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On

The Constitutionality of Legislation Restoring Tribal Criminal Jurisdiction Over Non-Indians

Before the

United States Senate Committee On Indian Affairs

Thursday, September 25, 2007

I very much appreciate the invitation to appear before the Committee today.

I graduated from the Yale Law School in 1991, served as a law clerk to Justice David Souter of the United States Supreme Court in the October Term 1994, and have practiced and taught in the field of federal Indian law ever since. Much of my work has focused on the Supreme Court's Indian law jurisprudence.

Other witnesses have described for the Committee the tremendous, often heart-wrenching, problems that arise from the fact that Tribes cannot exercise criminal jurisdiction over those non-Indians who wreak havoc in the lives of their members and threaten the very fabric of reservation life. I am here to address the question whether Congress has the constitutional authority to take meaningful action in the face of those problems by restoring tribal criminal jurisdiction over non-Indians. The answer, as the Supreme Court made clear in its recent decision in *United States v. Lara*, 541 U.S. 193 (2004), is "yes."

Some of the most significant limitations on tribal criminal jurisdiction in the modern era have resulted from two Supreme Court decisions that preceded *Lara*. In a 1978 decision called *Oliphant v. Suquamish Tribe,* 435 U.S. 191 (1978), the Court examined an array of statutes, treaties, and other legal materials and concluded that the cumulative effect of these legislative and executive branch actions was to have divested Tribes of their inherent sovereign authority to prosecute non-Indians committing crimes in their territories. *Oliphant* reads like a federal common law decision – the Court did not purport to ground its decision in the text of the Constitution. However, as I will discuss in a moment, some came to argue that the decision was constitutional in nature and hence immune from Congressional modification. The same argument was made with respect to the Court's 1990 decision in *Duro v. Reina,* 495 U.S. 676 (1990), where the Court again canvassed an array of materials in concluding that the Tribes had also been divested of their sovereign authority to prosecute Indians who are not members of the prosecuting Tribe.

The *Duro* decision prompted immediate action from Congress. In legislation that came to be known as the "*Duro* fix," Congress made it clear that the Tribes' powers of self-government include "the inherent power, . . . hereby recognized and affirmed, to exercise criminal

jurisdiction over all Indians." That legislation was challenged by criminal defendants who argued that *Duro* and *Oliphant* were constitutionally based decisions that could not be altered by Congress.

In its 2004 decision in *Lara,* the Supreme Court flatly rejected this argument. In doing so, the Court made the following points that are critical to the issue I am addressing today:

- First, the Court reaffirmed the long-held view that Congress has "broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as `plenary and exclusive.'" Those powers are grounded in the Indian Commerce Clause, which is found in Article I, Section 8 of the Constitution.
- Second, the Court observed that Congress has historically exercised that plenary power both to restrict, and in turn, to relax restrictions on the Tribes' sovereign powers. Neither Congress nor the Court has treated Congress's plenary power over Indian affairs as a one-way ratchet – it may be used both to expand and to contract tribal authority.
- Third, no language exists in the Constitution suggesting a limitation on Congress's authority to relax restrictions that have been placed on the Tribes' sovereign authority.
- Fourth, the ability of Tribes to control events that take place in their own territories is an integral aspect of their sovereign authority, such that there is nothing remarkable about Congressional action that restores the Tribes' ability to do just that.
- Fifth, and finally, the Court stated in no uncertain terms that *Oliphant* and *Duro* are not constitutional decisions, but instead are subject to Congressional modification. In the Court's words, those decisions "reflect the Court's view of the tribes' retained sovereign status as of the time the Court made them. They did not set forth constitutional limits that prohibit Congress from changing the relevant legal circumstances, *i.e.,* from taking actions that modify or adjust the tribes' status. To the contrary, *Oliphant* and *Duro* make clear that the Constitution does not dictate the metes and bounds of tribal autonomy, nor do they suggest that the Court should second-guess the political branches' own determinations . . . . [W]e do not read any of [our] cases as holding that the Constitution forbids Congress to change 'judicially made' federal Indian law through . . . legislation." It bears mention in this regard that the *Lara* majority included then-Chief Justice Rehnquist, who had authored the *Oliphant* decision.

The *Lara* decision is subject to one very important caveat. The Court did not express a view on the question whether Congress can authorize Tribes to prosecute either non-Indians or non-member Indians absent the full panoply of due process protections that apply in federal and state courts. The Indian Civil Rights Act already makes most of those protections applicable in tribal court, but there are some important exceptions, most notably the right to counsel for indigent defendants. It is my view that any legislation authorizing the Tribes to exercise criminal jurisdiction over non-Indians should make the full array of due process protections applicable to such prosecutions. I think that there is a strong chance that the Court would otherwise strike down the legislation. Expanding the applicability of the due process clause in this way would not constitute an affront to tribal sovereignty because the Tribes will always have the choice as to whether to pursue such prosecutions or not. However, it would at the same time be sensible to make federal funding available so that Tribes that do not already do so can provide counsel for indigent defendants.

I do not mean to suggest by my remarks today that restoring tribal criminal jurisdiction is the only thing that Congress needs to do in order to address the serious problem of crime on Indian reservations. Time constraints preclude me from describing additional steps that Congress should take, and that have been described for this Committee in other hearings, but I would be happy to address those steps in response to questions. I will say here that there is no doubt in my mind that restoring tribal criminal jurisdiction over non-Indians is a very significant piece of the puzzle.

Lara is an extremely important decision. A Supreme Court that is widely regarded as highly jealous of its own prerogatives reaffirmed the notion that it is Congress that has the ultimate authority over Indian affairs. And *Lara* is the right decision. The field of federal-state-tribal relations is far too important and nuanced to ultimately be controlled by the inevitable constraints that exist on judicial decisionmaking. The Court's decision in *Oliphant* has, as a practical matter, contributed to disastrous results in Indian Country, but in *Lara* the Court at least made it clear that Congress may act to remedy those problems.

Thank you again for the opportunity to address the Committee on this very important issue.