MITCHELL | HAMLINE School of Law

Mitchell Hamline Law Review

Volume 47 | Issue 1 Article 6

2021

Gamble v. United States: Military Justice in Absence of Double Jeopardy

Kelsi B. White

GAMBLE V. UNITED STATES: MILITARY JUSTICE IN ABSENCE OF DOUBLE JEOPARDY

Kelsi B. White†

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† University of Denver Sturm College of Law, J.D. 2020. All views are my own. I would like to extend my gratitude to Professor Nancy Leong for her feedback, guidance, and support in drafting this article. Additionally, I would like to thank the editors of the *Mitchell Hamline Law Review* for their time and attention in editing.

ABSTRACT

In this article, I argue that to combat the over-delegation of power to military tribunals, some limiting principles must exist to prevent prejudiced and unwarranted second-chance prosecutions. The United States' criminal justice system purports to embrace sturdy protections against double jeopardy, meaning no person shall be tried twice for the same offense. Yet, this ideal is far from the reality. In a legal system governed by various, distinct sovereigns, prosecutors often have two, or more, opportunities to try a case. The United States Supreme Court reaffirmed this reality in *Gamble v. United States*,[1] which left service members particularly vulnerable to successive prosecutions in military courts.

This degradation of protection against repeated prosecution requires intervention from the Department of Defense (DOD). In this article, I seek to demonstrate that under the current system, double jeopardy exposure is a compounding threat to service member's legal rights. Consequently, this article proposes several limiting principles to minimize the use of successive prosecutions and enhance protections for service members during court-martial proceedings. Collective confidence in the legal system demands that when a service member's liberty is on the line, every precaution be taken to protect against unjust and imbalanced successive trials.

I. INTRODUCTION

Austin Greening, a twenty-four-year-old freshly enlisted sailor, saw an unfortunate and devastating mistake propel him down a hole of endless litigation, characterized by multiple guilty pleas and calculated tactics meant to keep him imprisoned for an extended time across multiple jurisdictions.[2] Greening was tried and convicted in Virginia state court for the accidental death of a fellow sailor.[3] New evidence was introduced before sentencing, so Greening was tried again, entered a guilty plea for voluntary

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[1] 139 S. Ct. 1960 (2019).

[2] *See generally* United States v. Greening, No. 201700040, 2018 WL 1547779 (N-M. Ct. Crim. App. Mar. 30, 2018). *See also* Joseph Darius Jaafari, *Do Soldiers Face 'Double Jeopardy' in Military Courts?*, MARSHALL PROJECT (Apr. 30, 2019, 6:00 AM), https://www.themarshallproject.org/2019/04/30/do-soldiers-face-double-jeopardy-in-military-courts [https://perma.cc/S2K2-3RRK].

[3] *See* Brock Vergakis, *After State Trial and Prison Time, Military Judge Sends Norfolk Sailor Who Killed Friend Back Behind Bars*, VIRGINIAN-PILOT (Sept. 22, 2016, 7:00 PM), https://www.pilotonline.com/military/article_ee90d2c3-ac5d-5b51-9997-b58d2df0651b.html [https://perma.cc/EZ3B-JKJB].

manslaughter, and served a six-month sentence.[4] The victim's family and the Navy were unsatisfied with this sentence.[5] To atone for what they believed to be an overly lenient sentence, the Navy opted to charge Greening with murder under the Uniform Code of Military Justice (UCMJ).[6] Thus, once Greening was released from civilian prison, he was immediately placed in the brig[7] to await his next trial.[8] If convicted, Greening might have faced life in prison on military murder charges.[9] Instead, he was sentenced to another three and a half years in military prison.[10] To a layman, this might appear, on its face, a clear violation of the prohibition against double jeopardy, but legal technicalities deem it perfectly permissible. While this is certainly an unsettling loophole, it is one the U.S. Supreme Court continues to uphold. This article will explore this unique exception to traditional conceptions of the Double Jeopardy Clause.

A fundamental precept to the notion of American liberty is that no person shall be tried twice for the same offense.[11] Yet, in a complex federalism system, this seemingly simple sentiment is far too good to be true. In a legal system governed by various, distinct sovereigns, the old maxim that prosecutors only get one bite at the apple is little more than folklore. While the U.S. Supreme Court reaffirmed the false narrative around double jeopardy in *Gamble v. United States*,[12] it left a glaring and often forgotten hole in its analysis: successive trials under the military justice system.

Since the passage of the Articles of War in 1776, Congress sought to insulate military courts from civilian control, noting that military justice is virtually inseparable from military discipline—a wholly distinct entity from civilian courts.[13] At America's founding, a system permitting a service member to be tried by both court-martial and a state criminal court for the same criminal act, let alone nonmilitary criminal conduct, could not possibly have been fathomed. The post-World War II expansion of military

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[4] *Id.*

[5] *Id.*

[6] *See Greening*, 2018 WL 1547779, at *2 (detailing steps taken by Greening's command to extend Greening's active duty status to keep him within UCMJ jurisdiction).

[7] A brig is a temporary place of confinement—akin to a jail cell—where Navy sailors or Marines are placed when accused of a crime. *See, e.g.*, Austin Rooney, *In the Slammer: Special Programs, Brig Duty*, ALL HANDS (Jan. 9, 2018), https://allhands.navy.mil/Stories/Display-Story/Article/1840462/in-the-slammer/ [https://perma.cc/5C75-99XJ].

[8] Vergakis, *supra* note 3.

[9] *Id.*

[10] *Id.*

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

[12] 139 S. Ct. 1960, 1964 (2019) (holding that prosecution by a separate sovereign is not considered a prosecution for the "same offence" and, therefore, does not violate the Double Jeopardy Clause of the Fifth Amendment).

[13] *See* JONATHAN LURIE, ARMING MILITARY JUSTICE 3 (1992).

authority to try service members for civilian crimes undermines the congressional intent of Article I, which provides Congress with the ability to make rules governing the armed forces and for trying military cases.[14] The implications of this expansion of power have been largely ignored, allowing the military unfettered authority to retry service members by court-martial for offenses receiving an unsatisfactory result in state court. Left unchecked, this power severely limits the rights of active duty, reserve, and retired members of the armed forces.

In *Gamble*, the Supreme Court upheld the separate sovereigns doctrine of the Double Jeopardy Clause of the Fifth Amendment,[15] thereby perpetuating a legal loophole undermining the individual liberties of its citizens—particularly service members of the armed forces. This article first analyzes the historical development of the Fifth Amendment's Double Jeopardy Clause and separate sovereigns doctrine during the preratification founding of the American military justice system.[16] Next, it provides an overview of the Court's reasoning for upholding the separate sovereigns doctrine in *Gamble*, as well as the counterarguments from Justices Ginsburg and Gorsuch who called for its invalidation.[17] In analyzing these criticisms, I seek to explore the evolution of these principles from their origination to their modern practice, particularly through the lens of military justice. Consequently, this article will argue that the Court's decision in *Gamble* fails to recognize the unique implications arising from successive prosecutions in military courts, which effectively authorizes a compounded loss of service members' rights.[18] I argue that to combat the over-delegation of power to military tribunals, some limiting principle must exist to prevent prejudiced and unwarranted second bites at the apple by partial adjudicators.[19]

II. BACKGROUND

This part provides context for the siloed development of both the separate sovereigns doctrine and the origins of military justice. It first discusses the evolution of double jeopardy jurisprudence and the establishment of the separate sovereigns doctrine—a doctrine developed in

[14] *See, e.g.*, Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933, 936–73 (2015).

[15] *Gamble*, 139 S. Ct. at 1976.

[16] *See infra* part II.

[17] *See infra* part III.

[18] *See infra* part IV.

[19] *See infra* part V.

a counter-textual fashion in light of the Fifth Amendment's construction and congressional intent. It then explores the independent development of the military justice system and early exploration of double jeopardy principles within the framework of separate sovereignty.

A. Fifth Amendment

The text of the Fifth Amendment reads: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."[20] The traditional understanding of the notion that individuals should be free from multiple prosecutions for the same offense has a long and storied history.[21] As Justice Hugo Black noted, "[f]ear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization."[22] Colonial enactments, established prior to the passage of the Fifth Amendment, either fully incorporated the rights, liberties, and immunities afforded to the subjects of England—which included a prohibition against double jeopardy—or established their own provisions precluding it.[23] These early enactments were often codified into state law prohibitions prior to the formal adoption of the Fifth Amendment in 1791.[24]

While the text of the constitutional amendment provides a seemingly comprehensible understanding of the strictures and dictates of the Double Jeopardy Clause, there has been substantial debate about the practical application of the clause. Early modern jurisprudence on the matter has indicated the important place double jeopardy has on the contemporary practice of law. For example, in *Green v. United States*, the Court, in dicta, offered:

> [T] he constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense.[25]

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

[21] *See* David S. Rudenstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 WM. & MARY BILL RTS. J. 193, 197–99 (2005).

[22] Bartkus v. Illinois, 359 U.S. 121, 151 (1959) (Black, J., dissenting).

[23] Maryland, Massachusetts, and Connecticut all adopted some form of prohibition against double jeopardy in their colonial enactments. *See* Rudenstein, *supra* note 21, at 221–22.

[24] The states that codified prohibitions against double jeopardy through case law, statute, or constitutional amendment included New Hampshire, New York, Virginia, Connecticut, Pennsylvania, and South Carolina. *See* Rudenstein, *supra* note 21, at 223–26.

[25] 355 U.S. 184, 187 (1957).

