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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :
Petitioner :
V. : No. 03-107
BILLY JO LARA. :
- - - - -X

Washington, D.C.
Wednesday, January 21, 2004

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:10 a.m.

APPEARANCES:

EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; on
behalf of the Petitioner.
ALEXANDER F. REICHERT, ESQ., Grand Forks, North Dakota; on
behalf of the Respondent.

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C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
EDWIN S. KNEEDLER, ESQ.	
On behalf of the Petitioner	3
ALEXANDER F. REICHERT, ESQ.	
On behalf of the Respondent	25
REBUTTAL ARGUMENT OF	
EDWIN S. KNEEDLER, ESQ.	
On behalf of the Petitioner	49

1 P R O C E E D I N G S

2 (10:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 03-107, the United States v. Billy Jo Lara.
5 Mr. Kneedler.

6 ORAL ARGUMENT OF EDWIN S. KNEEDLER

7 ON BEHALF OF THE PETITIONER

8 MR. KNEEDLER: Mr. Chief Justice, and may it
9 please the Court:

10 14 years ago in the Duro decision this Court
11 held that under the state of Indian law, as it then stood,
12 and Indian tribe could not prosecute an Indian who was not
13 a member of that tribe. The Court recognized, though,
14 that its decision might create a jurisdictional gap on
15 many reservations, but the Court concluded that if the
16 present jurisdictional regime proves insufficient to meet
17 the needs of reservation law enforcement, the proper body
18 to address that concern is Congress, which has plenary
19 power over Indian affairs.

20 Congress responded immediately to this Court's
21 decision. It -- it conducted an extensive inquiry and
22 heard hearings about the consequences of the Court's
23 decision and heard strong expressions of concern by many
24 Indian tribes, by the Federal Government, and by numerous
25 States about the law enforcement vacuum that would be

1 created over many misdemeanor offenses on Indian
2 reservations. And there was widespread support for
3 Congress to restore the power to Indian tribes to exercise
4 their sovereign power to prosecute non-member Indians.

5 (Scalia) QUESTION: Why didn't -- why didn't they extend
6 it to non-Indians? I mean, if it's a problem when a -- a
7 non-member Indian commits an offense on an Indian
8 reservation, why isn't it an equivalent problem when a --
9 a white man commits the same crime on an Indian
10 reservation?

11 MR. KNEEDLER: I think the answer lies in -- in
12 the longstanding jurisdictional regime on Indian
13 reservations. Going back to 1817, the general Indian
14 crimes statute has authorized prosecutions by the Federal
15 Government over crimes committed by non-Indians, including
16 misdemeanor crimes, and so there was not a jurisdictional
17 void. The difficulty came -- the -- the most acute
18 difficulty came from the fact that that statute, again
19 since the earliest times, had -- has exempted crimes
20 committed by one Indian against the person or property of
21 another.

22 QUESTION: Well, why couldn't they have changed
23 that? They could have solved the problem by simply
24 treating non-member Indians the same way they treat non-
25 Indians.

1 MR. KNEEDLER: Congress could have done so, but
2 Congress, with the plenary power over Indian affairs,
3 chose -- decided that the proper course or the most
4 appropriate course was to have that jurisdiction exercised
5 by the Indian tribes. And Congress heard considerable --
6 considerable evidence that that power had long, in fact,
7 been exercised by Indian tribes over other Indians who
8 were not members of the particular tribe.

9 QUESTION: What's --

10 **(Ginsburg)** QUESTION: There's some ambiguity about what
11 Indian refers to. Is it -- must it be someone who is
12 enrolled in an Indian tribe or can it be anyone who is the
13 child of Indian parents?

14 MR. KNEEDLER: It -- generally, it has been
15 understood to require a tribal affiliation. First of all,
16 the definition under -- under the Indian Civil Rights Act
17 for tribal power, Congress adopted the same meaning of
18 Indian that is applied under the Federal criminal statutes
19 for the purpose of having the two mesh completely.

20 QUESTION: Yes, but what is that? What is that
21 definition?

22 MR. KNEEDLER: And under that, obviously,
23 someone who is an enrolled -- formally enrolled member
24 would be an Indian, but as this Court pointed out in
25 footnote 7 of its Antelope decision, the -- that provision

1 has not been construed to require that strictly, that
2 ordinarily someone who is an Indian and has a tribal
3 affiliation and is recognized by the tribe is also
4 regarded as an Indian.

5 In this case, though, we have a situation where
6 someone who is an enrolled member of another tribe. So
7 questions about the -- about the -- how the statute should
8 be construed or applied in situations where there's not
9 one -- someone who's formally a member are -- are not
10 present in this case.

11 (O'Connor) QUESTION: Mr. Kneedler, is it the case that the
12 Bill of Rights is -- has not been thought applicable to
13 criminal defendants who are members of the tribe in a
14 tribal court or to non-tribal Indian -- non-tribal member
15 Indians?

16 MR. KNEEDLER: Yes. Under this Court's
17 decision, this --

18 QUESTION: In -- in tribal court.

19 MR. KNEEDLER: Yes. This Court's decision in
20 Talton v. Mayes said that the Fifth Amendment did not
21 apply to the exercise of powers by Indian tribes, and
22 that's been understood to apply to --

23 QUESTION: Would that be perhaps one reason why
24 Congress didn't go ahead and subject non-Indians to tribal
25 prosecution?

1 MR. KNEEDLER: Well, it -- it may be, but -- but
2 it's important to recognize what -- what Congress has also
3 done here was to enact the Indian Civil Rights Act which
4 extends to Indian tribes many of the requirements of the
5 Bill of Rights.

6 QUESTION: But not all.

7 MR. KNEEDLER: Not all of them, but Congress in
8 1968 examined the question of the -- of the rights of --
9 of Indians and others subject to tribal jurisdiction and
10 -- and applied the -- the provisions of the -- of the
11 Indian Civil Rights Act. So there -- the -- the --

12 **(O'Connor)** QUESTION: Should we consider in this case the
13 due process and equal protection arguments that are --

14 MR. KNEEDLER: I don't -- I don't believe they
15 are before the Court. What was before the -- those --
16 those questions go to what restraints are on the tribe
17 itself when it's exercising its own power. That was not
18 the basis of the court of appeals decision in this case.
19 The court of appeals decision was really on the separate
20 ground of what happens when you have, first, the tribe
21 exercising its sovereign power and then the United States
22 exercising power after that under the Double Jeopardy
23 Clause.

24 **(Kennedy)** QUESTION: Well, I suppose under one view of the
25 case -- and it's -- it's not your view -- if this were

1 deemed to be a delegated power, then the absence or the --
2 the presence of obligations under the Bill of Rights would
3 become very important.

4 MR. KNEEDLER: Well, I -- it depends what one
5 means by delegation. The word delegation is -- is used in
6 a variety of ways. I mean, for -- for example, it's
7 common to speak of Congress delegating power to an
8 executive agency to carry out a certain function, but when
9 the executive agency does this, it's not exercising
10 congressional power. It's exercising power that Congress
11 in its plenary authority has -- has conferred on the
12 executive branch to --

13 QUESTION: But -- but it --

14 MR. KNEEDLER: -- to then execute those laws.

15 QUESTION: But it is exercising the power of the
16 United States as distinct from the power of some other
17 sovereign. And -- and the issue in this case is whether
18 the -- as I understand it, is -- is whether the tribe is
19 exercising its own power or the power of the United
20 States.

