UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-17489

RUSSELL MEANS,
Petitioner-Appellant,

v.

NAVAJO NATION, a federally recognized Indian tribe; HONORABLE RAY GILMORE, Judge of the Judicial District of Chinle, Navajo Nation (Arizona)
Respondent-Appellee

UNITED STATES OF AMERICA,
Respondent-Intervenor-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Case No. 99-CV-1057-PCT-EHC-SLV

ANSWERING BRIEF OF THE UNITED STATES

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STATEMENT OF JURISDICTION

The United States adopts Means' statement of jurisdiction. (The issues of exhaustion and of availability of habeas remedies Means addresses in that section are addressed further in section I.A below.)

QUESTIONS PRESENTED

1. Whether the 1990 and 1991 amendments to the Indian Civil Rights Act (ICRA), 25 U.S.C. 1301 et seq., are consistent with the equal protection component of the due process clause of the U.S. Constitution.
2. Whether the amendments are consistent with the due process clause of the U.S. Constitution.

STATEMENT

In Duro v. Reina, 495 U.S. 676 (1990), the Supreme Court held that Indian Tribes no longer possessed the inherent authority to enforce their criminal laws against members of other Tribes. In response to that decision, Congress acted in 1990 and 1991 to amend the Indian Civil Rights Act of 1968, 25 U.S.C. 1301 et seq., to "recognize[] and affirm[]" Tribes' "inherent power * * * to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2). In United States v. Lara, 124 S.Ct. 1628 (2004), the Supreme Court rejected the argument that Congress lacked power to restore Tribal inherent sovereign authority in this manner. Id. at 1639. This case concerns whether these amendments are invalid on the alternative

grounds that they violate equal protection or due process, issues that the Court left open in Lara.

A. Criminal Jurisdiction In Indian Country

1. History and underlying principles

"Criminal jurisdiction over offenses committed in Indian country is governed by a complex patchwork of federal, state, and tribal law." Negonsott v. Samuels, 507 U.S. 99, 102 (1993) (citations omitted); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978). Whether a crime committed in Indian country, 18 U.S.C. 1151 (defining "Indian country"), may be prosecuted by the United States, the State, or a Tribe depends, among other things, on the nature of the crime, the identities of the perpetrator and the victim, and the existence of specific statutory or treaty provisions addressing the subject.

The United States may prosecute federal crimes of nationwide applicability to the same extent in Indian country as elsewhere. The Indian Country Crimes Act, 18 U.S.C. 1152, further provides that federal criminal laws applying in enclaves under exclusive federal jurisdiction apply within Indian country, except for (inter alia) offenses committed by one Indian against the person or property of another Indian. The Indian Major Crimes Act, 18 U.S.C. 1153, enumerates 14 offenses that, if committed by an Indian in Indian country, are subject to the same laws and

penalties that apply in areas of exclusive federal jurisdiction.

State authority to prosecute crimes involving Indians in Indian country is generally preempted as a matter of federal law. Negonsott, 507 U.S. at 103; United States v. Kagama, 118 U.S. 375, 384 (1886). States, however, possess jurisdiction over crimes committed by non-Indians against non-Indians in Indian country. United States v. McBratney, 104 U.S. 621 (1882).[1]

Tribes "possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." United States v. Wheeler, 435 U.S. 313, 323 (1978). The Supreme Court has accordingly held that Tribes have the power, by virtue of their retained inherent sovereignty, to prosecute their own members for violations of Tribal law. Id. at 326. However, by virtue of their dependant status, Tribes have been divested of their inherent power to prosecute non-Indians. Oliphant, 435 U.S. at 206-212.

Although courts have found that the Bill of Rights does not apply directly to Tribal governments, Talton v. Mayes, 163 U.S. 376 (1896), the Indian Civil Rights

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[1] Congress has plenary authority to alter the balance of federal and state criminal jurisdiction in Indian country, Negonsott, 507 U.S. at 103, and has done so with respect to some States. For instance, Public Law 280 granted a number of States authority to exercise general criminal jurisdiction over Indians in Indian country and made 18 U.S.C. 1152 and 1153 inapplicable in those areas. See Pub. L. No. 83-280, 18 U.S.C. 1162; 28 U.S.C. 1360.