According to this understanding, such actions on behalf of the State are "contrary to both the letter and spirit" of the clause.[26]

Alternatively, uncertainty over the meaning and parameters of the clause results from questions as to whether the protections from double jeopardy intend to defend individuals from cumulative punishment or the harassment of multiple trials.[27] This uncertainty and lack of uniformity between early decisions and modern interpretations led to inconsistent holdings where successive prosecutions have become paramount issues.[28]

Despite the commanding language of the Fifth Amendment, there is a long-recognized exception to the double jeopardy prohibition: the separate sovereigns doctrine. Essentially, the nature of federalism mandates that states and the federal government exist in separate, mutually exclusive spheres.[29] Yet, one of the foundational debates during the ratification period was whether the states and the federal government were to be considered a hybrid-sovereign system or, alternatively, part of "one whole."[30] Ultimately, the prevailing argument was that, while states were considered exclusive in their own right, it was equally important that separate sovereignty incorporate a "balance between the national and State governments . . . [to] form a double security for the people."[31]

This security breaks down where schemes form and evolve in ways that were inconceivable pre- and early post-ratification. For example, concurrent criminal statutes disrupt the distribution of authority between the federal and state governments.[32] This concept raises peripheral questions as to the ability of the federal system to balance rights.[33] However, this problem is not limited to a federal-state overlay.[34] A unique and often overlooked area where concurrent jurisdiction poses similar complications is between state or federal jurisdiction and the military justice system's jurisdiction.

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[26] *Id.* at 198.

[27] *See* LEONARD G. MILLER, DOUBLE JEOPARDY AND THE FEDERAL SYSTEM 6 (1968).

[28] *See* Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution: A Proposed Approach*, 92 GEO. L.J. 1183, 1197–99 (2004) (explaining historical inconsistencies in interpreting the Double Jeopardy Clause).

[29] *See* RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 53, 60–61 (1987).

[30] *See* THE FEDERALIST NO. 39 (James Madison); THE FEDERALIST NO. 82 (Alexander Hamilton).

[31] *See* BERGER, *supra* note 29, at 63.

[32] Because of the Supremacy Clause, concurrent state statutes tend to be preempted by federal laws—particularly where concurrent jurisdiction is at issue. *See* Joshua M. Devine, *Statutory Federalism and Criminal Law*, 106 VA. L. REV. 127, 144 (2020).

[33] *See* MILLER, *supra* note 27, at 5.

[34] This issue was considered most acute where the conduct offended multiple systems or laws, which created concurrent problems among the jurisdictions. *See* Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 264 (1965).

B. Origination of Military Justice

The presence of military court-martial proceedings predates the discovery of the Americas.[35] From the "Court of Chivalry" to the "Articles of War," there has long been an understanding that crimes committed by soldiers were subject to military jurisdiction.[36] These authorities inspired the American colonies to propagate their versions of the Articles of War.[37] While concerned with the impending revolution, the philosophical viewpoints shaping the construction of these Articles focused more squarely on building a functional military justice system with mechanisms to control and discipline members within its ranks.[38]

In its earliest days of development, the military justice system oscillated between civilian principles, constitutional values, and culturally ingrained military structures.[39] As a result, unique procedures and punishments arose for discipline-specific violations.[40] However, this system was not settled with an eye toward expanding a military tribunal's jurisdiction over conventional crimes.[41] Rather, questions surrounding civilian supervisory capacity over these proceedings raised additional issues regarding the role of military tribunals.[42] While boundaries between the military justice system and its civilian counterpart do exist, it is firmly established that military courts both derive power independent of their civilian counterparts and that their authority arises from the Constitution itself.[43]

This section analyzes the foundational origins of military justice and military courts. It then seeks to elaborate upon the innate distinctions between military and civilian courts. Next, this section assesses the pivotal role *Grafton v. United States* played in early common law conceptions of

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[35] Lt. Col. J.D. Droddy, USAF (Ret.), *King Richard to* Solorio*: The Historical and Constitutional Bases for Court-Martial Jurisdiction in Criminal Cases*, 30 A.F. L. REV. 91, 92 (1989).

[36] *See id.* at 91–95 (listing historical jurisdiction expectations of military members).

[37] *Id.* at 95–96.

[38] *See* LURIE, *supra* note 13, at 3.

[39] *See* Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 654 (2003).

[40] Additional procedures in place allow for nonjudicial punishment through mechanisms like administrative boards, summary courts-martial, and bad-conduct discharges for specific, service-related charges. *See id.* at 713.

[41] *Id.* Specifically, Turley critiqued the collateral areas in which the military justice system has taken over governance. *Id.* at 661–62. One such area concerns what he calls "troubling questions of both the necessity and legitimacy of military jurisdiction." *Id.* at 654.

[42] *See* LURIE, *supra* note 13, at 6.

[43] Capt. Brian C. Baldrate, *The Supreme Court's Role in Defining the Jurisdiction of Military Tribunals: A Study, Critique, & Proposal for* Hamdan v. Rumsfeld, 186 MIL. L. REV. 1, 10 (2005).

the separate sovereigns doctrine—specifically in the military context.[44] Finally, it provides an overview of the substantial expansion of military court jurisdiction and the implications that expansion has had on successive prosecutions.

1. Foundational Roots

During the foundational days of the American nation, then Commander in Chief, George Washington, called for revisions to the Articles of War, originally crafted by John Adams and Thomas Jefferson.[45] By 1776, Congress established what became known as the military court-martial.[46] In fact, the processes governing court-martial practice already underwent several revisions prior to the ratification of the United States Constitution.[47] While the system was well-established by the time the Constitution was ratified, the use of the court-martial was limited by the government's constitutional authority to convene them.[48]

The constitutional authority to create the pre-existing military courts is arguably derived from two distinct sources in the Constitution: (1) Article I, Section Eight, Clause Fourteen;[49] and (2) Article II, Section Two, Clause One.[50] While ascertaining exactly where the constitutional authority for military courts originates is difficult, it certainly does not fall within the ambit of Article III.[51]

Despite their establishment under the authority of the federal system through the ratification of the Constitution, very little about the

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[44] 206 U.S. 333 (1907).

[45] *See* LURIE, *supra* note 13, at 4–5.

[46] *See id.*

[47] *See id.* The original revisions to the 1775 Articles of War—as they were known at the time—were prompted by then-General George Washington who considered them insufficient. *Id.* at 4–5. The 1776 revisions were the first in a series of revisions that established the military court-martial and outlined due process considerations within the framework of military discipline. *Id.* at 5–6. Finally, Congress adopted procedural changes in 1786, just before ratification of the Constitution, that included cross-examination and a Court of Inquiry. *Id.* at 8–9.

[48] *See* Baldrate, *supra* note 43, at 10.

[49] *See id.* This Article gives Congress the power "to make Rules for the Government and Regulation of the land and naval Forces." *Id.* (quoting U.S. CONST. art. I, § 8, cl. 14).

[50] *See id.* at 12. Article II provides power to the President as an independent authority to agglomerate all military trials and tribunals. It makes the President the "Commander in Chief of the Army and Navy of the United States," and, therefore, court-martial are to be considered a tool to assist Presidents in their constitutional capacity to maintain good order and discipline within the forces. *Id.* at 12 (quoting U.S. CONST. art. II, § 2, cl. 1).

[51] *See id.* at 6–7, 14. This is important because the Constitution requires that Article III courts hear all cases and controversies, thereby limiting the jurisdiction of military courts, which do not garner the same constitutional respect as other courts. *Id.* at 14–15.

Articles of War changed during the nation's early years.[52] Some material changes occurred following major wars, with the greatest revisions taking place after World War II, including the formation of the UCMJ and Manual for Courts-Martial (MCM).[53] This modification to the Articles of War served as a catalyst for the modern expansion of military justice jurisdiction.[54] It is this expansion, in particular, that has further blurred the line between the military and civilian systems of justice.

2. Separation from the Civilian System

The United States Supreme Court accepts that the military system is a "separate community" with limited overlap with the typical functioning of the civilian justice system.[55] Indeed, from conception, both Thomas Jefferson and John Adams intended and supported a system of military justice that was "admittedly severe" based on the principle that "governance of the military was based on needs very different from those of a civilian polity."[56] Adams's notion of military justice as a lone entity, separate and distinct from civilian proceedings, reinforced much of the early decision-making about congressional interference with military justice practice.[57]

There was an inherent perception of danger in the idea of military encroachment into civil and political rights; therefore, the sharp separation of the two was necessary to preclude such a threat.[58] General William Tecumseh Sherman, head of the Army following the Civil War, recognized the danger of allowing civilian laws and values to seep into the governance of military justice.[59] He argued that contaminating military law with civilian principles would ultimately threaten and "weaken" military culture as a whole,[60] though the same precept operates in reverse as well.

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[52] *See* Droddy, *supra* note 35, at 98–99.

[53] *See id.* at 99–100. The UCMJ and MCM were both created through an Executive Order issued by President Harry Truman in 1951. Particularly, the MCM sought to "clarif[y] the customary relationship between military articles and the civil law." *Id.* at 100 (citing Exec. Order No. 10,214, 16 Fed. Reg. 1303 (Feb. 8, 1951)).

[54] *See id.* at 98–99.

[55] James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177, 177–78 (1984).

[56] *See* LURIE, *supra* note 13, at 5. Here, an analysis of a handful of the framers' intentions in drafting a Constitution where the military system was wholly distinct provides context for perceptions of the time. *Id.* at 5. This sets the framework to understand how the system developed.

[57] *Id.* at 6.

[58] Peter Margulies, *Justice at War: Military Tribunals and Article III*, 49 U.C. DAVIS L. REV. 305, 331 (2015).

[59] *See* Turley, *supra* note 39, at 651.

[60] *See id.* at 651–52. This vision was supported by the Supreme Court at the time as well. *Id.* at 652.

"Procedural informalities" deemed permissible in military tribunals would otherwise be considered insufficient in typical civilian courts.[61] These informalities, which carried over from common law edicts of military justice,[62] provide fodder for the argument that civilian legal concepts remained outside the purview of military jurisdiction.

