Affirmation of Tribal Criminal Jurisdiction Over Nonmember American Indians

On April 19, 2004, the United States Supreme Court decided *United States v Lara,*[1] a landmark case in federal American-Indian law. *Lara* upheld the authority of American-Indian tribes to prosecute nonmember American Indians and held that such prosecutions do not violate the Double Jeopardy Clause because an American-Indian tribe is "acting in its capacity of a separate sovereign." All Michigan tribes have significant numbers of nonmember American Indians—members of other American-Indian tribes and Canadian Indians—living in their Indian Country. The *Lara* decision clarifies an important area of law for the Michigan tribes—whether American-Indian tribes have *inherent* authority to prosecute nonmember American Indians.

Tribal Criminal Jurisdiction

Criminal jurisdiction in Indian Country is a complicated doctrine of law with practitioners often relying on a chart to decide which sovereign may prosecute in a particular case.[2] The complications arose over the course of more than 150 years of Supreme Court jurisprudence and several Acts of Congress. In the early 19th century case known as the Marshall Trilogy,[3] the Supreme Court first formulated its opinion of the relationship of American-Indian tribes as sovereign governments within the two-sovereign structure established by the United States Constitution. Chief Justice Marshall rejected arguments that American-Indian tribes were foreign nations and instead described them as "domestic dependent nations."[4] As "domestic dependent nations," American-Indian tribes possess criminal jurisdiction in Indian Country that is "complete, inherent, and exclusive," except as limited by Congress.[5] As such, American-Indian tribes have exclusive jurisdiction over crimes committed by American Indians against American Indians in Indian Country.[6] "Indian Country" is defined as all lands within American-Indian reservations, all dependent American-Indian communities, and all American-Indian allotments.[7]

Indian Country in Michigan, for example, includes reservation land and all land held in trust by the United States for the benefit of the tribes or individual American Indians.[8] At least nine Michigan American-Indian tribes have reservation or trust land in Michigan. In Indian Country, the state has no criminal jurisdiction over American Indians.[9]

However, the federal limitations on tribal criminal jurisdiction are significant. First, the Indian Civil Rights Act constrains tribes to sentencing offenders convicted in tribal courts to one year in prison and $5,000 in fines.[10] The Supreme Court articulated the second, and perhaps the most critical, limitation in *Oliphant v Suquamish Indian Tribe,*[11] where the Court held that American-Indian tribes do not have jurisdiction over non-American Indians. The federal government has exclusive jurisdiction in Indian Country over crimes committed by non-American

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Indians against American Indians[12] and the state has exclusive jurisdiction over crimes committed by non-American Indians against non-American Indians.[13] In *Oliphant,* the Court relied upon the novel theory that American-Indian tribes had been implicitly divested of the *inherent* authority to prosecute non-American Indians, noting that it was inconsistent with their status. Scholars harshly criticized that holding, largely because the Court didn't (and couldn't) say exactly *when* or *how* tribes' inherent authority had been divested.[14]

American-Indian tribes and the federal government have concurrent jurisdiction over 14 serious crimes, listed in the Major Crimes Act,[15] committed by American Indians.[16] Naturally, since an American Indian may be prosecuted twice—once by the tribe and once by the U.S. Attorney—for a crime in Indian Country, double jeopardy concerns arise. The Supreme Court put those concerns to rest in the 1978 case *United States v Wheeler,*[17] where the Court relied upon the dual sovereignty exception to the double jeopardy prohibition[18] because the federal government and American-Indian tribes are separate sovereigns.[19]

Wheeler and *Oliphant* presaged later decisions of the Court that shifted the law of tribal criminal jurisdiction by implying that American-Indian tribes could only prosecute their own members. *Wheeler* involved a claim under the Double Jeopardy Clause by a member against the convictions of both the federal government and his own tribe. The Court upheld the inherent authority of the tribe to prosecute the petitioner but created an element of doubt as to whether American-Indian tribes could prosecute nonmembers by referring not to "American Indians" but to "members." Completing the circle in 1990, the Court held that American-Indian tribes do not have criminal jurisdiction over nonmember American Indians in *Duro v Reina,*[20] reasoning that American-Indian tribes had been implicitly divested of their inherent authority to prosecute *all* nonmembers, including nonmember American Indians.

The "*Duro* Fix"

American-Indian tribes went into an uproar following *Duro.* The Court in *Duro* established an arbitrary line by differentiating between members and nonmembers instead of American Indians and non-American Indians. Nonmember American Indians play a significant role in the daily life of any American-Indian community—they participate in cultural ceremonies and powwows, they intermarry, they may be drawn to other American-Indian communities through the operation of the foster care and adoption provisions of the Indian Child Welfare Act and federal health, housing, and educational programs, and most importantly they are valued and essential members of the American-Indian community.[21] The Court's reliance upon the membership of an American Indian was completely out of tune with the reality on the ground—nonmember American Indians are far more integrated into an American-Indian community than tourists in a foreign land. In response, Congress exercised its plenary authority and quickly enacted what became known as the "*Duro* fix," amending the Indian Civil Rights Act to restore and affirm the "inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians,"[22] expressly avoiding the language of a delegation of federal authority.