Act imposes similar limitations on Tribes. ICRA's provisions include, for instance, due process and equal protection rights parallel to those arising under federal law, 25 U.S.C. 1302, and a habeas corpus remedy in federal court. Tribal courts have jurisdiction only over misdemeanor offenses, and are limited by ICRA to imposing punishments of up to one year in prison and a fine of $5,000. 25 U.S.C. 1302(7).

2. Duro and the ICRA Amendments

Historically, Tribal courts had long exercised jurisdiction over members of other Tribes, sometimes referred to as "nonmember Indians," as an aspect of inherent Tribal authority. In 1990, the Court decided Duro, 495 U.S. at 687-688, which found this inherent power presumptively inconsistent with the dependant status of Tribes. The Court accordingly concluded that Tribes could not exercise such authority absent affirmative action by Congress. Duro, 495 U.S. at 684-696.

Duro created a potentially significant jurisdictional gap in law enforcement in Indian country. After Duro, the United States, States, and Tribes lacked authority to exercise jurisdiction over an Indian defendant in Indian country who was a member of another Tribe if the offense was not among the major crimes enumerated in 18 U.S.C. 1153 (or a generally applicable federal crime) and the victim was another Indian. This presented a significant problem because many

reservations have a large population of nonmember Indians. The Duro Court acknowledged that issue, 495 U.S. at 697-698, but reasoned that it was for Congress, "which has the ultimate authority over Indian affairs," to provide a solution. Id. at 698.

Some five months later, Congress enacted legislation that reaffirmed inherent Tribal misdemeanor jurisdiction over nonmember Indians, thereby closing this gap. Pub. L. No. 101-511, Title VIII, § 8077, 104 Stat. 1892, 25 U.S.C. 1301(2). The legislation amended ICRA's definition of Tribes' "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2). The legislation also defined "Indian" to mean any person who would be subject to federal criminal jurisdiction as an "Indian" for purposes of 18 U.S.C. 1153. 25 U.S.C. 1301(4).

The initial legislation was effective only until September 1991. Congress intended this initial legislation to allow time to "work with the Indian nations, the Departments of Interior and Justice, and the states, to develop more comprehensive legislation . . . ." H.R. Conf. Rep. No. 101-938, pt. 2 (1990), 136 Cong. Rec. H13556, H13596 (Oct. 24, 1990).

During the year that followed, Congress held "extensive hearings." S. Rep.

No. 102-153 at 12 (1991) (appended). Because nonmember Indians "own homes and property, are part of the labor force, * * * frequently are married to tribal members," receive many Tribal services, and have other close ties to Tribes, Congress found that it was appropriate to include them within the jurisdiction of Tribal courts. Id. at 7 (1991).

Congress also concluded that long-accepted practice in Indian country supported this approach, observing that "[u]ntil the Supreme Court ruled in the case of Duro, Tribal governments had been exercising criminal jurisdiction over all Indian people within their reservation boundaries for well over two hundred years." S. Rep. No. 102-168, at 1 (1991). Congress accordingly made the legislation permanent. Pub. L. No. 102-137, § 1, 105 Stat. 646 (1991). The 1990 and 1991 legislation will be referred to herein collectively as the "ICRA amendments."

3. The Lara decision

In the wake of the ICRA amendments, a number of courts, including this Circuit, considered whether Congress had the authority to define the scope of inherent Tribal court jurisdiction in this manner, or such decisions were properly left to the courts. This Court found, sitting en banc in United States v. Enas, 255 F.3d 662 (9th Cir. 2001), that "Congress had the power to determine that tribal jurisdiction over non-member Indians was inherent." Id. at 676. In April 2004, the

Supreme Court reached the same conclusion in United States v. Lara, 124 S. Ct. 1628, 1639 (2004), finding that Congress could properly reaffirm Tribal authority over nonmembers.

