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Trapped in a Tangled Web United States v. Lara: The Trouble With Tribes and the Sovereignty Debacle

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TRAPPED IN A TANGLED WEB *UNITED STATES V. LARA:* THE TROUBLE WITH TRIBES AND THE SOVEREIGNTY DEBACLE

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> Stretched across the upper part of the doorway was a big spiderweb, and hanging from the top of the web, head down, was a large grey spider. She was about the size of a gumdrop. She had eight legs . . . "I'm not as flashy as some . . . but I'm near-sighted."[1]

INTRODUCTION

Indigenous peoples have been present on United States soil even before the nation became independent. When the Europeans came to the country and attempted to colonize the Indigenous peoples, conflict inevitably arose, and the colonizers were victorious in transforming tribes from self-governing bodies abundant with rich traditions and cultural innovations to timid groups at the mercy of white settlers. The transformation "manifested itself through tremendous loss of life and land" and established a "boundary line between the Indigenous and colonial societies."[2] Relations between Indian tribes and the United States government have continued to be unstable and ill-defined since colonization. The status of Indian tribes relative to the federal government has been difficult to characterize because tribes do not possess the same sovereign power as the states.[3]

Indians and Indian reservations make up a larger portion of the United States than most people realize. In Washington,

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1 E.B. WHITE, CHARLOTTE'S WEB 36-37 (Harper & Row, Inc. 1952),

2 Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 ARIZ. ST. L.J. 75, 78 (2002).

3 *See generally* Alexander Reichert, *Counsel for Billy Jo Lara*, 28 AM. INDIAN L. REV. 285 (2003/2004).

Oregon, and Idaho alone, there are forty-two federally recognized tribes that occupy over 5.6 million acres of land.[4] Washington tribes employ 15,000 Indian and non-Indian people.[5] Indian reservations across the United States generate $246 million in tax revenue each year for state and local governments, in addition to $4.1 billion in tax revenue for the federal government.[6] Additionally, there are over 250 tribal courts in the United States today.[7]

Given the increasing financial power and political influence of Indian tribes and the growing impact they have on non-Indian citizens, it is becoming increasingly important to identify Indian tribes' roles within the United States. That is, what civil or criminal control do Indian tribes have over their own members, over other Indians who are not members of their tribes, and over non-Indians? Additionally, what powers do Indian tribes possess under the laws of the federal government? Moreover, if Congress and the United States Supreme Court have the authority to make and to interpret law with regard to Indian tribes, then to what extent are Indian tribes sovereign?

Before colonization, Indian tribes were self-governing. However, after Europeans arrived in the New World, they began to introduce, and in many cases force, their values onto the Indians. Tribes were stripped of some of their power, and Indians began the struggle to preserve their own beliefs, cultures, and ways of life. While some Indians welcomed change and facilitated interaction between tribes and European colonists, and while some Indigenous peoples and Europeans believed both groups were on equal footing, most Europeans believed they were superior to the Indians.[8] Conflicting views among the colonists and the Indigenous peoples "resulted in the weakening, and in some cases, the extinction, of the Indigenous peoples, and the commensurate empowerment of the colonizing peoples."[9]

Even though colonists, and eventually the United States Supreme Court and Congress, began referring to Indian tribes as "sovereign," their actions with regard to the tribes speak louder than words. The acknowledgment of tribes as sovereign

4 Dan Murdock, *Ethical Implications in Indian Law*, 28 AM. INDIAN L. REV. 313, 313 (2003/2004).

5 *Id.*

6 *Id.* at 313-14.

7 Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myths and the Methods of* Marbury v. Madison *to Tribal Courts' Criminal Jurisdiction*, 36 ARIZ. ST. L.J. 77, 103-04 (2004).

8 Porter, *supra* note 2, at 79.

9 *Id.* at 78.

"increasingly looks like lip service,"[10] while Congress' plenary power over tribes serves "as a continuing reminder that the United States controls the Indian nations, very much like the way prison guards serve as a constant reminder to the convicts that they are not staying at the Holiday Inn."[11]

Arising out of this sovereignty debacle is the question of what constitutes a separate sovereign for purposes of Double Jeopardy in criminal prosecution. A recent Supreme Court decision attempts to clarify the issue, but only muddies the waters. *United States v. Lara*[12] demonstrates Congress' and the Supreme Court's continued refusal to truly recognize Indian tribes as sovereigns. Part I of this note reviews the history of Indian tribal relations with the United States government that has given rise to the present status of Indian tribes. Part II of this note discusses the Indian Civil Rights Act of 1968, its subsequent 1990 amendment, and the implications of this amendment on Indian tribes' rights to criminally prosecute their own members as well as nonmember Indians. Part III of this note summarizes *United States v. Lara*, examines the issue of tribal sovereignty in the context of *Lara*, and analyzes the implications of the Court's decision on the future of tribal sovereignty.

I HISTORY OF INDIAN TRIBAL RELATIONS WITH THE UNITED STATES

A. What is Indian Country?

Spiders catch their prey with their legs and use their fangs to inject poison.

"The relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else."[13] King George's Royal Proclamation of 1763 was the first instance in which the term "Indian country" was used to separate Indian-inhabited land from land owned by the colonists.[14] Of course, this was also an effort to by the government to gain centralized control over Indigenous peoples by segregating them from white settlers.[15] Still, the Crown understood that any person who

10 *Id.* at 84.
11 *Id.* at 86.
12 541 U.S. 193 (2004).
13 Cherokee Nation v. Georgia, 30 U.S. 1, 16 (1831).
14 Joseph D. Matal, *A Revisionist History of Indian Country*, 14 ALASKA L. REV. 283, 289 (1997).
15 *Id.*

ventured into "Indian country" did so at his own risk.[16]

After the United States became independent, it preserved the concepts of Indian country and centralized control because the government's goal was to "prevent Indian uprisings and preserve the peace along the frontier."[17] The United States concocted the first formal definition of "Indian country" through the Indian Trade and Intercourse Act of 1796.[18] It amended the Act in 1834 to include a newer, more accurate definition of Indian country after treaties and Indian removal rendered the borders set by the 1796 Act obsolete.[19] The new, but perhaps unimproved, definition characterized Indian country as:

> [A]ll that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country.[20]

The government continued to push Indian tribes westward and away from white settlers and citizens, and subsequently decided to settle the Indians on reservations within new states.[21] In 1874, the Indian Intercourse Act was repealed.[22] However, since the government moved Indian tribes within state borders, it was inevitable that conflicts between states and the tribes would develop.[23] Therefore, Congress decided to make Indian reservations "enclaves of exclusive federal jurisdiction" by requiring cessation of state jurisdiction over Indian land.[24]

One of the first cases in which the Supreme Court attempted to define Indian country was *Ex Parte Crow Dog*.[25] In *Crow Dog*, the Supreme Court characterized Indian country as all territory "'to which the Indian title has not been extinguished,' and which were either outside 'the exterior geographical limits of a state' or 'excepted from its jurisdiction . . . at the time of its admission.'"[26]

As Indian country and state territory continued to collide, the government passed the General Allotment Act of 1887, a

16 *Id.*

17 Mashpee Tribe v. Watt, 542 F. Supp. 797, 803 (D. Mass. 1982) (citing Mohegan Tribe v. State of Conn., 638 F.2d 612, 621 (2nd Cir. 1980)).

