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United States v. Billy Jo Lara and Tribal Sovereignty Over Nonmember Indians

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Summary

The Supreme Court will hear oral arguments January 21 in *United States v. Billy Jo Lara*, Docket No. 03-107, a case which presents an opportunity for the Court to resolve a split in the U.S. Circuit Courts of Appeals on the issue of tribal sovereignty over nonmember Indians. This confusion stems from the aftermath of the Court's ruling in *Duro v. Reina*, in which the Court held that a tribe has no inherent authority to assert criminal jurisdiction over Indians who are not members of that tribe. Congress responded by passing amendments to the Indian Civil Rights Act effectively overturning the Supreme Court's interpretation of inherent tribal authority. To resolve the conflict presented by *Lara*, the Supreme Court must answer novel questions regarding the source of tribal sovereignty and which branch has the final authority to determine the breadth of that sovereignty. This report will be updated when the Court renders its decision.

Background. Given that the Constitution is relatively silent regarding Indians,[1] the question of how Indian tribes fit into the American structure of government has been a problematic issue for the courts almost since the Constitution was ratified.[2] Nevertheless, courts have carved out a place for Indian tribes within this structure through the doctrine of Indian tribal sovereignty, which holds that, while tribes lack the external powers normally associated with full sovereignty by virtue of their incorporation within United States territory (e.g., the power to enter into treaties with foreign nations), tribes retain sovereignty over their own internal affairs.[3] This sovereignty, however, is subject to complete defeasance by Congress,[4] which enjoys nearly plenary power to legislate in

[1] They are mentioned twice, in Article I, §§ 2 and 8.

[2] *See generally* Frank Pommersheim, *Is There a Little (or Not so Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay*, 5 U. Pa. J. Const. L. 271 (January 2003).

[3] *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978).

[4] *Id.*

the field of Indian affairs.[5] Justice John Marshall famously likened the unique status of Indian tribes to "domestic dependent nations," and their relationship with the United States to "a ward to his guardian."[6] The Supreme Court has refined these ideas over the last two centuries to describe the limited authority that tribes have retained as those "inherent powers of a limited sovereignty which has never been extinguished."[7]

This inherent sovereignty doctrine reflects the fact that Indian tribes were at one time independent and self-governing societies[8] that existed prior to the United States Constitution, and much of their authority over their own internal affairs survived their assimilation into the United States. Because this power existed before the Constitution, it does not spring from that document, but is rather power retained from the tribes' days as sovereigns.[9] The Supreme Court has defined a tribe's inherent powers as those powers not inconsistent with the tribe's domestic dependent status.[10] As the Court put it, "Exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."[11] The inquiry into whether a tribe is exercising its inherent authority, then, must focus on whether a tribe's attempted exercise of authority falls "within that part of sovereignty which the Indians lost by virtue of their dependent status."[12] This distinction between a tribe's *inherent* authority and that authority which was *divested* upon the tribe's assimilation into United States territory is central to the conflict facing the Supreme Court in *Lara*.

Also central to the conflict in *Lara* is the distinction between members of the tribe and outsiders - i.e., Indians who are not members of the tribe and non-Indians. The inherent sovereignty that a tribe enjoys over its internal affairs clearly extends to members of that tribe, but does not extend to non-Indians, even when they reside on the tribe's reservation.[13] The question of authority over nonmember Indians, however, has been the subject of some wrangling between the judicial and legislative branches, and *Lara* represents an opportunity for the Supreme Court to clarify this area of Indian law.

Billy Jo Lara, an Indian, was arrested by Bureau of Indian Affairs (BIA) officers on the Spirit Lake Indian Reservation in 2001 for public intoxication. In the course of his arrest, Lara, who is not a member of the Spirit Lake Nation, struck one of the officers and

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[5] *Morton v. Mancari*, 417 U.S. 535, 551-552.

[6] *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

[7] *United States v. Wheeler*, 435 U.S. 313, 322 (1978).

[8] F. Cohen, Handbook of Federal Indian Law 229 (1982 ed.).