The Court found in Lara that Congress "does possess the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians." Id. at 1633. In reaching this conclusion, the Court cited, among other considerations, Congress's broad powers over Indian affairs, id. at 1633-35, and the history of changes in federal policy towards Indian Tribes (with attendant variations in the scope of Tribal sovereignty). Id. at 1635. The Court also observed that it is within Congress's power to adjust "the degree of autonomy enjoyed by a dependant sovereign that is not a State," id., and found that the change to Tribal authority was of limited scope. Id. at 1636.

The Court explained that its previous decisions had always defined the extent of Tribal sovereignty on the basis of, among other sources, Congressional legislation, so that the ICRA amendments could properly remove an obstacle to the exercise of that sovereignty. Id. at 1636-37. The Court declined to reach the issues of whether the ICRA amendments violated due process or equal protection, finding that they were not presented in the distinctive context of Lara's double jeopardy claim. Id. at 1638.

B. This litigation

The United States adopts the Statement of the Case of respondent Navajo Nation. That statement is summarized here for the Court's convenience.

Russell Means is a member of the Oglala-Sioux Tribe, a federally recognized Tribe. Mr. Means lived for ten years (from 1987 to early December 1997) near Chinle, Arizona, within the boundaries of the Navajo Nation. On December 28, 1997, the Navajo Nation charged Russell Means with committing battery on his then father-in-law Leon Grant, threatening Mr. Grant, and committing battery on his then nephew Jeremiah Bitsui, in violation of 17 Navajo Nation Code 310, 316. At the time, Means was married to Gloria Grant, an enrolled member of the Navajo Nation. Means was released before trial, subject to certain restrictions.

Means contested the jurisdiction of the Navajo Nation's courts, first in Chinle District Court, and then in the Navajo Nation Supreme Court. On May 11, 1999, the Navajo Nation Supreme Court denied relief, finding that the Navajo Nation had inherent jurisdiction over Means, and in any event that Means had assumed sufficient tribal relations with the Navajo Nation to warrant a finding that he had implicitly consented to such jurisdiction. Means v. District Court of the Chinle Judicial District, 26 I.L.R. 6083 (Navajo 1999) (appended). The Court also

found that the 1868 Treaty with the Navajo had recognized the Navajo Nation's jurisdiction over nonmember Indians, and that the Nation's exercise of jurisdiction over Means did not violate equal protection.

Means then filed a petition for a writ of habeas corpus (or in the alternative for a writ of prohibition) in the United States District Court for the District of Arizona. That Court denied the petition. This appeal followed.

This appeal was withdrawn from submission following oral argument pending a decision from the Supreme Court in Lara. Order, Nov. 19, 2003. On June 10, 2004, the United States sent a letter to the Court stating that it had not received notice pursuant to 28 U.S.C. 2403 of the constitutional challenge raised in this case. The Court provided such notice, and the United States now files this brief in intervention.

SUMMARY OF ARGUMENT

1. No threshold issue bars the Court from reaching the constitutional issues in this case. Although it is somewhat anomalous for a petition for habeas corpus to be heard before trial, Means has had an opportunity to present his jurisdictional arguments to the Navajo Nation's Supreme Court, and the Navajo Nation has not argued that this Court should require further exhaustion or abstain from exercising jurisdiction until after Means has been tried. Accordingly, the Court may properly

proceed to consider the merits of Means' arguments. (The fact that Means has not yet been tried may circumscribe this Court's review, because it is not fully clear what procedures the Navajo Nation will apply at trial.)

Nor does the 1868 Treaty with the Navajo preclude the Navajo Nation from exercising jurisdiction over Means. The Treaty has provisions governing extradition and providing for United States jurisdiction over certain offenses, but nothing in these provisions bars the Navajo Nation from exercising jurisdiction over nonmember Indians. This Court has rejected a reading of the Treaty as limiting the jurisdiction of the Navajo Nation. Moreover, as the Navajo Supreme Court's opinion in Means observes, evidence from shortly after the Treaty was ratified indicates that the Navajo Nation understood itself as retaining jurisdiction over nonmember Indians. In any event, the plain language of the ICRA amendments negates any limitations on the Navajo Nation's jurisdiction that might issue from the Treaty.