18 4 Cong. Ch. 30, 1 Stat. 469 (1796). S*ee also* Matal, *supra* note 14, at 290.

19 23 Cong. Ch. 161, 4 Stat. 729 (1834). S*ee also* Matal, *supra* note 14, at 290.

20 Act of June 30, 1834, ch. 161, 4 Stat. 729, 734.

21 Matal, *supra* note 14, at 290. *See, e.g.,* Organized Village of Kake v. Egan, 369 U.S. 60 (1962).

22 Matal, *supra* note 14, at 291.

23 *Id.* at 295.

24 *Id.* at 293.

25 109 U.S. 556 (1883).

26 Matal, *supra* note 14, at 301 (quoting *Ex Parte Crow Dog,* 109 U.S. at 561).

comprehensive piece of legislation allowing Indians fractional interests in land.[27] The General Allotment Act, also known as the Dawes Act, gave the President the power to allocate tribal lands to individual Indians.[28] Under the original General Allotment Act, Indians could purchase plots of 160 acres, and white settlers could purchase any left over land.[29] However, the allotments were held in trust by the United States for a minimum of twenty-five years.[30] After the Supreme Court decision in another case involving tribes, *In re Heff*[31], and several subsequent revisions of the General Allotment Act, the Indian Reorganization Act ended the allotment policy in 1934.[32] However, the General Allotment Act had far-reaching adverse consequences on the treatment of Indian country and tribal sovereignty because "the Court no longer considered tribal governments to exist, and it no longer viewed Indian lands as having unique jurisdictional status."[33]

In 1948 the United States codified the definition of Indian country:

> [T]he term "Indian country" . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[34]

Following this codification, there was a plethora of court cases that sought to interpret the term "Indian country," focusing on a variety of factors. It seemed as if neither courts nor Congress had a consistent idea of what Indian country was, or what jurisdiction Indians or the government had over crimes committed in Indian country.

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27 *See generally* FELIX COHEN, COHEN'S HANDBOOK ON FEDERAL INDIAN LAW (Rennard Strickland & Charles F. Wilkinson eds., Michie 1982), for an overview of several sections of the General Allotment Act and other pieces of legislation affecting it, as well as a comprehensive history of Indian relations with the government.

28 Matal, *supra* note 14, at 306 (citing Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887)).

29 *Id.* (citing 24 Stat. 388, 390).

30 COHEN, *supra* note 27, § 2.C.

31 197 U.S. 488 (1905).

32 Matal, *supra* note 14, at 307.

33 *Id.*

34 18 U.S.C. § 1151 (1948).

B. Trouble at the Court

The poison contains an agent that assists in dissolving the prey so the spider can consume it.

Since the Constitution gives very little guidance on Congress' power to regulate Indian affairs, in early cases the Supreme Court was forced to look outside the Constitution to make decisions about the power of Indian tribes to own and use land, their status as sovereigns, and their self-governance. Three cases that have come to be known as the "Marshall trilogy" provided yet another Supreme Court interpretation of the status of Indian tribes in the United States.[35]

In *Johnson v. M'Intosh*, the plaintiffs, British subjects and their heirs, claimed title to property conveyed to them by the Indians.[36] The defendants, on the other hand, received their title directly from the United States government. Both claimed that their title was superior.[37] The Court concluded that even though Indian tribes held title to land, the United States had superior title.[38] Therefore, the white settlers who had title conveyed by the U.S. government were permitted to purchase and sell the land, while tribes retained only the right to occupy and use it.[39]

In *Cherokee Nation v. Georgia*, the Court held that Indian tribes were "domestic dependent nations."[40] However, the Court at the same time acknowledged that tribal self-government was important, laying the foundation for future conflicts over tribal autonomy.[41] The following year, in *Worcester v. Georgia*, the Court held that Georgia state laws did not have an effect within Cherokee Nation territorial boundaries and referred to tribes as, "distinct, independent political communities, retaining their original natural rights."[42] Through this language, the Court again appeared to express the importance of tribal self-governance.[43] Unfortunately, neither the Court nor the government expounded on what they believed these "original

35 *See generally* Frank Pommersheim, *Native Americans and the Constitution: Is There a (Little or Not So Little) Constitutional Crisis Developing In Indian Law?: A Brief Essay*, 5 U. PA. J. CONST. L. 271 (2003). The three cases, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), are known as the "Marshall trilogy" because the opinions in each were delivered by Justice Marshall. *Id.*

36 21 U.S. (8 Wheat.) at 571-605.

37 *Id*.

38 *Id*.

39 *Id*.

40 30 U.S. (5 Pet.) at 17.

41 Pommersheim, *supra* note 35, at 275.

42 31 U.S. (6 Pet.) at 559.

43 Pommersheim, *supra* note 35, at 275.

natural rights" to be.

Clearly, issues of Indian tribal sovereignty and tribes' relationships to the government were abundant. In *Ex Parte Crow Dog*, the Supreme Court not only sought to define Indian country but also sought to determine whether federal statutes and treaties had extended criminal jurisdiction to cover crimes committed by one Indian against another in Indian territory.[44] Crow Dog was convicted of murdering Spotted Tail, an Indian from a different tribe.[45] The murder took place in Sioux territory, but under Sioux law Crow Dog's punishment would have been limited to his support of Spotted Tail's family.[46] The Court's opinion in *Ex Parte Crow Dog* addressed the issue specifically in reference to Sioux territory, but the opinion had a farther-reaching impact because of its holding and broad language. While the Court held that federal courts did not have jurisdiction to hear intra-state Indian criminal affairs, the Court thought that Indians should be judged, "by the customs of their people [and] the law of their land," and vacated Crow Dog's federal conviction.[47] There was such a public outcry following this decision that Congress passed the Indian Major Crimes Act, under which Indians who committed serious felonies, even within Indian territory, could be tried in federal court.[48]

Three years later, in *United States v. Kagama*, the Court upheld Congress' ability to enact the Indian Major Crimes Act and reaffirmed the notion that states did not have legislative power over Indian tribes, because the federal government had that power.[49] *Kagama* has come to be known as the foundation of Congress' plenary power over Indian tribes.[50] The Court stated that the "power of the general government over these remnants of a race once powerful"[51] is broad and plenary because "it alone can enforce its laws on all the tribes."[52]

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44 109 U.S. 556 (1883).

