Journal of Criminal Law and Criminology

Volume 69
Issue 4 *Winter*

Article 16

Winter 1978

Fifth Amendment--Double Jeopardy and the Doctrine of Dual Sovereignty

9901-4169/78/6904-0597$02.00/0
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 69, No. 4
Printed in U.S.A.

FIFTH AMENDMENT—DOUBLE JEOPARDY AND THE DOCTRINE OF DUAL SOVEREIGNTY

United States v. Wheeler, 435 U.S. 313 (1978).
Rinaldi v. United States, 434 U.S. 22 (1977).

The Supreme Court decided two cases last term which dealt with the scope of the government's capacity to initiate or terminate successive prosecutions under the doctrine of dual sovereignty. In *United States v. Wheeler*[1] the Court held that Indian tribes were separate sovereigns for purposes of the dual sovereignty doctrine, such that successive prosecutions in tribal and federal courts were not violative of double jeopardy. And, in *Rinaldi v. United States*,[2] the Court held that failure to grant a government motion to dismiss an indictment brought in violation of the government's rule against successive prosecutions amounted to an abuse of judicial discretion. In both cases the doctrine of dual sovereignty was left undisturbed. In the face of criticism directed at the doctrine by scholars, and their doubts as to its continuing validity, the Court's invocation of the doctrine served more than to help decide the cases. It served also to assure that the doctrine's vitality is unimpaired.

I

In *United States v. Wheeler*, the Supreme Court held that the doctrine of dual sovereignty applies to successive prosecutions in tribal and federal courts, as well as in state and federal courts.[3] As formulated in *Bartkus v. Illinois*[4] and *Abbate v. United States*[5] the doctrine states that where two sovereigns, each having an interest in the same subject matter, both make a particular act a crime, it is not a violation of the fifth amendment's prohibition against double jeopardy if each sovereign prosecutes the act. No prohibition exists under such circumstances, for the act is in fact "two offenses, for each of which the defendant is justly punishable."[6]

In *Wheeler*, Anthony Robert Wheeler, a member of the Navajo tribe, was convicted in the tribal court for the Navajo Tribal Code offenses of disorderly conduct and contributing to the delinquency of a minor.[7] More than a year later he was indicted for the federal offense of statutory rape,[8] the federal indictment arising from the same conduct for which he had already been convicted by the tribal court. Wheeler moved to dismiss the indictment on the grounds that contributing to the delinquency of a minor is a lesser included offense of statutory rape,[9] and therefore a prosecution for the federal offense would put him in jeopardy for a second time.[10] The district court dismissed the indictment in an unreported decision, and the Court of Appeals for the Ninth Circuit affirmed.[11] The court of appeals, pointing out that "the [Supreme] Court has construed its 'dual sovereignty' rationale narrowly and has never applied it outside the federal court and state court context,"[12] said that the relationship of the Indian tribes to the

---

[1] 435 U.S. 313 (1978).
[2] 434 U.S. 22 (1977).
[3] Mr. Justice Stewart wrote the opinion for a unanimous Court. Mr. Justice Brennan did not take part in the consideration or decision of the case.
[4] 359 U.S. 121 (1959).
[5] 359 U.S. 187 (1959).
[6] Moore v. Illinois, 55 U.S. (14 How.) 13, 20 (1852). This notion was strongly criticized in Note, 20 U. FLA. L. REV. 355 (1968):

> This simplistic view of criminal law may operate satisfactorily in a monarchy but it is totally inapposite in a federal system.... Crime is an offense against society and not against a king or government. The government prosecutes violations of the criminal law, but that does not mean that the government is injured by the commission of the offense.... The only really acceptable view of criminal prosecution in modern times is not punishment for offenses against a sovereign, but offenses against society. (Footnotes omitted).