21 MR. KNEEDLER: Right. I -- I was using that by
22 analogy to say that the word delegate is -- is often used,
23 including in this Court's opinions I think, in a -- in a
24 somewhat looser sense in terms of -- of authorizing
25 someone else to act. But I think -- I think --

1 **(Kennedy)** QUESTION: Well, if it's authorized --
2 exercising its own power, how then can Congress make the
3 Bill of Rights applicable. As -- as a condition to the
4 exercise of sovereignty? Is that the way it works?

5 MR. KNEEDLER: Yes. And that's -- I think
6 that's exactly what Congress did in the Indian Civil
7 Rights Act. It -- it require -- and -- and this Court
8 said in Wheeler and has said in numerous other decisions
9 that Congress has plenary power over the exercise of a
10 tribe's own sovereign powers. And what Congress did in
11 the Indian Civil Rights Act was precisely to regulate
12 that.

13 **(Souter)** QUESTION: Mr. Kneedler, may I raise the -- the
14 point that is -- is the greatest trouble for me so -- so
15 you perhaps could address that? Because it follows from
16 what Justice Kennedy has raised.

17 As I understand what we held -- forget our
18 language about delegation for a minute. As I understand
19 what we held in Oliphant, which we followed in Duro, was
20 that the very concept of -- of this dependent or
21 subordinate sovereignty that tribes are -- are understood
22 to have, the way we look at Indian issues, is inconsistent
23 with the exercise of tribal jurisdiction over a -- a non-
24 member. Whether that notion of subordinate or -- or
25 dependent sovereignty is constitutional or common law

1 doesn't really matter. As long as we're going to have
2 that concept, that concept is inconsistent with the
3 exercise of the tribe's own sovereign jurisdiction over a
4 -- a non-tribal member.

5 If we are going to stick with that concept then,
6 it seems to me that we have got to understand the statute
7 in question here as a statute that confers Federal power
8 on the tribe as distinct from one that restores the
9 tribe's sovereign power because the tribe can't have the
10 sovereign power as long as we are going to understand that
11 tribe to have this subordinate sovereignty. And
12 therefore, for me the concepts that we're using pretty
13 much force the conclusion that the -- that the power
14 that's being exercised is Federal not Indian.

15 Could you comment on -- on that analysis?

16 MR. KNEEDLER: Yes. I -- I think there -- there
17 are several responses to that point.

18 First of all, I think it matters a lot whether
19 one views the limitations on tribal power as mandated by
20 the Constitution or as a product of Federal common law.
21 And in -- and --

22 (Souter) QUESTION: Well, it may have a great deal to do
23 with whether we can change our conceptualization about
24 dependent sovereignty, but as long as we keep that
25 conceptualization, it seems to me we've got to accept the

1 conclusion that -- that I suggested.

2 MR. KNEEDLER: No. I -- I -- with respect, I
3 don't think that's correct because I think if it -- if it
4 is not -- if this conception is not constitutionally
5 mandated, then Congress has the authority, the plenary
6 authority, over Indian affairs to regulate, to modify
7 tribal jurisdiction. And -- and in fact, I think that --
8 that --

9 (Souter) QUESTION: Okay, but if it does so, we have to
10 accept the -- if we're going to follow that route, we will
11 have to accept the conclusion that the whole concept of
12 dependent sovereignty has -- has been modified in -- in
13 some way because you can't have it both ways.

14 MR. KNEEDLER: No. I -- I believe that's --
15 that's an expression of the dependency or a manifestation
16 of the dependency, not in derogation of it, because
17 dependent means that your ability to exercise authority --
18 in this case, the Indian tribe is always subject to the
19 overriding powers of the Federal Government. And what
20 this Court said precisely in the --

21 (Souter) QUESTION: Well, if that -- if that were all we
22 meant in *Oliphant*, we would have said the -- the Federal
23 Government could take away this power by statute. We
24 didn't say the Federal Government could take away the
25 power by statute. We said it is gone by virtue of the --

1 the sovereignty relationship.

2 MR. KNEEDLER: But it -- if -- if one looks back
3 at the Oliphant decision, what the Court there described
4 its -- its undertaking was was essentially a -- a -- an
5 articulation of what it called Indian law which is a -- a
6 combination of judge-made law but against the backdrop of
7 treaties and statutes. Those treaties and statutes are
8 not themselves embodying constitutionally mandated rules.
9 They are the product of the political branches. They
10 sometimes don't answer precise questions, and this Court
11 is required to articulate judicial principles as best it
12 can against the backdrop of those principles. But because
13 those principles themselves are traced to treaties and
14 statutes, it must be up to -- Congress must have the
15 authority to modify those rules, and that's consistent
16 with its plenary power over Indian affairs.

17 What this Court said in the Montana decision,
18 which -- which has been identified as the path-marking
19 decision over -- concerning jurisdiction over non-tribal
20 members, was what tribes lost by virtue of their dependent
21 status was the power independently to determine their
22 external relations.

23 This is not what we have here --

24 QUESTION: Well, isn't -- isn't that what we're
25 talking about --

1 MR. KNEEDLER: No. No, it isn't --

2 QUESTION: -- when we talk about sovereign
3 power?

4 MR. KNEEDLER: This is not a unilateral
5 assertion of tribal power. This Court held in -- in
6 *Oliphant* and *Duro*, by looking at the -- at the backdrop of
7 -- of statutory enactments, that its power had been
8 limited, but -- and the tribe did not unilaterally
9 overcome that. What Congress did was lift the limits so
10 that the tribe -- the tribe would then be authorized to
11 exercise sovereign power that it previously had -- had
12 had.

13 And it's in that -- it's directly analogous to
14 two important examples that I think are very instructive
15 here. One is that Constitution itself in the Commerce
16 Clause has been held to, of its own force, preempt State
17 laws in the interstate commerce and also in the Indian
18 Commerce Clause area. But Congress can, in the exercise
19 of its authority over commerce under either one, lift
20 those restrictions and authorize States to regulate in
21 areas they otherwise could not do.

22 (Scalia) QUESTION: And that has always been thought to
23 be a great anomaly that a constitutional requirement could
24 be eliminated by a Federal statute. I -- I hope you're
25 not urging that as -- as a rule which should be followed.

1 MR. KNEEDLER: No, but -- but the point is that
2 in that situation, even when the Constitution itself has,
3 as a matter of constitutional law, limited State
4 authority, Congress can lift that.

5 The other -- the other example --

6 **(Scalia)** QUESTION: Well, let's -- let's apply that
7 across the board then. I guess Congress can lift the
8 Fifth Amendment?

9 MR. KNEEDLER: No. It's --

10 QUESTION: Clearly you're not going to urge --

11 MR. KNEEDLER: No. It's --

12 QUESTION: Congress can lift the Double Jeopardy
13 Clause?

14 MR. KNEEDLER: No. I'm -- I'm not speaking of
15 Bill -- Bill of Rights provisions. I'm speaking of
16 Congress' Article I power.

17 **(Scalia)** QUESTION: There's -- there's a distinction
18 between the Bill of Rights and the rest of the
19 Constitution.

20 MR. KNEEDLER: Well, under -- under this Court's
21 decision -- decisions, Congress has been authorized to
22 allow States to regulate in areas it -- it would otherwise
23 not be able to, and when it does so, it's exercising its
24 own sovereign power, not power delegated by the Federal
25 Government.

1 The other -- the other instructive example is
2 Public Law 280. Since the outset of the Constitution,
3 really by the -- by carrying forward arrangements of -- in
4 Indian law prior to the adoption of the Constitution,
5 States have not been able to exercise jurisdiction over
6 matters involving Indians in Indian country absent an
7 affirmative authorization by Congress. In Public Law 280
8 Congress lifted those limitations and authorized tribes to
9 exercise jurisdiction over Indians and others in Indian
10 country.