45 *Id.* at 557.

46 Matal, *supra* note 14, at 303 (citing COHEN, *supra* note 27, at § 4.A).

47 *Ex Parte Crow Dog,* 109 U.S. at 571-72.

48 18 U.S.C. § 1153 (2000). *See also* Matal, *supra* note 14, at 303. The original version of the Indian Major Crimes Act allowed for federal prosecution of Indians for seven named offenses committed throughout organized territories and on Indian reservations. Today, the Act provides for federal prosecution of fourteen named offenses committed within Indian country. 18 U.S.C. § 1153. These offenses include, but are not limited to, murder, manslaughter, kidnapping, maiming, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault against an individual under 16 years of age, arson, burglary, and robbery. *Id.*

49 118 U.S. 375, 384-85 (1886).

50 Matal, *supra* note 14, at 305.

51 118 U.S. at 384.

52 *Id.* at 385.

In the mid-to-late 1900s, the issue of tribal sovereignty again began to mix with the issues of criminal prosecution and jurisdiction. In *Ophilant v. Suquamish Indian Tribe*, the Supreme Court held that tribal governments had lost inherent jurisdiction over non-Indians, and stated that when tribal land became part of United States territory, Indian tribes' rights as completely independent, sovereign nations were diminished.[53] However, the Court left open the question of whether tribes had jurisdiction over nonmember Indians.

II. *DURO V. REINA* AND THE INDIAN CIVIL RIGHTS ACT OF 1968

"I always give them a little anesthetic so they won't feel pain. It's a little service I throw in."[54]

In 1968, Congress passed the Indian Civil Rights Act (ICRA).[55] Also known as the Indian Bill of Rights, the ICRA imposes certain constitutional restrictions upon Indian tribal governments and guarantees Indians' basic civil rights.[56] The ICRA also requires that defendants in tribal court be accorded most of the protections that the Constitution extends to defendants in state and federal court, and provides for federal habeas review of tribal court convictions."[57] Additionally, the ICRA guarantees tribal members equal protection.[58]

The 1968 version of the ICRA repeatedly uses the phrase "any person" in connection with its various sections. The original interpretation of the Act, however, was not meant to imply that "Indian tribes can exercise civil jurisdiction over non-Indians."[59] A turning point for tribes everywhere took place with the Supreme Court's holding in *Duro v. Reina* and Congress' actions after the Court handed down its decision.[60] The events in *Duro* took place on the Salt River Indian Reservation just east of Scottsdale, Arizona.[61] Albert Duro was an enrolled member of a different tribe, the Torres-Martinez Band of Cahuilla Mission Indians.[62] Between March and June 1984, he resided on the Salt River Indian Reservation with a female companion who was a

53 435 U.S. 191, 195 (1978).
54 E.B. WHITE, *supra* note 1, at 48.
55 25 U.S.C.. §§ 1301 et. seq. (1968).
56 41 AM. JUR. 2d *Indians* § 13.
57 Brief for the United States at 34, United States v. Lara, 541 U.S. 193 (2004) (No. 03-107) (citing 25 U.S.C. § 1301 (1968)).
58 25 U.S.C. § 1301 (1968).
59 41 AM. JUR. 2d *Indians* § 13 (West 2004).
60 Duro v. Reina, 495 U.S. 676 (1990).
61 *Id.* at 679.
62 *Id.*

member of the Salt River Tribe.[63] In June 1984, Duro shot and killed a fourteen-year-old boy on the Salt River Reservation.[64] The boy was a member of the Gila River Indian Tribe.[65] Duro was placed in custody and taken to stand trial in tribal court.[66] However, at that time, the tribal court was limited to imposing criminal penalties only up to six months imprisonment and a $500 fine, because the court's powers were regulated by federal statute.[67] The tribal court charged Duro with illegal firing of a weapon on the reservation pursuant to the Indian Civil Rights Act authorizing tribes to exercise jurisdiction over nonmember Indians, and Duro moved to have the prosecution dismissed for lack of jurisdiction.[68]

After the tribal court denied his motion, Duro filed a petition for habeas corpus with the United States District Court for the District of Arizona.[69] The District Court granted the writ, and held that if the tribe asserted jurisdiction over Duro, a nonmember, it would violate the equal protection rights afforded Indians by the ICRA.[70] A divided panel of the Court of Appeals for the Ninth Circuit reversed, stating that "if Congress had intended to divest tribal courts of criminal jurisdiction over nonmember Indians they would have done so."[71] Judge Sneed, dissenting from the panel opinion, argued that giving a tribal court jurisdiction over a nonmember Indian would subject him to "impermissible racial classification" and there would be a "potential for bias" by a tribal court that consisted of Indians with whom Duro was not necessarily affiliated.[72] The panel opinion and the dissenting opinion were subsequently revised; however, during the revision period, the Eighth Circuit in *Greywater v. Joshua* held that tribal courts *did not* possess inherent criminal jurisdiction over nonmember Indians.[73] The United States Supreme Court granted certiorari to help resolve the conflict between the Eighth and Ninth Circuit decisions.[74] The Supreme Court went on to reverse the Ninth Circuit's decision, concluding that "Indian tribes lack jurisdiction over

63 *Id.*
64 *Id.*
65 *Id.* at 679.
66 *Id.* at 681.
67 *Id.*
68 *Id.*
69 *Id.*
70 *Id.* at 681.
71 *Id.* at 683.
72 *Id.* at 684.
73 846 F.2d 486 (8th Cir. 1988).
74 Duro v. Reina, 851 F.2d 1136 (9th Cir. 1987), *cert granted*, 490 U.S. 1034 (1989), *and rev'd by* 495 U.S. 676 (1990).

persons who are not tribe members."[75]

A. Tribal Pandemonium

"'Will you walk into my parlour' Said a spider to a fly; 'Tis the prettiest little parlour that ever you did spy.'"[76]

The Supreme Court's decision in *Duro* prompted outcry from Indian tribes across the nation.[77] Before the *Duro* decision, tribes had been exercising criminal jurisdiction over all Indians, including members and nonmembers, for over 200 years, and the United States had recognized the exercise of this jurisdiction.[78] Additionally, pursuant to the Indian Major Crimes Act,

> the United States has asserted exclusive jurisdiction over certain specified major crimes committed in Indian country by an Indian against another Indian. This provision excludes state jurisdiction and may also exclude concurrent tribal jurisdiction . . . .Section 1152 [the Indian Country Crimes Act] establishes exclusive Federal jurisdiction over all other general crimes except over crimes committed in Indian country by an Indian against another Indian. The section recognizes exclusive jurisdiction of a tribal government over such crimes.[79]

The decision in *Duro*, however, "established an arbitrary line by differentiating between members and nonmembers instead of American Indians and non-American Indians."[80] In reaching its conclusion, the *Duro* court did not address the history of relations between Indian tribes.[81] Indian tribes quickly pointed out that nonmember Indians play a sizeable role in the activities of other tribes and in the lives of other Indians; nonmember Indians are valued members of the community.[82] In addition, the Arizona, South Dakota, Nevada, North Dakota, and Montana legislatures called upon Congress to reaffirm Indian tribal jurisdiction over nonmember Indians who commit misdemeanors on host reservations.[83]

In response to this outcry, Congress used its plenary power to amend the Indian Civil Rights Act. This amendment is

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75 *Duro*, 495 U.S. at 685.

