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## UNITED STATES V. LARA, 124 S. Ct. 1628 (2004)

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**UNITED STATES v. LARA,  
124 S. Ct. 1628 (2004)**

*Introduction*

The Interstate Commerce Clause (Commerce Clause) grants the federal government authority, superior to any state claims, to regulate commerce with the Indian tribes.<sup>1</sup> The Commerce Clause was enacted partially in response to the confusion surrounding the multitude of individual treaties between Indian tribes (tribes) and the federal government.<sup>2</sup> In 1790, Congress extended its power over the tribes, again to the exclusion of the states with the Indian Nonintercourse Act which reserved the right to acquire Indian lands to the federal government.<sup>3</sup>

The legal relationship between the tribes and the federal government has since been augmented by Congress, the executive branch, the courts, and the tribes themselves.<sup>4</sup> Several principles have been articulated to legitimate the federal government powers: Congress exercises plenary power over Indian affairs; Indian tribes still retain sovereign but diminished inherent powers over their internal affairs and reservation territory; and the United States possesses a trust responsibility toward the tribes.<sup>5</sup> These principles derive from the "Marshall trilogy," and have structured the debate that pervades modern Indian law and policy.<sup>6</sup>

The Marshall trilogy, consisting of John Marshall's decisions in *Johnson v. M'Intosh*,<sup>7</sup> *Cherokee v. Georgia*,<sup>8</sup> and *Worcester v. Georgia*,<sup>9</sup>

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<sup>1</sup> U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

<sup>2</sup> DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW: CASES AND MATERIALS* 83, 326 (3d ed. 1993).

<sup>3</sup> Doug Nash, *Indian Lands: Nonintercourse Acts*, at [http://profs.lp.findlaw.com/ilands/ilands\\_2.html](http://profs.lp.findlaw.com/ilands/ilands_2.html).

<sup>4</sup> GETCHES, *supra* note 2, at 83.

<sup>5</sup> GETCHES, *supra* note 2, at 84.

<sup>6</sup> GETCHES, *supra* note 2, at 84.

<sup>7</sup> *Johnson v. M'Intosh*, 21 U.S. 543 (1823) (finding that Indians did not have title to land because they never actually owned it). In *Johnson*, the plaintiffs, mostly British citizens and their heirs, claimed title to property conveyed to them by the Piankeshaw Indians prior to the American Revolution. *Id.* at 571. The plaintiffs contended that their title ran directly from the Native Americans who owned the property and therefore it was superior to defendants' title. *Id.* The defendants' land grant came directly from the United States government and the district court held that defendants' claim was superior. *Id.* at 604. The court based this decision on the idea that the Piankeshaw were not actually able to convey the land because they never "owned" it in the traditional sense of the word. *Id.* at 595-96. The Supreme Court of the United States agreed and upheld the defendants' title by land grant. *Id.* at 604-05.

<sup>8</sup> *Cherokee v. Georgia*, 30 U.S. 1 (1831) (deciding that the Cherokee nation was not a foreign nation for constitutional purposes). In *Cherokee*, the plaintiffs filed a motion on behalf of the Cherokee nation for an injunction to restrain the state of Georgia from executing and enforcing its laws within the Cherokee territory, as designated by treaty between the United States and the Cherokee nation. *Id.* at 15. The Cherokee nation argued that it was a distinct state, capable of managing its own affairs and governing itself. *Id.* at 16. The nation also argued that it was not a state of the union and insisted that individually they were aliens, not owing any allegiance to the United States government. *Id.* The Court held that U.S.

advanced the idea that federal power over Indian affairs stems from protective obligations to the tribes.<sup>10</sup> In *Johnson*, this notion of the tribes as a protectorate positioned the United States as the overseer to the land early Europeans had "discovered."<sup>11</sup> The Marshall trilogy extended the paternal implication of the discovery doctrines to mean that the government had an inherent duty to ensure the sovereignty and independence of the Indian tribes by protecting them from outsiders, including the states.<sup>12</sup> The Supreme Court of the United States has stretched the concept of a protective duty to an almost unbridled power over the tribes.<sup>13</sup> Previously the Court had identified the Treaty Clause,<sup>14</sup> the War Power,<sup>15</sup> and the Property Clause<sup>16</sup> as sources of legislative and executive authority to regulate Indian affairs.<sup>17</sup> Today the federal power over Indian affairs is traced primarily to the Indian Commerce Clause as the only express grant of power over the Indians.<sup>18</sup>

