No. 20-7622

IN THE
Supreme Court of the United States

MERLE DENEZPI,
Petitioner,
v.
UNITED STATES,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF OF *AMICI CURIAE* FEDERAL INDIAN LAW SCHOLARS AND HISTORIANS IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are professors and scholars who teach and research federal Indian law and its history. They have an interest in the cohesive and correct development of this Court's Indian law jurisprudence and the accurate recitation of the history of relations between Native American tribes and the United States. *Amici* therefore file this brief to aid the Court in understanding the history of the Courts of Indian Offenses as tribal instrumentalities.

SUMMARY OF THE ARGUMENT

"To determine whether two prosecuting authorities are different sovereigns for double jeopardy purposes, this Court asks a narrow, historically focused question…. [W]hether the prosecutorial powers of the two jurisdictions have independent origins." *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 62 (2016). History and law provide a clear answer to this question: the C.F.R. Courts derive their prosecutorial power from the tribes they serve.

The C.F.R. Courts originated in the late-nineteenth-century Courts of Indian Offenses. Federal officials hoped to leverage these courts to transform Native culture and extinguish traditional practices. But in practice, these courts largely served as extensions of

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[1] The parties have consented to the filing of this *amicus curiae* brief. No counsel for either party authored this brief in whole or in part, and no person or entity other than the *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* file this brief as individuals and not on behalf of the institutions with which they are affiliated.

tribal communities, with Native judges—often elected by tribal members—enforcing tribal law with little regard to the federal regulations. During the Indian New Deal, federal officials cemented this de facto tribal control in new federal regulations. Like similar transformations in Indian schools, police, and other late-nineteenth-century institutions, these changes shifted the courts from implements of assimilation into manifestations of self-determination. In fact, many present-day independent tribal courts established under tribal constitutions, including the tribal court in *United States v. Wheeler*, 435 U.S. 313 (1978), trace their origins to the Courts of Indian Offenses. Today, C.F.R. Courts—renamed to shed their colonial nomenclature—remain functionally tribal courts. Their principal difference from other tribal courts is that they receive direct federal financing and logistical assistance.

The Courts of Indian Offenses exemplify the broader history of federal Indian policy. Especially in the nineteenth century, the federal government routinely sought to shape *tribal* institutions, sometimes heavy-handedly, to pursue federal aims, including assimilation. The relevant inquiry, however, is not "the extent of control [exercised by] one prosecuting authority … over the other" but rather the "ultimate source" of the "power to prosecute." *Sanchez Valle*, 579 U.S. at 67-68. Here, the historical record is clear. Many federal officials who established these courts recognized and intended that the courts they created, despite federal involvement, would exercise tribal prosecutorial authority. This was the point: at the time of the courts' creation, Congress *foreclosed* federal criminal jurisdiction over the categories of crimes prosecuted in

the Courts of Indian Offenses—a prohibition the Supreme Court recognized in *Crow Dog*. When Congress subsequently enacted the Major Crimes Act, it recognized that the Courts of Indian Offenses, because they relied on tribal prosecutorial authority, were an inadequate substitute for federal criminal jurisdiction.

A legal cloud nonetheless remained over the Courts of Indian Offenses for much of the late nineteenth century because of concerns over separation of powers: the Office of Indian Affairs doubted whether it could support the creation of courts—even tribal courts of this kind—absent congressional authorization. As a result, it sought to avoid litigation involving the courts, with the outcome that only a single federal district court ever ruled on their legality. That decision did little to clarify the *source* of the courts' authority. Rather, it upheld the Office of Indian Affairs' power to help establish the courts based on an amorphous, atextual theory of broad administrative power over uncivilized peoples.

Not until the Indian New Deal did the largely ad hoc Courts of Indian Offenses receive careful legal attention as part of the larger rationalization of federal Indian policy. Multiple federal officials, including Felix Cohen, unambiguously concluded that the "Courts of Indian Offenses derive their authority from the tribe, rather than Washington," 1 *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974*, at 476 (1979); they specifically *rejected* the double jeopardy theory that Petitioner advances here. Subsequently, Congress and the courts, including this Court, have consistently described the Courts of Indian

Offenses as tribal courts and treated them indistinguishably from other tribal courts.

By contrast, Petitioner's interpretation ignores all this history. By conflating the "historical wellsprings" of prosecutorial authority with the original, abandoned "purpose of the courts," Petitioner seeks to freeze federal Indian policy at its assimilationist apex—at the expense of the sovereignty of those Tribes, like the Ute Mountain Ute, who have chosen the C.F.R. Courts as the mechanism for exercising their authority today.

Moreover, in purporting to resolve one constitutional question, Petitioner's interpretation of the C.F.R. Courts as Article I administrative courts would create many more. Such courts would violate this Court's long-standing precedent limiting when Congress can create non-Article III tribunals, and would pose thorny constitutional problems around federal appointments and oversight. Instead of settling matters, such a holding would invite endless further litigation.

Finally, the principle that tribes and the federal government are separate sovereigns, affirmed in both *Wheeler* and *United States v. Lara*, 541 U.S. 193 (2004), rests on firm historical footing. Founding-era precedents clearly demonstrate that the founding generation expressly contemplated the possibility of concurrent tribal and federal criminal jurisdiction without any constitutional difficulty.

ARGUMENT

I. THE HISTORY OF THE COURTS OF INDIAN OFFENSES REFLECTS TRIBAL ORIGINS DESPITE ASSIMILATIONIST GOALS.

Jurisdiction, especially criminal jurisdiction, has long been a central issue in relations between the United States and Native nations—what the federal government has consistently called "Indian affairs."