76 Mary Howitt, *The Spider and the Fly*, *in* SKETCHES OF NATURAL HISTORY 128, 128 (Effingham Wilson, London 1834).

77 Matthew L.M. Fletcher, *American-Indian Law:* United States v. Lara: *Affirmation of Tribal Criminal Jurisdiction over Nonmember American Indians*, 83.7 MI B. J. 24 (2004).

78 S. REP. NO. 102-153, at 1 (1991).

79 *Id*. at 3. *See also* 18 U.S.C. § 1153 (1994).

80 Fletcher, s*upra* note 77, at 25.

81 S. REP. NO. 102-153, at 2 (1991).

82 Fletcher, *supra* note 77, at 25 (citing Carole Goldberg-Amberose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 LAW & SOC'Y REV. 1123 (1994)).

83 S. REP. NO. 102-153, at 2 (1991).

commonly called the "*Duro* fix" and restores the power of Indian tribes to prosecute nonmember Indians for crimes committed on their tribal land. The fix was supported by all of the tribes that testified before Congress prior to Congress amending the Act.[84] Through the *Duro* fix, Congress appeared to recognize that tribes need more power over events that occur within their borders. Indians who commit crimes on reservations of which they are not members will be subject to criminal prosecution "by the host tribal government in the same manner that they would be subject to prosecution by the United States for major crimes committed on Indian lands."[85] The Act, as amended, defines "Indian" as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, United States Code [the Indian Major Crimes Act], if that person were to commit an offense listed in that section in Indian country to which that section applies."[86]

Given the Congressional history and the plain language of the Indian Civil Rights Act of 1968 as amended, it seems appropriate to conclude that Congress was reinvesting Indian tribes with a power they already had: the power to prosecute *all* Indians who commit crimes on tribal land. This was an optimistic piece of legislation for Indian tribes in that they felt that a right they once had as a result of their inherent sovereign powers had been restored, and they would be able to enforce laws against nonmember Indians that may not otherwise be enforced in any other court.[87]

Around the time of the 1990 *Duro* decision and Congress' subsequent fix, tribes began to put forth even more of a concerted effort to make their voices heard, realizing if they did not, their past efforts could be thwarted and subsequent pleas may fall on deaf ears. Attempting to help themselves, the already-existing Native American Rights Fund, in conjunction with the National Congress of American Indians, formed the Tribal Supreme Court Project, which allows tribes to pool their resources in order to respond to the Supreme Court and Congress in a way which may help give them a voice that others can hear.[88] This effort developed a network of "attorneys and academics to share legal information and experience," which has helped ensure that the Supreme Court hears the best possible arguments in favor of the

84 Alex Tallchief Skibine, Duro v. Reina *and the Legislation that Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767, 768 (1993).

85 S. REP. NO. 102-153, at 2 (1991).

86 25 U.S.C. § 1301 (1990).

87 Fletcher, *supra* note 77, at 25.

88 Bethany R. Berger, United States v. Lara *as a Story of Native Agency*, 40 TULSA L. REV. 5, 16 (2004).

tribes when it opts to consider questions impacting Indian tribes and tribal relations.[89]

III. THE PROBLEM OF SOVEREIGNTY: *UNITED STATES V. LARA*

"In the spider-web of facts, many a truth is strangled."[90]

After the Supreme Court's decision in *Duro*, Congress amended the Indian Civil Rights Act to reaffirm Indian tribes' jurisdiction over all Indians. Congress' actions raise several important issues. First, by amending the Act to overrule the Supreme Court, Congress presumed that the *Duro* decision was based on federal common law rather than on constitutional grounds.[91] Second, by "reinvesting" tribes with a jurisdictional power the tribes presumed they retained all along, Congress acted as if tribes were not truly sovereign nations. Third, Congress' actions indicate that "tribes lost all power over persons other than members at conquest and whatever powers tribes have are the result of affirmative federal government grants."[92] This view of "delegated sovereignty" is an oxymoron: after all, "Indians like all other citizens share allegiance to the *overriding sovereign*, the United States."[93] Any other authority a tribe possesses "comes from the consent of its members, and so . . . marks the bounds of tribal authority."[94]

A. *United States v. Lara*: Background and Procedural History

1. District Court

Billy Jo Lara is a member of the Turtle Mountain Band of Chippewa Indians in North Dakota. He is married to a member of the Spirit Lake Tribe and resided with his wife and children on the Spirit Lake reservation in North Dakota.[95] On June 13, 2001, while on the Spirit Lake reservation, Bureau of Indian Affairs police officers arrested Lara for public intoxication.[96] When the officers informed Lara that there was an exclusion order prohibiting him from being on the Spirit Lake reservation,

89 *Id.* at 19 (citing Tracy Labin, *We Stand United Before the Court: The Tribal Supreme Court Project*, 37 NEW ENG. L. REV. 695, 697 (2003)).

90 Paul Eldridge, *available at* http://www.worldofquotes.com/author/Paul-Eldridge/1/index.html.

91 *See* United States v. Lara, 294 F. 3d 1004, 1006 (8th Cir. 2002) (citing Cooper v. Aaron, 385 U.S. 1, 18, (1958)), *reh'g en banc granted and rev'd by* 324 F.3d 635 (8th Cir. 2003), *cert. granted and en banc opinion rev'd by* 541 U.S. 193 (2004).

92 Resnik, *supra* note 7, at 115.

93 Skibine, 66 S. CAL. L. REV. at 775 (emphasis added).

94 *Id.*

95 United States v. Lara, 541 U.S. 193, 196 (2004).

96 United States v. Lara, 324 F.3d 635, 636 (8th Cir. 2003).

Lara struck one of them with his fist.[97] The Spirit Lake tribe charged Lara with five violations of the Sprit Lake Tribal Code, including violence to a policeman.[98] However, Lara had another problem on his hands: Bureau of Indian Affairs ("BIA") officers are not only tribal officers, but also federal officers. Thus, when Lara punched the BIA officer, he opened the door to federal prosecution as well.[99] This is precisely what occurred: a federal grand jury indicted Lara for assault on a federal officer, in violation of 18 U.S.C. § 111(a)(1).[100] Lara moved to dismiss the indictment, claiming that the federal charges violated the Double Jeopardy clause[101] and impermissible selective prosecution.[102] The magistrate judge denied the motion, and Lara entered a guilty plea on the condition that he could seek appellate review of his motion to dismiss the indictment.[103]

2. United States Court of Appeals, Round 1: 2002

A panel of the United States Court of Appeals for the Eighth Circuit affirmed the district court's denial of Lara's motion to dismiss the indictment.[104] The court cited the "separate sovereigns" doctrine, under which a tribal court and the federal government may prosecute a defendant for the same conduct if the tribal court and the federal government draw their authority from separate sources of power.[105] Lara argued to the panel that the separate sovereigns doctrine did not apply to his case because the tribe that prosecuted him, the Sprit Lake Nation, and the federal government both derive their power from the same source: the United States Constitution.[106] The government argued the opposite: "the Spirit Lake Nation draws its authority from retained sovereignty, [and] not from a Congressional

97 *Id.*

98 *Id.*

99 *See* Melissa L. Tatum, Symposium, *Tribal Sovereignty and* United States v. Lara*: Symposium Foreword*, 40 TULSA L. REV. 1 (2004).