3. Grafton v. United States

This section shifts to an overview of the civilian conception of successive prosecution and its place in military justice jurisprudence. The Supreme Court's decision in *Grafton*, while consistent with early common law conceptions of separate sovereignty, stood in contrast to a line of then-recently decided cases that altered the jurisprudential tides away from a general fear of successive prosecutions.[63] Rather than ignoring widely recognized doctrines governing the prohibition against successive prosecutions by dissimilar sovereigns, *Grafton* distinguishes that, where offenses are similar in "substantial respect" and have already been tried in a competent jurisdiction, subsequent trials serve no utility and may be discarded.[64]

Grafton involved the court-martial of a service member in the Philippines for murder.[65] The soldier was acquitted and subsequently retried in a local court for the same offense.[66] The second trial resulted in a guilty verdict and a sentence of twelve years and a day.[67] Grafton argued before the Supreme Court that his Fifth Amendment right to be free from double jeopardy was violated, which led the Court to reverse the conviction.[68] In so finding, the Court reasoned:

> [W]e rest our decision . . . upon the broad ground that the same acts constituting a crime against the United States cannot, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the same or in another court, civil or military of the same government.[69]

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[61] Margulies, *supra* note 58, at 335.
[62] Such informalities initially included the lack of counsel for the defendant. Furthermore, there were fewer mechanisms to temper harsh punishments. *Id.* at 335.
[63] *See generally* Moore v. Illinois, 55 U.S. 13 (1852); United States v. Marigold, 50 U.S. 560 (1850); Fox v. Ohio, 46 U.S. 410 (1847).
[64] Grafton v. United States, 206 U.S. 333, 355 (1907).
[65] *Id.* at 333.
[66] *See* LURIE, *supra* note 13, at 79 (citing *Grafton*, 206 U.S. at 351–52).
[67] *See id.* (citing *Grafton*, 206 U.S. at 344).
[68] *See id.* (citing *Grafton*, 206 U.S. at 345).
[69] *Grafton*, 206 U.S. at 352.

This holding rests on the general notion that prohibiting double jeopardy, through the Constitution or an act of Congress in civilian courts, must apply equally to court-martial proceedings—a comparably competent jurisdiction.[70]

4. Expansion of Jurisdictional Power

Modern developments in the UCMJ expanded the jurisdiction of military courts to permit the prosecution of nearly all crimes committed by service members—in their civilian capacity or otherwise.[71] This expansion usurped the idea that the military justice system was primarily focused on maintaining discipline and order and instead allowed Congress, through its plenary power over the military, to extend criminal subject-matter jurisdiction to military courts over both common law and statutorily defined felonies.[72]

Previously, the Court ruled in *O'Callahan v. Parker* that service members could not be tried by court-martial for non-service-related offenses.[73] The Court, in handing down this decision, provided:

> A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved . . . . But the justification for such a system rests on the special needs of the military, and history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty . . . . "There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution."[74]

However, this understanding of the jurisdictional limitations inherent to court-martial proceedings was shortly abolished in *Solorio v. United States*,[75] which extended the scope of charges that could be brought against military personnel, including those without a direct link to military discipline.[76] The abolition of the distinction between service-connected crimes and non-

[70] *See id.* (holding that where an individual is tried for an offense in any court that derives its authority from the United States—regardless of conviction or acquittal—that individual may not be tried again for that same offense).
[71] Note, *Military Justice and Article III*, 103 HARV. L. REV. 1909, 1910 (1991).
[72] *Id.* at 1914–16. This expansion was temporarily curbed in *O'Callahan v. Parker*, wherein the Supreme Court expressed concern regarding military courts' ability to handle the "subtleties of constitutional law." *Id.* at 1916 (quoting 395 U.S. 258, 265 (1969)).
[73] 395 U.S. 258, 272 (1969).
[74] *Id.* at 265 (quoting Toth v. Quarles, 350 U.S. 11, 22 (1955)).
[75] 483 U.S. 435 (1987).
[76] *See* Margulies, *supra* note 58, at 341.

service-connected offenses was predicated upon the belief that doing so "was a futile enterprise" and difficult to administer in practice.[77]

This expansion broke down the dividing line between military and civilian courts, allowing military courts to procure greater power in deciding cases. Not only was the expansion codified in the UCMJ and MCM, through defined criminal articles, it was also enshrined in Article 134 (the General Article),[78] which allowed for the assimilation of state laws and permitted the prosecution of such offenses under federal law.[79] This rapidly expanded the power and jurisdiction of court-martial proceedings to reach crimes and offenses that never would have been fathomed by the Constitutional framers during the early days of the nation.

The robust expansion of the military justice system and its jurisdictional capacity has opened the door to lengthy debates about the fairness and veracity of the process. This substantial jurisdictional overlap, compounded with newly emerging understandings of double jeopardy's relation to separate sovereignty, led the Supreme Court to grant certiorari in *Gamble v. United States* in 2018.

III. GAMBLE V. UNITED STATES

The Supreme Court heard arguments in *Gamble v. United States* in December 2018 and announced its decision in June 2019.[80] Rather than upend the present conception of "offence" and dual sovereignty, the Court found in favor of preserving the status quo—permitting continued successive prosecutions in state and federal courts.[81] This part provides an overview of the Court's decision, beginning with a brief recitation *Gamble*'s facts and procedural history. The next section analyzes the majority opinion, authored by Justice Alito, and discusses the majority's rationale for preserving the separate sovereigns doctrine as it relates to double jeopardy. Then, the subsequent section briefly surveys Justice Thomas's concurring opinion expressing his reservations about the use of *stare decisis* as a general principle of judicial decision-making. The final section of this part examines Justice Ginsburg's and Justice Gorsuch's separate dissents, which this article expands upon in subsequent parts.[82]

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[77] *See id.* at 342.
[78] 19 U.S.C. § 934, art. 134 (2018).
[79] 18 U.S.C. § 13 (2018).
[80] 139 S. Ct. 1960 (2019).
[81] *Id.* at 1980.
[82] *See infra* part III.

A. Facts

As the adage goes, "if you want something done right, do it yourself." This logic drove federal prosecutors to indict Terance Martez Gamble for a felon-in-possession offense despite his guilty plea to a similar charge in Alabama state court.[83] In November 2015, an Alabama police officer pulled Gamble over for a damaged headlight before the officer allegedly detected the odor of marijuana permeating from Gamble's vehicle.[84] Having established probable cause to search the vehicle, the officer uncovered a loaded 9-mm handgun.[85] Gamble had a prior second-degree robbery conviction, which prohibited him from possessing a firearm under both Alabama and federal law.[86] The subsequent federal prosecution was authorized by the long-standing doctrine permitting prosecutions by different sovereigns—in this case, state and federal—and, thereby, did not implicate double jeopardy concerns.[87]

B. Procedural History

Gamble believed he was being charged twice for the same act.[88] He moved to dismiss the federal indictment on the grounds that it was brought for "the same offense" for which he had already been convicted in an Alabama state court.[89] Gamble argued that the federal indictment violated his constitutional protection against double jeopardy.[90]

The federal district court denied his motion to dismiss based on precedent indicating two offenses are not considered the "same offense" if they are prosecuted on behalf of different sovereigns.[91] Following the district court's denial, Gamble plead guilty to the federal felon-in-possession offense, but he preserved the double jeopardy challenge for appeal.[92] The Eleventh Circuit affirmed on appeal—approving the conviction on separate

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[83] *Gamble*, 139 S. Ct. at 1964.
[84] *Id.*
[85] *Id.*
[86] *Id.* Alabama code specifically provided that "no one convicted of a 'crime of violence' 'shall own a firearm or have one in his or her possession.'" *Id.* (citing ALA. CODE § 13A-11-72(a) (2015)). The corresponding federal law—criminalizing the same act as a separate "offense"—prohibits those convicted of some felony-level offenses from "ship[ping] or transport[ing] in interstate or foreign commerce, or possess[ing] in or affecting commerce, any firearm or ammunition." 18.U.S.C. § 922(g)(1) (2018).
[87] The rationale, espoused by earlier courts, noted that prosecution for two offenses (one under federal law and one under state law) necessarily implicated two distinct offenses charged against the defendant. *Gamble*, 139 S. Ct. at 1964.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.* (quoting Heath v. Alabama, 474 U.S. 82, 92 (1985)).
[92] *Id.*

sovereignty grounds.[93] Gamble then appealed to the U.S. Supreme Court, which granted certiorari to determine whether the Double Jeopardy Clause forbids successive prosecutions by separate sovereigns.[94]

C. Opinion of the Court

Justice Alito delivered the opinion of the Court, in which Chief Justice Roberts and Justices Thomas, Breyer, Sotomayor, Kagan, and Kavanaugh joined.[95] In affirming the Eleventh Circuit decision, the Court determined "[e]liminating the dual-sovereignty rule . . . would not even prevent many successive state and federal prosecutions" derived from the same criminal act so long as they are defined by statutory elements.[96]

Justice Alito began by extrapolating whether the Court should overrule the long-standing separate sovereigns doctrine of the Double Jeopardy Clause—specifically noting the complexity of double jeopardy jurisprudence.[97] Ultimately, Justice Alito pointed to three seminal cases to ground his separate sovereign, separate-interest argument, leading to his conclusion that the "duality of harm explains how 'one act' could constitute 'two offences, for each of which [the offender] is justly punishable.'"[98]

In crafting a historical analysis of the "170 years of precedent" on double jeopardy, Justice Alito cabined his inquiry to avoid the founding-era conception of the right to protection from double jeopardy.[99] Rather, he focused on the doctrinal development presented in three seminal cases: *Fox v. Ohio*,[100] *United States v. Marigold*,[101] and *Moore v. Illinois*.[102] These cases, Justice Alito asserted, spell out the foundational principles of the separate sovereigns doctrine.[103]

First, *Fox* held that the class of crime and its impact on public safety might require separate and distinct prosecutions.[104] As a corollary to this understanding, *Marigold* contemplated that "the same act might, as to its character and tendencies, and the consequences it involved, constitute an offence against both state and federal governments," thus permitting

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[93] *Id.* In *Gamble*, the Court used the verbiage "dual-sovereignty" doctrine. For the purposes of this article, the terms dual-sovereignty and separate sovereignty are interchangeable.
[94] *Id.* at 1964–65.
[95] *Id.* at 1960.
[96] *Id.* at 1980.
[97] *Id.* at 1963–64.
[98] *Id.* at 1967 (quoting Moore v. Illinois, 55 U.S. 13, 14 (1852)).
[99] *Id.* at 1964. Gamble focused the majority of his argument on original conceptions of double jeopardy and English common law perceptions regarding the right.
[100] 46 U.S. 410 (1847).
[101] 50 U.S. 560 (1850).
[102] 55 U.S. 13 (1852).
[103] *Gamble*, 139 S. Ct. at 1966.
[104] *Id.* (citing *Fox*, 46 U.S. at 435).