Native peoples have governed themselves under their own laws since time immemorial. *See generally* Justin B. Richland & Sarah Deer, *Introduction to Tribal Legal Studies* (3d ed. 2016). After the creation of the United States, the new federal government recognized the authority of Native nations over self-governance. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). But from the Founding onward, the United States also began to assert shared jurisdiction within Indian country. In 1790, the First Congress passed the Trade and Intercourse Act, the first in a long line of statutes that extended federal jurisdiction over non-Indians who committed crimes against Indians within Indian country. Act of July 22, 1790, ch. 33, § 5, 1 Stat. 137, 138.

In 1817, Congress further extended concurrent federal jurisdiction over crimes committed by *Indians* against non-Indians. Act of Mar. 3, 1817, ch. 92, 3 Stat. 383. Yet the federal government doubted whether it could extend jurisdiction over Indian-on-Indian crime. The 1817 statute specifically exempted offenses "committed by one Indian against another" from federal criminal jurisdiction, leaving such crimes within

exclusive tribal jurisdiction. *Id.* § 2. Congress later affirmed concurrent tribal jurisdiction over Indian crimes against non-Indians by adding an explicit *statutory* protection against dual prosecution. Act of Mar. 27, 1854, ch. 26, § 3, 10 Stat. 269, 270 (later codified at 18 U.S.C. § 1152) (exempting from federal prosecution any Indian who "has been punished by the local law of the tribe").

In the late nineteenth century, however, federal Indian policy shifted dramatically. The expansion of the United States led to ever more aggressive federal intrusions into Native life. *Cohen's Handbook of Federal Indian Law* § 1.04 (Nell Newton ed. 2012). The federal government confined Native peoples onto reservations—lands reserved to Native nations by treaty, statute, or executive order—and it sought to transform these reservations into the equivalent of detention camps, which would force assimilation onto resistant Native peoples. *See* Maggie Blackhawk, *Federal Indian Law as Paradigm within Public Law*, 132 Harv. L. Rev. 1787, 1841 (2019). *See generally* Stephen J. Rockwell, *Indian Affairs and the Administrative State in the Nineteenth Century* (2010).

This effort involved the creation of multiple coercive institutions, including boarding schools and prisons, as well as the forced allotment of Native lands. *See generally* Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920* (1984). Each reservation was supervised by a federal Indian agent. The agent reported to the Commissioner of Indian Affairs, who ostensibly regulated the agents' behavior. In practice, the agents exercised seemingly

unbridled authority, leading to protestations that the agents were "incompetent tyrants who must be accepted and endured regardless of the wish of the governed." *Granting Indians the Right to Select Agents and Superintendents: Hearing on S. 3904 Before the S. Comm. on Indian Affairs*, 64th Cong. 7 (1916).

As part of this process of coercive assimilation, federal officials, particularly the Indian agents, became increasingly preoccupied with the problem of perceived "lawlessness" on Indian lands. They recognized, though, that while their authority was unconstrained in theory, in practice their powers were limited in a key way: Native people would not voluntarily submit to the destruction of their way of life. Accordingly, they sought to manipulate tribal institutions to increase Indians' compliance with their edicts.

By this period, many tribes had successfully created their own tribal courts and police modeled after Anglo-American systems. *See generally* Rennard Strickland, *Fire and the Spirits: Cherokee Law from Clan to Court* (1975). Seeing an opportunity, Indian agents began to experiment with creating tribal police and courts for tribes that currently lacked them, hoping that by creating *tribal* police and courts, they could increase compliance with *federal* objectives. *See, e.g.*, Office of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1875*, at 308 (1875) (advocating for the creation of an Indian police because "I am convinced that Indians, as a general rule, will submit with much better grace to authority apparently emanating among themselves, than they will to any interference or dictation from a

different race."). Thus, in 1878, the Commissioner of Indian Affairs established an Indian police force, staffed by tribal members, for tribes without existing police. William T. Hagan, *Indian Police and Judges: Experiments in Acculturation and Control* 42 (1966). Five years later, the Office of Indian Affairs created the Courts of Indian Offenses, which the Secretary of the Interior authorized by issuing governing regulations under his own authority. Dep't of the Interior, *Rules Governing the Court of Indian Offenses* (1883). Notably, the regulations exempted the so-called "Five Civilized Tribes," which had their own court systems. *Id.* at 5; *see also* Hagan, *supra*, at 109 (observing that the Office of Indian Affairs did not establish courts for tribes with "recognized tribal governments").

The regulations undoubtedly reflected federal assimilationist aims: they outlined a variety of "Indian offenses" punishable in the new courts, including polygamy, Native religious ceremonies, and other "heathenish rites and customs." Rules, *supra*, at 6-7. However, the courts were controlled by Native people: the regulations designated the three highest ranking members of the Indian police force, "when practicable," to constitute a three-judge court; otherwise, the agents were to seek out reputable members of the tribe. *Id.* at 5. Moreover, the regulations were brief and vague, leaving the judges great leeway in how they operated—a pattern largely continued in later, updated regulations issued in 1892, Hagan, *supra*, at 118-19, and in 1904,

Office of Indian Affairs, *Regulations of the Indian Office* 102-04 (1904).[2]

At their heyday in 1900, Courts of Indian Offenses existed on about two-thirds of the nation's Indian agencies. Hagan, *supra*, at 109. Yet the courts' reality rarely corresponded to the agents' assimilationist aspirations. Many Indian agents had difficulty finding judges, and so relied on tribal elections to select them. *Id.* at 114-16. The courts also rarely targeted Native cultural practices: as one agent presciently observed, "I think it will be difficult to persuade Indian judges to regard and punish as crimes acts which they and their people have from time immemorial looked upon as perfectly proper and right." Office of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1884*, at 85 (1884).

