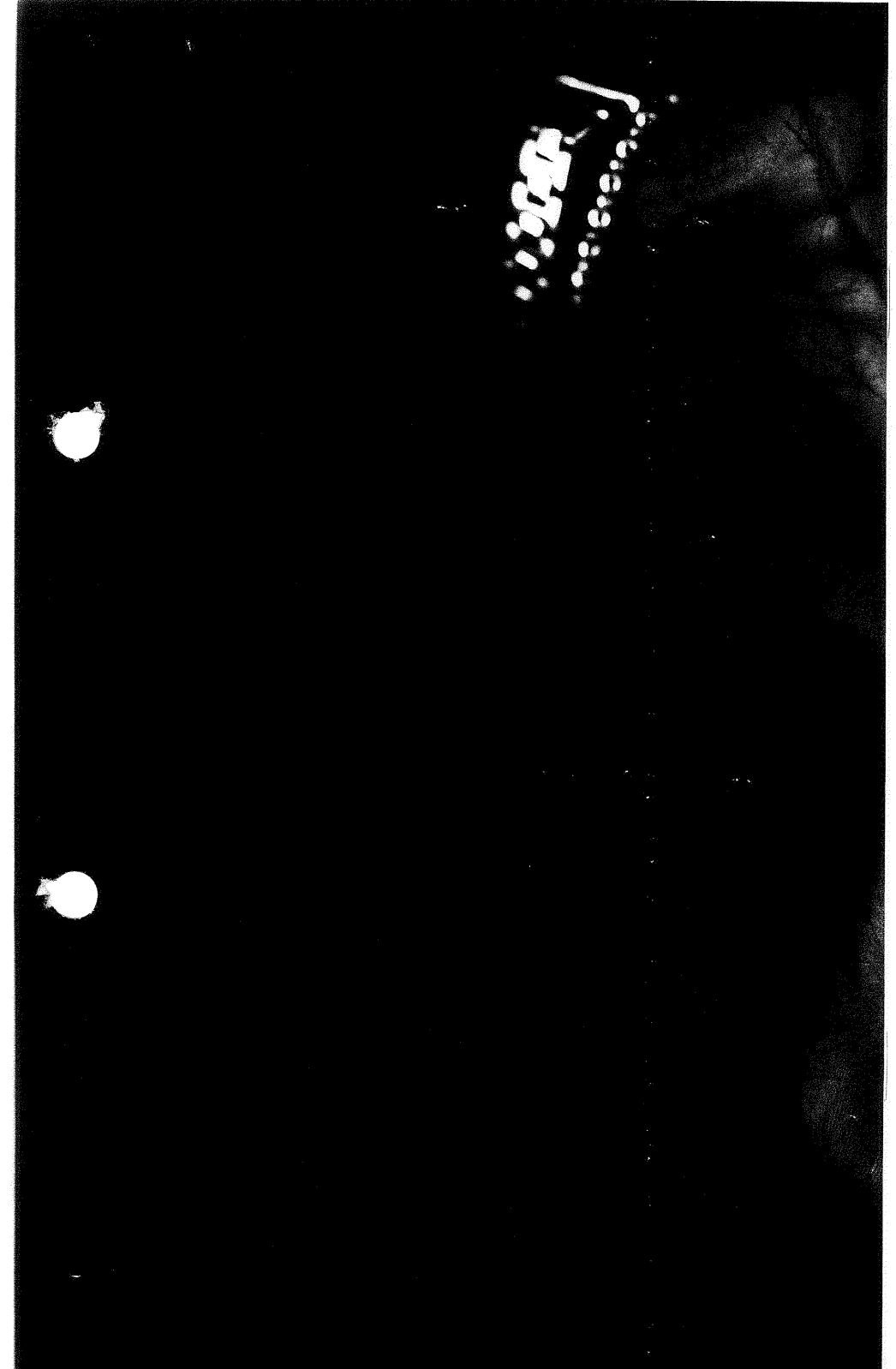

No. 02-___

In The

Supreme Court of the United States

FRANK LONG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

By Congressional act, the Menominee Tribe lost its power to prosecute tribal members for violating tribal law in 1961, but regained that power by a subsequent act of Congress in 1973. The petitioner was charged by tribal and federal prosecutors, in that order, with the same offense in 2001. The question presented is:

Whether a federally recognized Indian tribe, whose present power to prosecute tribal offenses was established by an act of Congress, prosecutes as a sovereign separate from the federal government for purposes of the dual sovereignty exception to the Fifth Amendment's Double Jeopardy Clause.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that this Court issue a writ of certiorari to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit appears at Appendix A to the Petition and is reported at 324 F.3d 475.