[7] NAVAJO TRIBAL CODE § 17-351 (1959) (disorderly conduct), and § 17-321 (1959) (contributing to the delinquency of a minor).
[8] The federal offense in question is defined in 18 U.S.C. §§ 1153 and 2032 (1970).
[9] The holding that contributing to the delinquency of a minor was a lesser included offense in statutory rape was not challenged by the government. 435 U.S. at 316, n.4.
[10] Such a holding, coupled with a finding that the tribe was not a sovereign separate from the federal government, would have blocked the second prosecution. *See, e.g.*, Brown v. Ohio, 432 U.S. 161 (1977).
[11] United States v. Wheeler, 545 F.2d 1255 (9th Cir. 1976).
[12] *Id.* at 1257 (footnote omitted).

federal government "does not fall neatly into either the 'single sovereign' or 'dual sovereign' categories."[13]

Although aware that the matter of tribal sovereignty was ambiguous, the court of appeals nevertheless found two pillars upon which to base its holding that the tribes were not a separate sovereign for double jeopardy purposes. First, the court looked to the Supreme Court's oft-quoted language from *United States v. Kagama*.[14] There, the Court had noted that "[The tribes] were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, but as a separate people with the powers of regulating their internal and social relations."[15] Second, the court observed that Congress "has complete and plenary control over the criminal jurisdiction of tribal courts."[16] Ultimately, the court decided that tribal sovereignty fell short of state sovereignty, such that separate prosecutions by tribal and federal authorities based on the same conduct were impermissible.[17]

In its reversal, the Supreme Court disagreed with the Ninth Circuit in both its evaluations of tribal sovereignty and its reliance on the fact that Congress has complete control over Indian affairs. The Court called the Indians' sovereignty a "retained sovereignty,"[18] that is, an inherent power of self-government that predated the coming of Europeans to America. The Court recognized, however, that the Indians' sovereignty was one from which certain prerogatives have been removed by treaty, by statute, and by the tribes' incorporation into the United States and attendant "acceptance of its protection."[19]

In answer to arguments that the tribes' dependence on the United States precluded their being separate sovereigns for double jeopardy purposes, the Court looked to its decision in *Worcester v. Georgia*.[20] The *Worcester* Court had declared Indians a domestic dependent nation and had noted that "the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right of self-government, by associating with a stronger and taking its protection."[21] Accepting the *Worcester* notions, the *Wheeler* Court further acknowledged Indian sovereignty by citing a Senate Report which had said that "their right of self-government ... has never been questioned."[22] The Court also opposed any suggestion that Indian sovereignty had collapsed at some point and then been partially revived. Instead, the Court characterized diminutions in Indian sovereignty as having been made bit by bit, by purposeful action of Congress—yet at no point obliterative of the Indians' ever-present "retained sovereignty." Thus, according to the Court, what measure of sovereignty that has not been taken from the Indians still belongs to them.

From this standpoint, the absence of any delegated sovereignty by Congress to the tribes by way of statute or treaty[23] is further evidence of Indians' retained sovereignty. While the Court acknowledged the existence of "implicit divestiture" of sovereignty—that which follows necessarily from the tribes' incorporation into the United States—it pointed out that "[t]he areas in which such implicit divestiture has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe."[24] Thus, finding support for Indian sovereignty in the law of nations and of the United States, and finding no implicit or explicit divestiture of that sovereignty relevant to the matter at hand, the Court found a much greater sovereignty residing in the tribes than had the lower court.

With its gaze fastened on the "primeval sovereignty"[25] of the Navajos, the *Wheeler* Court intimated that the Ninth Circuit had erred in viewing Congress' power to control completely Indian affairs as determinative of the issue of tribal sovereignty.[26] While the Court believed that Congress may divest the tribes of more of their sovereignty, the fact that Congress had not yet done so meant that the tribes still retained a measure of their sovereignty. In this respect, the Supreme Court's "past-oriented" theory of sovereignty, one that ac-

[13] *Id.*

[14] 118 U.S. 375 (1896).

[15] *Id.* at 381–82.

[16] 545 F.2d 1255, 1257 (9th Cir. 1976).

[17] After *Wheeler* was decided by the Ninth Circuit, the Court of Appeals for the Eighth Circuit expressly rejected the Ninth Circuit's holding in *Wheeler*, holding for its part that such prosecutions were not barred. United States v. Walking Crow, 560 F.2d 386 (8th Cir. 1976).