A seminal 1928 report on the state of Indian affairs, known as the Meriam Report, confirmed this prediction. The Report's authors carefully observed the Courts of Indian Offenses, noting that they "vary greatly" among the tribes. Institute for Government Research, *The Problem of Indian Administration* 769-73 (1928). Nonetheless, the report concluded, the courts were almost all informal, tribally led adjudications that differed sharply from so-called "white man's court." *Id.* The court proceedings occurred without attorneys, and almost always in Indigenous languages. *Id.*; *see also* Hagan, *supra*, at 119. Of the 1904 regulations, the report

[2] Notably, the 1904 regulations delineated the Courts of Indian Offenses separately from "Federal and Territorial Courts." *Regulations of the Indian Office*, *supra*, at 101-04.

noted, "[I]t is doubtful whether one in ten of the judges has ever read any of [the federal regulations], and certain it is that it has little practical effect in governing their deliberations." *Institute*, *supra*, at 769. Instead, the judges ruled based on tribal law and customs. *See id.* ("The decision rendered in these cases depends not upon code or precedent, but upon that subtle quality of the mind called common sense and upon an understanding of the current native ideas of property and justice."); *see also* Hagan, *supra*, at 118.

The Meriam Report, centrally focused on concerns over Indian agents' abuse and overreach of authority, also helped prompt the wholesale reformation of federal Indian policy known as the Indian New Deal. The Indian New Deal sought to restore tribal self-governance in place of paternalist federal control. Its centerpiece legislation, the Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934), embraced the creation of newly constituted tribal governments that would enact their own legislation.

This transformation extended to the Courts of Indian Offenses, which were substantially remade in new regulations issued in 1935. The key shift, in line with the broader aims of the Indian New Deal, was to formally recognize greater tribal governmental control over the courts and to leverage the courts to promote tribal autonomy rather than eliminate tribal culture. Judges would now be appointed by the commissioner of Indian affairs subject to a two-thirds vote of the tribal council, displacing any role of the agents in judicial

appointments. 25 C.F.R. § 161.3 (1938).[3] The regulations also authorized the tribal council to establish the rules for tribal court procedure, *id.* § 161.5, and officially instructed the courts to apply "any ordinances or customs of the tribe," *id.* § 161.23. The tribal council could further choose, at its sole discretion, to adopt tribal custom to govern domestic relations, including adoption. *Id.* § 161.28. As for criminal law, the regulations provided that tribes could enact their own law and order code that would displace nearly all federal regulations, except those pertaining to funding tribal judges. *Id.* § 161.1.

The subsequent history of the Courts of Indian Offenses is a microcosm of the broader history of federal Indian policy over the twentieth and twenty-first centuries. As the federal government embraced self-determination, many of the coercive assimilationist institutions of the late nineteenth century were repurposed to further these new aims of bolstering tribal culture and authority. The same boarding schools, for instance, that once sought to destroy Native culture have become a source of pride and identity for many Native communities.[4] Similar histories exist for tribal

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[3] This change better reflected the reality as to how judges were chosen, given that, as noted, many Indian agents relied on tribal elections to select judges. *Supra* 9.

[4] Some of these schools were turned over directly to the tribes to run, *e.g.*, Santa Fe Indian School Act, Pub. L. No. 106-568, 114 Stat. 2919 (2000), while others continue to operate under the auspices of the federal Bureau of Indian Education but with substantial tribal collaboration and input, *see* Testimony of Mark Cruz, Deputy Assistant Sec'y – Pol'y & Econ. Dev. Indian Affairs, *Health & Safety Risks of Indian Children at BIE (Bureau of Indian Education)*

police, prisons, and hospitals, which today operate to further tribal self-determination under a variety of formal arrangements involving tribal and federal cooperation.

The Courts of Indian Offenses—now rechristened C.F.R. Courts, to describe their new role distinct from their assimilationist history—have undergone a similar transformation. As the 1935 regulations expressly authorized, most tribes in the United States have elected to supplant the C.F.R. Courts with tribal courts established under their own tribal constitutions. By 1975, the Task Force on Indian Affairs reported, "[O]f the approximately 110 tribal courts, only about twenty are Courts of Indian Offenses." U.S. Dep't of Justice, *Report of the Task Force on Indian Matters* 53 (1975). Today, only five C.F.R. Courts remain, serving fifteen of the five hundred and seventy-four federally recognized tribes. U.S. Dep't of the Interior — Indian Affairs, https://www.bia.gov/CFRCourts (last visited Jan. 12, 2022).

Yet these courts remain vital for the tribes that have elected to maintain them. In particular, organizing and running an entire criminal and civil justice system, with often inadequate and unpredictable federal funding, can be prohibitively expensive, especially for smaller or remote tribes with constrained resources. For these tribes, the continuing viability of the C.F.R. Courts allow them to enforce tribal law under tribal control even as the federal government provides the underlying

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Boarding Schools (May 16, 2019), https://www.doi.gov/ocl/indian-boarding-schools.

administrative and financial support. *See* Amicus Br. of Ute Mountain Ute Tribe et al. at 9-11.

The C.F.R. Courts, then, have seen a complete reversal from their original purpose as envisioned by the Indian agents. Yet there is less to this transformation than meets the eye. Even at the start, tribal control thwarted assimilationists' ambitions for these courts. Today, the C.F.R. Courts remain what they have always effectively been—forms of tribal courts.