The opinion of the United States District Court for the Eastern District of Wisconsin appears at Appendix B to the Petition and is reported at 183 F. Supp.2d 1106.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit decided Petitioner's case on March 20, 2003. Neither party filed a petition for rehearing.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Const. amend. V, cl. 2, provides:

> nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .

2. The Menominee Termination Act of 1954, Pub. L. 83-399, ch. 303, 68 Stat. 250 (codified as amended at 25 U.S.C. §§ 891-902 (1964)), stated, in pertinent part:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the purpose of this Act is to provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin.
>
> . . . .
>
> [A]ll statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.

3. Title 25, United States Code, Section 903a(b) provides:

> Subchapter XL of this chapter is hereby repealed and there are hereby reinstated all rights and privileges of the tribe or its members under Federal treaty, statute, or otherwise which may have been diminished or lost pursuant to such subchapter.

4. Title 25, United States Code, Section 903a(c) provides:

> Nothing contained in this subchapter shall diminish any rights or privileges enjoyed by the tribe or its members now or prior to June 17, 1954, under Federal treaty, statute, or otherwise, which are not inconsistent with the provisions of this subchapter.

5. Title 25, United States Code, Section 1301(2) provides:

> "powers of self government" . . . means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.

STATEMENT OF THE CASE

1. The Menominee Tribe's reservation in northeast Wisconsin was created by the Treaty of Wolf River in 1854. A Menominee justice system existed for nearly the next 100 years. *See United States v. Long*, 324 F.3d 475, 477 (7th Cir. 2003) (citing Stephan M. Tourtillot-Grochowski, *Profile, Menominee Tribal Court,* in ON COMMON GROUND: A MEETING OF STATE, FEDERAL AND TRIBAL COURTS § 2 (Mar. 11-12, 1999)).

In 1953, Congress enacted Public Law 83-280, 67 Stat. 588 (1953) (codified in part at 18 U.S.C. § 1162), which gave Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin jurisdiction to prosecute crimes committed by or against Indians in "Indian country." The original statute exempted the Menominee Tribe.

But in 1954, as part of the federal government's policy of assimilating Indian tribes into mainstream society, Congress enacted the Menominee Termination Act, Pub. L. 83-399, ch. 303, 68 Stat. 250 (1954) (codified as amended

at 25 U.S.C. §§ 891-902 (1964)).[1] The Termination Act stated: "[A]ll statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." 68 Stat. 252. Two months later, Congress amended Public Law 83-280 to remove the Menominee exemption and extend the state of Wisconsin's jurisdiction to crimes committed by Indians on the Menominee Reservation. Pub. L. 83-661, ch. 910, 68 Stat. 795 (1954). Courts read Public Law 280 *in pari materia* with the Menominee Termination Act. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411 (1968). Read together, Public Law 280 and the Menominee Termination Act eliminated the Menominee Tribe's power to enact and enforce criminal law on its reservation and gave that power exclusively to the state of Wisconsin.

Nineteen years later, in 1973, Congress enacted the Menominee Restoration Act, which repealed the Termination Act. The Restoration Act "reinstated all rights and privileges of the tribe or its members under Federal treaty,

[1] Also terminated were the Klamath Tribe of Oregon; 61 tribes and bands of Western Oregon; the Alabama and Coushatta Tribes of Texas; the Mixed Blood Utes of Utah; the Southern Paiute Tribe of Utah; the Lower Lake Rancheria of California; the Wyandotte of Oklahoma; the Peoria of Oklahoma; the Ottawa of Oklahoma; the Coyote Valley Rancheria of California; 37 to 38 California Rancherias under the California Rancheria Act; the Catawba Tribe of South Carolina; and the Ponca Tribe of Nebraska. *See* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 811 (1982 ed.)

statute, or otherwise" which may have been lost pursuant to the Termination Act. 25 U.S.C. § 903a(b).[2]

In 1976, the state of Wisconsin retroceded its criminal jurisdiction over the Menominee Reservation back to the federal government. A Menominee Tribal Court was established in 1979.

2. Petitioner stole a pick-up truck on the Menominee Reservation in Keshena, Wisconsin, in April 2001. He pled no contest to theft in the Menominee Tribal Court and was sentenced to 120 days in tribal jail.