## FACTS

Billy Jo Lara, a member of the Turtle Mountain Band of Chippewa Indians, married a woman from the Spirit Lake Tribe of Sioux Indians (Tribe) and lived on the latter's reservation with his family.<sup>19</sup> Despite the marital bond, Lara was not considered a member of the Tribe.<sup>20</sup> After several incidents of misconduct, the Tribe issued an order excluding Lara

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CONST. art. I, § 8, which empowered Congress to regulate commerce, specifically treated the Cherokee nation as distinct from a foreign nation. *Id.* at 18-19. Nevertheless, the Court found that an Indian tribe or nation within the United States was not a foreign state within the meaning of the Constitution. *Id.* at 20.

<sup>9</sup> *Worcester v. Georgia*, 31 U.S. 515 (1832) (finding unconstitutional a Georgia law which prevented whites from living on Indian land). The Cherokee nation entered into treaties with the United States that guaranteed Indian lands for Indians. *Id.* at 554-56. A congressional act to promote the civilization of Indian tribes, this authorized the President to appoint persons to minister and educate Indians. *Id.* at 557. However, one Georgia law prohibited white persons from living on Cherokee land without a license and another law redrew the boundaries of Cherokee territory. *Id.* at 542. Georgia authorities arrested Worcester, who lived on Cherokee land as part of his appointment to educate and minister to them, and the trial court convicted him. *Id.* at 540. Worcester sought review in the Supreme Court of the United States by writ of error. *Id.* at 536-37. The Court reversed and annulled the judgment. *Id.* at 562. The Court held that Georgia's laws were repugnant to present treaties and federal laws. *Id.* at 540-41.

<sup>10</sup> GETCHES, *supra* note 2, at 84.

<sup>11</sup> *Id.* at 325.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>15</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>16</sup> U.S. CONST. art. IV, § 3, cl. 2.

<sup>17</sup> GETCHES, *supra* note 2, at 325.

<sup>18</sup> *Id.* at 326.

<sup>19</sup> *United States v. Lara*, 124 S. Ct. 1628, 1631 (2004).

<sup>20</sup> *Id.* at 1632.

from the reservation.<sup>21</sup> Lara ignored the order, striking an officer in his attempt to gain access to the reservation.<sup>22</sup>

The Tribe subsequently prosecuted Lara for "violence to a policeman."<sup>23</sup> Lara pleaded guilty and served 90 days in jail.<sup>24</sup> After Lara served his sentence, the United States government charged him in federal court for assaulting an officer, a federal crime.<sup>25</sup>

The elements of the federal crime are similar to those of the tribal charge, which ordinarily would have brought Lara within the protections of the Fifth Amendment's Double Jeopardy Clause.<sup>26</sup> Before a Magistrate Judge in the United States District Court for the District of North Dakota, however, the government argued that Indian tribes only act as separate sovereigns when they prosecute their own members, and, thus, double jeopardy did not apply.<sup>27</sup> Although the government acknowledged that the Supreme Court of the United States had held that a tribe no longer possessed inherent or sovereign authority to prosecute nonmember Indians,<sup>28</sup> the government argued that the newly amended statute, 25 U.S.C. § 1302, specifically authorized tribes to prosecute Indian members of different tribes.<sup>29</sup> The government argued that the statute did not delegate the federal government's own powers, but enlarged the tribes' inherent powers of self-government.<sup>30</sup>

The Magistrate and the United States Court of Appeals for the Eighth Circuit accepted the government's claim, rejecting Lara's double jeopardy defense.<sup>31</sup> The United States Court of Appeals for the Ninth Circuit reversed, however, holding that the Tribe had exercised delegated federal prosecutorial power.<sup>32</sup> As a result, the concept of dual sovereignty did not apply, and the Double Jeopardy Clause barred a second prosecution.<sup>33</sup> The

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<sup>21</sup> *Id.* at 1631.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* (citing 18 U.S.C.A. § 111 (2002)).

<sup>26</sup> *Id.* ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . .")

<sup>27</sup> *Id.* at 1632.

<sup>28</sup> *Id.* (citing *Duro v. Reina*, 495 U.S. 676 (1990)).

<sup>29</sup> *Id.* (citing Indian Civil Rights Act of 1968, § 201(2), as amended, 25 U.S.C. § 1301 *et. seq.* (2004)) ("[P]owers 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; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians").