2. The ICRA amendments do not violate equal protection. The amendments apply only to Indians who are members of or affiliated with Tribes. The Supreme Court and this Circuit have repeatedly found that Congress may enact legislation that singles out tribal Indians for distinct benefits or burdens so long as it has a rational basis for doing so.

The ICRA amendments easily satisfy this rational basis requirement. The Court's decision in Duro left a gap in law enforcement in Indian country, in which no sovereign had authority to prosecute most types of misdemeanors committed by nonmember Indians. Congress found that Tribes were best suited to undertake these prosecutions in light of their understanding of local conditions and strong interest in ensuring effective law enforcement. The ICRA amendments also enhance Tribal sovereignty by reaffirming a long-recognized inherent Tribal power.

Nor must the Tribe extend Means voting rights in order to exercise jurisdiction over him. Means has a right to participate in the affairs of his own Tribe; other nonmember Indians have a similar right with respect to their own Tribes. Tribes have historically had inherent authority to exercise jurisdiction over nonmember Indians on their territory. In reaffirming this jurisdiction, Congress merely acted to adjust the balance of benefits and burdens associated with Tribal membership, clarifying that Tribal members are subject to the jurisdiction of other Tribes. Means was entitled to substantial Tribal services from the Navajo Nation, and himself benefited from the Nation's enhanced ability to maintain law and order. Any person who is dissatisfied with the ICRA amendments may avoid entering the jurisdictions of other Tribes, or may disclaim Tribal membership and

instead be subject to the jurisdictional rules governing non-Indians.

3. The ICRA amendments are also consistent with due process. ICRA provides defendants in Tribal court proceedings with substantial procedural rights, and the Navajo Nation affords defendants additional rights beyond those required by ICRA's express terms. Apart from general claims about the application of the Bill of Rights in Tribal court, Means has not identified any specific rights that he claims will be denied in his prosecution. Means has therefore waived any specific due process challenge; such a premature challenge is in any event nonjusticiable. Nor can Means show that the ICRA amendments are unconstitutional in all of their applications, as he must do to bring this facial challenge.

In any event, ICRA guarantees criminal defendants in Tribal court largely the same protections to which criminal defendants in federal and state court are entitled under the United States Constitution. 25 U.S.C. 1302. ICRA also provides a right to federal habeas corpus review. To the extent that a particular Tribal prosecution of a nonmember Indian raises specific due process or equal protection concerns, such concerns would properly be raised in that prosecution, first in Tribal court and then through a habeas petition. A Tribe may well decide to provide the requested protection voluntarily, or as a matter of Tribal law. If it does not, a habeas petitioner may argue that ICRA's due process provision implicitly

provides procedural protections not specifically enumerated in ICRA, such as a right to free counsel, or assert other applicable constitutional or statutory rights. However, Means has failed to make any such arguments, and they would be premature at this stage.

ARGUMENT

We begin by addressing potential threshold issues that might preclude the Court from reaching the constitutional questions at issue in this case. We then address Means' argument that the ICRA amendments violate the equal protection component of the due process clause, and then his claim that they violate the due process clause generally. For convenience, these arguments will be referred to as his "equal protection" and "due process" arguments.[2]

I NO THRESHOLD ISSUE BARS THE COURT FROM REACHING THE CONSTITUTIONAL QUESTIONS IN THIS CASE

We first briefly address two potential threshold issues. Although the United

[2] Means suggests at various points in his brief that Congress lacked authority to adopt the ICRA amendments, Brief at 35-38, or that the amendments delegate Federal power rather than reaffirming Tribal authority, Brief at 34-40 & n.21. The Supreme Court resolved those issues in Lara, finding that Congress did have authority to enact the ICRA amendments, and that the legislation reaffirmed retained Tribal authority rather than delegating Federal authority. 124 S. Ct. at 1632-33. We therefore do not address these issues further.

