Extradition Treaty with Peru, art. IV, U.S.-Peru, Jul. 26, 2001, 2001 U.S.T. LEXIS 94

Extradition Treaty with the Philippines, art. 4, U.S.-Phil., Nov. 13, 1994, 1994 U.S.T. LEXIS 185

Extradition Treaty with Poland, art. 7, U.S.-Pol., Jul. 10, 1996, 1996 U.S.T. LEXIS 54

Extradition Treaty with South Africa, art. 6, U.S.-S. Afr., Sep. 16, 1999, 1999 U.S.T. LEXIS 158

Agreement in Implementation of the Treaty of Friendship and Cooperation Between Spain and the United States of America, art. XXII, U.S.-Spain, Jan. 31, 1976, 1976 U.S.T. LEXIS 230

Extradition Treaty with Sri Lanka, art. 5, U.S.-Sri Lanka, Sep. 30, 1999, 1999 LEXIS 171

Extradition Treaty with Switzerland, art. 4, U.S.-Switz., Nov. 14, 1990, 1990 U.S.T. LEXIS 221

Extradition Treaty with Thailand, art. 5, U.S.-Thail., Dec. 14, 1983, 1983 U.S.T. LEXIS 418

Extradition Treaty with Trinidad and Tobago, art. 5, U.S.-Trin. & Tobago, Mar. 4, 1996, 1996 U.S.T. LEXIS 59

Extradition Treaty Between the Government of the United Kingdom and Northern Ireland and the Government of the United States, art. V, U.S.-Gr. Brit.-Ir., Mar. 31, 2003, 2003 U.S.T. LEXIS 129

Extradition Treaty with Zimbabwe, art. 5, U.S.-Zimb., Jul. 25, 1997, 1997 U.S.T. LEXIS 99