II. FEDERAL OFFICIALS HAVE LONG RECOGNIZED THAT THE COURTS OF INDIAN OFFENSES DERIVE THEIR PROSECUTORIAL POWER FROM TRIBES.

Historically, extensive federal involvement in Indian country has led to the complex entanglement of tribal and federal authority. Because the federal government long saw itself as responsible for fostering and overseeing tribal government, many tribal institutions continue to reflect a legacy of federal oversight and involvement in their establishment. For instance, many tribal constitutions and codes—unambiguously exercises of tribal authority—still contain provisions requiring approval from the Secretary of the Interior that demonstrate past federal involvement in their creation. *See, e.g.*, Const. of the Nez Perce Tribe art. IX (1983).

The history of the Courts of Indian Offenses similarly reflects extensive federal involvement in tribal affairs. The courts, after all, developed at the heyday of the nation's assimilationist Indian policy, when, as discussed, Indian agents exercised extensive control

over all aspects of reservation life—including the Indian police and the Courts of Indian Offenses.

Yet the agents' past control over aspects of these courts does not address the dispositive question here: the *source* of the prosecutorial power of the Courts of Indian Offenses. As this Court has repeatedly explained, "The degree to which an entity exercises self-governance—whether autonomously managing its own affairs or continually submitting to outside direction—plays no role in the analysis [of separate sovereignty]." *Sanchez Valle*, 579 U.S. at 67. Rather, "our test hinges on a single criterion: the 'ultimate source' of the power undergirding the respective prosecutions." *Id.* at 68 (quoting *Wheeler*, 435 U.S. at 320).

Here, the history is clear: despite the agents' assimilationist *aims*, the *source* of the authority of the Courts of Indian Offenses was tribal sovereignty. Federal officials expressed this view at the time of the courts' creation—indeed, this was then the *only* legally permissible interpretation of the courts, given then-extant statutory restrictions on federal jurisdiction. And in the subsequent century and a half, the executive, Congress, and the courts, including this Court, have all specifically affirmed this conclusion, repeatedly determining that the C.F.R. Courts are legally equivalent to other tribal courts.

A. Federal Officials and Congress Described the Courts of Indian Offenses as Exercising Tribal Authority at the Time of their Creation.

The idea that the federal government might help create *tribal* institutions intended to "undermine …

traditional tribal government," Pet. Br. at 12, might strike present-day observers unfamiliar with this history as odd. But in fact, federal efforts to use *tribal* institutions to remake Native societies is deeply rooted in the history of federal Indian policy. Indeed, when the Courts of Indian Offenses were initially created federal officials concluded that the Courts, though heavily shaped by federal agents, were in fact expressions of *tribal* authority.

Federal efforts to remake Native government began soon after ratification, when President Washington successfully urged the new federal government to embrace a policy of "civilization." Colin G. Calloway, *The Indian World of George Washington: The First President, the First Americans, and the Birth of the Nation* 451-76 (2018). This policy pressured Native nations to abandon traditional tribal laws and governance in favor of systems similar to U.S. states with elected legislatures, written laws and constitutions, and formal tribal courts. *Id.* Federal Indian agents of the era pursued this goal by helping establish and oversee Anglo-American-style courts and legislatures that the agents recognized exercised *tribal* authority. *See* Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836*, at 61 (2010) (describing how the influential agent Benjamin Hawkins "understood that he exercised delegated Creek jurisdiction, not federal authority").

Federal Indian agents of the late nineteenth century regarded their role similarly: they, too, sought to use *tribal* institutions to remake Native society. This

approach proved especially important as the Office of Indian Affairs sought to punish Indian-on-Indian crimes.

As discussed above, federal law of the era specifically *excluded* federal jurisdiction over such crimes. Act of Mar. 27, 1854, ch. 26, § 3, 10 Stat. at 270. Since 1874, the Office of Indian Affairs had lobbied Congress, unsuccessfully, to repeal this provision. *See, e.g.*, S. Rep. No. 43-367, at 1-2 (1874). However, the ad hoc creation of the Indian police and Courts of Indian Offenses provided a way around this congressional limitation. As federal Indian agents and the Commissioner of Indian Affairs repeatedly observed in their reports,[5] that was because the Courts exercised *tribal* authority. *See, e.g.*, *1884 Annual Commissioner Report*, *supra*, at x ("The decision and *authority*, *coming as it does from their own people*, has the moral tendency to educate them up to the idea of law." (emphasis added)); Office of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1885*, at xxi (1885) ("[A]gents have been accustomed to punish for minor offenses, by imprisonment in the guard-house and by withholding rations; but by the present system *the Indians themselves*, through their judges, decide who are guilty of offenses under the rules, and pass judgement in accordance with the provisions thereof." (emphasis added)); Office of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1889*, at 26 (1889) ("Since 1882, what is known as a 'court of Indian

[5] These reports are the same sources that Petitioner repeatedly cites to establish the assimilationist purposes of the courts. Pet. Br. at 18-20.

offenses' has been established and maintained upon a number of Indian reservations. It has been a tentative and somewhat crude attempt to break up superstitious practices, brutalizing dances, plural marriages, and kindred evils, and to provide *an Indian tribunal* which, under the guidance of the agent, could take cognizance of crimes, misdemeanors, and disputes among Indians, and by which they could be taught to respect law and obtain some rudimentary knowledge of legal processes." (emphasis added)); *id.* at 134 ("The Court has performed good work…. I believe, as a rule, in these Indians having their differences settled by a *court of their own people*." (emphasis added)).