[9] *Talton v. Mayes*, 163 U.S. 376, 382-383 (1896).

[10] *Duro v. Reina*, 495 U.S. 676, 686 (1990) ("Had the prosecution been a manifestation of external relations between the Tribe and outsiders, such power would have been inconsistent with the Tribe's dependent status, and could only have come to the Tribe by delegation from Congress").

[11] *Montana v. United States*, 450 U.S. 544, 564 (1981).

[12] *Wheeler*, 435 U.S. at 326.

[13] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978).

subsequently pled guilty to three violations of the Spirit Lake Tribal Code.[14] Lara was later charged in federal court with assaulting a federal officer, and moved to dismiss on the ground that his having to stand trial in both tribal and federal court for the same offense violated the Double Jeopardy Clause of the Fifth Amendment.[15] The Fifth Amendment's Double Jeopardy Clause states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." The Supreme Court has limited the protections of the Double Jeopardy Clause, however, by holding that it does not apply to a person who violates the laws of two independent sovereigns and thus commits a crime against each.[16] The deciding factor in whether this "dual sovereignty" doctrine applies is whether the two prosecuting entities derive their power from the same source.[17] So, in *Lara*, if the Spirit Lake Nation prosecuted Mr. Lara pursuant to its *inherent* authority - authority which, as discussed above, does not derive from the Constitution - then there was no double jeopardy problem when the federal government, which does get its power from the Constitution, also prosecuted Mr. Lara. On the other hand, if the San Carlos Nation traces its power to prosecute a nonmember Indian to a delegation from Congress, then that power springs from the Constitution, and Mr. Lara was tried twice in violation of the Double Jeopardy Clause.

***Duro* and the ICRA Amendments of 1990.** In *Duro v. Reina*,[18] the Supreme Court was confronted with the question of whether or not Indian tribes have inherent authority to assert criminal jurisdiction over nonmember Indians. The Court, citing the historical record and a concern for the personal liberties of nonmembers who could be punished by a government in which they have no part, found that tribes do not possess the inherent authority to assert criminal jurisdiction over nonmembers.[19] The Court noted, however, that Congress has the power to delegate such authority if it so chooses.[20]

Immediately following the Court's ruling in *Duro*, Congress amended the Indian Civil Rights Act[21] to include in the definition of "powers of self-government" the "*inherent* power of Indian tribes...to exercise criminal jurisdiction over all Indians"[22] (emphasis added). Congress also amended the definition of "Indian" to include all Indians subject to federal jurisdiction under the Major Crimes Act.[23] Congress

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[14] *See United States v. Billy Jo Lara*, 324 F.3d 635, 636 (8th Cir. 2002).

[15] *See id.*, at 637.

[16] *Heath v. Alabama*, 474 U.S. 82, 88 (1985).

[17] *Id*, at 88.

[18] 495 U.S. 676 (1990).

[19] *Id.*, at 698.

[20] *Id.*

[21] 25 U.S.C. § 1301 et seq.

[22] 25 U.S.C. § 1301(2).

[23] 25 U.S.C. § 1301(4).

specifically included the phrase "inherent power" to declare that this power was not being newly delegated to the tribes, but rather had always been with them.[24]

So, as Mr. Lara's case came before the Eight Circuit, the court had a very difficult inquiry before it. In order to determine whether the Double Jeopardy Clause had been violated, the court had to ascertain the source of the power the San Carlos Nation sought to exercise. To make that determination, however, the Eighth Circuit had to first rule on whether Congress acted impermissibly in overturning *Duro*.