States has intervened primarily to address the constitutional issues in this case, we brief these threshold issues because they involve the interpretation of federal statutes and treaties, and because they affect whether the Court must reach the constitutional questions. We address first whether Means may maintain a pretrial petition for habeas corpus, and then Means' arguments relating to the 1868 Treaty with the Navajo.

A. Pretrial Habeas Corpus Is Not Barred On These Narrow Facts

This action is in a somewhat unusual posture, as Means filed a petition for habeas corpus after he was charged and released, but before trial. A section 1303 petition for habeas corpus operates to "test the legality of [petitioner's] detention by order of an Indian tribe." 25 U.S.C. 1303.[3] The Navajo Nation argued in district court that the conditions of Means' release did not suffice to meet the statutory definition of "detention." The Navajo Nation has not pressed that argument on appeal, however, and conditions imposed on pretrial release (like those here) can suffice to meet this statutory definition. Dry v. CFR Court of Indian Offenses for the Choctaw Nation, 168 F.3d 1207 (10th Cir. 1999); see also Hensley v. Municipal Court, 411 U.S. 345, 348-49 (1973) (interpreting "custody"

[3] Means also seeks habeas corpus under 28 U.S.C. 2241. Because he has a section 1303 remedy, we do not address whether that remedy is exclusive, or whether Means might also have a section 2241 remedy.

requirement of federal habeas statutes); Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 890-91 (2d Cir. 1996) (word "detention" in 25 U.S.C. 1303 is synonymous with "custody").

The Supreme Court has emphasized that the exhaustion requirement restricts the availability of pretrial habeas corpus. Hensley, 411 U.S. at 353 ("Our decision does not open the doors of the district courts to the habeas corpus petitions of all persons released on bail . . ."); Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 489-91 (1973). An exhaustion requirement also applies to Tribal court proceedings, National Farmers Union Insurance Cos. v. Crow Tribe, 471 U.S. 845, 854-57 (1985), and would ordinarily bar pretrial habeas corpus petitions. Exhaustion can be waived, however, and the Navajo Nation may have waived exhaustion here. Granberry v. Greer, 481 U.S. 129 (1987) (waiver discretionary). Moreover, Means has already been able to present his arguments to the Navajo Supreme Court, arguably satisfying the exhaustion requirement.

The abstention doctrine would likewise ordinarily bar a pretrial habeas corpus petition. In re Justices of the Superior Court Department of the Massachusetts Trial Court, 218 F.3d 11 (1st Cir. 2000). But the Navajo Nation has not pressed this argument, and the Court is not required to reach this question sue sponte. The fact that Means has not yet been tried may, however, restrict the scope

of the Court's review; Means cannot challenge the precise procedures applied to him in the Navajo Nation's courts, because the nature of those procedures is not yet clear.

B. The 1868 Treaty With The Navajo Does Not Restrict The Jurisdiction Of The Navajo Nation.

Means also argues that the 1868 Treaty with the Navajo divests the Navajo Nation of jurisdiction over nonmember Indians. We briefly address this issue because of its relationship to the history of Tribal jurisdiction over nonmember Indians and to the intended scope of the ICRA amendments. In short, although the Treaty provides for certain remedies, those remedies are not properly treated as exclusive. In any event, to the extent that the Treaty might be read to restrict Tribal jurisdiction, the ICRA amendments negate any such effect.

The Treaty contains two clauses providing for remedies in the case of certain offenses, one addressing offenses by "bad men among the Indians" and the other offenses by "bad men among the whites." 1868 Treaty with the Navajo, 16 Stat. 667 (appended). The first of these clauses provides for offenders among the Navajo Nation to be delivered to the United States for prosecution on request, and for the Navajo Nation to pay compensation if it refuses to do so.[4] This provision is

[4] It provides: "If the bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject (continued...)

triggered only by a request from the United States's agent, and so is not properly treated as exclusive of the Navajo Nation's jurisdiction. (Indeed, were this provision read to be exclusive, it would seemingly bar criminal jurisdiction even over the Nation's own members.) See also Tsosie v. United States, 825 F.2d 393, 398-400 (Fed. Cir. 1987) (noting abrogation of some elements of this provision).