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

Supreme Court of the United States granted certiorari to address the differences in interpretations of the amended statute.<sup>34</sup>

### HOLDING

The Supreme Court of the United States held that the source of the Tribe's power to prosecute and punish the defendant for violence to a policeman was inherent tribal authority rather than delegated federal authority.<sup>35</sup> The Court further held that Congress possessed constitutional power to lift or relax restrictions on Indian tribes' criminal jurisdiction over nonmember Indians that were previously imposed by political branches of government.<sup>36</sup> Finally, the Court held that the Double Jeopardy Clause could not bar a federal prosecution of the defendant, following the Tribe's prosecution, absent a showing that the source of the tribal prosecution was federal power.<sup>37</sup>

### ANALYSIS

Justice Breyer, writing for the majority, began his analysis with a brief discussion of 25 U.S.C. § 1301 and its legislative history.<sup>38</sup> The Court focused on the statutory language, "recognize[s] and affirm[s]," as evidence the amendment was restoring inherent tribal power and not establishing an entirely new source of authority.<sup>39</sup> The Court found that Congress itself also provided insight into its intent.<sup>40</sup> The legislative history is replete with statements approving such concepts as "this legislation is not a delegation of this jurisdiction but clarification," and "the premise is that the Congress affirms the inherent jurisdiction of tribal governments over nonmember Indians."<sup>41</sup> The Court determined that both sources indicate that the statute sought to adjust the tribes' status.<sup>42</sup>

Further, in rejecting Lara's attempt to show that Congress did not possess the ability to alter the tribes' status, the Court concluded that Congress derived its power from 1) the Indian Commerce Clause<sup>43</sup> and the

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 1639.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 1632-33.

<sup>39</sup> *Id.* at 1632.

<sup>40</sup> *Id.* at 1633.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1633 (citing U.S. CONST., art. I, § 8, cl. 3.) ("The Congress shall have Power . . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .").

Treaty Clause;<sup>44</sup> 2) the Constitution's "plenary" grants of power;<sup>45</sup> 3) previous examples of congressional adjustments to similarly situated entities;<sup>46</sup> 4) the lack of constitutional language to the contrary;<sup>47</sup> 5) the fact that the change at issue was a limited one;<sup>48</sup> and 6) the Court's notion that its holding was consistent with established precedent.<sup>49</sup>

Simply stated, the central function of the Indian Commerce Clause "is to provide Congress with plenary power to legislate in the field of Indian affairs."<sup>50</sup> Congressional powers stemming from the Treaty Clause are less clear.<sup>51</sup> While the Treaty Clause derives from Article II, applies to the executive branch, and does not authorize Congress to act legislatively, treaties can authorize Congress to deal with matters it otherwise could not address.<sup>52</sup> The Court stated that the Commerce Clause "in no way affects Congress' plenary powers to legislate on problems of Indians,"<sup>53</sup> despite the fact that Congress ended the practice of entering into treaties with the tribes in 1871.<sup>54</sup> In addition, the Court noted Indian affairs were more an aspect of military and foreign policy and thus the power to legislate them does not come within any affirmative grant of constitutional power, but rather those powers described as "necessary concomitant of nationality."<sup>55</sup>

The Court had held the Indian Commerce Clause permitted Congress to both restrict and ease restrictions on tribes.<sup>56</sup> Recognizing that the tribes were of diverse cultures, living on billions of acres of land, the Court reasoned that Congress would need to have this flexibility and had in fact used it on numerous occasions to address the changing needs of the United States and the tribes.<sup>57</sup> Further, the statutory goal of modifying the degree of

<sup>44</sup> *Id.* at 1634 (citing U.S. CONST., art. II, § 2, cl. 2) ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments").

<sup>45</sup> *Id.* at 1634.

<sup>46</sup> *Id.* at 1635 (citing *Hawaii v. Mankichi*, 190 U.S. 197, 209-10 (1903)).

<sup>47</sup> *Id.* at 1635-36.

<sup>48</sup> *Id.* at 1636.

<sup>49</sup> *Id.* at 1636-37 (citing *United States v. Wheeler*, 435 U.S. 313 (1978); *Oliphant v. Suquamish*, 435 U.S. 191 (1978); *Duro v. Reina*, 495 U.S. 676 (1990)).

<sup>50</sup> *Id.* at 1633 (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)).

<sup>51</sup> *Id.* at 1633-34.