100 The language of the statute is as follows:

> Whoever (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties . . . shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and in all other cases, be fined under this title or imprisoned not more than 8 years, or both.

18 U.S.C. § 111(a) (2005).

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

102 United States v. Lara, 294 F.3d 1004 (8th Cir. 2002).

103 *Id.*

104 *Id.* at 1005-06.

105 *Id.* at 1006.

106 *Id.*

delegation of power."[107]

Therefore, the government argued that the Sprit Lake Nation is a separate sovereign from the federal government and both may prosecute Lara under the separate sovereigns doctrine.[108] The Court of Appeals agreed with the government, explaining that, "*Duro* grounds its holding in federal common law, not Constitutional law, because *Duro* discusses tribal sovereignty without reference to the Constitution."[109] Accordingly, tribal sovereignty is governed by federal common law, and the court "must defer to Congress."[110] Turning then to Congress' amendment of the Indian Civil Rights Act (ICRA), the court concluded that Congress did not intend to expressly delegate Congressional authority when it amended the ICRA; instead, Congress' intent was to recognize inherent tribal power.[111] Thus, since the Sprit Lake tribe drew its power from retained sovereignty and the federal government drew its power from a different source, Lara's Double Jeopardy argument failed.[112]

3. United States Court of Appeals, Round 2: 2003

After the Court of Appeals' 2002 decision, Lara petitioned for a rehearing en banc.[113] The Court of Appeals granted Lara's petition and reversed the panel's 2002 decision.[114] The court recognized that the Ninth Circuit, in *United States v. Enas*, held that *Duro* was a common law decision and thus Congress had the power to override it by amending the Indian Civil Rights Act.[115] The court also noted that the *Enas* court, "conceded that sovereignty has 'constitutional implications'" but nevertheless decided that *Duro* was a common law decision.[116] The Court of Appeals went on to respectfully disagree with the Ninth Circuit's holding in *Enas*, concluding instead that, "the distinction between a tribe's inherent and delegated powers is of constitutional magnitude and therefore is a matter ultimately entrusted to the Supreme Court. Absent a delegation from

107 *Id.* at 1006.

108 *Id.*

109 *Id.* at 1007. *See also Duro*, 495 U.S. at 676.

110 *Lara*, 294 F.3d at 1007.

111 *Id. See also* United States v. Weaselhead, 36 F. Supp. 2d 908, 913 (Neb. 1997), quoting H.R. CONF. REP. NO. 102-261, at 3-4 (1991) ("Indian tribal-governments have retained the criminal jurisdiction over non-member Indians and [the Indian Civil Rights Act amendment] is not a delegation of this jurisdiction but a clarification.").

112 *Lara*, 294 F.3d at 1007.

113 United States v. Lara, 324 F.3d 635 (8th Cir. 2003) (en banc).

114 *Id.* at 640-41.

115 *Id.* at 639 (citing United States v. Enas, 255 F.3d 662 (9th Cir. 2001) (en banc), *cert. denied*, 534 U.S. 1115 (2002)).

116 *Id.* (quoting *Enas*, 255 F.3d at 673).

Congress, a tribe's powers are those 'inherent powers of a limited sovereignty which has never been extinguished.'"[117]

4. United States Supreme Court

The United States Supreme Court granted certiorari to decide "whether Congress has the constitutional power to relax restrictions that the political branches have, over time, placed on the exercise of a tribe's inherent legal authority."[118] The Court decided that Congress does possess such power and Lara's conviction was therefore not barred by the Double Jeopardy clause.[119] At first glance, this decision seems to be somewhat of a victory for tribes since it reaffirms the *Duro* fix, which allows tribes criminal jurisdiction over non-member Indians who commit crimes on tribal land.[120] The Court's ultimate conclusion, that tribes retain such criminal jurisdiction over non-member Indians, is proper in that it does give tribes a small amount of control over what happens within tribal borders. However, the Court's reasoning is flawed and a deeper examination leads to the conclusion that both the Court and Congress wish Indian tribes to remain virtually powerless to control relations, both within their borders and outside of their reservations' physical boundaries.

In reaching its decision, the Court broke its rationale into six elements: First, the Indian Commerce and Treaty Clauses gave Congress plenary and exclusive authority to write and pass laws with regard to Indian tribes.[121] Second, Congress had interpreted those "'plenary' grants of power as authorizing it to enact legislation that restricts and" relaxes tribal powers.[122] Third, Congress' goal of altering "the degree of autonomy" of a dependent sovereign that is not a State is a familiar legislative objective.[123] Fourth, Lara did not point to any language in the Constitution suggesting that there is a limit on Congress' "authority to relax restrictions on tribal" powers.[124] Fifth, the power that Congress "reinvested" in the tribes was similar to a tribe's powers to prosecute its own members, which makes the

117 *Id.* at 639 (quoting United States v. Wheeler, 435 U.S 313, 322(1978)) (emphasis omitted).

118 *Lara*, 541 U.S. at 196.

119 *Id.* at 197, 210.

120 *See* Kevin K. Washburn, *Lara, Lawrence*, *Supreme Court Litigation, and Lessons from Social Movements*, 40 TULSA L. REV. 25, 25, 28(2004).

121 *Lara*, 541 U.S. at 200. *See also*, *e.g.*, Washington v. Confederated Bands and Tribes of Yakima Nation, 439 U.S. 463, 470-71, (1979) ("Congress in the exercise of its plenary and exclusive power over Indian affairs . . . ."); *Wheeler*, 435 U.S. at 323.

122 *Lara*, 541 U.S. at 202.

123 *Id.* at 203.