The Office of Indian Affairs, however, was not content with pursuing its aims through the Courts of Indian Offenses, perhaps because of the extent of tribal control. It continued to seek *federal* jurisdiction over Indian-on-Indian crimes. But its efforts confronted a major setback in 1883, when the Supreme Court invalidated a conviction in one such test case, concluding that the existing statutory exemption still barred federal jurisdiction over Indian-on-Indian offenses. *Ex parte Crow Dog*, 109 U.S. 556 (1883). Significantly, even after the Supreme Court definitively ruled that Congress had *prohibited* federal jurisdiction over solely Indian crimes, the newly created Courts of Indian Offenses continued to operate to prosecute such offenses—a practice that would have been illegal had those Courts been *federal* instrumentalities.

The Office of Indian Affairs responded to *Crow Dog* by successfully pressing for new federal legislation, the Major Crimes Act, that explicitly established federal

jurisdiction over serious Indian crimes, including solely Indian offenses. Ch. 341, § 9, 23 Stat. 362, 385 (1885). Of course, had the Courts of Indian Offenses actually been federal courts, this statute would have been redundant. Indeed, under Petitioner's theory, the Major Crimes Act would have been self-defeating, because prosecutions before the Courts of Indian Offenses would displace any and all prosecutions under the new statute.

This is not mere speculation. On the contrary, the Courts of Indian Offenses were explicitly discussed during debate over the MCA—and rejected as a solution to Indian country crime because they were *too* removed from federal prosecutorial power. Representative Cutcheon from Michigan quoted at length from a report by the Commissioner of Indian Affairs:

> If offenses of this character can not be tried in the court of the United States, there is no tribunal in which the crime of murder can be punished. Minor offenses may be punished through the agency of the "court of Indian offenses," but it will hardly do to leave the punishment of the crime of murder to a tribunal that exists *only by the consent of the Indians of the reservation.*

16 Cong. Rec. 935 (1885) (emphasis added) (statement of Rep. Cutcheon) (quoting 1884 Annual Report) (quoted in *Keeble v. United States*, 412 U.S. 205, 211 (1973)); *see also id.* at 934 ("If, however, an Indian commits a crime against an Indian on an Indian reservation there is now no law to punish the offense except, as I have said, *the law of the tribe*, which is just no law at all." (emphasis

added)). The Office of Indian Affairs, meanwhile, pointed out that the new law's passage "might also lead to an Indian's *being tried in two courts on the same charge*," Hagan, *supra*, at 146 (emphasis added)—an outcome that, even at that time, made sense only if the Courts of Indian Offenses exercised tribal authority.

As this evidence amply demonstrates, the view that the Courts of Indian Offenses exercised tribal authority, far from being "troublingly revisionist," Pet. Br. at 21, was actually the dominant view of much of the Office of Indian Affairs, as well as of Congress, at the moment of the courts' creation. That made perfect sense, since one of the main reasons the Office of Indian Affairs had embraced this ad hoc solution was because federal law had foreclosed *federal* jurisdiction over Indian crimes. The Courts of Indian Offenses, by contrast, allowed the federal government to pursue its aims using *tribal* authority and institutions.

B. Confusion and Separation-of-Powers Concerns Nonetheless Dogged the Courts of Indian Offenses.

The widespread agreement that the Courts of Indian Offenses exercised tribal prosecutorial power did not resolve the confusion and uncertainty that surrounded them in the late nineteenth century. In the words of their principal historian, summarizing this debate, they rested on a "shaky legal foundation," Hagan, *supra*, at 110, and were "operating in a constitutional twilight zone," *id.* at 174.

The cause for this unease was not the source of the courts' authority, but rather concerns over the separation of powers. At the time, administrative law

was still quite nascent, and the boundaries of administrative authority ill-defined. *See* Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 Yale L.J. 1362 (2010). Even if the courts were exercising tribal authority, the Office of Indian Affairs felt uneasy relying only on vague congressional authorization to legitimate the agency's role in their creation. Hagan, *supra*, at 110.[6] For this reason, the Office deliberately sought to evade litigation involving the courts to "avoid … unfavorable court decisions." *Id.* at 174.

It succeeded: ultimately, only a single district court opinion of the era addressed the courts' legality. The court upheld the Courts of Indian Offenses by reasoning that, contrary to the name, they were not courts at all:

> These "courts of Indian offenses" are not the constitutional courts provided for in section 1, art. 3, Const., which congress only has the power to "ordain and establish," but mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to

[6] Petitioner maintains that Congress resolved any doubts about authorization when it appropriated $5,000 for judges' salaries in 1888. Pet. Br. 20; *see* Indian Department Appropriations Act of 1888, ch. 503, 25 Stat. 217, 233; Hagan, *supra*, at 112-13. In fact, skepticism continued unabated. In 1890, for instance, the Commissioner of Indian Affairs expressed the view that the courts remained at best "quasi-legal," having been maintained for eight years "without money, legislative authority, or precedent." Hagan, *supra*, at 110.

> whom it sustains the relation of guardian. In fact, the reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.

United States v. Clapox, 35 F. 575, 577 (D. Or. 1888).