separate penalties to attach from both entities.[105] This notion was expanded further in *Moore*, where the Court outlined the purported legal distinction between the "the same act" and "the same offence."[106] Abstractly, the Court stated a single act could be the source of the violation of the law (an offense) of two separate sovereigns, making the singular act punishable by both.[107]

The Court then argued that the standard derived from these cases was firmly cemented in its *United States v. Lanza* decision.[108] In *Lanza*, the Court held that an act designated "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."[109] Justice Alito and the Court found that Gamble's original intent early common law argument could not overcome the weight of *stare decisis*.[110] It expressly rejected the conception that incorporating the Double Jeopardy Clause against the States effectively abrogates the application of the separate sovereigns doctrine.[111] Instead, the Court held that a broad dual-sovereignty doctrine continued to exist as a backdrop to Double Jeopardy Clause jurisprudence, despite the incorporation of the Fifth Amendment.[112]

Finally, Justice Alito expressed that eliminating the separate sovereign doctrine would not narrow the reach of federal criminal law, nor would it fundamentally alter the legal conception of "offence" for double jeopardy purposes.[113] Overturning this long-standing doctrine would require the Court to ignore *stare decisis* and undergo a revolutionary recalculation of federalism and basic criminal conduct principles.[114]

D. Justice Thomas's Concurring Opinion

Justice Thomas filed an opinion concurring in the result but writing separately to address his view on the veracity and proper application of *stare*

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[105] *See id.* (quoting *Marigold*, 50 U.S. at 569).
[106] *See id.* (citing *Moore*, 55 U.S. at 14).
[107] *Moore*, 55 U.S. at 20. The *Gamble* Court further extrapolated that "[a]n assault on a United States marshal . . . would offend against the Nation and a State" by "'hindering' the 'execution of legal process,' and the second by 'breach[ing]' the 'peace of the State.'" *Gamble*, 139 S. Ct. at 1966–67 (quoting *Moore*, 55 U.S. at 20).
[108] 260 U.S. 377, 382 (1922).
[109] *Gamble*, 139 S. Ct. at 1967 (quoting *Lanza*, 260 U.S. at 382). This argument rests on the distinction between "the people of a State" and "the people of all the States," even though each derives its power from the same source: the people. *Id.* at 1999 n.26 (Gorsuch, J., dissenting).
[110] *Id.* at 1978.
[111] This is expressly argued to combat the analogy to the silver-platter doctrine in the Fourth Amendment, which aptly applies to the separate sovereignty exception to the Double Jeopardy Clause of the Fifth Amendment. *Id.* at 1978–79.
[112] *See id.* at 1979.
[113] *See id.* at 1980.
[114] *See id.*

decisis.[115] He agreed with Justice Alito that the historical record of the separate sovereignty doctrine did not justify overhauling the settled exception.[116] However, Justice Thomas asserted the Court's reliance on *stare decisis* did not comport with Article III because it justified the supremacy of clearly erroneous decisions over the literal text of the Constitution and federal statutory law.[117] Justice Thomas's concern involved the movement toward federal common law, under the guise of *stare decisis*, and away from the three bodies of federal positive law: "the Constitution; federal statutes, rules, and regulations; and treaties."[118] He asserted that interpreting the law as a judicial duty requires "adherence to the original meaning of the text," and not a blind adherence to demonstrably erroneous precedent.[119]

E. Justice Ginsburg's Dissenting Opinion

Justice Ginsburg filed a dissenting opinion. Her overarching concern was that the majority permitted Gamble's liberty to be depleted based on a "metaphysical subtlety" known as the separate sovereigns doctrine.[120] Justice Ginsburg asserted that the focus on English common law to ascertain whether foreign judgments would bar successive state or federal prosecutions was misguided.[121] Instead, the focus should have been on the basic tenants of the construction of the federal system itself: those of a "compound republic."[122]

Justice Ginsburg maintained that the precedent relied upon by the majority to uphold the existence of the separate sovereigns doctrine was derived from outdated dicta.[123] Furthermore, she stressed that *stare decisis* should not command when a case "concern[s] procedural rules that

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[115] *Id.* at 1980–81 (Thomas, J., concurring).
[116] *Id.* at 1980 (Thomas, J., concurring).
[117] *Id.* at 1981 (Thomas, J., concurring) (noting, there will always be a "tempt[ation] for judges to confuse [their] own preferences with the requirements of the law" (citing Obergefell v. Hodges, 576 U.S. 644, 687 (2015) (Roberts, C.J., dissenting))).
[118] *See id.* at 1980–84 (Thomas, J., concurring).
[119] *Id.* at 1989 (Thomas, J., concurring). Justice Thomas still concluded Gamble failed to establish that the separate sovereignty doctrine was incorrect or demonstrably erroneous.
[120] *Id.* at 1989 (Ginsburg, J., dissenting).
[121] *Id.* at 1990 (Ginsburg, J., dissenting).
[122] *Id.* at 1990–91 (Ginsburg, J., dissenting). A compound republic, as Justice Ginsburg posits, connotes the delegation of authority between the federal government and the States was intended to serve as "double security [for] the rights of the people"—the true sovereigns. *See id.* at 1991 (citing THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 22, at 152 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).
[123] *Gamble*, 139 S. Ct. at 1991 (Ginsburg, J., dissenting). Justice Ginsburg specifically noted early American courts disfavored successive prosecutions, even where calling upon "separate" Federal and State sovereigns. *See id.* at 1992 (citing Houston v. Moore, 18 U.S. 1, 15 (1820)).

implicate fundamental constitutional protections."[124] Specifically, she pointed to several limiting principles suggesting the "unjust" purposes of successive prosecutions are well recognized in the legal community.[125]

F. Justice Gorsuch's Dissenting Opinion

Justice Gorsuch filed a dissenting opinion expressing concerns about the Court's willingness to readily endorse a massive exception to the prohibition against double jeopardy.[126] He posited that the Court endorsed a system where "if all the might of one 'sovereign' cannot succeed against the presumptively free individual, another may insist on the chance to try again."[127] Justice Gorsuch traced his rationale for the complete abrogation of the separate sovereigns doctrine to the historical practices of ancient times, including the Greeks, Romans, Old Testament, and early days of common law.[128] Furthermore, he argued that the government proffered no evidence to suggest the framers intended "same offence" to have a "lawyerly sovereign-specific meaning."[129]

To illustrate his historical analysis, Justice Gorsuch relied heavily on court-martial proceedings within the military justice context.[130] This

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[124] *Id.* at 1993 (Ginsburg, J., dissenting) (quoting Alleyne v. United States, 570 U.S. 99, 116 n.5 (2013)).

[125] *Id.* at 1992, 1995 (Ginsburg, J., dissenting). Justice Ginsburg pointed to the DOJ's use of its *Petite* policy to reduce the number of offenses it tries that are "based on substantially the same act(s) or transaction(s)" as conduct previously tried in state courts, limiting federal prosecution to cases that left a "substantial federal interest . . . demonstrably unvindicated." *Id.* at 1995 (quoting DEP'T OF JUSTICE, JUSTICE MANUAL § 9-2.031(A) (rev. July 2009)). Additionally, Justice Ginsburg drew on the fact that over half of the States prohibit successive prosecution for offenses previously resolved in either state or federal courts. *Id.* (Ginsburg, J., dissenting).

[126] *Id.* at 1996 (Gorsuch, J., dissenting).

[127] *Id.*

[128] *Id.* Justice Gorsuch points to these three historical periods as key sources in the development of American government and law. First, Justice Gorsuch notes that the law in ancient Athens established that "man could not be tried twice for the same offense." *Id.* (citing ROBERT J. BONNER, LAWYERS AND LITIGANTS IN ANCIENT ATHENS 195 (1927)). Next, the Old Testament teachings also supported this bar to the practice of double jeopardy. *Id.* (citing ZACHARY NUGENT BROOKE & CHRISTOPHER N. L. BROOKE, THE ENGLISH CHURCH AND THE PAPACY 204–05 n.1 (1931)). Last, early common law stated that to "'punish a man twice over for one offence' would be deeply unjust." *Id.* (quoting 1 FREDRICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 448 (2d ed. 1898)).

[129] *Id.* at 1998 (Gorsuch, J., dissenting). In particular, Justice Gorsuch points to the fact that, in 1786, a congressional committee promoted federal authority over import duties so as to prevent "thirteen separate authorities" from "ordain[ing] various penalties for the same offence." *Id.* (quoting 30 Journals of the Continental Congress: 1774–1789, at 440 (J. Fitzpatrick ed. 1934)).

[130] *Id.* at 1998, 2003–04. First, Justice Gorsuch points to a Continental Congress resolution from 1778, which declared no person can be tried in state court "for the same offense, for

illustration added fodder to his argument that, upon adoption of the Fifth Amendment in 1791, a multiplicity of common law authorities supported the convention that "a prosecution in *any* court, so long as the court had jurisdiction over the offense, was enough to bar future re-prosecution in another court."[131] Justice Gorsuch took issue with the Court's reliance on *stare decisis*, while it wholly ignored the Constitution "as originally adopted and understood," to prohibit successive federal and state prosecutions.[132] He argued that the early nineteenth century cases precipitating the separate sovereigns doctrine were decided by narrow margins.[133] Ultimately, Justice Gorsuch concluded there is no doubt that "the benefits the framers saw in prohibiting double prosecutions remain real, and maybe more vital than ever, today."[134]

IV. ANALYSIS

Gamble reaffirmed a misguided line of modern precedent that indiscriminately followed *stare decisis* rationales. Such blind adherence solidified a major loss for the individual rights of everyday Americans and, more specifically, the rights of American service members. As the appellate defense divisions of the various service branches argued in their amicus brief, "the separate-sovereigns exception not only allows another bite at the apple after a state trial: it slices the apple into 'bite sized' pieces for the government," by allowing military prosecutors to effectively alter the final verdict of a state court jury.[135] Early proponents of the separate sovereigns doctrine likely could not have anticipated such a scenario. This construction allows the orders of legally unqualified commanders to abrogate a service

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which he had previous thereto been tried by a Court Martial," and vice versa. *Id.* at 1998 (quoting 10 Journals of the Continental Congress: 1774–1789, at 72 (J. Fitzpatrick ed. 1934)). Justice Gorsuch also refers to an early, foundational case, *Houston v. Moore*, to establish that where there is concurrent jurisdiction between courts "the sentence of either Court, either of conviction or acquittal, might be [later] pleaded in bar of the prosecution before the other." *Id.* at 2004 (quoting Houston v. Moore, 18 U.S. 1, 31 (1820)).