124 *Id.* at 204.

change at issue limited.[125] Finally, the idea that Congress possessed the power to relax restrictions on tribes' inherent prosecutorial authority was consistent with decisions in other Supreme Court cases.[126]

B. What's Wrong With this Picture?

The doctrine of inherent sovereignty in federal Indian law holds that "tribes are domestic dependent nations which may exercise powers free of the strictures of the Constitution unless limited by treaty or Congress."[127] The idea of inherent sovereignty stems from the Marshall trilogy, which limited tribes in two areas: the ability (or lack thereof) to convey land, and the inability to deal as foreign nations to create treaties with the United States.[128] Essentially, "Native Americans were *mere occupiers* with an individuality not subject to the laws of the federal government *but not completely independent of them either*."[129] The doctrine of inherent sovereignty is troubling in and of itself because if tribes are sovereign, or were ever meant to be treated as such, they should not be "mere occupiers," or "dependent nations," which are subject to the mercy of Congress. Indian tribes are not sovereign, autonomous, or independent; Indian tribes are more accurately described as dependent nations.

At issue in *Lara* is the separate sovereign doctrine, an exception to the Double Jeopardy clause, in which multiple governmental units may prosecute a defendant for the same conduct if those governmental units draw their authority from separate sources of power. The fundamental concept underlying the separate sovereigns doctrine is "sovereigns." If Indian tribes draw their authority to prosecute Indians who commit crimes on tribal land from a source other than their own inherent power, then tribes are not sovereign.

The Supreme Court has previously held that when an Indian tribe prosecutes its own members, it is acting as a separate sovereign.[130] The Court also found that when a tribe prosecuted

125 *Id.*

126 *Id.* at 205.

127 L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 810 (1996).

128 *Id.*

129 April L. Seibert, Note, *Who Defines Tribal Sovereignty? An Analysis of* United States v. Lara, 28 AM. INDIAN L. REV. 393, 394 (2003/2004) (emphasis added).

130 *Lara*, 541 U.S. at 199. *See also Wheeler*, 435 U.S. at 318, 322-23 (1978) (a tribe's "*sovereign* power to punish *tribal* offenders," while subject to congressional "defeasance," remains among those "'inherent powers of a limited sovereignty which has never been extinguished'" (emphasis added and deleted)).

a member or a non-member Indian, its source of power to do so was the tribe's own inherent power; thus, it was acting as a separate sovereign.[131] However, by analyzing whether Congress has the power to relax restrictions placed on the exercise of a tribe's *inherent* legal authority by political branches, one must necessarily conclude that tribes are not regarded by either Congress or the Supreme Court as sovereign, and they do not possess any authority without either the Constitution or Congress granting them such authority.

C. Problems with the *Lara* Factors

1. If Congress Has Plenary Power over Indian Tribes They Cannot Be Independent Sovereigns

The Court reasoned that the Constitution, via the Indian Commerce and Treaty Clauses, gives Congress "plenary and exclusive" power to legislate with regard to Indian tribes.[132] Second, Congress has interpreted those plenary grants of power as authorizing it to enact legislation that restricts and relaxes tribal powers.[133] The plenary powers doctrine has been the source of much agony for Indian tribes in the United States "because of its potential to allow Congress to obliterate tribal governments and treaties."[134]

"[T]he sovereignty of the tribes is subject to exceptionally great powers of Congress to regulate and modify the status of tribes."[135] With regard to Indians, Congress has authorized different policies at different times throughout United States history.[136] Aside from attempting to define Indian country through the Indian Intercourse Act and subsequently through steps to provide Indians with their own territories within states, Indian tribes are also specifically mentioned in the Indian Commerce Clause of the United States Constitution. This clause gives Congress the power to "regulate commerce with foreign Nations and among the several states and with the Indian tribes."[137] The Indian Commerce Clause is derived from Article IX of the Articles of Confederation, which stated that Congress has "the sole and exclusive right and power of . . . regulating the

131 *Lara*, 541 U.S. at 199.

132 *Id.* at 200.

133 *Id.*

134 Edwin Kneedler, *Indian Law in the Last Thirty Years: How Cases Get to the Supreme Court and How They Are Briefed*, 28 AM. INDIAN L. REV. 274, 279 (2003).

135 William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 1 (1987).

136 *Lara*, 541 U.S. at 200.

137 Pommersheim, *supra* note 35, at 273 n.12.

trade and managing all affairs with the Indians."[138]

In the early years of the United States, Congress may have been well served to interpret the Indian Commerce Clause as granting to it the power to regulate *all* Indian affairs, despite the fact that that the clause specifically grants power over only Indian *commerce*. However, even with changing times and the increased purchasing and political power of Indian tribes in this country, the Court continues to interpret this clause as not only giving Congress the power to regulate trade and commerce with the tribes, but also as authority to legislate other issues with regard to tribal affairs.[139] The problem with this interpretation is that "the treaty power does not literally authorize Congress to act legislatively," because it actually gives the President the power and authority to make treaties.[140]

In 1871, Congress ended the practice of entering into treaties with Indian tribes, but the Supreme Court nonetheless stated that the statute terminating such power, 25 U.S.C. § 71, "in no way affected Congress' plenary powers to legislate on problems of Indians."[141] Congressional policy today still purports to seek "greater tribal autonomy within the framework of a 'government-to-government relationship.'"[142] Yet, Congress has made major policy changes with regard to Indians, even in the last fifteen years, indicating that tribes are not as autonomous as the government makes them out to be.[143]

If Congress has plenary and exclusive power to legislate with regard to Indian tribes, then tribes are not truly sovereign, because they do not possess the ultimate power to decide whether they and their members will interact with the federal government and various states. Because Congress gave Indian tribes their recognized status within this country, it follows that because of its plenary power to legislate with regard to tribes, Congress has the power to extinguish tribal status. If a separate body has the complete power to regulate tribal affairs, then tribes are not sovereign; instead, they are dependent.

138 *Id.* (quoting the Articles of Confederation art XII).

139 *Id.* at 273.

140 *Lara*, 541 U.S. at 201.

141 *Id.* (quoting Antoine v. Washington, 420 U.S. 194, 203 (1975)).

142 *Id.* at 202 (quoting 59 Fed. Reg. 22951 (April 29, 1994)).

143 In the past fifteen years, Congress has, among other things, enacted the *Duro* fix and written multiple laws with regard to Indian gaming. With the increasing influence tribes have on the communities in which they are situated, and therefore on the United States itself, the government continues to step in and regulate Indian tribes.

2. The Constitution Does Not Give Congress An Enumerated Power To Alter Tribal Sovereignty

The Court in *Lara* noted that Congress' statutory goal of modifying the degree of autonomy of a dependent sovereign that is not a State is a common legislative objective.[144] Here again, the Court states that Congress may modify a tribe's degree of autonomy within the United States. As the court in *Wheeler* noted, Indian tribes enjoy a sovereignty that, "exists only at the sufferance of Congress and is subject to complete defeasance."[145] The Court refers to Indian tribes as "dependent sovereign[s]," however, the terms contradict one another. If a tribe is dependent, then it is not truly sovereign.[146] Since Congress may write laws with regard to tribes' internal affairs and jurisdiction, as well as tribal relations with the government, then Indian tribes are not entirely self-governing, even though they possess the power to write laws with regard to certain aspects of internal tribal affairs. Thus, they lack true sovereignty.