11 QUESTION: Authorized States.

12 MR. KNEEDLER: Pardon me?

13 QUESTION: Authorized States.

14 MR. KNEEDLER: Excuse me. Authorized States.

15 And in doing so, those States are not exercising
16 delegated Federal power. Congress lifted a barrier to the
17 exercise by States of their own sovereign power to
18 prosecute according to their laws.

19 **(Breyer)** QUESTION: So in saying that, what you're doing
20 -- is what you're doing taking the word dependent in
21 domestic dependent nation and saying that Congress has a
22 degree of leeway to define what is and what is not
23 encompassed by the word dependent so that if Congress
24 wants to, it can say that whereas previously an exercise
25 of pre-1650, your Indian jurisdiction, because they could

1 have, you know -- which was removed by the word dependent
2 is not removed --

3 MR. KNEEDLER: Yes.

4 (Breyer) QUESTION: -- because Congress -- Congress can
5 redefine the term dependent?

6 MR. KNEEDLER: I -- I agree with your result. I
7 -- I think conceptually what I would say is dependent
8 defines the relationship between the tribe and the
9 National Government --

10 QUESTION: Yes.

11 MR. KNEEDLER: -- in this case Congress. And --
12 and Congress in the -- in the exercise of its superior
13 sovereignty is -- is defining the contours of the
14 dependent sovereign's authority. So it -- it is a
15 manifestation of the dependent relationship.

16 QUESTION: So when you look at Duro, it -- it
17 said that what it found the exercise of criminal
18 jurisdiction inconsistent with was the notion of
19 dependency in the phrase, domestic dependent nation.

20 MR. KNEEDLER: Yes. And --

21 (Breyer) QUESTION: And -- and therefore -- and -- and
22 there -- so Congress has the authority to say no, at least
23 as to future, it is not inconsistent.

24 MR. KNEEDLER: Yes.

25 QUESTION: Is that right?

1 **(Scalia)** QUESTION: And -- and since this has nothing to
2 do with prior Indian tribal power but simply with
3 arrangements that Congress chooses to adopt, it
4 necessarily follows that Congress could provide that
5 anyone in this room, whether an Indian -- whether an
6 enrolled Indian or not, could be subjected to trial by a
7 -- a tribal court and then subjected to a second trial,
8 despite the Double Jeopardy Clause, by a court of the
9 United States. Right? Congress could provide that.

10 MR. KNEEDLER: Yes. I -- I think that's right.
11 And --

12 **(Scalia)** QUESTION: I -- I find it hard to think that
13 that's all that the Double Jeopardy Clause means.

14 MR. KNEEDLER: Well, the -- this Court held in
15 Wheeler that prosecution by an Indian tribe of a -- of a
16 member of the tribe in that situation, followed by a
17 prosecution by the Federal Government for what would --
18 the same conduct, was not the same offense because the
19 ultimate authority to prosecute derived from different
20 sources. And we think the same --

21 **(Scalia)** QUESTION: But derived from inherent tribal
22 authority, which had not been taken away. What's
23 different here is that it had been taken away and was
24 given back, and it's hard to decide -- it's hard to
25 consider that inherent tribal authority, even though the

1 -- the statute refers to it that way.

2 MR. KNEEDLER: Well, it -- I -- I think by
3 inherent what the Court meant in both *Oliphant* and -- and
4 in *Duro* was original sovereignty that has continued
5 unlimited or unrestricted down to the present day. In
6 other words, it -- it has been -- it has been allowed to
7 continue, and in that sense it's inherent in being --

8 QUESTION: That provides a limitation. That
9 provides a limitation to -- you know, to jurisdiction over
10 the -- over the tribal members, and that was a very
11 important limitation. Now you're saying that limitation
12 doesn't exist.

13 MR. KNEEDLER: Well, I -- I --

14 QUESTION: It doesn't matter what has been
15 allowed to -- to continue down to the present day.
16 Congress can change all of that and permit jurisdiction
17 over non-tribal members and, it necessarily follows,
18 permit jurisdiction over non-Indians without violating the
19 Double Jeopardy Clause.

20 MR. KNEEDLER: If -- if we -- if we look at the
21 reality of the nature of the prosecutions here, this was a
22 prosecution brought by tribal officials in a tribally
23 constituted court enforcing provisions of tribal law, not
24 title 18, under a tribal constitution. That --

25 (Rehquist) QUESTION: Are you saying that Congress could

1 require the trial of non-Indians before a -- an Indian
2 tribal court?

3 MR. KNEEDLER: Yes. I -- I believe the -- this
4 Court's decision in -- in Oliphant says so in several
5 respects. What the Court -- in several locations. What
6 the Court said in Oliphant is that the -- the tribes
7 necessarily lost their dependent -- excuse me -- by virtue
8 of their dependent status, lost their ability to prosecute
9 non-Indians except in a manner acceptable to Congress. So
10 the -- the Court necessarily assumed that Congress could
11 revest this authority in the Indian tribes.

12 (Breyer) QUESTION: This is maybe -- it's very
13 interesting. Suppose -- I would think on your approach
14 then that the rights that the individual tribe gets is a
15 function of the Due Process Clause. And -- and is there
16 any basis? After all, Indian tribal members are persons
17 within the United States to whom the Due Process Clause is
18 applicable. Imagine a tribe that does not give you
19 counsel in a criminal trial. That could happen. All
20 right? Now, is there a basis under the Due Process Clause
21 for distinguishing between whether the defendant in such a
22 case is, A, a member of that tribe; B, a non-tribe member
23 but an Indian; C, a non-Indian?

24 MR. KNEEDLER: Well, several things. First of
25 all, the -- the Due Process Clause of the Fifth Amendment

1 under this Court's decision in Talton probably would not
2 apply of its own force to the tribe. But what does apply
3 is the Indian Civil Rights Act. What -- Congress filled
4 that void by -- by -- as a statutory matter requiring that
5 certain rights be --

6 QUESTION: Well, the statute isn't going to help
7 in terms of my question because I'm interested in
8 Congress' power.

9 MR. KNEEDLER: Yes. I -- I think --

10 QUESTION: And -- and maybe we don't have to
11 reach that in this case.

12 MR. KNEEDLER: I -- I think --

13 QUESTION: And maybe the answer to this case
14 makes no difference in respect to that.

15 MR. KNEEDLER: I -- I think -- I think in asking
16 a due process question, you might be asking -- a
17 procedural due process question, you might be asking an
18 equal protection type question.

19 QUESTION: I'm asking a question in respect to
20 right to counsel, for example.

21 MR. KNEEDLER: Right -- right to counsel is not
22 -- is not expressly guaranteed by the Indian Civil Rights
23 Act. If there is a particular prosecution that is found
24 to violate fundamental fairness because of the absence of
25 counsel, the Indian Civil Rights Act would -- would

1 provide a vehicle for that argument.

2 (Scalia) QUESTION: Well, except -- except with respect
3 to the Indian Civil Rights Act, you can -- you can -- and
4 I think this solves due process problems. You -- you can
5 assert the maxim of volenti non fit injuria. You -- you
6 are not subject to -- to this kind of trial unless you
7 choose to be an enrolled member of the tribe. You can
8 withdraw from that at any time.