As to the "bad men among the whites" provision, it applies only on "proof to the agent," a precondition that has not been satisfied.[5] Moreover, the presence of this precondition indicates that the remedies of this provision are not exclusive. It would be especially unusual to read the Treaty to bar jurisdiction over nonmember Indians, because the Treaty specifically sought to preserve the right of the Navajo Nation to defend its territory against other Tribes. See Art. II (providing the Navajo Nation discretion as to whether to admit other Indians); Tsosie, 825 F.2d at

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[4](...continued)
to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them . . . ."

[5] It provides: "If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained."

396 ("It is evident from the negotiations that the Navajos were not to be permanently disarmed, and could defend their reservation. . . .").

As discussed in section II.B.2 below, such an interpretation would also be inconsistent with the United States's general practice of not interfering with Tribes' jurisdiction over nonmembers. Indeed, an 1883 opinion of the Attorney General specifically found that the United States lacked jurisdiction over intertribal offenses, and that a similar "bad man among the whites" treaty provision did not change that result. 17 Op. Att'y Gen. 566 (1883) (appended).[6]

This Court has twice held that the 1868 Treaty reaffirms, rather than restricts, the Navajo Nation's jurisdiction over nonmembers. In State of Arizona ex rel. Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969), this Court found that the Navajo Nation retained exclusive authority over extradition of nonmember Indians.

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[6] The Attorney General cited the "bad man" provision in discussing the lack of Federal jurisdiction, not displacement of Tribal jurisdiction. But if this provision does not establish Federal jurisdiction, it surely cannot divest Tribes of jurisdiction (thereby creating a jurisdictional void).

Means cites Ex parte Crow Dog, 109 U.S. 556 (1883), as holding that a similar "bad man" provision in another treaty "provides for tribal jurisdiction only over intratribal offenses." Reply at 4. On the contrary, that case holds that this provision does not create federal jurisdiction over intra-tribal offenses. Id. at 567. The Court's analysis emphasized that federal jurisdiction had historically been limited to offenses committed by white persons against Indians (and vice versa), and offenses "by Indians against each other were left to be dealt with by each tribe for itself." Id. at 571-72.

413 F.2d at 686. In Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983), this Court found that the Navajo Nation retains civil jurisdiction over non-Indians, saying that "the reservation of land to the Navajos by these treaties establishes Navajo lands as within the exclusive sovereignty of the Tribe under general federal supervision." Id. at 597. See also Williams v. Lee, 358 U.S. 217 (1959).

The Supreme Court of the Navajo Nation has also, in a thorough and persuasively-reasoned opinion, rejected an interpretation of the Treaty as restricting the Tribe's jurisdiction. Means v. District Court, 26 I.L.R. 6083 (Navajo 1999). In the course of that analysis, the Court describes a specific instance in 1881 in which the Navajo Nation admitted members of the Paiute Tribe (now a federally recognized Tribe) subject to an express acknowledgment of the Nation's criminal jurisdiction. Id. at 6086. Thus, shortly after entering into the Treaty, the Navajo Nation understood itself to have retained criminal jurisdiction over nonmember Indians. "Treaties with the Indians must be interpreted as they would have understood them, and any doubtful expressions in them should be resolved in the Indians' favor." Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970) (citation omitted).

Finally, even supposing that some treaty provision restricted the jurisdiction

of the Navajo Nation, the ICRA amendments would eliminate any such obstacle. Although Congress's principal objective in enacting the amendments was to reaffirm the jurisdiction displaced by Duro, the language chosen by Congress was not limited to that context. Instead, Congress provided generally that it "hereby recognized and affirmed" "the inherent power of Indian tribes * * * to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2).