The Eighth Circuit Opinion. The primary question for the Eighth Circuit was whether the Supreme Court's holding in *Duro* was based on the Constitution or federal common law. The Supreme Court has the final say in interpreting the Constitution,[25] and Congress cannot overturn such an interpretation without amending the Constitution itself.[26] Conversely, Congress is free to overturn judicial determinations of federal common law - which is based in neither the Constitution nor statute - with no such constraint.[27] The Eighth Circuit found that *Duro* was grounded in the Constitution, and 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."[28] In reaching this conclusion, the court reasoned that the question of a tribe's inherent powers requires "ascertainment of first principles regarding the position of Indian tribes within our constitutional structure of government."[29]

The court went on to find that, because the decision in *Duro* was a constitutional one, Congress could not change it by statute, and therefore the ruling in *Duro* - that tribes have no inherent authority to assert criminal jurisdiction over nonmembers - stands. The only option open to Congress after *Duro*, the court continued, was to *delegate* criminal jurisdiction over nonmember Indians to the tribes. After construing the ICRA amendments as just such a delegation, the Eighth Circuit concluded that the Spirit Lake Nation was acting under this delegated authority, ultimately derived from the Constitution, and therefore the federal prosecution, tracing its power to the same source, violated the Double Jeopardy Clause.[30]

The dissent argued that the decision in *Duro* was not constitutional, but rather federal common law, evidenced by the fact that the Supreme Court analyzed history and governmental customs, rather than the Constitution, in reaching its decision. According

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[24] *See* H.R. Conf. Rep. No. 102-261, at 3 (1991) (*reprinted in* 1991 U.S.C.C.A.N. 379, 380 ("[T]his legislation is not a delegation of [criminal jurisdiction over nonmember Indians] but a clarification of the status of tribes as domestic dependent nations. Hence, the constitutional status of Indian tribes as it existed prior to the *Duro* decision remains intact.")).

[25] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

[26] *See, Boerne v. Flores*, 521 U.S. 507 (1997).

[27] Erwin R. Chemerinsky, Federal Jurisdiction 349 (3d ed. 1999).

[28] *United States v. Billy Jo Lara*, 324 F.3d 635, 639 (8th Cir. 2003).

[29] *Id.* (*quoting United States v. Weaselhead*, 156 F.3d 818, 824 (8th Cir. 1998), *vacated, United States v. Weaselhead*, 165 F.3d 1209 (8th Cir. 1999).

[30] *Id.*, at 640.

to the dissent, the Supreme Court was forced to do this because in the few places that the Constitution mentions Indian tribes, it is only to clarify that they have extra-constitutional status.[31] "Without any statute stating whether Indian tribes had criminal jurisdiction over nonmember Indians," the dissent reasoned, "it acted as a common-law court, using whatever sources were relevant and readily at hand to ascertain the applicable legal principles and to answer the question before it."[32] What Congress did when it enacted the ICRA amendments, according to the dissent, was not to delegate newly-created authority, but rather to restore part of the inherent sovereignty that the Supreme Court had erroneously stripped away. As the dissent put it, Congress "merely relaxed a common-law restriction on a power previously possessed."[33] Since *Duro* was a common law decision, Congress clearly had the power to overrule it, said the dissent, especially in light of the plenary control that Congress enjoys over Indian tribal sovereignty.[34]

The Ninth Circuit Opinion in *United States v. Enas*. In *United States v. Enas*,[35] an earlier case dealing with facts very similar to those in *Lara*, the Ninth Circuit found the *Duro* ruling to be an interpretation of federal common law that Congress had the power to correct. The court recognized some difficulties with its ruling, however. First, the court saw a possible separation of powers problem where Congress overrules a Supreme Court's historical interpretation of the law. As the court put it, "[O]nce the Supreme Court has ruled that the law is 'X,' Congress can come back and say, "no, the law is "Y," but it cannot say that the law was *never* "X" or *always* "Y."[36] Second, the court was very concerned with the distinction between inherent and delegated authority, which also brought potential separation of powers problems into play. As the court put it, "Although the line between inherent and delegated powers is a fuzzy one, we are nonetheless required by Supreme Court precedent to recognize this line," and, after applying *Duro*'s historical narrative, "to consider the respective powers of Congress and the courts with regard to this dispute."[37] With this required distinction in mind, the Court asked rhetorically: "[I]f a power first created by Congress tomorrow could be designated as "inherent," what power could ever be "delegated? Put simply, none."[38] But the court ultimately determined that, in the limited context of federal common law, Congress has

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[31] *Id.*, at 644 (*quoting* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. Chi. L. Rev. 671, 691 (1989)).