[18] 435 U.S. at 323.

[19] *Id.*

[20] 31 U.S. (6 Pet.) 515, 560–61 (1832).

[21] 435 U.S. at 326 (quoting *Worcester*, 31 U.S. (6 Pet.) at 560–61 (1832)).

[22] *Id.* at 325, n.23, (quoting S. Rep. No. 268, 41st Cong. 3d Sess., 10, (1870)).

[23] The relevant treaties and statutes can be found in the NAVAJO TRIBAL CODE (1969).

[24] 435 U.S. at 326.

[25] *Id.* at 328.

[26] *See Id.*

knowledged both the tribes' primeval sovereignty and the diminutions of it, differed markedly from that of the court of appeals, which had assessed tribal sovereignty from the standpoint of only one of a number of possible futures. And, from an analytical standpoint, the Supreme Court's view is preferable. The Court's position is more generous, reserves more attributes of sovereignty to the inferior governmental body, the tribe; and more cautiously acknowledges diminutions of sovereignty only where there is an historical event, such as a treaty or a statute, to account for such diminution.

Aside from acknowledging the constitutional principle that, as regards certain sovereigns, prosecution by one sovereign cannot be barred by the previous prosecution of another, the Court also reiterated the practical rationale mentioned in earlier cases, that barring the second prosecution might frustrate a sovereign's interest in enforcing its own laws.[27] The Court demonstrated a deep concern for tribal sovereign interests and an unwillingness to see them melt away in the powerful solvent of Congressional "plenary control." As the Court noted, the "tribal courts are important mechanisms for protecting significant tribal interests."[28] It is understandable, therefore, that the Court did not read the federal statute as pre-empting the Navajo statute.

A holding that Indian tribes were sufficiently independent as to admit of subsequent federal prosecutions of those tried in Indian courts was not reached without some trepidation on the part of the Court. In *Bartkus* itself, the Court had written that while successive prosecutions based on the same conduct are a result of the dual sovereignty of the states and the federal government, the result is one with which the Court is "in little sympathy."[29] Yet the result in *Wheeler* was inescapable unless the Court was prepared to overthrow either the retained sovereignty of the Indians or the doctrine of dual sovereignty. The Court declined to overthrow either.

While the prohibition of double jeopardy is well-settled in the Western legal tradition,[30] its precise meaning has varied from age to age, and at times it has been wholly ignored.[31] The United States Constitution forbids double jeopardy,[32] and all fifty states have a similar prohibition either in their constitutions or in their common law.[33] The prohibition of double jeopardy is meant not only to protect the accused from harassment by the sovereign, but also to ensure that judgments are final, for if a new prosecution can be easily initiated, the previous trial is thereby rendered ineffective.[34]

The problem of successive prosecutions by two sovereigns was first discussed by the Supreme Court in nineteenth century cases concerned with a closely related issue—the power of both Congress and the state legislatures to criminalize the same conduct.[35] In none of these cases had successive prosecutions actually taken place, but in all of them the problem was discussed in dicta. Among the Court members, there was general agreement that inasmuch as the state and federal governments constituted "dual sovereigns," neither a federal nor a state prosecution could bar prosecution by the other sovereign. At the same time, though, some Justices expressed regret that the federal system left open this possibility of successive prosecutions.[36]

In 1922, the problem of successive prosecutions was squarely presented to the Court in *United States v. Lanza*.[37] The defendant there filed a plea in bar of his federal prosecution for violation of the Volstead Act, stating that he had already been convicted of violating state statutes prohibiting the same conduct. Rather than attack the doctrine of

[27] The argument was first made in Fox v. Ohio, 46 U.S. (5 How.) 410 (1847), and was reiterated in *Bartkus*.

[28] 435 U.S. at 332.

[29] With respect to successive prosecutions, the Court said in *Bartkus*, 259 U.S. at 138, at the close of its opinion: "The greatest of self-restraint is necessary when the federal system yields results with which a court is in little sympathy."