[131] *Id.* at 2000 (emphasis in original).

[132] *See id.* at 2005.

[133] *See id.* at 2007. Justice Gorsuch stressed that *Bartkus v. Illinois* and *Abbate v. United States* were decided by 5-to-4 and 6-to-3 margins, respectively. *See* 359 U.S. 121 (1959); 359 U.S. 187 (1959). He then argued this precedent was eroded by subsequent decisions of the Court. *Gamble*, 139 S. Ct. at 2007 (Gorsuch, J., dissenting) (citing Benton v. Maryland, 395 U.S. 784, 793 (1969)).

[134] *Id.* at 2009. Where governments may utilize multiple prosecutions "it is 'the poor and the weak,' and the unpopular and controversial, who suffer first." *Id.* (quoting *Bartkus*, 359 U.S. at 163 (Black, J., dissenting)).

[135] Brief of the U.S. Navy-Marine Corps Appellate Defense Division et al. as Amici Curia Supporting Petitioner at 2, Gamble v. United States, 139 S. Ct. 1960 (2019) (No. 17-646) [hereinafter Brief of the U.S. Navy-Marine Corps].

member's liberty.[136] Where a commander seeks their own preferred charges as a second avenue towards so-called justice, *Gamble* now affirms that he or she may effectively circumvent the prior state or federal jury determination.[137] This affirmation is particularly concerning because deference to the jury's factfinding role is a bedrock principle of the American legal system.[138] There is no legitimate proposition upon which the separate sovereigns doctrine, permitting successive prosecutions through a court-martial, should be tolerated. The overlap between state and military systems are minimal and, to some degree, anachronistic.[139] As such, this development has dangerous implications for service members who find themselves charged with crimes in state or federal courts.

This part will first examine the prudential development of the military court-martial system, its double jeopardy understanding, and its interaction with the civilian judicial system. Next, this part will analyze the pragmatic dangers of successive prosecutions in military courts, resulting from the structural dissimilarities inherent in the military justice scheme. Furthermore, I argue that by allowing the separate sovereigns doctrine to apply in court-martial proceedings, service members face a compounded loss of rights that is detrimental to broader notions of justice and liberty. Finally, this part analyzes the negative impact this doctrine has on individual service members through the posture of *Greening*—a recent Navy court-martial proceeding that doubled the accused's sentence through the weaponization of the double jeopardy exception to the detriment of the sailor's liberty and security.[140]

A. Understanding the Framers' Intent

As noted above, the isolation of the military justice system was intentional. The founders believed the governance of the military required radically different standards than those of civil society.[141] "[T]his concern

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[136] *See* Jaafari, *supra* note 2 (explaining that the military commanders in charge of court-martial proceedings often have little or no legal background or training and lack ethical oversight akin to a state or military bar).

[137] Of particular concern is the fact that many military judges have asserted that the armed forces have a protected interest in trying those cases where a state court has handed down a sentence that it considers improper or overly lenient. They also claim that victims' families are vindicated through successive court-martial proceedings because they "ensur[e] justice is served." *Id.*

[138] Harold P. Weinberger, Norman C. Simon, and Samantha V. Ettari, Kramer Levin Naftalis & Frankel LLP, *Civil Jury Trials (Federal)*, WESTLAW PRACTICAL L. (2019), File. No. w-020-5711.

[139] *See* Brief of the U.S. Navy-Marine Corps, *supra* note 135, at 4.

[140] *See generally* No. 201700040, 2018 WL 1547779 (N-M. Ct. Crim. App. Mar. 30, 2018).

[141] I am analyzing framer's intent not because they were great expositors of individuals' rights and liberties at the time they drafted the Constitution, but to provide a comprehensive

and its attendant preferences continues to the present day."[142] Original understandings of common law court-martial jurisdiction were intended to be incredibly narrow and did not permit jurisdiction over offenses against civilians without some military nexus—which invariably prevented instances of double jeopardy.[143] It was not until 1863, nearly a century after the enactment of the Articles of War, that Congress permitted court-martial proceedings against "soldiers, in wartime, for civil crimes."[144] At that time, it was universally understood there was no utility in trying a service member for a civil crime where a competent state or federal court had jurisdiction to do so.[145]

1. English Common Law & the Constitutional Convention

The United States brand of military justice was structured to parallel many of the practices and principles ingrained in English common law. In particular, the writings of Blackstone served as a source of inspiration as to the structural understanding of military court-martial proceedings.[146] Blackstone's commentaries stated that "[t]he necessity of order and discipline in an army is the only thing which can give it countenance."[147] He expounded that:

> This discretionary power of the court martial is indeed to be guided by the directions of the crown; which, with regard to military offences, has almost an absolute legislative power. "His majesty," says the act, "may form articles of war, and constitute courts martial, with power to try any crime by such articles, and inflict penalties by sentence or judgment of the same." A vast and most important trust! an unlimited power to create crimes, and annex to them any punishments, not extending to life or limb! These are indeed forbidden to be inflicted, except for crimes declared to be so punishable by this act; which crimes we have just enumerated, and among which we may

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understanding of the original interplay between the separate military justice complex and double jeopardy conceptions. There is little doubt this doctrine has developed and evolved along with modern society, which I seek to address in later sections of this article.

[142] *See* LURIE, *supra* note 13, at 4.

[143] *See* Brief of the U.S. Navy-Marine Corps, *supra* note 135, at 29.

[144] *See id.* at 30 (quoting Reid v. Covert, 354 U.S. 1, 23 n.42 (1957)) (emphasis omitted).

[145] *See id.*

[146] *See* Margulies, *supra* note 58, at 332.

[147] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS *413 (1753), http://files.libertyfund.org/files/2140/Blackstone_1387-01_EBk_v6.0.pdf [https://perma.cc/A2HK-8NTT].

> observe that any disobedience to lawful commands is one.[148]

Quite aptly, Blackstone noted his concerns related to the broad expansion of the military courts' power to try a comprehensive range of cases.[149] It is this skepticism that informed the framers in fashioning a similar system in the emerging nation.[150]

The English system recognized the importance of housing the armed forces under Parliament—the functional equivalent of Congress—and the value in allowing that body to determine what could be tried by court-martial.[151] In replicating this structure, the United States Congress housed the power to regulate the armed forces under Clause Fourteen.[152] Though the framers were less concerned with the individual rights and liberties of American service members,[153] it is unlikely they contemplated service members being subject to double jeopardy without concern.

Early discussions surrounding the origin of the Fifth Amendment's language led to a debate as to whether to include certain phrasing to clarify the meaning of "same offense."[154] Congressmember George Partridge, Jr.[155] proposed the inclusion of the phrase "by any law of the United States," though this language was omitted from the final text and did not indicate the general mindset of the congressional populace at the time of its conception.[156]

> Furthermore, notes from the Continental Congress recognized that: [N]o person shall be tried in any Court of Judicature for the same offence, for which he had previous thereto been tried by a Court Martial; or be arrested or called to trial by a Court Martial for any offense not expressly made

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[148] *Id.* at *415–16.
[149] *Id.* at *417.
[150] Suja A. Thomas, *Blackstone's Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States*, 55 WM. & MARY L. REV. 1195, 1219 (Mar. 2014) ("The text is consistent with English commentary at the time of the adoption of the Bill of Rights; Blackstone argued against greater jurisdiction for the military courts and emphasized that they should be used only at times of war for order and discipline in the army.").
[151] Loving v. United States, 517 U.S. 748, 766 (1996).
[152] *Id.* at 767.
[153] *See* LURIE, *supra* note 13, at 3.
[154] 1 ANNALS OF CONG. 753 (1789).
[155] Representative George Partridge, Jr. served as an officer and minuteman during the Revolutionary War in addition to holding his position as a delegate in the House of Representatives for the state of Massachusetts. *The First Federal Congress: Representative George Partridge*, GEO. WASH. UNIV., https://www2.gwu.edu/~ffcp/exhibit/p1/members/reps/partridge.html [https://perma.cc/2HET-YALJ] (last visited Nov. 22, 2019),
[156] 1 ANNALS OF CONG. 753 (1789).

> cognizable before them, or for which the offender may be under arrest, indictment or imprisonment by a civil authority.[157]

There can be no more explicit recognition that, though early conceptions of the military justice system did not advocate for the full swath of protected liberties for service members, protections against double jeopardy were of paramount importance from the start. Through discovery and development, these protected liberties became more widely recognized. Now, any abdication of these protections is an affront to the military justice system's purpose as a whole.

2. Differentiating Military Courts as Article I Courts

The military justice system, in its general capacity, is granted the ability to exercise jurisdiction over a broad array of criminal cases, as permitted by Article I of the Constitution.[158] Article I, Section Eight, Clause Fourteen of the Constitution, which grants plenary powers to Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces," permits trying a service member through court-martial proceedings solely based on the accused's status as a military member.[159]

Examinations into the administration of court-martial proceedings indicate, at common law, these proceedings were not intended to exercise judicial power in the same manner as civilian courts because they are inherently creatures of the military.[160] As Colonel Frederick Wiener argued, military justice must be malleable to accommodate the liberty and due process interests afforded to civilian defendants while simultaneously allowing for the capacity to "respond to the needs of military command and control."[161] Thus, while governed by a different article (congressional control through Article I), the protections afforded to civilian defendants should not be depleted in the military context.