The Court states that Lara does not point to any explicit language in the Constitution suggesting there is a limit on Congressional authority to restrict or relax tribal powers.[147] What the Court does not recognize is that tribal members cannot point to explicit language in the Constitution with regard to Congress' authority on tribal affairs, because none exists. Justice Thomas, although concurring in the judgment, notes that "[t]he Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty."[148] There are only three places in which the term "Indian" appears in the United States Constitution.[149] First, it appears in Article I regarding apportionment of the House of Representatives.[150] Second, it appears in substantially the same form in the Fourteenth Amendment, which superseded the Article I reference. [151] Finally, the Indian Commerce Clause appears in Article I.[152]

The Court concedes that the treaty power, which is often referred to as a source of Congressional power over tribes, does not literally give Congress the authority to legislate with regard

144 *Lara*, 541 U.S. at 202.
145 *Wheeler*, 435 U.S. at 323.
146 *See generally Lara*, 541 U.S. at 193.
147 *Id*. at 196.
148 *Id*. at 224 (Thomas, J., concurring in the judgment).
149 Resnik, *supra* note 7, at 80.
150 U.S. CONST. art. I, § 2, cl. 3 ("[E]xcluding Indians not taxed.").
151 U.S. CONST. amend XIV, § 2.
152 U.S. CONST. art. I, § 8, cl 3.

to Indian affairs.[153] Thus, "it provides *no* power to *Congress*, at least in the absence of a specific treaty."[154] The treaty power problem was prevalent even in the early 1900s, as illustrated in *Missouri v. Holland*.[155] Although *Holland* challenged the Migratory Bird Treaty Act, it provides a good illustration of the sovereignty debacle and constitutional problems that plague the *Lara* decision and Indian affairs in general.

In *Holland*, Missouri filed a suit against the United States game warden to enjoin the United States from trying to enforce the Migratory Bird Treaty Act and certain regulations made by the Secretary of Agriculture on the grounds that the statute was unconstitutional.[156] The state argued that the statute interfered with states' sovereign rights because it provided for specified close seasons and other protections for certain species of birds that migrated between the United States and Canada.[157] The Supreme Court held that the Act was constitutional as the treaty-making power was expressly delegated to the United States under the Treaty clause[158] and the Supremacy Clause.[159] However, the decision tells the tale of a power struggle between the states and the federal government that is analogous to the situation facing Native Americans today.

Ironically, only six years prior to the *Holland* decision, the United States District Court for the Eastern District of Arkansas in *United States v. Shauver* struck down as unconstitutional an earlier federal statute regulating migratory birds because Congress "attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States."[160] Despite the fact that the court in *Shauver* found that migratory birds fell under the purview of matters that should be regulated by the states, counsel for the Attorney General in *Holland* argued that the government may exercise its powers within the various states to the extent necessary, "although they may involve an interference with what would otherwise lie exclusively within the province of the state."[161] The Supreme Court accepted

153 *Lara*, 541 U.S. at 201.

154 *Id.* at 225 (Thomas, J., concurring in the judgment).

155 252 U.S. 416 (1920).

156 *Id.* at 430-31.

157 *Id.* at 431.

158 U.S. CONST. art. II, § 2, cl. 2.

159 U.S. CONST. art. VI, cl. 2.

160 *Holland*, 252 U.S. at 432. *See also* United States v. Shauver, 214 F. 154 (1914) ("The court is unable to find any provision in the Constitution authorizing Congress, either expressly or by necessary implication, to protect or regulate the shooting of migratory wild game when in a state, and is therefore forced to the conclusion that the act is unconstitutional.").

161 Brief for Appellee, Missouri v. Holland, 252 U.S. 416, 419 (1920) (No. 609).

the government's argument despite the fact that the government, by deviously going through the back door and entering into a treaty with Canada, sought to accomplish the same objective it attempted to undertake in *Shauver*. Counsel for the Appellant in *Holland*, recognizing the irony of the situation, aptly noted that

> [i]f it had even been suggested that, although Congress had no power to control the taking of wild game within the borders of any State, yet indirectly by means of a treaty with some foreign power it could acquire the power and by this means its long arm could reach into the States and take food from the tables of their people, who can for one moment believe that such a constitution would have been ratified?[162]

By the same token, even though the treaty power gives Congress no authority to regulate the relationship between tribes and the federal government absent a specific treaty, Congress uses its long arm to delve into tribal affairs via the treaty power and take from tribes that which it has no authority to seize: sovereignty.

> If Congress by means of a treaty can tell the people of a State when and under what conditions they may take wild game which they own in their collective sovereign capacity . . . then . . . they are states in name only, and our government a very different government from that presupposed and intended by the people who ratified the Constitution.[163]

Similarly, with regard to tribal self-government, because Congress bestowed upon itself the power to legislate with regard to Indian affairs and did not leave that task to the tribes, Congress does not view the tribes as sovereign. Instead, Congress views the tribes as dependent on the government to regulate virtually every aspect of their affairs, something Indians likely never pondered and the government, if it views tribes as sovereign, should never have contemplated either.

3. If Congress Has Power To "Reinvest" Tribes With Prosecutorial Power, Then The Tribes Are Not Sovereign

The Court states that the power that Congress reinvested in the tribes is similar to a tribe's powers to prosecute its own members, which makes the change at issue limited.[164] True, the *change* at issue may be limited, but the overreaching powers of the Supreme Court and Congress with respect to tribes are not. The trouble with *Lara* is that the Court circumvents the issue that has been at the core of Indian law and legislation since

162 Brief for Appellant, Missouri v. Holland, 252 U.S. 416, 418 (1920) (No. 609).
163 *Id*.
164 *Lara*, 541 U.S. at 203.

colonization: sovereignty. Simply because Congress reinvests tribes with a power that they already had, or which is similar to another power tribes possess, it does not necessarily follow that Congress believes that tribes are sovereign. Limited power does not equate to sovereignty.

The Court states that Congress' power to relax restrictions on tribes' inherent prosecutorial authority is consistent with other Supreme Court cases.[165] While this may be the case, it still does not mean that Congress and the Supreme Court view tribes as separate sovereigns. This is evidenced by the fact that Congress and the Supreme Court decide the laws of Indian nations with regard to dealings with the government and non-Indians. In fact, Congress, through its 1990 amendment of the Indian Civil Rights Act, dictated the way it believed Indians should behave with respect to other Indians within Indian territory. Although it is true that prior to the ICRA amendment tribes had been exercising authority over nonmember Indians who committed crimes on host tribal land, when Congress reaffirmed that power, it was essentially dictating to Indian tribes what they could or could not legally do with regard to nonmember Indians. Congress, if it had chosen to do so, could have refrained from amending the ICRA or amended it differently, denying Indian tribes all power to prosecute nonmember Indians who commit crimes on host territory.