This language does not refer to Duro, and reaffirms Tribal jurisdiction over nonmember Indians impaired by whatever means. Congress specifically observed in the legislative history of the ICRA amendments that it viewed this language as reinstating the jurisdiction of two Tribes in Maine over nonmember Indians. Congress said that existing federal and state law provided for jurisdiction of the Passamaquoddy and Penobscot Tribes over one another's members, but "are not clear on the extent of jurisdiction each Tribe has over members from other Tribes," and that Congress wished to eliminate any such ambiguity. H. Conf. Rep. 102-261 at 7 (appended).[7] As discussed below in Section II.B.1, in enacting the ICRA

[7] Maine law appears to have expressly restricted these Tribes from exercising jurisdiction over nonmember Indians. 30 M.S.R.A. 6206(3) (providing for these two Tribes to exercise jurisdiction over one another's members, but that "the State shall have exclusive jurisdiction over * * * persons not members of either"). Congress said that "it is important that these tribes have jurisdiction over all Indians violating tribal law," and "it is therefore the intent of the Committee of the Conference that the provisions of H.R. 972 shall be applicable to tribes in the State (continued...)

amendments Congress determined that Tribes were best able to address the particular law enforcement problems presented by nonmember Indians in Indian country. Although it was Duro that prompted Congress to act, this determination was general in nature, and was not limited to a decision to overrule Duro.[8]

II. THE ICRA AMENDMENTS ARE CONSISTENT WITH EQUAL PROTECTION

The ICRA amendments are consistent with equal protection. Congress has broad authority to adopt laws applying distinctive rules to federally recognized Tribes and their members, subject only to the requirement that the legislation have

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[7](...continued)
of Maine." H. Conf. Rep. 102-261 at 7; see also S. Rep. 102-168 at 13.

[8] Means observes, Brief at 18, that repeals of Indian treaties by implication are disfavored. Although that is correct, see, e.g., Reich v. Great Lakes Indian Fish and Wildlife Commission, 4 F.3d 490, 493 (7th Cir. 1993), even supposing that the Treaty restricted Navajo Nation jurisdiction, the broad language of section 1301(2) and accompanying evidence of specific Congressional intent to eliminate obstacles to Tribal jurisdiction would overcome that restriction.

There might be limited and unusual circumstances in which the analysis of the interaction between treaty rights and the ICRA amendments might proceed differently. This might occur if a treaty (unlike the 1868 Treaty) expressly indicated that a Tribe desired to renounce jurisdiction over nonmember Indians. Likewise, if a Tribe had no authority to exercise criminal jurisdiction at all, even over its own members, it might be that the ICRA amendments would not properly be construed to reinstate jurisdiction over nonmember Indians.

a rational basis. Congress had a sound basis for this legislation: it serves to ensure that some governmental entity has authority to maintain law and order on reservations and to enhance the sovereignty of Tribes, and it does so without impairing the interests of nonmember Indians.

A. Congress May Legislate Distinctive Rules to Govern Relations Between Tribes and Tribal Members.

1. Only Indians Who Are Members of or Affiliated With a Federally Recognized Tribe Are Subject to Tribal Court Jurisdiction By Virtue of the ICRA Amendments

At the outset, we note that the ICRA amendments affect only persons who are members of or affiliated with a federally recognized Tribe. ICRA defines "Indian" to mean any person subject to federal criminal jurisdiction as an "Indian" for purposes of 18 U.S.C. 1153. See 25 U.S.C. 1301(4). A person is subject to federal criminal jurisdiction as an "Indian" under 18 U.S.C. 1153 (and other federal criminal statutes applicable in Indian country) only if he both (1) is of Indian ancestry, and (2) is enrolled in or affiliated with a federally recognized Tribe. United States v. Antelope, 430 U.S. 641, 646-647 n.7 (1977); United States v. Keys, 103 F.3d 758, 761 (9th Cir. 1996).

