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DOUBLE-JEOPARDY/](http://opiniojuris.org/2019/08/30/the-u-s-supreme-court-on-international-double-jeopardy/)

**THE U.S. SUPREME
COURT ON
INTERNATIONAL
DOUBLE JEOPARDY**



30.08.19 | [0 Comments](#)

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The Supreme Court's recent decision in *Gamble v. United States* explicitly raised the question of double jeopardy in international cases by positing scenarios in which the United States may wish to successively prosecute after a prior prosecution in a foreign country for crimes occurring abroad. These cases exist and have seen an upward tick in recent years involving, among other things, crimes of terrorism and drug trafficking.

Gamble dealt with the so-called "dual sovereignty" doctrine, which allows multiple sovereigns to prosecute despite the Constitution's injunction against double jeopardy because each sovereign has a distinct law proscribing a

distinct offense, so the Double Jeopardy Clause's bar on multiple prosecutions for the same "offence" simply doesn't come into play.

A fascinating aspect of *Gamble's* discussion of international double jeopardy involves the Court's justification of a successive U.S. prosecution where the United States has "interests," tying this interest analysis both to Supreme Court jurisprudence on the history of dual sovereignty domestically and to international law bases of jurisdiction internationally.

As to the latter observation, it turns out that the Supreme Court's jurisprudence on dual sovereignty also justifies the existence of a separate sovereigns as relating to jurisdiction: namely, a sovereign means an entity with independent jurisdiction to make an apply law, or jurisdiction to prescribe.

If this is right, and I think it is, it means that an entity is not a separate sovereign, and cannot successively prosecute, unless it has jurisdiction. And what that means is that the entity's exercise of jurisdiction must comply with due process. It also turns out that the Constitution's test for whether a state has prescriptive jurisdiction under the Due Process Clause involves an interest analysis based on contacts to the state.

What does all of this mean for international double jeopardy? It means that where the United States has an attenuated jurisdictional link to the crime, it's jurisdictional claim looks weak and so does its status as a sovereign for purposes of dual sovereignty. I would moreover contend that where a prior prosecution is done in conjunction with U.S. authorities, its laws and sentencing match up with U.S. laws and sentencing, and the proceedings are not a sham, that may well vindicate U.S. interests disqualifying it as a sovereign for purposes of dual sovereignty.

One final point: Where the only basis for prosecuting is the enforcement of international law through the doctrine of universal jurisdiction, a successive prosecution is barred. The U.S. has no national interest based on national territory or persons and the only available law has already been "used up" (assuming the prior prosecution used the international offense definition of the crime).

I have spelled out these arguments in much more detail in a forthcoming piece here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3431288, and welcome reader's comments: colangelo@smu.edu.