D. Double Jeopardy

The Supreme Court found that Lara's tribal prosecution and subsequent federal prosecution for the same crime did not violate the Double Jeopardy clause of the Fifth Amendment.[166] The Double Jeopardy clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[167] Under normal circumstances, the Double Jeopardy clause would bar Lara's subsequent federal prosecution. However, there is an exception to the double jeopardy clause: the separate sovereigns, or dual sovereignty, doctrine. This doctrine holds that when an individual violates the "peace and dignity" of two sovereigns by a single act, that is, they violate the laws of two separate sovereigns, there are two distinct offenses.[168] Because the *Lara* Court found that Indian tribes possess the inherent sovereignty to prosecute nonmember Indians who commit crimes on host

165 *Id.*

166 *Id.* at 210.

167 U.S. CONST. amend. V.

168 *Lara*, 541 U.S. at 220 (Thomas, J., concurring) (quoting Heath v. Alabama, 474 U.S. 82, 88 (1985)).

tribal land, the Court found that the Sprit Lake Nation was a separate sovereign from the federal government. Thus, the dual sovereignty doctrine permitted both the tribal and the federal prosecutions.[169] However, this conclusion was not without criticism. Justice Thomas, although concurring in the judgment, pointed out that confusion and mixed messages are still abundant in tribal sovereignty cases. He noted two diametrically opposed assumptions underlying sovereignty cases: First, Congress possesses the power to "regulate virtually every aspect of the tribes without rendering tribal sovereignty a nullity."[170] Second, the tribes somehow remain inherently sovereign with the ability "to enforce their criminal laws against their own members."[171]

Over twenty years ago, the Supreme Court faced the same dilemma in *United States v. Wheeler*. The Court noted that an Indian tribe's power to punish tribal members who commit crimes on tribal land was among the inherent powers of Indian tribes. However, those powers were subject to "complete" congressional "defeasance."[172] Even after Congress amended the Indian Civil Rights Act in 1990, purporting to "reinvest" Indian tribes with the inherent power to prosecute nonmember Indians, Congress still holds the puppet strings. That is, Congress ultimately has the power to take away tribes' authority to prosecute both member and nonmember Indians. Both the Court and Congress appear to promote the idea that the Indians' source of power to prosecute criminals is a power derived from inherent sovereignty. However, in reality, this power seems to be a delegated federal power. Justice Kennedy, concurring in the *Lara* judgment, points out that

> [t]he terms of the [amended Indian Civil Rights Act] are best understood as a *grant or cession from Congress* to the tribes, and it should not be doubted that what Congress has attempted to do is subject American citizens to the authority of an extraconstitutional sovereign to which they had not previously been subject. The relaxing-restrictions formulation is further belied by the involvement of the United States in all aspects of the tribal prosecution of a non-member Indian. . . . This does not indicate the sort of detachment from the exercise of prosecutorial authority implicit in the description of Congress' Act as having relaxed restrictions.[173]

Adding an interesting twist to the plot, both Justice Souter and Justice Scalia, who rarely share the same point of view,

169 *See Lara*, 541 U.S. at 210.
170 *Id.* at 215 (Thomas, J. concurring).
171 *Id.*
172 *Wheeler*, 435. at 322.
173 *Lara*, 541 U.S. at 213 (Kennedy, J., concurring) (emphasis added).

dissented. Justice Souter wrote that the majority's reasoning implied that allowing Congress to amend the Indian Civil Rights Act was "more like the delegation of lawmaking power to an administrative agency, whose jurisdiction would not even exist absent congressional authorization."[174] An application of the Double Jeopardy doctrine turns on just how far inherent jurisdiction extends.[175]

Although Indian tribes do have limited powers to punish offenders who commit crimes within tribal territory, that power is still scrutinized by the ever watchful eye of the federal government. Congress and the Supreme Court still maintain that Indian tribes are separate sovereigns, and therefore, when an Indian commits a crime on tribal land, both the tribal and federal governments may prosecute him without offending the Double Jeopardy clause. Yet, if Congress has the plenary authority to disinvest tribes of that power by making it illegal to prosecute tribal members or nonmembers for crimes they commit on tribal land, then it does not seem to follow that Indian tribes are separate sovereigns. If this is the case, then tribal power is delegated federal power, and the Fifth Amendment should bar the Court from twice putting Lara in jeopardy.

There is no way to deny that the United States government has extensive power over Indian tribes. Realistically speaking, because tribes are reliant on the federal government, Congress' continual interference with tribal affairs and jurisdictional issues is at odds with the tribes' dependent status and most definitely at odds with their independent status. When Congress enacted the *Duro* fix to reinvest tribes with powers they possessed from their inception, Congress gave powers to the tribes that dependent bodies cannot really possess. Hence, Congress confused the situation even further with its "largely rhetorical" notions of indigenous nation sovereignty and independence.

IV. CONCLUSION

"The bird a nest, the spider a web, man friendship."[176]

Congress undeniably has the power to regulate Indian tribes, controlling a multitude of tribal affairs, both externally, and, to some extent, internally. However, this leads to the conclusion that Indian tribes are not sovereign bodies and probably have not been since colonization. The United States government and

174 *Id.* at 227 (Souter, J., dissenting).

175 *Id.*

176 William Blake, *available at* http://www.worldofquotes.com/author/William-Blake/1/index.html.

Indian tribes alike have made progress in leaps and bounds since both bodies experienced a head-on collision during the nation's inception. However, the government, while insisting that Indian tribes are sovereign nations, continuously appears to disregard their sovereignty by enacting laws that impact the tribes. If the Supreme Court and Congress believe that Indian tribes are sovereign, they should treat them as such.

Tribes have made countless efforts to improve their status within this country. Unfortunately, sometimes those efforts do not succeed. Making improvements, while partially the tribes' responsibility, should also be a priority for the government. The Court and Congress should take the initiative to recognize that when they refer to Indian nations as sovereign, they are perpetuating a false sense of independence and ability to completely self-govern. Our nation's law and policymaking bodies should reveal their true stance on how they view Indian nations.

Although there is no easy solution to such a deeply-rooted historical issue, recognizing that there is a problem, and identifying the source of that problem is at least a first step. Although "[t]he case before us must be considered in light of our whole experience and not merely in that of what was said a hundred years ago,"[177] it still appears that Congress and the Supreme Court would rather continue giving lip service to tribal sovereignty than come to a resolution that allows the government to remain powerful but also allows tribes to preserve an independence and heritage that, if destroyed, could drive a stake through the rich traditions that are at heart of this nation.

177 *Holland*, 252 U.S. at 433.