B. Successive Prosecutions in Military Courts

Despite the practice of discrete separation between civilian and military proceedings, recent developments have integrated the systems to permit the unjust expansion of successive prosecutions and "rob[] the old

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[157] 10 Journals of the Continental Congress: 1774–1789, at 72 (J. Fitzpatrick ed. 1934)).
[158] *See* ANNA C. HENNING, CONG. RESEARCH SERV., RL34697, SUPREME COURT APPELLATE JURISDICTION OVER MILITARY COURT CASES (2009).
[159] Solorio v. U.S., 483 U.S. 435, 438 (1987).
[160] James E. Pfander, *Article I Tribunals, Article III Courts, and Judicial Power of the United States*, 118 HARV. L. REV. 643, 754 (2004).
[161] *See id.* at 755 (citing Frederick Bernays Wiener, *American Military Law in the Light of the First Mutiny Act's Tricentennial*, 126 MIL. L. REV. 1, 1–5 (1989)).

rule of significan[ce]."[162] Because court-martial jurisdiction has become "*even more* expansive than the general federal criminal jurisdiction," it has provided military prosecutors unfettered authority to bring cases against military members under the cover of the UCMJ, even if a trial has already concluded in state or federal court.[163] Not only does this support a complete degradation of the protections against double jeopardy for service members, it also impermissibly expands the separate sovereigns doctrine to incorporate a jurisdiction never intended to hold the same degree of authority.

1. Use in Practice

Poor regulations characterize the management of court-martial jurisdiction over criminal acts involving the same general offenses that were previously brought in state courts.[164] This practice is a particularly vexing issue as none of the military branches keep records regarding previously tried civilian cases.[165] Because there is "no military-wide regulation restricting the ability of military convening authorities," senior-ranking officers, typically with little to no legal training, are tasked with "conven[ing] a successive court-martial."[166] As a result, the subsequent trials of service members previously tried in state or federal courts fly under the radar without significant scrutiny.

The Departments of the Army and the Air Force do not keep records of how often they conduct successive court-martial proceedings, but the Navy has consistently held approximately two per year.[167] The deficiency in the records suggests an indifference on behalf of the military branches that is quite disturbing considering the gravity of the liberty interest at stake when service members are subject to successive proceedings—court-martial or otherwise. However, those in favor of successive court-martial proceedings contend there are other limiting mechanisms to prevent rampant abuse by government prosecutors.

One purported mechanism arises in *Blockburger v. United States*,[168] where the Court developed a test (the *Blockburger* test) to be

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[162] *See* Brief of the U.S. Navy-Marine Corps, *supra* note 135, at 32 (citing Planned Parenthood v. Casey, 505 U.S. 833, 855 (1992)).
[163] *Id.* at 31–33.
[164] *Id.* at 5. *See also* Jaafari, *supra* note 2.
[165] *See* Jaafari, *supra* note 2 ("It's unclear how often the military tries service members on charges already adjudicated in civilian courts.").
[166] *See* Brief of the U.S. Navy-Marine Corps, *supra* note 135, at 5 (citing 10 U.S.C. § 82 (1985)).
[167] *See id.* at 6–7.
[168] 284 U.S. 299 (1932).

applied where two similar statutes govern the same conduct.[169] The *Blockburger* test is a pseudo-limiting mechanism applying in all contexts where there may be successive prosecutions.[170] It requires that, where the transaction results from two statutory provisions, they must each require proof of a separate and distinct element.[171] Where a single act violates multiple statutes, and each requires additional facts, the accused is not exempt from prosecution or punishment under both statutes.[172]

The intention of the *Blockburger* test was to prevent prosecutors from continuously trying a defendant by charging lesser included offenses until they finally secured a conviction.[173] However, the separate sovereigns doctrine, coupled with the good order and discipline provision, has had the opposite effect in the military context.[174] Because so many UCMJ crimes mandate the crime also be prejudicial to good order and discipline or bring disrepute upon the armed forces, it is easy to meet the requirements of the *Blockburger* test.[175]

An article within the UCMJ proscribes the ability to try an accused a second time for the same offense, but the statute is internally facing.[176] Despite this structure, safeguards to protect against the abuse of successive trials in a military context are severely limited. The Department of Defense (DOD) does not have a procedure akin to the *Petite* Policy issued by the Department of Justice (DOJ) to limit when use of successive prosecution is appropriate.[177] In contrast, the DOJ explicitly calls for the sparing use of successive prosecutions as a general rule in civilian courts.[178] The DOJ *Petite* policy specifically states:

> In order to insure the most efficient use of law enforcement resources, whenever a matter involves overlapping federal and state jurisdiction, federal prosecutors should, as soon

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[169] *Id.* at 304. However, scholars have noted that the *Blockburger* test does not necessarily stand for the principle of "sameness" that has often been attributed to it by various courts. *See* Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 943 YALE FAC. SCHOLARSHIP SERIES 1807, 1807 n.3 (1997).

[170] *See* Poulin, *supra* note 28, at 1213.

[171] *Blockburger*, 284 U.S. at 304.

[172] *Id.*

[173] *See* Maj. Daniel J. Everett, *Double, Double Toil and Trouble: An Invitation for Regaining Double Jeopardy Symmetry in Courts-Martial*, ARMY L. 6, 13 (2011).

[174] *Id.*

[175] *See e.g.*, Droddy, *supra* note 35, at 95.

[176] "Internally facing" refers to the idea that the prohibition against successive prosecutions, as outlined in the UCMJ, means that there may not be two court-martial proceedings for the same offense, referred to as Former Jeopardy. 10 U.S.C. § 844, art. 44 (2019).

[177] *See* Brief of the U.S. Navy-Marine Corps, *supra* note 135, at 15–16.

[178] ADAM HARRIS KURLAND, SUCCESSIVE CRIMINAL PROSECUTIONS: THE DUAL SOVEREIGNTY EXCEPTION TO DOUBLE JEOPARDY IN STATE AND FEDERAL COURTS 3–4 (2001).

> as possible, consult with their state counterparts to determine the most appropriate single forum in which to proceed to satisfy the substantial federal and state interests involved, and, if possible, to resolve all criminal liability for the acts in question.[179]

The policy effectively and substantially curtails the number of successive cases brought between traditional federal and state courts. However, because there is no parallel provision recognized by the DOD, no authority governs a military prosecutor's discretion to bring or bar successive court-martial proceedings. A system devoid of such oversight creates a perfect situation for abuse by those who wish to use military tribunals to take a second bite at the apple.

2. Article 134 & Assimilation

Another mechanism providing a practical loophole to the "same offense" bar is Article 134 of the UCMJ—otherwise known as the "general article." Article 134 functions as a catch-all provision to try crimes not otherwise articulated.[180] Pragmatically, it provides another avenue to distinguish common federal or state crimes from those separately triable by government prosecutors during court-martial proceedings.

The purpose behind Article 134 is to capture "all disorders and neglects to the prejudice of good order and discipline in the armed forces" and to encompass all conduct that could bring discredit upon the armed forces.[181] This conception harkens back to the idea that an offense tried by military tribunals should have some military-applicable component tied to it.[182] Following the recent revision to the UCMJ in 2018, an even greater array of crimes may fall within the ambit of those "garden-variety crimes" that are apt to have duplicative state court trials.[183] This revision is particularly dangerous in light of the "heightened degree of state and military cooperation" of late.[184]

The Federal Assimilative Crimes Act (FACA) is a facet of Article 134, permitting the military prosecution of a state crime if it could be

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[179] DEP'T OF JUSTICE, JUSTICE MANUAL § 9-2.031 (2020), https://www.justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals [https://perma.cc/L6QJ-UNMK].
[180] 10 U.S.C. § 934, art. 134 (2019).
[181] *Id.*
[182] *See e.g.*, LURIE, *supra* note 13, at 6.
[183] *See* Brief of the U.S. Navy-Marine Corps, *supra* note 135, at 32.
[184] "Military criminal investigators typically work very closely with state investigators when crimes involve both jurisdictions." *See id.* at 33 (quoting Maj. Charles L. Prichard, Jr., *The Pit and the Pendulum: Why the Military Must Change its Policy Regarding Successive State-Military Prosecutions*, 414 ARMY LAW. 1, 16 (2007)).

charged through the FACA.[185] This Act sidesteps the *Blockburger* issue by incorporating the "prejudice of good order and discipline" and the "bring[ing] discredit upon the armed forces" elements to satisfy conviction under Article 134.[186]

Because the military and state often have concurrent jurisdiction over land where a base is settled, a person who commits an offense on that land may open him or herself up to vulnerabilities of prosecution, both from the state court and military court-martial proceedings. In other words, a person who commits an offense on that land may open him or herself up to vulnerabilities of dual prosecutions if the crime is subject to assimilation under the FACA. The only difference—though of utmost importance under *Blockburger*—between the two trials would be the incorporation of the "good order and discipline" and the "to bring discredit upon the armed forces" provisions of the general article.[187] Any suggestion that this satisfies the *Blockburger* test and does not implicate a double jeopardy violation requires an act of mental gymnastics. This language effectively provides a workaround to allow military tribunals to bring a broader range of charges in court-martial proceedings without offending the *Blockburger* test or the Fifth Amendment.

C. Compounding Effect of Loss of Rights

Not only is there a sense of unease in the ability to try an individual twice for the same general offense in a military court-martial, but these trials also have a compounding effect that may lead to a greater loss of individual rights. Due in large part to early conceptions regarding the military justice system's sole purpose of maintaining discipline within the ranks, as opposed to adjudicating civil crimes, certain general rights and protections are conspicuously absent from military trials.[188] This section outlines a few of the key safeguards forming the cornerstone of the traditional civilian trial that are absent in the military context. The section will argue that this provides fertile ground for successive prosecution to deplete the bundle of rights that are generally afforded to criminal defendants. By stripping these safeguards, defendants are left with limited protective rights when hauled before a military tribunal.

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[185] *See* HENNING, *supra* note 158. *See also* 18 U.S.C. § 13 (2020).
[186] *See* 18 U.S.C. § 13 (2020).
[187] Under the FACA, state law is applicable to conduct occurring on federal land. *See id.* However, through the inclusion of the "good order and discipline" and "to bring discredit upon the armed forces" elements of Article 134, a state law could be construed as a separate, federal offense that could be separately tried. *See* 10 U.S.C. 934 (1950).
[188] *See, e.g.*, LURIE, *supra* note 13, at 6.