The *Clapox* decision did little beyond upholding the legality of the Courts of Indian offenses; it was notably vague on the *source* of their prosecutorial authority. To the unclear extent it concluded that the Courts were *federal* instrumentalities, it reached that outcome based on a late nineteenth-century interpretation that authorized unchecked federal administrative power over Indians rooted in their purportedly uncivilized status. This untethered, free-floating executive power over "Indians" based on claims of societal superiority, contested even at the time, has since rightfully come to be seen as repugnant and at odds with a federal government of separated powers. *See* Blackhawk, *supra*, at 1824-25.[7] It is now settled law that the federal

[7] Federal administrative actions during this era included the seizure of Native land without compensation and the coercive suppression of Native dances and other religious practices. *See* Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 Stan. L. Rev. 773, 794 (1997) ("The agents assumed that the government had the authority to suppress specific religious practices of its Native American wards, because their practices were not Christian and were obstacles to civilization."). Subsequent caselaw has confirmed the illegality of

government cannot arbitrarily subject civilians to federal executive courts simply because it deems them "uncivilized." *Cf. Reid v. Covert*, 354 U.S. 1 (1957). *Clapox*'s antiquated conception of federal executive power—one of the only sources even implying that the Courts of Indian Offenses were *federal* instrumentalities—appropriately prevented the "federal" view of the Courts of Indian Offenses from achieving widespread adoption, even in the nineteenth century, and it merits no weight or serious consideration today.

C. Since the Indian New Deal, the Courts of Indian Offenses Have Been Unambiguously and Repeatedly Recognized as Tribal Courts.

The Indian New Deal substantially altered federal Indian policy, including with respect to the Courts of Indian Offences. As described above, the new regulations that the Office of Indian Affairs promulgated remade the courts, explicitly eliminating the authority of the Indian agents and placing the courts more firmly under the control of the tribal government.

The Indian New Deal also led the first serious effort to systemize and rationalize two centuries of statutes, administrative actions, and court decisions governing what became known, for the first time, as federal Indian law. In the 1930s, the Solicitor of the Department of the Interior Nathan Margold crafted a series of influential

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such actions. *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980); *Church of the Lukumi Babalu Aye, Inc. v. Hileah*, 508 U.S. 520 (1993); *Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir. 2014).

memorandum opinions that sought to systematize a century's worth of caselaw and precedent on the source and nature of tribal sovereignty. Margold's memos, in turn, became the basis for Felix Cohen's canonical *Handbook of Federal Indian Law*, first published in 1941.[8]

Both sets of sources grappled with the legal basis for the Courts of Indian Offenses. In a seminal 1934 memo, *Powers of Indian Tribes*, Margold recounted contentions over agency authority to create the Courts, which "administer[ed] a rough-and-ready sort of justice." *Opinions of the Solicitor*, *supra*, at 476. Citing *Clapox*, Margold observed that a "more satisfactory defense of [the courts'] legality" is that the "Courts of Indian Offenses 'derive their authority from the tribe, rather than from Washington.'" *Id.* (quoting W.G. Rice, *The Position of the American Indian in the Law of the United States*, 16 J. Comp. Legis. & Int'l L. 78, 93-94 (1934)).

Margold was even more definitive in a 1935 memo that specifically addressed the courts' legality. There, he concluded:

> [T]he courts of Indian offenses do not rely for their legality solely upon the authority of the Secretary to create them. They are manifestations of the inherent power of the tribes to govern their own members.

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[8] Justice Felix Frankfurter later described the treatise as "the definitive work on" federal Indian law. Felix Frankfurter, *Of Laws and Men*, at 296 (Philip Elman ed. 1956).

> It has been the persistent program of Congress to leave crimes involving only Indians within the control of the tribes.

Id. at 536.

Felix Cohen reached the same conclusion in the first edition of his *Handbook*. Cohen was skeptical of the legal theory that undergirded the *Clapox* decision: "[T]he claim of administrative officers to plenary power to regulate Indian conduct," he observed, "has been rejected in every decided case where such power was not invoked simply to implement the administration of some more specific statutory or treaty provision." Felix S. Cohen, *Handbook of Federal Indian Law* 103 (1941). Instead, Cohen quoted verbatim Margold's conclusion that the Courts of Indian Offenses exercised tribal, not federal, authority. *Id.* at 149.

Cohen also specifically questioned the double jeopardy theory advanced by Petitioner here. His *Handbook* quoted at length a 1939 memorandum from the Solicitor of the Department of the Interior entitled "dual sovereignty." *Id.* at 359 (quoting *Opinions of the Solicitor*, *supra*, at 891). The memo concluded that a dual prosecution before an Article III federal court and a tribal court, *including the Courts of Indian Offenses*, would be constitutionally permissible. *Id.* at 362. The memo observed, "it has often been recognized that the jurisdiction of the Federal courts and of the Indian courts does not coincide, since they derive their authority from different powers and function for different purposes." *Id.* (quoting *Opinions of the Solicitor*, *supra*, at 897). As a result, the memorandum concluded, "an individual who … offends against the

laws of several jurisdictions may be constitutionally punished by the agencies of each jurisdiction." *Id.* (quoting *Opinions of the Solicitor*, *supra*, at 898).[9]

During the Indian New Deal, then, careful examination reiterated officials' earlier initial conclusions: Courts of Indian Offenses, while partly administered by the federal government, were nonetheless equivalent to other *tribal* courts, and similarly derived their authority from tribal sources.