<sup>52</sup> *Id.* at 1628, 1633-34 (citing *Missouri v. Holland*, 252 U.S. 416, 433 (1920)).

<sup>53</sup> *Id.* at 1634 (quoting *Antoine v. Washington*, 420 U.S. 194, 203 (1975)).

<sup>54</sup> *Id.* (stating that tribes are not entities "with whom the United States may contract by treaty" (citing 25 U.S.C. § 71 (1871))).

<sup>55</sup> *Id.* at 1634.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

autonomy dependent sovereigns enjoyed was not an unusual objective.<sup>58</sup> The modification was only a limited alteration, not an effort to legislate radical changes or interfere with State power or authority.<sup>59</sup> Supreme Court precedent has held that the power to prosecute nonmembers was an aspect of tribes' external relations and hence part of the tribal sovereignty divested by treaties and by Congress.<sup>60</sup> The Court has never held that Congress could not modify or adjust the tribes' status.<sup>61</sup>

There is no explicit language in the Constitution suggesting a limitation on Congress' authority to relax the restrictions on tribal sovereigns.<sup>62</sup> Despite the Court's previous ruling in *United States v. Wheeler*<sup>63</sup> that the power to prosecute nonmembers was an aspect of the tribes' external relations and hence part of the tribal sovereignty that was divested by treaties and by Congress, *Oliphant v. Suquamish*<sup>64</sup> and *Duro v. Reina*<sup>65</sup> made clear that the Constitution does not dictate the bounds of tribal

<sup>58</sup> *Id.* at 1635.

<sup>59</sup> *Id.* at 1635-36.

<sup>60</sup> See generally *United States v. Wheeler*, 435 U.S. 313 (1978); *Oliphant v. Suquamish*, 435 U.S. 191 (1978); *Duro v. Reina*, 495 U.S. 676 (1990).

<sup>61</sup> *Lara*, 124 S. Ct. at 1636.

<sup>62</sup> *Id.* at 1635.

<sup>63</sup> *United States v. Wheeler*, 435 U.S. 313 (1978) (finding that a prosecution for a crime in a tribal court did not preclude prosecution in federal court under the double jeopardy clause). In *Wheeler*, the respondent, a Navajo Tribe member, was charged with statutory rape in a federal court. *Id.* at 315. He filed a motion to dismiss, claiming that because he had earlier been convicted by a tribal court of a lesser included offense, the double jeopardy clause barred the federal prosecution. *Id.* at 315-16. The district court granted his motion and dismissed the indictment. *Id.* at 316. The Court of Appeals for the Ninth Circuit affirmed. *Id.* The Supreme Court of the United States reversed, however, holding that the source of the power to punish tribal offenders was the inherent power of a limited sovereignty that had never been extinguished, and not a delegation to the tribe of federal authority. *Id.* at 321, 323-24. Thus, when the Navajo Tribe criminally punished a member, it acted as an independent sovereign, not as an arm of the federal government. *Id.* at 329-30. Therefore, where tribal and federal prosecutions were brought by separate sovereigns, they were not "for the same offence," and the double jeopardy clause did not bar the federal prosecution. *Id.*

<sup>64</sup> *Oliphant v. Suquamish*, 435 U.S. 191 (1978) (determining that tribal courts do not have inherent authority to punish non-Indians). In *Oliphant*, the United States Court of Appeals for the Ninth Circuit denied the petitioner's request for habeas relief and held that respondent Suquamish Indian Tribe had criminal jurisdiction over non-Indians because it retained those powers of autonomous states that were neither inconsistent with its status nor expressly terminated by Congress. *Id.* at 194-95. The Supreme Court of the United States noted that by acknowledging their dependence on the United States in the Treaty of Point Elliott the Suquamish recognized that the federal government would arrest and try non-Indian intruders who came within their reservation. *Id.* at 207. Moreover, the Court held that Indians did not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress. *Id.* at 208. Although Indian tribes retained elements of "quasi-sovereign" authority after ceding their lands to the federal government and announcing their dependence on the federal government, the tribes' retained powers were not such that they were limited only by specific restrictions in treaties or congressional enactments. *Id.* Rather, Indian tribes were prohibited from exercising both those powers of autonomous states that were expressly terminated by Congress and those powers "inconsistent with their status." *Id.*