Nonmember American Indians subjected to dual tribal and federal prosecutions immediately challenged the *Duro* fix on the ground that Congress did not have the authority to "restore and affirm" the inherent authority of American-Indian tribes to prosecute nonmember American Indians.[23] These petitioners argued that once a tribe's inherent authority to prosecute nonmember American Indians had been divested by operation of history, it could not be returned by an Act of Congress. The theory was that, if Congress could not "restore and affirm" the inherent authority of tribes, then Congress could only delegate its own authority to the tribes. If that were the case, then both the tribes and the federal government would be prosecuting nonmember American Indians with *federal* authority, implicating the Double Jeopardy Clause.

Congress's Plenary Power

Because the states repudiated their authority to regulate American-Indian affairs during the ratification of the United States Constitution, the federal government retained plenary and exclusive authority to regulate American-Indian affairs.[24] The Indian Commerce Clause became the main source of plenary Congressional authority over American-Indian affairs. Congress has exercised this authority to define the parameters of criminal jurisdiction in Indian Country several times in the last two centuries, including the enactment of the Major Crimes Act[25] and the Indian Country Crimes Act.[26] The Supreme Court has repeatedly affirmed the plenary power of Congress to enact statutes for the benefit of American-Indian tribes and individual American Indians.[27]

Importantly, Congress relied upon its plenary power to enact dozens of other statutes that compose much of the statutory authority upon which the federal government operates its much-needed programs for the benefit of American-Indian tribes. Congress enacted the Indian Child Welfare Act,[28] the

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Indian Self-Determination and Education Assistance Act,[29] the Native American Housing and Self-Determination Act,[30] the Indian Gaming Regulatory Act,[31] and many other statutes, relying upon its plenary power to legislate on behalf of American Indians.

Billy Jo Lara

Billy Jo Lara is a member of the Turtle Mountain Band of Chippewa Indians in North Dakota. He married a member of the Spirit Lake tribe in North Dakota and moved to that reservation, a common circumstance on all American-Indian reservations. According to the federal prosecutor, Assistant United States Attorney Janice Morley, and the Spirit Lake tribal prosecutor, Michelle Rivard, Lara began to repeatedly disturb the peace and perpetrate domestic violence, steadily increasing the violence of his crimes, until he was banished from the Spirit Lake Reservation.[32] As is the unfortunate signature of many domestic violence cases, Lara returned and was arrested by a Bureau of Indian Affairs officer, who happen to be cross-deputized by the tribe. When Lara knocked out one of the arresting officers, the tribe prosecuted Lara, followed shortly thereafter by the United States Attorney's Office prosecution for assaulting a federal officer.[33]

Following the arguments made by previous nonmember American-Indian defendants, Lara argued that the federal prosecution violated the Double Jeopardy Clause because the *Duro* fix was a delegation of federal authority. Though the federal district court and a three-judge panel of the eighth circuit disagreed with Lara,[34] the eighth circuit re-heard the case en banc and reversed, holding that the *Duro* fix was a delegation of federal power, invalidating the federal conviction.[35] Because the eighth circuit decision conflicted with the decisions of two other circuits, the Supreme Court granted certiori and, subsequently, reversed that court.[36]

Importance to Michigan American-Indian Tribes

Lara establishes that Michigan tribes have the inherent authority to prosecute nonmember American Indians living in each of their communities. A decision adverse to the federal government would have meant that only the United States Attorney could prosecute nonmember American Indians for crimes in Michigan Indian Country. Crimes such as domestic violence and misdemeanors call for a swift local response, a response the federal government, despite the best efforts of the U.S. Attorneys, can rarely offer due to their lack of resources and distance from most Michigan reservations.[37] Preserving tribal jurisdiction over nonmember American Indians goes a long way toward ensuring the swift response required for most of the potentially deadly domestic violence situations in Indian Country.

The *Lara* decision also strongly supported the plenary power of Congress to legislate for the benefit of American-Indian tribes, a doctrine that had come under fire in recent years. Many American-Indian law commentators had worried that the Court would invalidate the *Duro* fix and eviscerate Congressional power to regulate American-Indian affairs.[38] For if Congress could not validly create the *Duro* fix, then there might be fodder that Congress couldn't enact the Indian Child Welfare Act and other statutes enacted to assist American Indians and American-Indian tribes. *Lara* largely put that question to rest, affirming Congressional plenary power and holding that Congress had authority to relax "restrictions on tribal sovereign authority."[39] *Lara* affirms that Congress has power to redefine the metes and bounds of tribal sovereignty even after the Supreme Court has limited tribal authority. ✦

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Footnotes

1. 124 S Ct 1628 (2004).
2. The chart is reprinted at Hon. William C. Canby, Jr., *American Indian Law in a Nutshell* 168 (3rd ed 1998).
3. *Johnson v M'Intosh,* 21 US (8 Wheat) 543 (1823); *Cherokee Nation v Georgia,* 30 US (5 Pet) 1 (1831); *Worcester v Georgia,* 31 US (6 Pet) 515 (1832).
4. *Cherokee Nation,* 30 US at 17.
5. Hon. William C. Canby, Jr., *American Indian Law in a Nutshell* 170 (4th ed 2004) (citing Ex parte Crow Dog, 109 US 556 (1883)).
6. See id (citing 18 USC 1152).