[30] *See* M. FRIEDLAND, DOUBLE JEOPARDY, 1969. The prohibition is found among ancient Greek and Roman writings.

[31] *See* Sigler, *A History of Double Jeopardy*, 7 AM. J. LEG. HIST. 283, (1963).

[32] "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

[33] The five states which lack a prohibition of double jeopardy in their constitutions have it in their common law. They are Connecticut, Maryland, Massachusetts, North Carolina and Vermont.

[34] *See* Comment, 28 U. CHI. L. REV. 591, 598 (1961).

[35] Moore v. Illinois, 55 U.S. (14 How.) 13 (1852); United States v. Marigold, 50 U.S. (9 How.) 560 (1850); Fox v. Ohio, 46 U.S. (5 How.) 410 (1847); Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820). *See also* United States v. Amy, 24 F. Cas. (No. 14, 445) (C.C.D.Va.) at 811, where Justice Taney, in a circuit opinion, discussed the question.

[36] Justice McLean, for example, dissented in Moore v. Illinois, saying: "It is believed that no government, regulated by laws, punishes twice criminally the same act. And I deeply regret that our government should be an exception to a great principle of action, sanctioned by humanity and justice." 55 U.S. (14 How.) 13, 22 (McLean, J., dissenting) (1852).

[37] 260 U.S. 377 (1922).

dual sovereignty, the defendant attempted to use it to his advantage, claiming that since the eighteenth amendment clothed both "Congress and the several states" with "concurrent powers to enforce" the Act,[38] both the state law and the federal law derived their force from the same authority, such that a second prosecution should be barred. The Court, however, rejected the defendant's argument, holding that the state law derived its authority "not from this Amendment, but from the power originally belonging to the states, preserved to them by the Tenth Amendment."[39] The *Lanza* Court expressly refrained from ruling against dual sovereignty in its circumstances because the fifth amendment's double jeopardy provision was not held applicable to the states by fourteenth amendment due process. But subsequently, in *Bartkus* and *Abbate,* the Court held squarely that the federal and state governments were separate sovereigns, such that each could prosecute for all offenses against its interests, even in the face of a prior prosecution by the other.[40]

In the meantime, there developed alongside the *Lanza-Bartkus-Abbate* rulings another series of cases holding that, for purposes of double jeopardy, neither courts-martial and territorial courts,[41] nor federal and territorial courts,[42] nor municipal and state courts[43] could be considered arms of separate sovereigns so as to permit successive prosecutions. And, in the very early *Nielsen v. Oregon,*[44] the Court had stated in dictum that:

> where an act is *malum in se* prohibited and punishable by the laws of both States, the one first acquiring jurisdiction of the person may prosecute the offense, and its judgment is a finality in both States, so that one convicted or acquitted in the courts of the one cannot be prosecuted for the same offense in the courts of the other.[45]

In addition to these constitutionally mandated constraints upon a governmental entity's capacity to pursue successive prosecutions, there arose, shortly after *Bartkus* was decided, a self-imposed prosecutorial limitation on the federal government's pursuit of constitutionally permissible successive prosecutions. This limitation, known as the *Petite* policy, instructed members of the Justice Department to pursue successive prosecutions only where "the need is compelling."[46]

After *Bartkus* and *Abbate,* certain Supreme Court decisions gave rise to speculation that the Court was eroding the rule of dual sovereignty, perhaps even clearing the way for a reversal of it.[47] In *Elkins v. United States,*[48] the Court held that evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's fourth amendment immunity from unreasonable searches and seizures, was inadmissible at a federal trial, despite the fact that no federal officers had taken part in the search. Likewise, in *Mapp v. Ohio*[49] evidence illegally obtained by federal officers was held inadmissible in a state trial. And, in *Murphy v. Waterfront Commission,*[50] the Court held that a grant of immunity by one jurisdiction did not give that jurisdiction the power to compel a witness to give information that might be used to convict him of a crime in another jurisdiction.