<sup>65</sup> *Duro v. Reina*, 495 U.S. 676 (1990) (finding that an Indian tribe cannot maintain criminal jurisdiction over a nonmember Indian). In *Duro*, at issue was whether the Salt River Pima-Maricopa Indian Community could assert criminal jurisdiction over the defendant, who was an Indian but not a

autonomy.<sup>66</sup> In addition, historic practice, expert opinion, modern tribal courts, and published opinions of the Solicitor of the Department of the Interior were all consulted as authorities.<sup>67</sup> The Court did not consider whether a statute could constitutionally remove restrictions on the tribes' inherent authority.<sup>68</sup> Consequently, the Court did not read *Wheeler*, *Oliphant*, or *Duro* as holding that the Constitution forbids Congress to change federal Indian law through this type of legislation.<sup>69</sup> The Court conclusively decided that these cases were not determinative because Congress enacted an amendment to the statute.<sup>70</sup>

In recognizing that Congress had the power to relax restrictions on the tribes' authority,<sup>71</sup> the Court noted that Lara failed the first step necessary to prove his constitutional argument.<sup>72</sup> It necessarily followed that he could not prove the three remaining steps, and thus Lara was not protected by the double jeopardy clause.<sup>73</sup>

Lara focused his appeal largely on an argument claiming Congress had overreached its legislative authority.<sup>74</sup> The Court noted that in order for this "lack of constitutional power" claim to succeed, Lara had to show that Congress did not possess the constitutional power to enact a statute that modifies tribal power, such that the word "inherent" in the statute's phrase "inherent power" was void.<sup>75</sup> In addition, Lara was required to show that the word "inherent" was severable from the statute and that the remainder of the statute was valid without the word.<sup>76</sup> Such a showing would signify that the Tribe's prosecution was federal, by way of delegation, and hence the Double Jeopardy Clause prohibited the second prosecution.<sup>77</sup>

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member of the Pima-Maricopa tribe. *Id.* at 679. The defendant stood trial after he allegedly committed a murder within the boundaries of the reservation. *Id.* at 679, 681. After the tribal court denied his motion to dismiss the prosecution for lack of jurisdiction, the defendant filed a petition for habeas corpus in the district court. *Id.* at 681-82. The district court granted the writ, but the United States Court of Appeals for the Ninth Circuit reversed. *Id.* at 682. The Supreme Court of the United States held that the tribe's retained sovereignty did not include the authority to impose criminal sanctions against a citizen outside its own membership. *Id.* at 679. The Court concluded that if the present jurisdictional scheme proved insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem was the United States Congress, which had the ultimate authority over Indian affairs. *Id.* at 698. The Court reversed the judgment of the court of appeals. *Id.*

<sup>66</sup> *Lara*, 124 S. Ct. at 1635.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 1632-33.

<sup>72</sup> *Id.* at 1638.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 1632-33.

<sup>75</sup> *Id.* at 1638.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*



Lara made several secondary arguments in an effort to bolster his case.<sup>78</sup> Lara's claim of denial of equal protection argument focused on Congress' use of the language, "all Indians," in the phrase "inherent power . . . to exercise criminal jurisdiction over all Indians."<sup>79</sup> Lara claimed the language was race-based and without justification.<sup>80</sup> In addressing this argument, the Court decided that even if the language was race-based, the entire argument was beside the point.<sup>81</sup> At best, this showed not that Lara's first conviction was federal, but that it was constitutionally defective.<sup>82</sup> That, however, would not further Lara's double jeopardy claim.<sup>83</sup>

Lara further argued that the Due Process Clause forbids Congress to permit a tribe to prosecute a nonmember.<sup>84</sup> Considering this argument, the Court noted that even if it was valid and showed that any prosecution of a nonmember was void, this would not prove that the source of the tribal prosecution was federal power.<sup>85</sup> Therefore, Lara could not win his double jeopardy claim.<sup>86</sup>

Lara's last argument claimed that the lack of constitutional procedural guarantees, such as the right to counsel, was an important reason for concluding that the tribes did not have "inherent power" pursuant to 28 U.S.C. § 1302.<sup>87</sup> This argument also failed to impress the Court.<sup>88</sup> The Court replied that the argument simply repeated both his due process and the equal protection arguments.<sup>89</sup> As such, the problem Lara identified would still exist whether the Court interpreted the statute as delegating federal power or not.<sup>90</sup> As a result, that argument did not assist Lara any more than the others did.<sup>91</sup>

In reversing the Ninth Circuit Court of Appeals, the majority concluded that Congress exercised constitutionally provided powers when it permitted tribes, as an application of their inherent tribal authority, to prosecute nonmembers.<sup>92</sup> The Tribe was acting as an independent sovereign, rather than as an arm of the federal government.<sup>93</sup> Consequently, the Double

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<sup>78</sup> *Id.* at 1637-39.