FAST FACTS:

All Michigan tribes have significant numbers of nonmember American Indians living in their Indian Country.

American-Indian tribes and the federal government have concurrent jurisdiction over 14 serious crimes committed by American Indians.

***Lara* established that Michigan tribes have the inherent authority to prosecute nonmember American Indians living in each of their communities.**

7. 18 USC 1151.
8. See *United States v Anthony,* 47 F3d 1170, 1994 WL 735269 (CA 6, Jan 12, 1994) (unpublished) (holding the housing project owned by Sault Ste. Marie tribe is "Indian Country"); *United States v Cardinal,* 954 F2d 359 (CA 6 1992) (holding that Keweenaw Bay Indian Reservation is "Indian Country").
9. *People v Bowen,* 1996 WL 33357554 (Mich App, Oct 11, 1996) (unpublished), lv denied, 454 Mich 877; 560 NW2d 640 (1997); *People v Bennett,* 195 Mich App 455; 491 NW2d 866 (1992), lv denied, 442 Mich 913; 503 NW2d 448 (1993).
10. 25 USC 1302(7).
11. 435 US 191; 98 S Ct 1011 (1978).
12. E.g., *State v Larson,* 455 NW2d 600 (SD 1990); *State v Flint,* 756 P2d 324 (Ariz 1988).
13. *United States v McBratney,* 104 US (14 Otto) 621 (1881); *Draper v United States,* 164 US 240; 17 S Ct 107 (1896).
14. E.g., Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases,* 16 Public Land Law Review 1, 11–12 (1995).
15. 18 USC 1153.
16. See *Wetsit v Stafne,* 44 F3d 823 (CA 8 1995); Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze,* 18 Arizona Law Review 503, 559 n 295 (1976).
17. 435 US 313; 98 S Ct 1079 (1978).
18. See *Heath v Alabama,* 474 US 82, 88; 106 S Ct 433 (1985).
19. See generally Hon. Sandra Day O'Connor, *Lessons From the Third Sovereign: Indian Tribal Courts, 33* Tulsa Law Journal 1 (1997).
20. 495 US 676; 110 S Ct 2053 (1990).
21. See Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life,* 28 Law & Society Review 1123, 1128 (1994).
22. 25 USC 1301(2).
23. E.g., *United States v Long,* 324 F3d 475 (CA 7), cert denied, 124 S Ct 151 (2003); *United States v Enas,* 255 F3d 662 (CA 9 2001), cert denied, 534 US 1115; 122 S Ct 925 (2002); *Means v Northern Cheyenne Tribal Court,* 154 F3d 941 (CA 9 1998); *Morris v Tanner,* 288 F Supp 2d 1133 (D Mont 2003); *United States v Archambault,* 206 F Supp 2d 1010 (D SD 2002); *United States v Weaselhead,* 36 F Supp 2d 908 (D Neb 1997), aff'd, 165 F3d 1209 (CA 8) (en banc), cert denied, 528 US 829; 120 S Ct 82 (1999); *Mousseaux v United States Commission of American Indian Affairs,* 806 F Supp 1433 (D SD 1992), aff'd, 28 F3d 786 (CA 8 1994).
24. See *Oneida County, New York v Oneida American Indian Nation of New York,* 470 US 226, 234 & n 4; 105 S Ct 1245 (1985); *United States v Forty-Three Gallons of Whiskey,* 93 US (3 Otto) 188, 194 (1876).
25. 18 USC 1153. See also *United States v Seymour,* 38 F3d 261 (CA 6 1994) (§ 1153 prosecution).
26. 18 USC 1152.
27. E.g., *United States v Kagama,* 118 US 375, 384–85; 6 S Ct 1109 (1886); *Negonsott v Samuels,* 507 US 99, 103; 113 S Ct 1119 (1993).
28. 25 USC 1901 et seq.
29. 25 USC 450 et seq.
30. 25 USC 4101 et seq.
31. 25 USC 2701 et seq.
32. Panel Presentation on *United States v Lara,* University of North Dakota School of Law, March 30, 2004.
33. See *Lara,* 124 S Ct at 1631.
34. See *United States v Lara,* 2001 WL 1789403 (D SD, Nov 29, 2001), aff'd, 294 F3d 1004 (CA 8 2002).
35. See 324 F3d 635 (CA 8 2003) (en banc).
36. See *Lara,* 124 S Ct at 1631.
37. See Leslie A. Hogan, *Prosecuting Non-Indian Perpetrators of Domestic Violence,* Bedohgeimo: A Newsletter from the United States Attorney's Office, Western District of Michigan, Winter 2004 at 5.
38. E.g., Frank Pommersheim, *Is There A (Little or Not So Little) Constitutional Crisis Developing in Indian Country?: A Brief Essay,* 5 University of Pennsylvania Journal of Constitutional Law 271 (2003).
39. *Lara,* 124 S Ct at 1634.