Later that year, a federal grand jury sitting in the Eastern District of Wisconsin issued an indictment charging petitioner with the same theft, contrary to 18 U.S.C. § 1153(a) (the Indian Major Crimes Act, which grants federal jurisdiction over 14 enumerated crimes committed on reservation lands by Indians, including larceny).

3. Petitioner moved to dismiss the indictment based on double jeopardy. The district court granted Petitioner's

[2] The following tribes also had federal recognition restored: the Klamath Tribe of Oregon, 25 U.S.C. §§ 566-566h; the Siletz Tribe of Oregon, 25 U.S.C. §§ 711-711f; the Confederated Tribes of Coos, Lower Umpqua and Siuslaw of Oregon, 25 U.S.C. §§ 714-714f; the Coquille Tribe of Oregon, 25 U.S.C. §§ 715-715g; the Alabama and Coushatta Tribes of Texas, 25 U.S.C. §§ 731-737; the Paiute Indians of Utah, 25 U.S.C. §§ 761-768; the Wyandotte, Peoria, Ottawa and Modoc Tribes of Oklahoma, 25 U.S.C. §§ 861-861c; the Catawba Tribe of South Carolina, 25 U.S.C. §§ 941-941c; the Ponca Tribe of Nebraska, 25 U.S.C. §§ 983-983h; the Ysleta del Sur Pueblo Tribe of Texas, 25 U.S.C. §§ 1300g-1300g-7; the Auburn Tribe of California, 25 U.S.C. §§ 1300l-1300l-7; and the Graton Rancheria of California, 25 U.S.C. §§ 1300n-1300n-6.

motion to dismiss. The district court noted that under *United States v. Wheeler*, 435 U.S. 313, 323 (1978), tribes retain sovereign powers until Congress acts. But, the district court concluded that Congress did act to affect the Menominee Tribe's sovereign powers:

> In fact, Congress acted twice, first in 1954 by terminating the Tribe's sovereignty and, second, in 1973 by reinstating it. To conclude in the face of these acts that the Tribe's power to prosecute defendant is inherent rather than delegated would be to collapse and render meaningless the distinction between inherent and delegated power, which is the linchpin of the *Wheeler* decision. When Congress passed the Restoration Act in 1973, it conferred power on a Tribe that had none. If this was not a delegation of power it is difficult to imagine what would be.

United States v. Long, 183 F. Supp.2d 1106, 1113 (E.D. Wis. 2002), *rev'd*, *United States v. Long*, 324 F.3d 475 (7th Cir. 2003).

The district court held that the source of the Menominee Tribe's power to prosecute tribal crimes was the Restoration Act of 1973; therefore, "the dual sovereignty doctrine does not apply in the present case because the Tribe and the United States are nominally different prosecuting entities whose authority stems from the same source," and Petitioner's prosecution in federal court for the "same offence" violated double jeopardy. *Id.* at 1115.

4. The United States Court of Appeals for the Seventh Circuit reversed. That court described the issue as a "difficult question of first impression in a long line of cases dealing with Indian sovereignty beginning as early as the days of John Marshall," 324 F.3d at 476, that in turn

raised "complex questions about the scope of the Double Jeopardy Clause, tribal sovereignty, and Congress's power to regulate Indian tribes." *Id.* at 478.

The Seventh Circuit characterized the source of the Menominee's power as "debatable" because of the series of legislative acts that altered the Menominee's status as a tribe. *Id.* at 480. But the court determined that the Restoration Act was an "effort by Congress to place the Menominee back in the position they held before the Termination Act." *Id.* at 482. Because the tribe exercised its own sovereign power, the court concluded, the dual sovereignty exception to the Double Jeopardy Clause allowed sequential tribal and federal prosecutions. *Id.*

5. Petitioner timely seeks a writ of certiorari.

REASONS FOR GRANTING THE WRIT

A. This Court Has Specifically Reserved Deciding the Question Presented

This case presents the question specifically reserved by this Court in *United States v. Wheeler*, 435 U.S. 313 (1978). In *Wheeler*, the Court held that a prosecution by the federal government, subsequent to a prosecution by the Navajo Nation for the same behavior, did not violate double jeopardy. *Id.* at 327-28. The Court emphasized that the power to punish offenses against tribal law committed by tribal members was part of the Navajos' "primeval sovereignty," that this power had never been relinquished by treaty or otherwise, and that this power was not attributable to any delegation to the tribe of federal authority. *Id.* at 328.

But *Wheeler* left open whether a tribe that lost its sovereign power to try tribal criminals and then regained it by act of Congress would be an arm of the federal government and therefore not a separate sovereign for double jeopardy purposes: "That interesting question is not before us, and we express no opinion thereon." 435 U.S. at 328 n.28. But that "interesting question" is presented squarely in this case.