9 MR. KNEEDLER: Yes.

10 (Scalia) QUESTION: But to now extend the Government's
11 power to subject people to this kind of trial beyond
12 members of the -- of the tribe that -- that has the tribal
13 court to members of other tribes and, as you necessarily
14 acknowledge, even to non-Indians, that's a -- that's a
15 step I'm -- I'm not prepared to contemplate.

16 MR. KNEEDLER: Well, with -- first of all, with
17 respect to members of tribes other than the prosecuting
18 tribe, Congress in the exercise of its plenary authority
19 over tribes we think certainly should have the power to
20 regulate the relationship among tribes, tribes with each
21 other, and relationships of tribes and their respective
22 members with each other.

23 QUESTION: Well, would it --

24 MR. KNEEDLER: That's what Congress has done
25 here.

1 QUESTION: Would it be a defense, say, to
2 someone charged with a crime in Wisconsin to say volenti
3 non fit -- you move to Minnesota. They don't treat you --

4 MR. KNEEDLER: No, it would not. And that's --
5 that is another -- there -- there are really two different
6 questions. One, can someone be subjected to the
7 jurisdiction of a court when he's not participating in the
8 -- in the process there? And that happens all the time
9 when people are prosecuted in another jurisdiction.

10 There's a separate question of -- of what
11 procedural protections would be afforded in such a trial,
12 and that's where the Indian Civil Rights Act steps in.

13 (Ginsburg) QUESTION: Mr. Kneedler, just to bring it back
14 to this case, as I understand it, there was no due process
15 or equal protection challenge by Mr. Lara. He's
16 contesting the second proceeding.

17 MR. KNEEDLER: That's -- that's correct. In
18 fact, it's a necessary -- he has to accept the validity of
19 his -- of his prior prosecution and -- and leave it
20 standing in order to --

21 QUESTION: Because if it's not valid, then he's
22 being prosecuted for the first time.

23 MR. KNEEDLER: Right. That -- that's correct.

24 (Scalia) QUESTION: Yes, but all these questions are very
25 relevant to whether we should accept your -- or -- or the

1 Government's assertion of what Congress can do. Those --
2 if -- if your -- your proposal raises all of these serious
3 constitutional questions, we're less inclined, it seems to
4 me, to adopt that proposal.

5 MR. KNEEDLER: Well, there -- there's I think
6 another important point to be made about the nature of
7 Congress' powers in this area. To say that an Indian
8 tribe could only prosecute a non-member -- a non-member
9 Indian through the exercise of delegated Federal power
10 would itself be a -- a substantial constitutional anomaly.

11 I think it's important to -- to consider the
12 scope of Congress' plenary powers within the framework of
13 the structure of the Constitution itself. The --

14 (Kennedy) QUESTION: But -- but -- so -- so what you're
15 saying is that if the Court has very substantial concerns
16 over the Government's proposition that within the
17 territorial United States a non-constitutional entity can
18 be allowed to try a United States citizen, if we have
19 concerns about that, you're giving us no ability to draw a
20 line so that you can prevail in this case. You are -- it
21 seems to me that you are conceding, by your last
22 statement, that if we rule in favor of your position, it
23 must necessarily apply to non-Indians.

24 MR. KNEEDLER: No, I -- I --

25 QUESTION: And this is an astounding

1 proposition.

2 MR. KNEEDLER: I did not -- I did not mean to
3 say -- to say that. I mean, first of all, I think
4 Oliphant contemplates that. What rights would attach is
5 -- is a separate question.

6 But I -- but I do think that there is a distinct
7 authority for Congress to regulate or to permit a tribe to
8 exercise jurisdiction over members of other tribes. This
9 is a power that has historically been left to tribes by
10 the Federal statutory regime in Indian country since 1817
11 down to the present time. There is still an exception --

12 QUESTION: Yes, but that was before Indians were
13 citizens of the United States.

14 MR. KNEEDLER: But -- no. That has continued up
15 to the present time. There is still an exception in the
16 statutory regime for tribes to --

17 QUESTION: Yes, but one wonders if you go beyond
18 members of the tribe itself to outsiders, whether that
19 distinction between citizens of the United States is
20 valid.

21 MR. KNEEDLER: I -- I believe it is. In -- in
22 Duro itself, the Court said that citizenship does not
23 detract from Congress' plenary power over Indian affairs.

24 The -- the last point I wanted to make and then
25 I would like to reserve the --

1 QUESTION: But that was -- that was not in the
2 context of regulating non-Indians.

3 MR. KNEEDLER: No. Here we're talking about --
4 this case involves non-member Indians, and as I said, the
5 ability of Congress to regulate relationships between
6 tribes and -- and their members would seem to be at the
7 core of the power.

8 And as this Court has said in its federalism
9 cases, it would be a -- a mixing of sovereignty to regard
10 the States as mere agents of the Federal Government. They
11 are separate sovereigns, and we think the same is true --

12 QUESTION: Yes, but they are also not dependent
13 sovereigns.

14 MR. KNEEDLER: That's --

15 QUESTION: I mean, there's an entirely different
16 conceptualization involved.

17 MR. KNEEDLER: But again, in our -- in our view,
18 the dependency describes Congress' power to regulate and
19 limit and prescribe the rights available in tribal courts.

20 If I may reserve the balance of my time.

21 QUESTION: Very well, Mr. Kneedler.

22 Mr. Reichert, we'll hear from you.

23 ORAL ARGUMENT OF ALEXANDER F. REICHERT

24 ON BEHALF OF THE RESPONDENT

25 MR. REICHERT: Mr. Chief Justice, and may it

1 please the Court:

2 When Congress amended the Indian Civil rights
3 Act in response to this Court's invitation in Duro,
4 Congress exceeded its power by overruling this -- this
5 Court's determination on the limits of tribal sovereignty.
6 The tribal power that Congress can give and take away
7 cannot by definition be a sovereign power. The tribal
8 court, acting without its own sovereign authority,
9 prosecuted Billy Jo Lara using this Federal authority, and
10 his subsequent Federal prosecution, therefore, double --
11 violated the Double Jeopardy Clause.

12 **(Ginsburg)** QUESTION: If we take your approach then in
13 trying to carry out what was the will of Congress, I think
14 we'd have to say that the first prosecution doesn't count
15 because the one thing is -- seems to me pretty clear from
16 this record, that Congress did not want to have a
17 situation where there was a delegation of Federal
18 authority. The whole idea was that you would have the
19 Federal -- the possibility of the Federal prosecution and
20 the tribal prosecution. I -- I think that it's -- it's
21 inescapably clear that that's what Congress wanted to do,
22 to preserve the possibility of a U.S. attorney
23 prosecution.

24 So if you're right, then I think making the --
25 the bottom line what would Congress do if it couldn't

1 accomplish what it set out to accomplish, one would say,
2 well, all bets are off and not adopt your position that
3 Congress chose to delegate Federal authority when it seems
4 to me pretty clear that it didn't.

5 MR. REICHERT: Your Honor, I believe that
6 Congress' intent was clear on two points. The first point
7 was that they were attempting to restore tribal
8 sovereignty, which they cannot do by its definition. But
9 they were also clearly trying to close a jurisdictional
10 gap, a jurisdictional loophole.