The *Elkins, Mapp,* and *Murphy* cases presented situations where state and federal authorities had acted in concert to circumvent important constitutional protections. Two separate sovereigns, neither of which was capable by itself of circumventing the particular constitutional safeguards, had pooled their respective powers to nullify those safeguards. When the Court blocked this type of anti-constitutional marriage of sovereigns, many observers, seeing a close resemblance to those cases involving successive prosecutions based on a single

[38] U.S. CONST. amend. XVIII.

[39] 260 U.S. at 382.

[40] Justice Black dissented strongly in both cases, describing the Court's basis for its decision as "meager" and the result as "shocking." 359 U.S. at 162 (Black, J., dissenting).

[41] Grafton v. United States, 206 U.S. 333 (1907).

[42] Puerto Rico v. Shell Co. (P.R.), 302 U.S. 253 (1937).

[43] Waller v. Florida, 397 U.S. 387 (1970).

[44] 212 U.S. 315 (1909).

[45] *Id.* at 320. The words "for the same offense" are perhaps ill-chosen, for the Court has steadfastly held that an act which offends two sovereigns is two offenses. This appears to be true whether or not both can prosecute. *See* note 6 and accompanying text *supra.*

[46] The policy was announced in a Department of Justice press release on April 6, 1959, shortly after the decisions in *Bartkus* and *Abbate,* by then United States Attorney General William Rogers. It said, in part, "[a]fter a state prosecution there should be no Federal trial for the same act or acts unless the reasons are compelling." The name comes from Petite v. United States, 361 U.S. 529 (1960), where the policy was first given recognition by the Supreme Court.

[47] *See* 46 IND. L.J. 413 (1971); 1 LOY. CHI. L. J. 98 (1970); 66 NW. U.L. REV. 248 (1971); 39 U. CINN. L. REV. 799 (1970); 20 U. FLA. L. REV. 355 (1968); 11 WM. & MARY L. REV. 946 (1970).

[48] 364 U.S. 206 (1960).

[49] 367 U.S. 643 (1961).

[50] 378 U.S. 52 (1964).

act, believed that the *Bartkus* doctrine was being eroded, for that too seemed an impermissible marriage.[51] And, when the Court in *Benton v. Maryland*,[52] held that the fifth amendment's double jeopardy guarantee should apply to the states through the fourteenth amendment, this belief became more substantial. Since a major part of the Court's justification for dual sovereignty in *Lanza* and *Bartkus* had arisen from the inapplicability of double jeopardy protections to the states, the *Benton* incorporation of the provision into the fourteenth amendment was thought to have left the vitality of dual sovereignty in question.

In addition to the supposed erosion of *Bartkus* by the Court, several states had blunted the doctrine by taking it upon themselves to enact statutes barring state prosecutions where a federal one had already taken place.[53] Therefore, when the Supreme Court accepted the *Wheeler* appeal, the time seemed right for a re-examination, and perhaps a reversal, of *Bartkus*.[54]

The Supreme Court did not deal extensively with the doctrine of dual sovereignty in *Wheeler*. While the Court did explain the doctrine, its rationale and some of its history, the Court concentrated on applying the doctrine to a new situation—conviction by a tribal court—rather than on defending the doctrine or seeking new justification for it. The Court asserted the doctrine confidently, not as one under review, but as one being well-settled. Thus, the Court's decision was principled, perhaps even predictable, for it was inevitable that the two threads of Indian sovereignty and dual sovereignty should one day meet. In *Wheeler*, the Court wound them together without breaking either.

