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Justices seem hesitant to bar feds, state from prosecuting individual for same crime

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Some of President Trump's opponents had warned that a case before the Supreme Court on double jeopardy could expand his pardon powers to protect political allies — but the justices avoided that issue during oral argument Thursday.

They focused instead on longstanding precedent and constitutional rights over whether a defendant can be charged for the same crime twice, in this case in both federal and state courts.

Justices from both sides of the ideological divide appeared skeptical of overturning decades of legal doctrine that has said the federal and state governments are “dual sovereigns,” and can each bring charges for the same crime if it wants.

“This is a 170-year-old rule,” said Justice Elena Kagan.

The case involves two-time felon Terance Gamble, who was nabbed for being a felon in possession of a gun. Both Alabama and the federal government charged him for the violation, which he said amounts to double jeopardy.

“There is an ancient rule not to be tried twice for the same crime,” said Louis A. Chaiten, Gamble's lawyer, told the court.

The federal government, though, argued it's allowed under the “separate sovereigns” exception, which justices have ruled as valid since the middle of the 19th century and which Gamble wants to have overturned.

“I can point to a lot of practical problems that could develop,” said Eric J. Feigin, the Justice Department's attorney, adding that the federal government would want to maintain an interest in the regulation of firearms, and not leave that only to the states.

Justice Brett M. Kavanaugh, the newest member of the high court, suggested the felon must show an “egregious wrong” in encouraging the court to undo centuries of precedent. And Justice Stephen G. Breyer appeared worried about what would happen to civil rights prosecutions, typically brought by the federal government, if the court were to rule for Gamble.

He also wondered how far back the courts could go in overturning precedent, pointing to an early founding-era ruling that helped solidify the courts' claims to final constitutional say over laws.

“Maybe *Marbury v. Madison* was wrong?” Justice Breyer said. “Look at the doors we are opening up.”

Justice Samuel A. Alito said barring dual prosecutions could create a situation where an inept prosecutor in another country failed to convict someone for killing an American overseas — and U.S. authorities would be powerless to launch their own prosecution.

Mr. Chaiten said there’s already a precedent for international cases, with U.S. courts able to decide whether to recognize the foreign trial. He said Gamble’s case is different since it deals with states and the federal government.

Justice Kavanaugh wasn’t buying it. “Your position would substantially hamper those national security efforts,” he told Mr. Chaiten.

A number of conservative and liberal organizations backed Gamble, saying the exploding federal criminal code has grown to a point where there’s too much overlap with state laws creating too many chances for double jeopardy.

Ilya Shapiro, a senior fellow with the Cato Institute, which sided with Gamble, had previously predicted a favorable ruling, but was surprised at the direction of Thursday’s argument.

He emerged saying he could now see a 6-3 split in favor of the government and dual prosecution — which made him wonder why the court took the case, given that the lower courts had already affirmed the prosecution.

Some legal analysts said if the justices did overturn the doctrine and rule that only one set of charges can be brought, it would mean Mr. Trump could pardon his allies from federal prosecutions from matters being probed by the special counsel’s office. That would effectively shut out states from bringing charges even if their own laws had been violated.

But Mr. Trump and any potential pardons stemming from the special counsel’s probe didn’t come up when the two sides sparred during oral arguments Thursday.