Since then, a nearly unbroken line of legislation and court decisions, including from this Court, has affirmed that conclusion. For instance, in 1968 Congress enacted the seminal Indian Civil Rights Act, which extended many of the protections of the Bill of Rights to tribal court proceedings and other tribal exercises of "powers of self-government." Pub. L. No. 90-284, 82 Stat. 73, 77

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[9] Ignoring Cohen and sidelining Margold, Petitioner argues that their views deserve no weight because they only belatedly addressed the legality of these courts and were rejected by "scholars." Pet. Br. at 23 (citing Vine Deloria, Jr. & Clifford M. Lytle, *American Indians, American Justice* 115 (1983)). In fact, as the previous discussion recounts, *supra* 14-19, the view that the courts of Indian Offenses exercised tribal authority existed since their creation. Moreover, Deloria and Lytle's three-page discussion of the courts shows only that the courts were widely acknowledged as assimilationist institutions when they were created—a point that goes to the courts' initial *purpose*, but not the *source* of their authority. *See* Deloria & Lytle, *supra*, at 113-16; *cf.* Pet. Br. 23 (maintaining that the C.F.R. Courts do not function as tribal courts because they "were not originally designed to serve any such *purpose*" (emphasis added)). Finally, respectfully, Petitioner's characterization of the entire field based on a single citation is unfounded, as this brief by leading Indian law scholars demonstrates.

(1968). The statute further defined that term: "'powers of self-government' means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, *including courts of Indian offenses*." 25 U.S.C § 1301 (emphasis added). It also stated, "'Indian court' means any Indian tribal court or court of Indian offense." *Id.* The statute further required that the Secretary of the Interior issue a new model code to ensure "any individual being tried for an offense by a *court of Indian offenses* shall have the same rights, privileges, and immunities under the United States Constitution as would be guaranteed any citizen of the United States being tried *in a Federal court* for any similar offense." 25 U.S.C. § 1311 (emphasis added).

Courts investigating the question in this era repeatedly reached the same conclusion. *See, e.g.*, *Begay v. Miller*, 222 P.2d 624, 628 (Ariz. 1950) ("It is our view that the Court of Indian Offenses, when sitting as a court in divorce matters, is not a federal court under Art. 3, Sec. 1, of the Federal Constitution, but is simply a tribal court exercising jurisdiction retained by the Indians over their own domestic relations problems."); *Iron Crow v. Ogalala Sioux Tribe of Pine Ridge Rsrv., S.D.*, 231 F.2d 89, 96 (8th Cir. 1956) (noting, in a case challenging C.F.R. Court jurisdiction, that "the Indian Tribal Courts have inherent jurisdiction over all matters not taken over by the federal government, but … federal legislative action and rules promulgated thereunder support the authority of the Tribal Courts").

This Court, too, has described the courts of Indian offenses as tribal courts. In *Williams v. Lee*, this Court addressed the scope of the jurisdiction of a C.F.R. Court administered by the Navajo Nation. 358 U.S. 217 (1959). The Court repeatedly described the "Navajo Courts of Indian Offenses" as part of the "Navajo tribal government and *its* courts." *Id.* at 222 (emphasis added). It ultimately concluded that the exercise of state jurisdiction would "undermine the authority of the *tribal courts* over Reservation affairs and hence would infringe on the right of the Indians *to govern themselves.*" *Id.* at 223 (emphasis added).[10]

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[10] Petitioner cites *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965), as rejecting this conclusion. But that was a habeas decision, not a double jeopardy decision, and the standards in the two contexts differ. *See Munaf v. Geren*, 553 U.S. 674, 686 (2008) (determining that habeas relief is available under 28 U.S.C. § 2241 even when a petitioner's custody "could be viewed as 'under … color of'" an authority other than the United States so long as a "United States official charged with his detention has 'the power to produce' him" (quoting *Wales v. Whitney*, 114 U.S. 564, 574 (1885))). Indeed, reflecting this distinction, the *Colliflower* court, too, repeatedly described the Court of Indian Offenses in question as a "tribal court," 342 F.2d at 373, 375-76, and it rested its decision not on the principle that C.F.R. Courts exercise federal authority, but on the conclusion that the "Indian courts functioning in the Fort Belknap community" were "in part, at least, arms of the federal government," *id.* at 378-79.

In any event, in *Wheeler*, this Court specifically rejected *Colliflower* and repudiated its underlying theory that federal involvement made tribal courts federal instrumentalities. *Wheeler*, 435 U.S. at 319 n.10; *see also Davis v. Muellar*, 643 F.2d 521, 532

This consistent line of decisions reflects current reality and understanding. As discussed, the Courts of Indian Offenses never served agents' assimilationist aims very well, precisely because of what the agents (mistakenly) believed would aid their cause: the fact that the Courts were, at bottom, tribal institutions. Today, tribes like Ute Mountain control almost all aspects of the C.F.R. Courts—including the sources of law, the choice of court officials, and the decision to prosecute—with almost no federal involvement whatsoever. *See* Amicus Br. of Ute Mountain Ute Tribe et al. at 9-11, 21-23. This transformation in the nature of the C.F.R. Courts—which parallels that of many Indian country institutions—reflects the complex history of federal Indian policy.

But by conflating the "historical wellsprings" of authority with the original, abandoned "purpose of the courts," Pet. Br. at 12, 14, Petitioner seeks to sweep away all this history and freeze federal Indian policy at its assimilationist apex. Ironically, this interpretation condescendingly accuses the Ute Mountain Ute Tribe of choosing to perpetuate an irredeemably imperialist institution. This assumption that outsiders know better than the Ute Mountain Ute Tribe what will best advance Ute Mountain's own autonomy replicates the same flawed, paternalist reasoning that Petitioner claims to critique.

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n.13 (8th Cir. 1981) (McMillian, C.J., dissenting) (describing *Colliflower* as overruled in *Wheeler*).

III. INTERPRETING THE C.F.R. COURTS AS EXERCISING TRIBAL AUTHORITY IS THE *ONLY* CONSTITUTIONALLY VALID INTERPRETATION OF THE COURTS.