II

The doctrine of dual sovereignty is an outgrowth of the American federal system, and it has support both in theory and in practice. But it is also "unfortunate" and fails to win our complete sympathy because we sympathize with the accused, from whose standpoint two prosecutions for the same act are still two prosecutions for the same act, no matter how well justified.[55] The *Petite* policy is an outgrowth of that sympathy, a manifestation of the benevolence described by Justice Daniel over 130 years ago in *Fox v. Ohio*.[56] As Daniel had claimed in *Fox:*

> It is almost certain that, in the benignant spirit in which the institutions both of the state and the Federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless, indeed, this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor.[57]

---

[51] One court of appeals of Ohio came to the conclusion in 1970 that "the rule in *Bartkus* is so enfeebled as to lack all binding force." State v. Fletcher, 22 Ohio App. 2d 83, 259 N.E.2d 146 (1970). The Ohio Supreme Court reversed, however, with a sharp chastisement. As that Court noted:

> "Courts in this state are not expected to render decisions on any shamanesque blending of periphrasis, clairvoyance, speciosity, and anticipation as to what the United States Supreme Court will decide in *futuro* in a given factual situation.... If the United States Supreme Court specifically overrules *Bartkus* on the dual-sovereignty concept enunciated therein, then this court will follow such new ruling in our decisions. Until then we will adhere to *Bartkus*. Clearly *Benton* did not change the dual-sovereignty principle of *Bartkus*." 26 Ohio St. 2d 221, 225, 271 N.E.2d 567, 569 (1971), *cert. denied*, 404 U.S. 1024 (1972).

The federal courts, of course, did not deviate from the holding in *Bartkus*. *See* United States v. Addington, 471 F.2d 560 (10th Cir. 1973); United States v. Jackson, 470 F.2d 684 (5th Cir. 1972), *cert. denied*, 412 U.S. 951 (1973); United States v. Barone, 467 F.2d 247 (2d Cir. 1972).

Benton v. Maryland, 395 U.S. 784 (1969) gave rise to a great deal of speculation that the doctrine of dual sovereignty was coming to an end (*see* note 47, *supra*), although it is difficult to see why. The usual line of reasoning was that *Benton*, in holding that the double jeopardy prohibition of the fifth amendment was applicable to the states through the fourteenth amendment, partially overruled Palko v. Connecticut, 302 U.S. 319 (1937), and since *Palko* was one of the bases on which *Bartkus* rested, *Benton* thereby weakened *Bartkus*. But the doctrine of dual sovereignty did not in any sense rest on *Palko*. It rested on *Lanza*, decided in 1922, and the nineteenth century cases already mentioned. It should be noted in this regard that there was also law review commentary arguing that *Benton* did not weaken *Bartkus*. *See* Kimmelman, *Double Jeopardy: A Political Perspective*, 5 CUM.-SAM. L. REV. 369 (1975) and 12 DUQ. L. REV. 365 (1973).

[52] 395 U.S. 784 (1969). *But see* discussion in note 51 *supra*.

[53] *See, e.g.*, CAL. PENAL CODE § 793 (West 1970); ILL. ANN. STAT. ch. 38, § 3-4 (Smith-Hurd 1972); 18 PA. CONS. STAT. ANN. § 111 (Purdon 1973).

[54] Clayton, *Indian Jurisdiction and Related Double Jeopardy Questions*, 17 S. DAK. L. REV. 341 (1972) anticipated the situation faced by the Court in *Wheeler*, and explained the issues and opposing views thoroughly.

[55] *See* note 6 *supra* for a strong criticism of the theory.

[56] 49 U.S. (9 How.) 410 (1847).

[57] *Id.* at 435.

But the *Bartkus/Petite*-policy edifice is not flawless, and it was out of a flaw in it that the situation in *Rinaldi v. United States*[58] arose. In *Rinaldi* the petitioner was convicted in a Florida state court for conspiracy to rob a Miami hotel.[59] While the appeal from that conviction was pending, a prosecution was initiated in a federal district court for crimes arising out of the same facts.[60] The petitioner tendered a guilty plea to the federal prosecutor along with a suggestion that the prosecutor request that any federal sentence run concurrently with the state sentence. The trial attorney from the Department of Justice refused the offer and insisted on a trial. When the district judge questioned the attorney about his refusal, he answered that he had been instructed to proceed with the trial because there was grave concern that the state conviction would be overturned. The petitioner was convicted in the federal trial,[61] and the state conviction was upheld in the state appellate court.