<sup>79</sup> *Id.* at 1638.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1638-39.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1639.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

Jeopardy Clause did not prohibit the federal government from proceeding with its prosecution.<sup>94</sup>

### CONCURRING OPINIONS

Justices Stevens, Kennedy, and Thomas filed concurring opinions.<sup>95</sup> Justice Stevens noted that Indian tribes had governed territory long before Columbus arrived.<sup>96</sup> In contrast, the States had never been independent sovereigns.<sup>97</sup> Yet in years past, Congress had expanded the states' powers to include those the Constitution prohibited.<sup>98</sup> Since Congress has expanded the states' powers to include those they could not previously exercise, it is unexceptional that Congress could a fortiori also relax restrictions on powers that had existed earlier.<sup>99</sup>

Justice Kennedy stated that Congress demonstrated a clear intent to restore, not delegate, powers to the tribes and, consequently, Lara's double jeopardy argument must fail.<sup>100</sup> Although he agreed with the majority's conclusion, Justice Kennedy did not believe it was necessary for the Court to delve into the Constitution to create its justification.<sup>101</sup> Indeed, he thought a pronouncement that Congress can subject a citizen to a sovereignty outside the basic structure of the Constitution was a serious step.<sup>102</sup> Acknowledging a historical exception for Indian tribes to govern the relations among their own members, Justice Kennedy believed the exception was limited to the extent that a member of a tribe consents to be subjected to the jurisdiction of his tribe.<sup>103</sup>

Justice Kennedy also noted that the individual citizen has an enforceable right to those structural guarantees of liberty provided for in the Fifth and Fourteenth Amendments, a right which he felt the majority ignored.<sup>104</sup> He concluded that perhaps the Court's holding could be justified by an argument that by enrolling in one tribe, Lara consented to the criminal

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1639, 1641.

<sup>96</sup> *Id.* at 1640.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 1640-41 (arguing that a proper approach would be to take Congress at its word when it stated that its intention of the Indian Civil Rights Act of 1968 was to restore to the tribes, based on a theory of inherent sovereign power, and not on delegation).

<sup>102</sup> *Id.* at 1640.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 1641.

jurisdiction of other tribes but noted that the Court did not take up that point.<sup>105</sup>

Justice Thomas concurred with the majority, despite believing that the Court should reexamine the premises and logic upon which tribal sovereignty has been built.<sup>106</sup> He noted that the confusion reflected in Court precedent arose from two largely incompatible assumptions: 1) Congress can regulate virtually every aspect of the tribes without rendering tribal sovereignty a nullity; and 2) the Indian tribes somehow retained inherent sovereignty to enforce their criminal laws against their own members.<sup>107</sup> He concluded that these conflicting observations were the result of the Court's failure to adequately analyze the Constitution.<sup>108</sup>

Justice Thomas further rejected the Court's resort to a recitation of past examples concerning congressional assertions of its constitutional plenary power.<sup>109</sup> He stated that the Court's analysis failed for two reasons: 1) Congress cannot simultaneously claim the power to regulate the tribes through ordinary domestic legislation and also maintain that the tribes are sovereign; and 2) the Court's examples of instances where Congress exercised its power to alter the status of United States territories are not on point; Congress has plenary power to govern territories and the Court itself has held that the Double Jeopardy Clause applies to the territories.<sup>110</sup>

Furthermore, Justice Thomas opined that the 1871 legislation terminating the practice of dealing with the tribes by treaty should have been given more weight.<sup>111</sup> He concluded by stating that although the issue of double jeopardy has constitutional implications, it does not follow that the Court's federal-common-law decisions regarding the tribes' inherent authority had become enshrined as constitutional holdings that Congress could not change.<sup>112</sup>

#### DISSENTING OPINION

Justice Souter, joined by Justice Scalia, dissented, arguing that the Court's precedent holds that any tribal exercise of criminal jurisdiction over

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1642.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 1648.

<sup>111</sup> *Id.* at 1642.