[32] 324 F.3d at 644. The dissent also noted that the weight of academic authority agrees that the *Duro* decision was based in federal common law. *See, e.g.*, Frank Pommersheim, *"Our Federalism" in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community*, 71 U.Colo. L. Rev. 123, 177 (2000); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 Yale L.J. 1, 65 (1999); L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millenium*, 96 Colum. L.Rev. 809, 853 (1996).

[33] 324 F.3d at 641.

[34] *Id.*, at 646.

[35] 255 F.3d 662 (2001).

[36] *Id.*, at 671 *quoting Means v. Northern Cheyenne Tribal Court*, 154 F.3d 941, 946 (9th Cir. 1998).

[37] *Id.*

[38] *Id.*, at 670.

the power to overrule the Supreme Court's interpretation of legal history.[39] The majority added an important qualification at the end of its opinion, however, stating that if this were a question of *constitutional* history, the ICRA amendments would have been impermissible.[40]

The Importance of *Lara*. Both the federal government and various Indian tribes have filed briefs in opposition to the Eighth Circuit's holding. The United States is concerned about preserving its interest in seeing that violators of federal law are punished in a manner befitting their crimes. The United States points out in its brief that, while tribes may prosecute all offenses committed by Indians on their reservations, the punishment for any such offense is limited to one year imprisonment, a $5,000 fine, or both.[41] "Often, therefore," the government continues, "a tribal prosecution of a non-member Indian, even if successful, could not result in a sentence that adequately vindicates federal interests."[42] The United States also argues in its brief that criminals could benefit from a possible race between the tribal and federal governments to prosecute an offender. Echoing the Supreme Court's concern in an earlier case, the United States brief states that "a non-member Indian would have a great incentive to enter a prompt plea in a tribal prosecution, thereby gaining protection from federal prosecution."[43]

If the Supreme Court adopts the Eighth Circuit's reasoning, Congress may have to choose between the state of affairs mentioned above and divesting the tribes of some or all of their criminal jurisdiction over nonmember Indians. The Supreme Court has recognized that such an option would eliminate the Double Jeopardy problem, but also give rise to new ones, in that it would frustrate the tribal interests in maintaining order and preserving traditional tribal customs regarding transgressions.[44]

For these reasons, it seems unlikely that the Supreme Court will follow the Eighth Circuit's rationale in *Lara*. In crafting a judicial solution to the unique dilemma presented by the case, however, the Court also has an opportunity to offer a clearer picture of how Indian tribes fit into the American constitutional structure, and to more sharply define the roles of the Legislative and Judiciary branches in relation to Indian tribal sovereignty.

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[39] 324 F.3d at 675.

[40] *Id.*, at 675 ("It cannot be the case that Congress may override a constitutional decision by simply rewriting the history on which it is based."). The concurrence took an approach similar to the one taken by the dissent in *Lara*, comparing tribal sovereignty to "a vessel that Congress may fill or drain at its pleasure, subject to certain constitutional limitations." *Id.*, at 683.

[41] Brief for the United States at 20, *United States v. Billy Jo Lara* (U.S. No. 03-107).

[42] *Id.*

[43] *Id.*, at 21 (citing the Supreme Court's concern in *Wheeler*, 435 U.S. at 330-331, that "the prospect of avoiding more severe federal punishment would surely motivate a member of a tribe charged with commission of an offense to seek to stand trial first in a tribal court. Were the tribal prosecution held to bar the federal one, important federal interests in the prosecution of major offenses on Indian reservations would be frustrated").

[44] *Wheeler*, 435 U.S. at 331 ("The problem would, of course, be solved if Congress, in the exercise of its plenary power over the tribes, chose to deprive them of criminal jurisdiction altogether. But such a fundamental abridgement of the power of Indian tribes might be...undesirable").