

A new Supreme Court case aims to close the huge loophole in US “double jeopardy” law

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The US Supreme Court is back in session after its summer recess. On the docket this term is *Gamble v. US*, a case that challenges the “separate sovereign” exception to the Fifth Amendment’s double jeopardy clause, an exception which allows multiple prosecutions stemming from a single offense.

The matter may have important ramifications for criminal defendants, including Donald Trump’s former campaign chairman Paul Manafort, who is being investigated by federal special prosecutor Robert Mueller and New York authorities (pdf).

The Fifth Amendment to the US Constitution prohibits double jeopardy, or prosecution for the same offense. But the separate sovereign exception, introduced in the 1922 Supreme Court case *US v. Lanza*, undermines that protection by allowing different governmental entities to prosecute a person for the same actions and to impose independent sentences for the same crime. Each state and the federal government are all different “sovereigns.”

“[A]n 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,” the court wrote.

Gamble’s challenge to the “separate sovereign” exception

In Terance Martez Gamble’s case (pdf), the crime in question is being a felon in possession of a firearm. In 2015, Gamble was pulled over for a broken tail light and found in possession of a gun. Because of a 2008 robbery on his record, Gamble is a felon, and having a gun was for him both a state and federal crime.

He pleaded guilty in Alabama state court and served a one-year sentence for the offense. The Alabama US Attorney’s Office also charged Gamble with the same crime, involving the same conduct, under federal law. Gamble challenged the charge as violating the Fifth Amendment’s double jeopardy protections and was denied in the lower courts. He reserved the right to appeal the denial and again pleaded guilty; he was sentenced to 46 months in prison, a punishment he is serving now and which was run concurrently with the state sentence.

Under the “separate sovereign” exception, different ruling entities don’t violate double jeopardy when prosecuting the same offense. But Gamble argues that this undermines the original intent of the Fifth Amendment and violates Supreme Court precedent holding that the double jeopardy clause applies to states via the Fourteenth Amendment’s incorporation principles.

In an amicus brief (pdf) filed on behalf of Gamble in September, the American Civil Liberties Union and the CATO Institute argue that “concerns about government overreach and harassment are particularly acute today because the scope of federal criminal law is far more expansive than it was when the dual-sovereignty exception was last considered” in 1992.

Now that federal and state law now significantly overlap and the different authorities cooperate extensively on criminal investigations, it is “particularly easy for the federal and state governments to engage in the repeated harassment for a single offense that the Double Jeopardy Clause was adopted to prevent,” the brief argues.

Government overreach

The federal government, represented by acting solicitor general Jeffrey Wall, counters that a crime charged by different sovereigns, even if it contains identical elements, doesn’t qualify as the same offense. Basically, separate sovereigns make a single offense “separate” for the purpose of the Fifth Amendment.

In its brief to the high court opposing Gamble’s petition (pdf) for review, the government writes, “The Double Jeopardy Clause thus does not forbid successive prosecutions by a State and the federal government because a State and the federal government are ‘two sovereignties, deriving power from different sources.’”

Gamble acknowledges the exception exists. He just wants the high court to reconsider it. And his position finds scholarly support.

Writing in SCOTUS Blog on Sept. 18, University of California-Hastings law professor Rory Little explains, “Although there is no lower-court split of authorities on this question, scholars have long criticized this ‘separate sovereigns’ atextual exception to the double jeopardy clause.” In other words, academics say there’s little evidence that the Framers intended such an exception, based on their writing and the text of the constitution itself.

Little believes the high court accepted Gamble’s case for review because “due-process oriented justices,” or those especially interested in procedural questions, are concerned. And he classifies the matter as one of several on the docket this term that are a “law professor’s dream” insofar as it deals with a fundamental constitutional question and basic criminal procedure.

If Gamble succeeds in convincing the high court to find the separate sovereigns exception does violate double jeopardy protections, many defendants stand to benefit.

As the law stands now, even if Paul Manafort were convicted in federal court and subsequently pardoned by the president, the scope of such a pardon would be limited to federal crimes—it wouldn’t necessarily prevent state authorities from pursuing him for the same offenses.

But Gamble’s gambit to overrule the exception could change that. If he won, and the “double jeopardy” protection were applied to state and federal sovereigns, Manafort could use a federal prosecution as his defense to state charges, to the extent that the offenses involved stem from the same incidents.