1. Lack of Impartiality

Generally, adjudicators are presumed to be impartial and apolitical to ensure their decision is both fair and unbiased.[189] However, because court-martial proceedings fall squarely outside the strictures imposed on Article III adjudicators, there is no guarantee of impartiality in the routine dispensation of justice.

Where a person is tried in a successive trial for the same offense, it is dangerous to haul him or her before an adjudicator who has no mandate to remain impartial like an Article III judge.[190] The punitive consequences are akin to those of the prior prosecution in state court; therefore, there is no decreased risk to offset the eroded protections. Compounding matters, the military judiciary is dependent on the executive and Congress; therefore, those who adjudicate these matters cannot be considered impartial decision-makers.[191]

Military judges are not siloed from politics and partiality in the same way civilian court judges are; they are still subject to promotion and command influence.[192] With such incentives looming over their heads, military judges may be tempted to overlook procedural protections for defendants in an effort to please superiors and convening authorities.[193] It is entirely conceivable these superiors may desire to bring a successive prosecution and direct a verdict in contravention of what justice would require.[194] This danger increases tenfold where a defendant was acquitted in state court, yet both Congress and military command believe justice has not been served. In such cases, Congress and command may determine that the accused need to be retried in a different arena to vindicate their preconceived perceptions of justice.

2. Jury of Peers Versus Ranking Members

In the military, a jury of your peers representative of the community does not hold the same meaning as it does in a civilian court. In a court-martial proceeding, the jury (otherwise known as a "panel") is comprised of senior ranking officers.[195] The convening authority is not required to

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[189] *See, e.g.*, Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493, 498 (2014).
[190] *See* Brief of the U.S. Navy-Marine Corps, *supra* note 135, at 11–12.
[191] *See Military Justice and Article III*, *supra* note 71, at 1918–19.
[192] *See id.* at 1920–21.
[193] *See id.*
[194] *See id.*
[195] *See* Jaafari, *supra* note 2.

"detail"[196] a representative panel by demographics or rank but are, instead, governed by the strictures of 10 U.S.C. § 825.[197] This distinction fosters a strong, hierarchical power disparity that can act to the detriment of the service member being tried.[198]

Alternatively, traditional state and federal defendants are ensured a fundamental constitutional "selection of a petit jury from a representative cross section of the community."[199] Without this protection, arbitrary power could be used to conspire against and disserve marginalized and disadvantaged defendants by depriving them of liberty and subjecting them to unfair successive prosecutions.[200]

3. Lack of Unanimity

Finally, there is no requirement in court-martial proceedings that the panel returns a unanimous verdict, regardless of the offense charged.[201] This unsettling diminution of jury protections gives rise to serious concerns as to the justice of such convictions.[202]

For example, the separate sovereigns doctrine permitted the retrial of Private Seth Lemasters after he was acquitted in a Virginia state court.[203] The subsequent conviction resulted in a ten-year sentence, in no small part because the panel was not required to return a unanimous verdict to achieve a conviction.[204] Essentially, the military is afforded a preview of the strengths and weaknesses of a case as it proceeded in state court before bringing effectively the same case in a court-martial proceeding, one where the bar for conviction is substantially lower. In what alternate universe could this have been the intention in crafting these separate adjudicatory systems?

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[196] The term "detail" typically means to form or convene a temporary, ad hoc group of service members for a particular mission. Therefore, a group detailed to a court-martial panel is tasked with the mission of dispensing justice. *See Glossary*, OFFICE OF MILITARY COMM'N, https://www.mc.mil/LEGALRESOURCES/Glossary.aspx [https://perma.cc/P4TB-WRQK].

[197] 10 U.S.C. § 825 (2018). The principal strictures require that a defendant who is a commissioned officer be tried by a panel of commissioned officers. *Id.* Enlisted defendants, for their part, may not be tried by members of their own unit or by a panel with fewer than one-third enlisted members, of which none may be junior in rank to the defendant. *Id.*

[198] *See* Brief of the U.S. Navy-Marine Corps, *supra* note 135, at 7–8.

[199] *See id.* at 11 (quoting Taylor v. Louisiana, 419 U.S. 522, 528 (1975)).

[200] *See id.*; Taylor v. Louisiana, 419 U.S. 522, 698 (1975).

[201] *See* Brief of the U.S. Navy-Marine Corps, *supra* note 135, at 8–9.

[202] *See* Vladeck, *supra* note 14, at 936.

[203] Brief of the U.S. Navy-Marine Corps, *supra* note 135, at 11–12 (citing United States v. Lemasters, No. 20111143, 2013 WL 6913001, at *1–2 (A. Ct. Crim. App. Dec. 31, 2013)).

[204] *Id.* at 13.

D. United States v. Greening

The poignant example of Austin Greening throws the dangers of court-martial proceedings into sharp relief. Austin Greening, a former sailor for the United States Naval forces, was loading and unloading firearms in his apartment in the presence of his friend and fellow sailor, Gunner's Mate Third Class (GM3) K.K.[205] While GM3 K.K. was attempting to hand Greening one of the loaded pistols, Greening accidentally allowed the pistol to discharge, and a round subsequently struck GM3 K.K. just below his left eye, killing him.[206] Greening was charged with murder in a Virginia state court in 2013.[207]

During his initial civilian proceeding in August 2013, Greening was indicted for second-degree murder and use of a firearm in the commission of a felony.[208] He was initially convicted of both crimes but was later retried upon discovery that the Commonwealth's medical examiner disclosed erroneous information to the court, bringing into question the veracity of the original conviction.[209] Thereafter, Greening entered into a plea agreement where he plead guilty to involuntary manslaughter, accepting a sentence of three years of confinement with two years, six months suspended.[210] Ultimately, Greening served seven weeks in jail before being released on September 9, 2015.[211] The very next day, Greening was taken into pretrial confinement by naval authorities, and court-martial charges were proffered two weeks later.[212]

Throughout his civilian trial, Greening's command continued to send him Administrative Marks, informing him that he would be "voluntarily" extended beyond his scheduled service due to his prospective court-martial proceedings.[213] Upon release from civilian confinement, naval commanders proffered charges against Greening for murder under the UCMJ.[214]

Greening was then tried by a military judge, by general court-martial, who convicted him of involuntary manslaughter and obstruction of justice in violation of Articles 119 and 134 of the UCMJ.[215] He was sentenced

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[205] *See* United States v. Greening, No. 201700040, 2018 WL 1547779, at *1 (N-M. Ct. Crim. App. Mar. 30, 2018). *See also* Jaafari, *supra* note 2.
[206] *See Greening*, 2018 WL 1547779, at *1.
[207] *See* Jaafari, *supra* note 2.
[208] *Greening*, 2018 WL 1547779, at *1 (citing VA. CODE ANN. §§ 18.2-32, 18.2-53.1 (2018)).
[209] *Id.*
[210] *Id.*
[211] *See id.*; Jaafari, *supra* note 2.
[212] *Greening*, 2018 WL 1547779, at *1 n.6 (2018).
[213] *Id.* at *2.
[214] *See* Jaafari, *supra* note 2.
[215] *Greening*, 2018 WL 1547779, at *1.

to forty-two months of confinement, subject to reduced pay, and a dishonorable discharge.[216]

On appeal, Greening proffered two arguments: (1) the government lacked personal jurisdiction over him due to untimely action in releasing him from active duty and (2) the Navy violated his Fifth Amendment due process rights by failing to provide notice that he was being held involuntarily on active duty.[217] Ultimately, the Navy-Marine Corps Court of Criminal Appeals affirmed the court-martial findings and sentence.[218]

Not only does this result add to the litany of unjust precedent permitting the stripping of service members' rights, but it also sanctions their unconstitutional, successive prosecutions.[219] Attorneys from various service branches filed appeals against the government during the review of this case to advocate for the principle that "those who serve[] our country receive the proper double jeopardy protections of the Constitution," which they note is the "basic charter of rights to which they took an oath to defend with their lives."[220] How can service members risk their lives to defend a Constitution that takes no strides to protect their own?

V. IMPLEMENTATION OF LIMITING PRINCIPLES

In light of the compounding effect on the loss of rights that service members subjected to successive prosecutions face, this part seeks to offer a handful of limiting principles to reduce and eliminate the use of military tribunals as a workaround to better-postured prosecutions. Even though *Gamble* permits the application of the separate sovereigns doctrine to the Double Jeopardy Clause, these limitations can help ensure military members do not find themselves helpless in the face of an unjust and historically improvident decision.

First, I argue for the implementation of a military-specific *Petite* Policy to govern the appropriate use of successive prosecutions and to provide much-needed DOD oversight. A *Petite* Policy would establish guidelines as to which cases the DOD could reasonably permit a successive prosecution predicated on substantially the same act as the first.[221] Second, I argue for enhanced restrictions on the use of the general article in bringing

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[216] *Id.*
[217] *Id.* at *3–4.
[218] *Id.* at *5.
[219] *See* Jaafari, *supra* note 2.
[220] *Id.* As Greg T. Rinckey—former Army judge advocate and founding partner of Tully Rinckey firm—aptly stated, "It smells bad . . . It smells like double jeopardy." *Id.*
[221] Presently, DOJ prosecutors look to the *Petite* Policy to guide their decision as to whether to bring a federal case against a defendant for substantially the same act prosecuted in state court. Though there is no statutory bar precluding federal prosecutors from calling for a successive prosecution, the DOJ places a self-imposed restraint on bringing such cases unless a "substantial federal interest" needs vindication. *See* DEP'T OF JUSTICE, *supra* note 179.

successive prosecutions. Finally, I implore the military justice system to seek alternatives to this practice and increase its standards to prevent unfettered abuse to the detriment of military justice, military discipline, and the American legal system as a whole.

A. Formation of a Department of Defense "Petite" Policy

This section provides an insight into the benefits of adopting a military-specific *Petite* Policy that could dictate under what conditions, if ever, it would be appropriate to permit a successive prosecution through court-martial proceedings. This *Petite* Policy would mirror the DOJ's policy, which requires a careful examination of the utility in trying an individual again, in a different forum, for effectively the same offense.[222] Not only would this practice require the DOD to apply greater scrutiny to its generally permissive view of supplemental military jurisdiction subsequent to a state court proceeding, but it would also provide clear guidelines to ensure just outcomes are achieved in the greatest number of cases.