11 Under the Government's contention, the entire
12 statute should be thrown out and neither one of those
13 clear intents from Congress can be saved. But under the
14 -- under what the Eighth Circuit did and under what I'm
15 asking this Court to do, the -- one of those intents can
16 be saved and that is --

17 (Scalia) QUESTION: But you can't do that. You can't --
18 you can't achieve the end by a means other than the means
19 which Congress provided to that end. It did, indeed,
20 intend to close a gap, but the means which it selected to
21 close that gap was the reconferral -- the attempted
22 reconferral of inherent sovereignty upon the Indian
23 tribes. There's no delegation language in that. They
24 clearly chose the means to the end of -- of covering the
25 gap, the means of reconferring sovereignty. And if that

1 is invalid, then the statute is invalid. We -- we have no
2 power to transmogrify it into a -- a delegation when it
3 clearly is not that.

4 MR. REICHERT: And if this Court was to
5 determine that this is a -- that this is not a delegation
6 and that this Court determines that the statute cannot be
7 saved, then Mr. Lara still was prosecuted in the tribal
8 court. He was still prosecuted under color of law. He
9 served 90 days in the tribal jail on this offense, 155
10 days total.

11 The tribal court believed it was acting
12 properly. It was told by Congress. Congress is the body
13 which tells the tribe what to do.

14 (Rehquist) QUESTION: Do you -- do you have authority for
15 the proposition that if you're tried by a court without
16 jurisdiction, it's nevertheless sufficient to invoke
17 double jeopardy, if we have to reach that here? Do you
18 have authority for that or is that a novel proposition?

19 MR. REICHERT: I don't believe that it's novel.
20 There is -- this Court has not ruled that a court without
21 jurisdiction can, therefore, subject some -- can subject
22 somebody to initial jeopardy in the double jeopardy sense.

23 But the Fifth Amendment clearly -- the Fifth
24 Amendment does not protect against dual investigations or
25 dual prosecutions. It protects against dual punishment,

1 and Mr. Lara has been punished. He served 90 days in
2 jail. Congress can't now --

3 QUESTION: What if -- what if he'd been
4 prosecuted in France and served 90 days there and then he
5 was tried here? Would that be double jeopardy?

6 MR. REICHERT: I don't believe so, Your Honor.

7 (Kennedy) QUESTION: Well, and -- and furthermore, you
8 have a habeas remedy after the first -- after the first
9 trial to -- to object to the sentence.

10 Getting back to the -- to the point, why is it
11 -- let's assume for the moment -- it's just an assumption
12 -- that the -- that the tribes had as a historical matter
13 the sovereign authority to try non-member Indians and that
14 Congress took that away. Could Congress then give it
15 back?

16 MR. REICHERT: Congress can -- could always give
17 it back under a delegation. Congress always has the power
18 to --

19 QUESTION: Why -- why would it be a delegation?
20 Why couldn't they say we -- we define the scope of Indian
21 sovereignty and we -- we ratchet it up and we ratchet it
22 down?

23 MR. REICHERT: What Congress takes away and
24 Congress gives back is a power of Congress. It can't be a
25 reaffirmation of a tribal sovereign power. That which --

1 **(Stevens)** QUESTION: May -- may I interrupt you on that?
2 Supposing they had a -- a procedure for electing their
3 chiefs and Congress said that's unfair to women or
4 something, so you can't do it anymore, and then 10 years
5 later just repealed the statute. Would they then have
6 delegated the power to elect the chiefs the way they did
7 it for 100 years?

8 MR. REICHERT: I think technically they would,
9 but in that situation it's -- it's not so important
10 whether they're using a delegated power or a sovereign
11 power because this case presents unique facts where
12 sovereignty becomes of paramount importance because of
13 this Court's adoption of the dual sovereignty doctrine.
14 In many instances, Congress delegates authority and it --
15 the importance of whether it be a delegation or whether it
16 be a -- a re-recognition or a restoration of inherent
17 tribal sovereignty is not nearly as important. And in
18 that case, I think it would be a delegation of Federal
19 power, but I don't think it would affect the election of
20 the tribal chairmen.

21 QUESTION: Mr. Reichert --

22 **(Breyer)** QUESTION: They could do it with Puerto Rico,
23 couldn't they? Sorry. With Puerto Rico, can't Congress,
24 for example, define the sovereign relation between the
25 United States and the Commonwealth of Puerto Rico. I

1 would have thought it had considerable power there. And
2 if it can do it there, why can't it do it here?

3 I mean, you could enter into a treaty changing
4 the nature of the sovereign power and the House of
5 Representatives and the Senate have basically taken to
6 themselves through statute the treaty-making authority.
7 And so what's -- why is this any different from -- from
8 redefining the nature of the sovereign relationship
9 between, say, Guam, Puerto Rico, a whole -- you know,
10 those entities that are not States?

11 MR. REICHERT: When Congress acts with -- as it
12 acts towards Puerto Rico, it can use its treaty powers and
13 not be conferring sovereign power on Puerto Rico. And
14 Puerto Rico is considerably --

15 QUESTION: Suppose it does. Suppose it says the
16 commonwealth, which is a totally uncertain concept,
17 henceforth means A, B, C, D, and E. All right? Now --
18 now, whether that's wise or not wise I have no idea, but I
19 don't see anything in the Constitution that would stop
20 Congress from doing that. And if there is nothing there,
21 why is there here where, in fact -- I don't want to repeat
22 myself.

23 But my understanding of this is that over the
24 years Congress has, through legislation -- or Congress has
25 changed the making of the treaty to define the

1 relationship into a situation where we define the
2 relationship with the Indian tribes through legislation.

3 QUESTION: What about Philippines?

4 QUESTION: At least I don't see why they --

5 (Scalia) QUESTION: I assume we did precisely that with
6 the Philippines, and I -- I guess Justice Breyer is
7 suggesting that we can simply revoke Philippine
8 independence, which we -- which we graciously gave them,
9 and now, since it was all done through the treaty power,
10 we can just revoke it.

11 (Breyer) QUESTION: But this is the opposite. I suppose
12 we could --

13 MR. REICHERT: To address that, Puerto Rico is
14 different than a State and Puerto Rico and States are very
15 different from tribes. Tribes are dependent nations.
16 They are a unique body within our constitutional
17 framework.

18 And when Congress acts in relation to tribes,
19 they can act in a number of different ways. In fact,
20 Congress can completely take away a tribe's sovereignty,
21 but it cannot restore that sovereignty once it's -- it has
22 taken it away. The reason that this -- the reason that
23 this is --

24 (Stevens) QUESTION: Can I just -- it seems to me that's a
25 critical part of the case where the -- supposing the tribe

1 had a -- a criminal statute and saying you cannot cut
2 trees above 5,000 feet on the mountains because that's
3 sacred land or something like that. And Congress decided
4 they wanted to build a road up there, so they preempted
5 the -- the Indian statute and said we cannot enforce that
6 statute. Then after they built the road, they decided,
7 well, they'd let them go back to the way they did, and
8 they said we repeal the preempting statute. Now, would
9 that be a delegation of power to -- to protect those
10 religious grounds, or would that be just a restoration of
11 a preexisting sovereign power?

12 MR. REICHERT: I believe that that would be a
13 delegation of Congress' power. Once it has taken
14 something away, it cannot give it back. And powers which
15 are -- which are sovereign cannot be defined as sovereign
16 when --

17 (O'Connor) QUESTION: Where -- where do you get the
18 authority for that one-way ratcheting when we've said that
19 Congress has plenary power over the tribes? What opinion
20 of this Court do you look to for that proposition?

21 MR. REICHERT: I would look to *Oliphant* or to
22 *United States v. Sioux Nation* or the *Alcea Band of the*
23 *Tillamook Tribe* wherein this Court said Congress' plenary
24 power is not absolute. Congress -- this Court has often
25 said Congress has plenary power, but that plenary power is

1 not absolute. And one of the -- one of the most important
2 limitations on Congress' power with regard to Indian
3 tribes is that it must be subject to the limitations of
4 the Constitution.