Petitioner repeatedly argues that C.F.R. Courts exercise federal sovereignty because they are Article I administrative courts authorized by Congress. Pet. Br. at 8, 14, 17. But adopting this interpretation would not clarify or simplify the courts' status. On the contrary, it would create a host of constitutional difficulties that would put one hundred fifty years of practice at odds with this Court's clear and long-standing precedent.

Since at least 1855, it has been black-letter law that Congress has limited constitutional authority to establish non-Article III federal tribunals. *See Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855) (holding that Congress could not "withdraw from judicial cognizance [of Article III federal courts] any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty"). Congress may create such courts in a few circumstances. It may authorize administrative tribunals to hear matters involving "public rights." *Id*; *see also Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365 (2018). It may subject members of the armed services to courts martial. *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857). And it may create legislative courts to govern the U.S. territories. *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828).

None of these exceptions applies here. A court exercising general criminal and civil jurisdiction over all Indians, 25 C.F.R. §§ 11.114-.118, is not merely

adjudicating "public rights." *See Oil States*, 138 S. Ct. at 1372-74. Indian tribes are not U.S. territories, as this Court has expressly determined in the double jeopardy context. *Sanchez Valle*, 579 U.S. at 70. And any analogy between the Courts of Indian Offenses and courts martial, always highly dubious, is profoundly inapt today.

These restrictions on the creation of Article I tribunals are not the only constitutional limitations that Petitioner's interpretation would disregard. His view would also conclude that Congress can create Article I tribunals without appeal to or oversight by any Article III tribunals. *See* 25 C.F.R. §§ 11.200, .800 (authorizing appeal only to appellate division, which issues a "final" decision). Further, it would hold that the federal government can devolve nearly all control and appointment authority over federal Article I courts to other sovereigns.[11] *But see United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021) (emphasizing Appointments Clause limitations on Article I judges); *Lara*, 541 U.S. at 216 (Thomas, J., concurring) ("[U]ntil we are prepared to recognize absolutely independent agencies entirely outside of the Executive Branch with the power to bind the Executive Branch (for a tribal prosecution would then bar a subsequent federal prosecution), the tribes cannot be analogized to administrative agencies.").

Petitioner's proposed solution is thus no solution at all. It is, rather, an invitation into a thicket of constitutional dilemmas and conundrums. A holding

[11] Here, under a 638 self-determination contract with the BIA, "the Tribe manages almost every aspect of the court's operations." Amici Curiae Br. of Ute Mountain Ute Tribe et al. at 10.

that embraced his interpretation would require either the wholesale rewriting of constitutional doctrine governing Article I tribunals or the conclusion that for nearly a century and a half Congress and courts, including this Court, have not only permitted but endorsed an unconstitutional practice.

IV. BECAUSE C.F.R. COURTS EXERCISE TRIBAL AUTHORITY, DUAL PROSECUTION IN THE C.F.R. COURTS AND FEDERAL COURT DOES NOT VIOLATE DOUBLE JEOPARDY.

Like other tribal courts, then, the ultimate source of power for the C.F.R. Courts is tribal sovereignty. Prosecution under this authority is therefore not a federal prosecution, as *Wheeler*, 435 U.S. 313, and *Lara*, 541 U.S. 193, conclusively held.

These cases rest on a solid foundation of Founding-era precedent, which expressly contemplated dual Native-federal criminal punishments. The earliest treaties that the United States entered with Native nations expressly recognized those tribes' power to "punish … as they please" U.S. citizens who illegally settled on Native lands guaranteed by treaty. *See, e.g.*, Treaty of Hopewell, U.S. - Cherokee Nation, art. V, Nov. 28, 1785, 7 Stat. 18, 19; Treaty of New York, U.S. - Creek Nation, art. VI, Aug. 7, 1790, 7 Stat. 35, 36. Those same treaties simultaneously provided for *federal* criminal jurisdiction over those same squatters. Treaty of Hopewell, art. VII, 7 Stat. at 19; Treaty of New York, art. IX, 7 Stat. at 37. Shortly before enacting the Bill of Rights, the first Congress codified this jurisdiction into law through the Trade and Intercourse Act, which made

illegal settlement on Native land a federal crime. Act of July 22, 1790, ch. 33, § 5, 1 Stat. at 138.

Throughout the nineteenth century, Congress maintained this Founding-era understanding of concurrent tribal and federal jurisdiction. As discussed above, Congress expressly *exempted* from federal prosecution under the Indian Country Crimes Act any Indian who "has been punished by the local law of the tribe." Act of Mar. 27, 1854, ch. 26, § 3, 10 Stat. at 270. If tribes were *not* separate sovereigns for double jeopardy analysis, this provision (which remains part of federal law, 18 U.S.C. § 1152) would be a meaningless reiteration of what the Constitution already mandated. Moreover, this statutory language underscores that, if Congress had *wanted* to avoid dual tribal-federal prosecutions when it crafted the Major Crimes Act, it knew how to do so. In reality, creating separate federal authority to prosecute regardless of tribal action was one of the primary purposes of the MCA, which explicitly sought to overturn the result in *Crow Dog*.

In short, the United States from the beginning anticipated that tribes and the federal government would each retain separate power to punish criminals for violations of their own laws without implicating Double Jeopardy. Indeed, Petitioner accepts that *Wheeler* and *Lara* were correctly decided. *See* Pet. Br. 5. In turn, because the C.F.R. Courts exercise tribal authority, Petitioner's federal prosecution does not violate double jeopardy.

CONCLUSION

The Tenth Circuit's judgment should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

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