While the federal conviction was on appeal to the Court of Appeals for the Fifth Circuit, the petitioner argued, and the government agreed, that the *Petite* policy had been violated. The court of appeals granted a motion to remand to the district court to permit the prosecution to seek a dismissal of the indictment pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure.[62] But the district court, using the discretionary power granted it by Rule 48(a), refused to dismiss the indictment,[63] basing its refusal on the government's bad timing (the motion came after the conviction), and bad faith. The district court resented what it perceived to be the government's manipulation of the judicial system, that is, the government's straddling of the *Petite*-policy fence—abiding by the policy so long as state convictions were secure, but abandoning it if they were not. The district court's refusal to dismiss the indictment was affirmed by the Fifth Circuit.[64] The majority, noting that the government had conceded at oral argument that it had violated its own policy, characterized the problem as a conflict "between the executive and judicial branches as to each of their roles in a determination to dismiss under 48(a)."[65] The dissent, however, swayed by what it deemed to be good faith (albeit late-blooming) on the part of the government, favored the motion to dismiss.[66]

The Supreme Court, by and large, agreed with the dissenters and reversed. As the Court stated, "Our examination of the record has not disclosed (and we will not presume) bad faith on the part of the Government *at the time it sought leave to dismiss the indictment* against petitioner."[67] The Court did not comment on the differences of opinion below regarding the purpose of Rule 48(a), but chose instead to shift the emphasis to the defendant and the *Petite* policy. In connection therewith, the Court pointed out both that the *Petite* policy was parallel to the fundamental constitutional guarantee against double jeopardy,[68] and that it had a "lack of sympathy" with the *Bartkus* result.[69]

Mr. Chief Justice Burger dissented without an opinion. Mr. Justice Rehnquist, joined in his dissent by Mr. Justice White, gave more attention to the purpose of Rule 48(a). He wrote that the words "by leave of court" were added to the rule to allow for "an independent judicial assessment of the public interest in dismissing the indictment."[70] He was troubled by the prospect of a "new policy" whereby the government might be empowered to initiate federal prosecutions whenever it doubted the security of state convictions, and drop those prosecutions if state convictions later proved secure. He felt that the issue needed full argument, and he was no doubt right. Once the majority decided that the government had acted in good faith, it followed naturally that it would favor the motion to dismiss. But if the government's plan from the outset was to drop the prosecution if the state conviction was affirmed, then the motion to dismiss was not good faith at all, but part of a larger bad faith. The problem will reappear, and continue to nettle judges, who will feel they have been duped by the government.

[58] 434 U.S. 22 (1977).

[59] The state offenses were conspiracy to commit robbery, conspiracy to commit grand larceny, and carrying a concealed weapon. 434 U.S. at 23 n.2.

[60] The federal offense was conspiracy to affect interstate commerce by robbery in violation of the Hobbs Act, 18 U.S.C. § 1951 (1970). 434 U.S. at 23.

[61] United States v. Washington, 390 F. Supp. 842, 843, (S.D. Fla. 1975).

[62] FED. R. CRIM. PRO. 48 reads: "The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant."

[63] United States v. Washington, 390 F. Supp. 842, 843 (S.D. Fla. 1975).

[64] *In re* Washington, 531 F.2d 1297 (5th Cir. 1976); *In re* Washington, 544 F.2d 203 (5th Cir. 1976) (*en banc*).

[65] 544 F.2d at 209.

[66] *Id.* at 213.

[67] 434 U.S. at 30 (emphasis added).

[68] *Id.* at 29.

[69] *See* note 29 *supra*.

[70] 434 U.S. at 34.

Conclusion

By pretermitting scholarly criticism of the doctrine of dual sovereignty and predictions of its demise, the Court in *Wheeler* and *Rinaldi* underscored the doctrine's continuing strength as a theory of federalism. Dual sovereignty is not soon to be uprooted, but criticism of it will probably not abate either, especially since such criticism went unanswered in these two opinions. It is not clear that federal, state, and tribal sovereignties cannot abide harmoniously together in a federalism where successive prosecutions based on the same conduct are not permitted.