5 (Souter) QUESTION: Okay. Mr. Reichert, may I interrupt
6 you there? Because I -- I think -- I think there are two
7 different arguments in play in -- in what's going on here,
8 and I thought you had started out with one and now you
9 seem to be going to a different one.

10 One argument is Congress didn't take away this
11 power over -- the tribal power to -- to prosecute non-
12 tribal members. There's no act of Congress that said they
13 can't do that. The reason they can't do that is there's a
14 sovereignty relationship. There's no act of Congress that
15 articulated that sovereignty relationship. It's just the
16 way we understand things. The tribes are dependent
17 sovereigns.

18 And on that theory -- that's where I -- I
19 thought you were coming from originally, and -- and on
20 that theory, Congress can't restore it because it can't
21 change that relationship, or at least it hasn't changed
22 that relationship of -- of dependent sovereignty.

23 A second way that -- that is being explored here
24 is -- is on the assumption that Congress by some act took
25 away the sovereignty to prosecute non-tribal members and

1 now wants to give it back.

2 I'm not sure what the answer should be in the
3 second case, but I thought your argument depended on the
4 first case or the first example. Is -- is that correct?

5 MR. REICHERT: The --

6 QUESTION: In other words, it's -- it's the
7 sovereign relationship rather than an act of Congress that
8 takes away that is crucial for understanding the issue
9 here.

10 MR. REICHERT: If I could just -- it's this
11 Court that said that that -- that recognized -- and its
12 role is to say what the law is -- looked at the dependent
13 nature of the Indian tribes and said this does not exist.
14 This power to prosecute --

15 QUESTION: We said that in Oliphant, among other
16 things.

17 MR. REICHERT: Correct.

18 QUESTION: Yes, okay.

19 QUESTION: So it's a power always to take away,
20 but never to give back that's --

21 MR. REICHERT: Yes, but Congress can always give
22 back using their plenary power. Congress can always
23 delegate powers back to the tribes. It simply cannot make
24 sovereign that which is not. That which is --

25 QUESTION: But do we -- I'm sorry.

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QUESTION: Can I interrupt --

QUESTION: Do we -- we have to get --

(Stevens) QUESTION: What transformed the tribes from independent sovereigns to dependent sovereigns was not a decision of this Court and the act of Congress. It was the acts of the legislature and they took over a lot of things that were previously independent sovereignty of the tribes. And if you go back a couple hundred years, they clearly had their own inherent power to try non-members. Maybe they lost it in the change in the relationship between the United States and the tribe, but that's not as a result of an act of Congress or a decision of this Court. It's the result of historical events.

MR. REICHERT: It's a result, Your Honor, of their accepting the dependent -- accepting the protection and the benefits and the burdens of the United States. And that boils down to the essential question which is who has the -- who has the final authority on what the limits on inherent sovereignty are. Is it this body or is it Congress? And --

(Scalia) QUESTION: Essentially the trouble I have with your case is that it depends on making a distinction between the status of -- of Indian sovereignty which hasn't yet been taken away but which exists totally the

1 whim of Congress. And that, you say, is not -- is -- that
2 does not allow the Double Jeopardy Clause to be invoked
3 because -- I don't know what. You call that sovereignty,
4 that dependent sovereignty? But you say, however, if
5 Congress acts to take it away, then it can't give it back.

6 It seems to me in both cases whatever power the
7 Indian tribe has is power that exists at the pleasure of
8 the United States, and I don't know why in -- the one case
9 is any better than the other as far as the Double Jeopardy
10 Clause is concerned. Whatever power they exercise, they
11 exercise because we let them exercise it. Isn't that
12 right?

13 MR. REICHERT: That's right, and --

14 QUESTION: Well, why shouldn't the -- I mean, I
15 -- I -- if the Double Jeopardy Clause doesn't apply in one
16 situation, it seems to me it shouldn't apply in the other.

17 MR. REICHERT: And Billy Jo Lara was prosecuted
18 using Federal power, and that's -- and that's the premise.
19 He -- when he was prosecuted by the tribe, he was
20 prosecuted using Federal power. And then his subsequent
21 prosecution in the Federal court --

22 QUESTION: Why -- why doesn't Gideon v.
23 Wainwright and all the other provisions of the Bill of
24 Rights apply?

25 MR. REICHERT: To Billy Jo Lara as a non-member

1 of the tribe? I think that it should apply.

2 QUESTION: To -- to any Indian tribal
3 prosecution of its own -- even of its own members.

4 MR. REICHERT: Because this Court said in United
5 States v. Wheeler that the -- the member of a tribe has
6 accepted the benefits and the burdens of being a member of
7 that tribe, and one of the burdens is that the Bill of
8 Rights does not apply. And at any time that tribal member
9 can decide to leave his or her tribe and no longer be a
10 member, no longer accept the benefits and no longer accept
11 the burdens, which is the fundamental unfairness of either
12 placing a non-Indian or a non-member Indian before a
13 tribal court which does not give that person their full
14 constitutional rights.

15 (Breyer) QUESTION: So -- so the answer then to the due
16 process problem, which you've just given, is that the --
17 the member -- the tribal member, the non-tribal Indian,
18 and the non-Indian are all persons subject to the Due
19 Process Clause, but what counts is due process may vary
20 between whether you are a tribal member or not because of
21 the argument you just gave. Now, if that's so, that
22 solves that problem.

23 Then we're back to the question of why not allow
24 Congress to define sovereignty. I thought Justice
25 Scalia's point was a very good point to mention the

1 Philippines. If you reverse it, don't we have the
2 authority in the United States to give the Philippines
3 independence? And if in fact, we get into the habit of
4 making that kind of decision through a congressional law,
5 why could we not do the same to the Indian tribes?

6 And if there is a boundary there, it must have
7 to do with the nature of a Constitution of the United
8 States, not some language. And I can't find anything here
9 that would suggest that in doing this, that boundary is
10 passed.

11 So what's -- what's the answer to that kind of
12 argument?

13 MR. REICHERT: Your Honor, as I understand your
14 question, you're looking for where in the Constitution
15 Congress has the power or this -- or this body has the
16 power.

17 QUESTION: To the contrary. I'm saying
18 naturally Congress has the power to take, let's say,
19 something that is not a State -- it is like Puerto Rico or
20 the Philippines -- and to say we are changing the status
21 of that entity.

22 Now, I would think you'd start from the
23 proposition that they do have the power to define the
24 relationship of entities that are not States to the United
25 States. Now, if there is a limit on that, it must be

1 found either explicitly, which I can't find, or implicitly
2 in the nature of the constitutional document itself. So I
3 am looking to you to tell me any kind of limit like that
4 which might prevent what Congress tried to do here.

5 MR. REICHERT: Congress has specific enumerated
6 powers in the Constitution. Nowhere in those specific
7 enumerated powers -- and the Government has pointed to no
8 specific enumerated powers that allows Congress to take
9 the action they did.

10 QUESTION: I want to turn the question then.
11 Which is the power that allowed us to give independence to
12 the Philippines? Which is the power that allowed us to
13 pass the Federal Relations Act or the Commonwealth
14 Relations Act that defines the relationship with Puerto
15 Rico? Which is the power -- where -- where are these
16 powers in the -- I'm not saying they're not there. I'm
17 saying that I'm not an expert in this area and I -- I'd
18 like you to make this argument of where they are.