1. DOD Oversight of Successive Prosecutions

The first step in reconstructing the military justice system requires implementing a strategy like the DOJ's *Petite* Policy. This policy would prescribe administrative limitations on what cases, and in what context, the separate branches could choose to pursue successive prosecution.

If the policy seeks to mirror the DOJ policy, it would need to prevent the initiation or continuation of court-martial proceedings where the act in question was "substantially the same act or transaction" as the act already adjudicated in state or federal court, unless the prior proceeding left a "substantial [military-specific] interest [] unvindicated."[223] As with the DOJ version, the DOD would be required to pursue a calculated comparison of the factual scenarios, bringing the offense under the domain of each respective jurisdiction. This would ensure any decision to move forward on a previously tried case would be grounded on careful, case-by-case considerations, an analysis that accounts for the fundamental utility and fairness of multiple prosecutions.

2. Proposed Requirements

I propose the factors established in the DOJ policy be incorporated into routine practice for military tribunals. Specifically, three prerequisites must be satisfied. First, the matter must involve a substantial military

[222] *See id.*

[223] *See* KURLAND, *supra* note 178, at 5 (citing DEP'T OF JUSTICE, JUSTICE MANUAL § 9-2.031(A) (2018)).

interest.[224] Second, the prior prosecution must have left that interest demonstrably unvindicated.[225] Third, the government must believe the defendant's conduct constitutes a military-specific offense that is likely to result in a conviction based on admissible evidence.[226]

Ultimately, such requirements should have a demonstrable impact on the present figures associated with the prevalence of successive prosecutions.[227] Moreover, a military-specific *Petite* Policy will likely decrease the number of *proposed* successive prosecutions as well.[228] This degree of oversight, and the clarity gained from adhering to a written policy, could further bolster the rights of military service members and help ensure they are fully protected from double jeopardy considering the *Gamble* decision.

B. Restriction on Use of Article 134 Charges

By using the separate sovereigns doctrine framework, the military code has found a means by which to incorporate a catchall article that may also implement state violations into the charging scheme. Since the Supreme Court decided *Parker v. Levy*,[229] it has placed limits on the reach of Article 134, which requires all charges include actual conduct detrimental to "good order and discipline," though the scope of this provision is still in doubt.[230] This doubt also manifests in the capacity to abuse successive prosecutions and threaten double jeopardy interests. This section seeks to limit the use of such an article to strategically minimize service member protections against successive prosecution.

1. The Guise of Good Order and Discipline

Practitioners have noted a marked diminution of the good order and discipline rationale, which has transformed itself into the quintessential "we don't like something but don't want to explain why" element.[231] No standardized definition exists for the term, which has permitted its

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[224] *See* DEP'T OF JUSTICE, *supra* note 179.
[225] *See id.*
[226] *See id.*
[227] *See* HENNING, *supra* note 158, at 1–2 n.2.
[228] The DOJ's *Petite* policy requires federal prosecutors to analyze the claim based on three substantive prerequisites, and it encourages the use of a single forum, thereby inherently reducing the number of proposed successive prosecutions. *See* DEP'T OF JUSTICE, *supra* note 179. If the DOD chose to implement a similar policy, then the likely outcome would be a reduction in both actual and proposed successive prosecutions.
[229] 417 U.S. 733 (1974).
[230] Colonel Jeremy S. Weber, USAF, *Whatever Happened to Military Good Order and Discipline?*, 66 CLEV. ST. L. REV. 123, 136 (2017).
[231] *Id.* at 165.

widespread abuse by commanders.[232] Such abuses have led modern Congressional leaders like Senator Kirsten Gillibrand to advocate for reforms that remove these commanders from decision-making processes that allow them to tout "good order and discipline" as a justification for their decisions.[233] Specifically, Gillibrand stated to the *Washington Post*:

> The Defense Department tells us that if 3 percent of the most senior commanders don't have the sole authority to decide whether a person accused of rape should be prosecuted, we will lose good order and discipline in our military. That same argument was used against integrating the services; against allowing women to serve; against repealing don't ask, don't tell; and against allowing women in combat. It wasn't true then, and it isn't true now.[234]

Attempts at reform have proven fruitless in recent decades. But, as Gillibrand impliedly supported, there is no evidence that permitting such offenses to be heard in civilian courts alone has negatively impacted the military's ability to preserve "good order and discipline."[235]

2. Prohibition on Bringing Successive Article 134 Claims

Rather than permit the continued expansion of the use of this article, the system must be amenable to the Pentagon's proposed reforms to the scope of its use.[236] Specifically, there must be an overall prohibition on the use of Article 134 in bringing successive prosecutions for crimes already tried in state court so as to not offend the double jeopardy protections that service members necessarily must retain.

If a blanket prohibition were imposed, this would require government prosecutors to designate the offense in a clear, offense-specific article of the UCMJ and MCM. This would ensure the use of a statutorily demonstrable standard that the military branches are required to publish for members to recognize and understand. Superimposing a federal or state offense into the catch-all, Article 134, not only facially suggests that there is weak justification in bringing a successive prosecution but also adds a military element to an otherwise wholly ordinary offense. This practice undermines the legitimacy of the military justice system and can be thwarted

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[232] One example concerning the abuse of this general article included the court-martial of an Army physician for refusing to conduct dermatology training for Special Forces members and for making anti-war statements to enlisted members. Thus, the use of the article runs the gamut. *See id.* at 133 (citing Parker v. Levy, 417 U.S. 733 (1974)).

[233] *Id.* at 167–68 (referring to military members resistance in accepting women's eligibility to serve in combat).

[234] *Id.* at 169 (quoting Kirsten Gillibrand, *Justice for Military Victims of Sexual Assault*, WASH. POST, May 27, 2016, at A17).

[235] *See* Vladeck, *supra* note 14, at 968–69.

[236] *See* Weber, *supra* note 230, at 165.

early on through a military-specific *Petite* Policy—particularly, where the government is seeking to bring a charge under Article 134. This policy will assuredly reduce the number of successive prosecutions and simultaneously preserve service members' double jeopardy protections.

C. Increased Standards for Successive Convictions

While not perfect, the civilian system for limiting the number and types of successive prosecutions is a model the military justice system must look to in driving back its overuse of such successive prosecutions.[237] First, the reforms may be balanced against the current use of the civilian *Petite* Policy, limiting the time and capacity in which successive prosecutions before distinct sovereigns may be brought.[238]

There must also be a diametric shift away from the overexpansion of military court-martial jurisdiction to combat this dangerous practice. One possible solution would be to return to the system originally conceived by the framers,[239] providing special solicitude to these tribunals to try military-specific offenses—not the full gamut of civilian crimes.

Take the case of *Greening*, for example. If the DOD had adopted a military-specific *Petite* Policy, DOD officers would have been tasked with first identifying a substantial military interest that had been left unvindicated in the state court proceeding. In this case, the interest espoused by Naval prosecutors appeared to be colored by the victim's family's dissatisfaction with the length of the state court sentence.[240] As a result, it is highly unlikely that this rationale would pass muster as a legitimate "substantial military interest." If for some reason DOD officers did find such an interest, officers would have been left to determine what interest was left demonstrably unvindicated. While there may have been an argument for the forthright application of justice due to the divulgence of erroneous information that led to a retrial, the retrial that was conducted in state court would appear to have directly vindicated this interest. Thus, the second rationale for the application would have also fallen short. Finally, DOD officers would then have had to fit the act within the framework of a military offense; a simple task under the facts in *Greening*, given that the UCMJ has a specific article outlining the elements of murder as well as involuntary manslaughter.[241] Consequently, the third prerequisite would have been easily met—even where the first two fell short. Hence, a military-specific *Petite* Policy would likely have entirely prevented the successive prosecution in Greening's case.

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[237] *See* Brief of the U.S. Navy-Marine Corps, *supra* note 135, at 14–16.
[238] *See* DEP'T OF JUSTICE, *supra* note 179.
[239] *See* Hirschhorn, *supra* note 55, at 210–13.
[240] *See* Vergakis, *supra* note 3.
[241] *See* 10 U.S.C. §§ 918–919 (2018).

Furthermore, there is no question that neither murder nor involuntary manslaughter are military-specific offenses.[242] Competent state courts may try them without requiring the military to step on a state court's toes to right a self-declared wrong. Were a limit that pared down the use of military courts for nonmilitary-related offenses to be imposed, Greening would never have been hauled before the military judge after already serving his state-imposed sentence.

While the military justice system is certainly an important and necessary facet of the armed forces, using it to circumvent outcomes in other jurisdictions is a complete usurpation of justice. Substantially more just outcomes result where civilian courts and military courts remain sufficiently separate and successive prosecutions are altogether abandoned.

VI. CONCLUSION

The Supreme Court's decision in *Gamble*—upholding the separate sovereigns doctrine of the Double Jeopardy Clause of the Fifth Amendment on *stare decisis* grounds—may have maintained the modern jurisprudential status quo, but it further entrenched a system that continually undermines the liberty and protections of military service members.[243] While the Court's attempt to play it safe may have little practical impact on traditional civilian prosecutions, the same cannot be said for military justice institutions that do not have the same type of limiting safeguards. The Court's refusal to give credence to the practical rationales behind the separation of the military justice system and the benefits of maintaining some degree of isolation to prevent abuse and disruption diminishes the authority and legitimacy of the court-martial process in its entirety. The system is fundamentally flawed if it permits young men and women to die in a fight to protect a set of Constitutional liberties that they themselves are deliberately and specifically denied.

[242] *See, e.g.*, 18 U.S.C. § 1112(a) (2020); ARIZ. REV. STAT. § 13-1103(a) (2020); COLO. REV. STAT. § 18-3-103 (2020); GA. CODE § 16-5-3 (2020); 720 ILL. COMP. STAT. 5/9-3(a) (2020); VA. CODE ANN. § 18.2-36.1 (2020).

[243] *See* Gamble v. United States, 139 S. Ct. 1960, 1979–80 (2019).