B. The Circuits Are Divided Over the Question Presented

A new conflict exists among the federal courts of appeals regarding the principle around which the reserved question in *Wheeler* revolves: whether a tribe exercises congressionally delegated power when Congress grants a power to a tribe that did not exist before Congress acted.

The Court of Appeals for the Seventh Circuit held below that if Congress chooses to place a terminated tribe back in the position it held before the Termination Act, the source of those restored powers remains the tribe's inherent sovereignty. *Long*, 324 F.3d at 482.

Just four days later, in contrast, a 7-4 en banc panel of the Court of Appeals for the Eighth Circuit held that "[o]nce the federal sovereign divests a tribe of its particular power, it is no longer an inherent power and it may only be restored by delegation of Congress's power." *United States v. Lara*, 324 F.3d 635, 639 (8th Cir. 2003) (en banc). At issue in *Lara* was an amendment to the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1301(2), which defined tribal powers of self-government as including the inherent power to exercise criminal jurisdiction over all Indians. The amendment was enacted in reaction to this Court's decision in *Duro v. Reina*, 495 U.S. 676, 688 (1990), in which the

Court held that a tribe's inherent sovereignty did not provide it with authority to exercise criminal jurisdiction over nonmember Indians.

The Eighth Circuit concluded that a tribe whose power to prosecute a nonmember Indian derived from an amendment to the ICRA exercised congressionally delegated power. *Lara*, 324 F.3d at 640. As a result, the court held that the federal and tribal prosecutions were not undertaken by separate sovereigns and the defendant's federal prosecution subsequent to a tribal prosecution for the same offense violated double jeopardy. *Id.*

Lara conflicts directly with the Ninth Circuit's en banc decision in *United States v. Enas*, 255 F.3d 662, 673 (9th Cir. 2001) (en banc). *Enas* held that this Court's decision in *Duro* was based on federal common law, which Congress could override by amending the ICRA. And because Congress had the ability to grant a tribe the inherent power to prosecute nonmember Indians, a federal prosecution could occur subsequent to a tribal prosecution without violating double jeopardy because the tribe did not exercise delegated federal power. *Id.* at 675.

The Seventh Circuit distinguished *Long* from *Enas* and *United States v. Weaselhead*, 156 F.3d 818 (8th Cir.), *vacated by equally divided court*, 165 F.3d 1209 (8th Cir. 1999) (en banc).[3] The court of appeals here observed that

---

[3] When *Long* was decided, *Weaselhead* was the controlling authority in the Eighth Circuit on the double jeopardy impact of the amendment to the ICRA that recognized an inherent power of tribes to prosecute all Indians, not just tribal members. *Lara sub silentio* overrules *Weaselhead*, petitioner believes.

the question in *Enas* and *Weaselhead* was whether Congress could create inherent sovereign powers that the Supreme Court had determined Indian tribes did not possess, while *Long* concerned the double jeopardy ramifications when Congress restores a power it had previously taken from the tribe. *Long*, 324 F.3d at 483. But this is a distinction with little difference. The Seventh, Eighth and Ninth Circuits all address the same basic question: when a tribe derives its present power solely from an act of Congress, may that power be classified as inherent for double jeopardy purposes?

C. The Question Presented Is of National Importance to Law Enforcement and Tribal Members

This case presents issues of national importance. The three circuits directly implicated by this petition contain 44 percent of the nation's people who classify themselves as "American Indian" or "Alaska Native" for purposes of the United States Census. *See* U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2000, at 5 (2002) (of the 2.5 million people who classified themselves as only "American Indian" or "Alaska Native" on the 2000 Census, 1.1 million lived in the states that compose the Seventh, Eighth and Ninth Circuits).

Federal and tribal law enforcement officials, as well as tribal members themselves, have a compelling interest in clarification of whether a tribe exercises inherent or delegated power when the power presently exists solely by act of Congress. As the decisions of the federal appellate courts now stand, law enforcement and tribal members are subject to inconsistent reasoning in the Seventh, Eighth and Ninth Circuits.

If the Solicitor General petitions for a writ of certiorari in *Lara*, this Court might consolidate that case with this one pursuant to SUP. CT. R. 27.3. Both cases merit review on writ of certiorari.

CONCLUSION

Petitioner prays that the Court grant a writ of certiorari and set this case for briefing and plenary consideration.

Respectfully submitted,

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June 2003