19 MR. REICHERT: In the Treaty Clause. And
20 Congress and the executive branch can have relations with
21 other nations through the Treaty Clause and can define
22 their relation.

23 But this Court has said that dealings with the
24 tribe is more than treaties and more than statutes, that
25 it also depends on the relationship of the tribes to this

1 dependent nation. And in giving their -- in -- in
2 accepting the protection of the United States, the tribes
3 accepted the burdens and necessarily gave up certain
4 aspects of their sovereignty.

5 QUESTION: Now, my impression is that we used to
6 do this through treaty, but at some point the House of
7 Representatives was somewhat unhappy about not having a
8 role in this and therefore it became changed such that the
9 relationship with the Indian tribes is defined through
10 agreement ratified and enacted into law by both houses of
11 Congress. Now, was that unconstitutional to do that?

12 MR. REICHERT: I'm not sure that it was -- if it
13 was unconstitutional or not, but I don't think that's the
14 important distinction, Your Honor. What the important
15 distinction is is where does this power to now deal with
16 Indian tribes and to -- what they're trying to do is
17 define sovereignty and take any role that this Court has
18 in defining sovereignty away. Under the Government's
19 analysis --

20 QUESTION: Well, I -- I suppose that if this
21 Court said that the nature of sovereignty is such that it
22 has certain limits and that this is imposed because of the
23 Constitution and because of long use, perhaps Congress
24 couldn't change it. But we haven't said that.

25 MR. REICHERT: But Congress --

1 (Kennedy) QUESTION: We have not said that. Duro didn't
2 say that. Duro said we'll look at the statute. Congress
3 didn't give this power. End of case. That's all.

4 Insofar as the territories, because that's under
5 Article IV of the Constitution, it has nothing to do with
6 this case.

7 MR. REICHERT: And Congress is already
8 attempting to -- with the Hicks fix to overrule Hicks,
9 Montana, and Oliphant. And if this Court gives to
10 Congress all the powers that the Government is asking them
11 to --

12 QUESTION: That may well be a different case
13 because then we're concerned with the powers of -- of
14 Indian tribes as a historical matter of their sovereignty
15 over citizens of the United States who have direct
16 relations, responsibilities, obligations, and rights both
17 with their States and with the National Government, and
18 under the insular cases, the Constitution applies with
19 full force to the territory of the United States. So
20 that's a very different -- that's a very different case.

21 MR. REICHERT: But Mr. Lara owes no allegiance
22 whatsoever to the Spirit Lake Sioux Tribe. He's a member
23 of a different tribe. Using -- he is a citizen of the
24 United States just like any other Indian. He receives no
25 benefits from the Spirit Lake Sioux Tribe.

1 **(Kennedy)** QUESTION: Then you're making a -- then you're
2 making a constitutional argument and it's an appropriate
3 argument. But I -- I don't think it follows from that
4 that within the realm where Congress does have authority,
5 i.e., the relations of Indian tribes with their own
6 members, that it can't give in one year and take away the
7 -- the other year. I -- I just don't think you need that
8 argument to prevail in your case.

9 MR. REICHERT: In -- and thank you.

10 (Laughter.)

11 MR. REICHERT: The -- and it is -- it is
12 critically important to look at what a tribe -- what
13 powers a tribe exerts over its members and what -- what
14 somebody who is a member of a tribe traveling across the
15 country, traveling across an interstate highway and is not
16 a member of that tribe, comes onto a reservation for no
17 reason other than to get through that reservation --

18 **(Ginsburg)** QUESTION: What about someone who lives on the
19 reservation, marries a woman who is a member of the tribe?
20 Why doesn't the tribe have at least the sovereign
21 authority -- it's always at the sufferance of Congress,
22 but to say when things go wrong on our reservation, when
23 our people are hurt, we are entitled to prosecute the
24 wrongdoer?

25 MR. REICHERT: Because if the Court were to

1 adopt that position, then there would be no reason not to
2 subject non-Indians to tribal jurisdiction as well.

3 That's a contact --

4 **(Kennedy)** QUESTION: Well, how do you distinguish Brendale
5 with a zoning ordinance and so forth? Is criminal
6 jurisdiction different?

7 MR. REICHERT: Criminal -- criminal jurisdiction
8 is significantly different than civil jurisdiction.

9 QUESTION: And -- and what's -- what's the
10 authority for that?

11 MR. REICHERT: I believe that that's in my
12 brief, Your Honor. I don't have that cite in front of me.

13 The -- but in -- in Duro this Court said that in
14 the criminal -- that the criminal context is unique, and
15 that in the -- in the realm of criminal law, we must first
16 look -- no matter what we think of history, no matter what
17 our interpretation is of history and statutes and
18 treaties, this must be examined under the guise that Billy
19 Jo Lara, or in that case Albert Duro, is a citizen first
20 and foremost of the United States.

21 **(Breyer)** QUESTION: But then you've given the answer to
22 your own question. If you're right -- if you're right
23 that this does -- is absolutely, you know, a violation of
24 due process to subject the non-tribal member, say, to a
25 trial without a lawyer, well, then you would win, but not

1 this case. What you would win is a case where there was
2 an appeal from the tribal prosecution, and under those
3 circumstances, they had raised the question just as you
4 phrased it, say it may not violate due process, for the
5 reasons you gave, not to give the tribal member a lawyer,
6 but it does violate due process for Congress to pass a law
7 which subjects me to this criminal trial without a lawyer
8 because I am not a tribal member. So if you are right,
9 there is a vehicle to make that claim and you will win or
10 your client will. But he didn't take advantage of that
11 vehicle in this case.

12 MR. REICHERT: And -- and it's interesting. The
13 Government says in numerous instances that habeas relief
14 is an appropriate remedy. This Court recognized in Duro
15 that habeas is not an appropriate remedy, and it's not for
16 two reasons, the first being habeas relief requires an in-
17 custody -- has an in-custody requirement. Mr. Lara is
18 quickly out of custody.

19 And without a lawyer, how can one be expected to
20 raise complex Federal rights such as habeas? When one
21 walks into a courtroom, one does not walk in and say --

22 (O'Connor) QUESTION: Well, we do it all the time. We have
23 a lot of pro se applicants that make very complex
24 arguments. That's not new.

25 MR. REICHERT: But it's not required to step

1 into a courtroom in the United States and say before this
2 proceeding starts, I want to invoke all of my rights.
3 Those rights must be waived. And at no point were these
4 -- were these rights waived by Mr. Lara.

5 QUESTION: Of course, he'd be subjected to the
6 same thing on his own reservation, on the reservation of
7 his own tribe, and you say that's okay.

8 MR. REICHERT: This Court has said that -- that
9 prosecuting a member on his own tribe is okay because he
10 has -- he has consented to that.

11 (Scalia) QUESTION: Mightn't there be such a thing as,
12 you know, when -- when you enroll in any tribe, you
13 subject yourself to what might be call Indian law --

14 MR. REICHERT: No --

15 QUESTION: -- the law of your tribal council and
16 the law of -- of other tribal councils? And just as
17 you're not entitled to an attorney before your own tribal
18 council, you're not entitled to an attorney before another
19 one. Why -- that -- that would be a sensible resolution
20 it seems to me.

21 MR. REICHERT: It would be wonderful if tribes
22 were the same, but tribes are not. Tribes are distinctly
23 different. To say that the -- that somebody in -- an
24 Indian in Alaska is going to know what the criminal laws
25 in the State of Florida are going to be is simply not the

1 case. He's not going to understand the customs. He --
2 this person would not have had any input into the tribal
3 council, what the laws were, who the judges --

4 (Ginsburg) QUESTION: How does that differ from somebody
5 from Virginia who caused some trouble in Louisiana and
6 doesn't want to go to the Louisiana courts because they
7 have this mixed civil/common law system?