<sup>112</sup> *Id.*

nonmembers necessarily rests on a delegation of federal power.<sup>113</sup> Consequently, it is not similar to a congressional permit to the States to exercise some authority it would otherwise be barred from wielding.<sup>114</sup> Thus, the power Congress has given to the tribes in its amendment to the 1968 Indian Civil Rights Act was more akin to the delegation of lawmaking powers to an administrative agency.<sup>115</sup>

Justices Souter and Scalia argued that the application of the double jeopardy doctrine of dual sovereignty turned on the question of how far a prosecuting entity's inherent jurisdiction extended.<sup>116</sup> They reasoned there were only two ways inherent sovereignty could be restored so as to alter application of the dual sovereignty rule: 1) Congress could grant the same independence to the tribes that it did to territories; or 2) the Court could repudiate its existing doctrine of dependent sovereignty.<sup>117</sup>

Justices Souter and Scalia concluded that the Court should maintain its reliance on *stare decisis*.<sup>118</sup> Court precedent, they argued, provided compelling principles, useful in times of confusion.<sup>119</sup> The Justices stated *Duro* and *Oliphant* should be upheld and that Congress could not control the interpretation of a statute in a way that is at odds with the constitutional consequences of the tribes' continuing dependent status.<sup>120</sup>

## CONCLUSION

The Court's decision could have significant implications for Native Americans. Effectively, for any crime for which a tribe can arrest and punish an Indian, the federal government can administer similar treatment. In day-to-day situations, the concept of dual sovereignty may be necessary for efficient tribal governance. In fact, tribal independence may be justifiable considering the manner in which the United States government has sabotaged the Native Americans' existence. However, if operation as a separate sovereign works to negate constitutional protections afforded to every other American citizen, its value is trivialized.

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<sup>113</sup> *Id.* at 1649 (citing *Duro v. Reina*, 495 U.S. 676 (1990)) ( "[B]ecause tribes have lost their inherent criminal jurisdiction over nonmember Indians, any subsequent exercise of such jurisdiction 'could only have come to the Tribe by delegation from Congress'").

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1650.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1651.

Considering that Native Americans are arrested at twice the rate for alcohol-related crimes than any other race,<sup>121</sup> there are 44% more American Indians under correctional control than the national rate,<sup>122</sup> and the United States Attorney's Office brought over one thousand cases against Native Americans,<sup>123</sup> there is a real possibility that Native Americans will serve significantly more time in prison as a result of being prohibited from claiming a double jeopardy defense. Native Americans already comprise about five percent (5%) of the prison population, an overrepresentation for a group that makes up less than one percent (1%) of the United States population.<sup>124</sup>

This decision maintains the perspective that the Native American tribes have long governed themselves. However, this application of sovereign authority punishes the individual for benefits that the group receives. In order for the tribes to be sovereign authorities, they must agree to have their members subject to two sets of laws. But because of their overlapping nature, the tribal laws cannot protect the alleged criminal from the federal laws, and neither can the federal laws protect the alleged criminal from the tribal laws. An agreement between tribal governments and the federal government on jurisdiction seems more reasonable. As a solution, if the crime is committed on a reservation, the tribe has the first right of refusal to prosecute. If the tribe refuses to prosecute, the federal government may then choose to do so. However, if the crime is committed off a reservation, then the federal government has automatic jurisdiction. If the federal government chooses not to prosecute, then the tribe may prosecute, if possible. This operates to protect both the alleged criminal and the victim, whether or not they are both Native American.

No justifiable reason exists to punish an Indian twice for a crime for which any other citizen would have been punished only once. Having both bodies of law operating simultaneously sets Native Americans apart as a separate class of citizens. This is discriminatory. Regardless of its powers to relax and restrict tribal sovereign authority, Congress should not be permitted to violate constitutionally based equal protection guarantees.

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<sup>121</sup> Marika F. X. Litras, *Bureau of Justice Statistics: Tribal Justice Statistics Collection Efforts*, at <http://www.tribalresourcecenter.org/programs/conferences/2001/statistics.pdf> (last visited Nov. 09, 2004).

<sup>122</sup> *Id.* (reporting 4,193 cases against Native Americans compared to the national rate of 2,907).

<sup>123</sup> *Id.*

<sup>124</sup> Dr. Tom O'Connor, *Sociology of Discrimination: Discrimination Against Native Americans - Criminal Justice Discrimination*, available at <http://faculty.ncwc.edu/toconnor/soc/355lect12.htm> (last modified Jan. 06, 2004).