8 MR. REICHERT: Because a criminal defendant in
9 Louisiana under your -- under your example would have the
10 full benefit of the Bill of Rights which a -- which an
11 Indian does not have in tribal courts. And that's the
12 difference. They would -- he would -- that person would
13 have a Louisiana lawyer who understood Louisiana law and
14 could speak on his behalf. Gideon v. Wainwright is --
15 there is wonderful language in there, talking about how
16 important it is to have a lawyer.

17 QUESTION: But this is --

18 QUESTION: Yes, but if -- if --

19 QUESTION: -- this is so hypothetical because
20 there's nothing in this record to show that he asked for a
21 lawyer, was denied a lawyer. We have to assume that --
22 that's -- that's not an issue in this case. You're --
23 you're not forced to have a lawyer.

24 QUESTION: But even beyond that, if you convince
25 us that the other -- the other conviction is void, what's

1 the basis for double jeopardy?

2 MR. REICHERT: Because Mr. Lara was prosecuted
3 under the color of law. He was prosecuted. He went to
4 jail for 90 days, and he --

5 QUESTION: Yes, but there's no valid judgment if
6 you're right.

7 MR. REICHERT: And Mr. Lara never attacked his
8 -- his judgment. The Government is attacking his
9 judgment, coming in -- he -- he never attacked his
10 judgment. Now the Government is coming in attacking his
11 judgment collaterally in order to exact a more harsh
12 sentence in Federal court.

13 QUESTION: No. They're relying on the dual
14 sovereignty doctrine. And you -- you don't seem to me to
15 challenge that either, do you? You're not asking us to
16 reexamine the basic double jeopardy doctrine.

17 MR. REICHERT: No, I am not, Your Honor. No, I
18 am not.

19 And -- and the tribe, acting under the direction
20 of Congress which has control over the Indian
21 reservations, acting under what they thought was a valid
22 statute, acting under a statute that would not be invalid
23 until this Court speaks, was placed in jail and has
24 suffered the constraints of being in jail, then was
25 subsequently prosecuted by that same body by Congress and

1 was indicted and now is going to be prosecuted a second
2 time. The Government can't rewrite the logs of the jail.
3 He was there and he -- and the fact that he was punished
4 is clear.

5 For these reasons, I ask this Court to affirm
6 the decision of the Eighth Circuit and to find that Billy
7 Jo's -- Billy Jo Lara's subsequent Federal prosecution
8 violated double jeopardy. Thank you.

9 (Kennedy) QUESTION: Can I ask just one question? Of what
10 tribe is Lara a member?

11 MR. REICHERT: The -- the --

12 QUESTION: Well, it will be in the record.

13 Do you know if there is a -- any kind of an
14 agreement between his tribe and the prosecuting tribe?

15 MR. REICHERT: No. In fact -- no, there is not.
16 And historically there wouldn't have been. They are two
17 tribes that were bitter enemies throughout history and --

18 QUESTION: Thank you, Mr. Reichert.

19 Mr. Kneedler, you have 4 minutes remaining.

20 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

21 ON BEHALF OF THE PETITIONER

22 MR. KNEEDLER: Thank you, Mr. Chief Justice.

23 The first point I'd like to make is that this
24 case only involves the question of whether Congress can
25 authorize tribes to exercise jurisdiction over Indians who

1 are members of other tribes or affiliated with other
2 tribes, not non-member Indians. And that -- that point is
3 significant because it calls into -- into play additional
4 powers that Congress has in this area particularly
5 defining the attributes of membership in a tribe.
6 Congress has -- among those attributes are the eligibility
7 for special benefits, educational benefits, health
8 benefits, housing benefits. So someone from another
9 tribe --

10 QUESTION: And I take it tribal membership is
11 always consensual in the context that we're talking about?

12 MR. KNEEDLER: I -- I think -- I think it would
13 -- yes, it would be. Someone always would have the -- the
14 ability to disavow his -- his Indian affiliation. I think
15 that would be an important part of it.

16 But -- so what Congress has done here is simply
17 to identify another attribute of membership or affiliation
18 with a tribe, which is that if you're on another tribe's
19 reservation, you will be subject to that tribe's criminal
20 jurisdiction. And that is important to law and order on
21 many reservations, as Congress itself realized when it
22 enacted this statute in 1991.

23 (Stevens) QUESTION: Is it correct that a defendant in the
24 case right before the trial starts could disavow his
25 Indian status?

1 MR. KNEEDLER: No. He could not -- I -- I think
2 he -- as long as he was affiliated at the time of the
3 conduct, I think -- I think the -- the consequences would
4 -- would flow from that.

5 QUESTION: I wonder if that -- why that would
6 follow? If he had that absolute right, it seems to me
7 anytime before judgment he should -- he could say I'm
8 stopped being an Indian.

9 MR. KNEEDLER: No. I -- I think -- I think
10 Congress at least under the Necessary and Proper Clause
11 could allow a tribe to maintain jurisdiction over
12 something that happened while the person was tribally
13 affiliated.

14 The -- another fundamental point is the one that
15 Justice Breyer mentioned is that there is nothing in the
16 Constitution that prohibits, the places a limit in this
17 situation on Congress' exercise of its plenary power over
18 Indian affairs. And in fact, there's much in the
19 Constitution that points to the contrary. The
20 Constitution refers to the Indian tribes, and as this
21 Court has said, that reference to tribes and to the
22 treaty-making power recognizes tribes as sovereigns, not
23 simply voluntary organizations, but in the Constitution
24 itself recognizes them as sovereigns. And the Court has
25 said that because of those powers and implicit from that

1 is the power of Congress to exercise protective authority
2 over Indian tribes. And here that protection includes
3 protection of tribal -- tribes from crimes committed by
4 other tribal members.

5 In solving this serious law enforcement problem,
6 Congress was entitled to be guided by the Constitution
7 itself which recognizes the tribes as sovereign and to
8 vest authority in them as sovereign rather than act in
9 derogation of the Constitution by deeming the tribes to be
10 agents of the Federal Government when a tribal prosecutor
11 is bringing a prosecution under tribal law in -- in tribal
12 court.

13 And Congress could rationally reach this
14 conclusion for another important reason, and that is the
15 lesson in history. History is very important in Indian
16 affairs, and Congress throughout history, since 1817 under
17 a jurisdictional regime that remains in effect, has left
18 to tribes the power to exercise jurisdiction over members
19 of other tribes, as this Court said in United States v.
20 Rodgers where it construed the Indian against Indian
21 exception as intended to allow tribe matters not -- and it
22 expressly said, not only with -- with their own tribe but
23 other tribes, to be left to the tribe.

24 QUESTION: Could the Congress define a -- a
25 criminal offense between one Indian as another Indian and

1 require that the trial be in a tribal court?

2 MR. KNEEDLER: A title 18 offense?

3 QUESTION: Yes.

4 MR. KNEEDLER: I -- I think that --

5 QUESTION: Because my next question would be if
6 they did, could there then be double jeopardy if there was
7 a second trial.

8 MR. KNEEDLER: That -- that would -- that --
9 that might present a -- a separate problem, but if the --
10 because there -- it might be the same offense.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
12 Kneedler.

13 The case is submitted.

14 (Whereupon, at 11:09 a.m., the case in the
15 above-entitled matter was submitted.)

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