A person who is of Indian ancestry, but is not enrolled in or affiliated with a federally recognized Tribe, is not an "Indian" under this definition. LaPier v. McCormick, 986 F.2d 303, 305 (9th Cir. 1992); United States v. Heath, 509 F.2d

16, 19 (9th Cir. 1974). The definition of "Indian" under section 1153 is long-standing, and Congress is assumed to legislate against the background of such long-standing interpretations. McDermott Int'l v. Wilander, 498 U.S. 337, 342 (1991) (when Congress uses a "term of art" it is presumed that Congress "intended it to have its established meaning").

The definition of an "Indian" does include certain persons who are closely affiliated with a Tribe, but are not formally enrolled. Keys, 103 F.3d at 761. This is a form of de facto Tribal membership, which recognizes that some persons may not be formally enrolled as a result of their status as minors, an administrative oversight, or some other circumstance, even though they are treated in practice as Tribal members. Whether a person is affiliated with a Tribe has been described as turning on "tribal or governmental recognition as an Indian." United States v. Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1979).[9] This category is not extensive, and those who satisfy it will have significant ties to the Tribe. For instance, minor children typically receive all of the benefits of Tribal membership, and are the children of Tribal members, but may not yet appear on Tribal membership rolls. Others who meet this definition will do so as a result of some form of voluntary

[9] See also Keys, 103 F.3d at 761; United States v. Ives, 504 F.2d 935, 953 (9th Cir. 1974); United States v. Dodge, 538 F.2d 770, 786 (8th Cir. 1976); Ex parte Pero, 99 F.2d 28, 31 (7th Cir. 1938).

affiliation.

2. Long-Standing Supreme Court Authority Treats Tribes As Political Entities, And Allows Laws Tailored To Tribes So Long As That Tailoring Has A Rational Basis

The definition of an "Indian" adopted by the ICRA amendments – requiring both Indian ancestry and membership in or affiliation with a federally recognized Tribe – appears in numerous Federal laws. The Supreme Court and this Circuit have repeatedly found that, under this definition, legislation governing "Indians" is not race-based, but addresses sovereign Tribes and their members, and is thus subject to rational basis review.

Congress possesses "plenary and exclusive power" to legislate with respect to federally recognized Tribes and their members. Washington v. Yakima Indian Nation, 439 U.S. 463, 470-471 (1979). This power includes authority to enact legislation directed specifically at Tribes. As the Supreme Court said in Mancari:

> The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl. 3, provides Congress with the power to "regulate Commerce * * * with the Indian Tribes," and thus, to this extent, singles Indians out as a proper subject for separate legislation.

417 U.S. at 551-52. In Duro, the Court likewise acknowledged "the Federal Government's broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits." 495 U.S. at 692.

The Supreme Court has upheld statutes governing "Indians" against equal protection challenges in a wide range of statutory contexts. See, e.g., Fisher v. District Court, 424 U.S. 382 (1976) (per curiam) (exclusive Tribal court jurisdiction over child custody proceedings); Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 479-480 (1976) (tobacco taxes); Morton v. Mancari, 417 U.S. at 553-54 & n. 24 (BIA hiring preference); see also Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 673 n.20 (1979) (exercise of treaty rights).

Means claims that the fact that Indian ancestry is an element of the definition of status as an "Indian" necessarily means that the ICRA amendments rely on a racial classification. Reply Brief at 17. The Supreme Court has repeatedly rejected this proposition. For instance, in United States v. Antelope, 430 U.S. 641 (1977), the Court rejected an equal protection challenge to 18 U.S.C. 1153, which is a statute that – like the ICRA amendments – establishes criminal jurisdiction, and from which ICRA draws its definition of the term "Indian." The Court underscored that there is "no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. . . ." Id. at 645. Instead, such legislation is based on "the unique status of Indians as 'a separate people' with their own political institutions." Id. at

646-647. In contrast to "immutable characteristic[s]" such as race, sex, and national origin, which are "determined solely by the accident of birth," Frontiero v. Richardson, 411 U.S. 677, 686 (1973), Tribal membership is voluntary, and it may be relinquished at any time. Duro, 495 U.S. at 694.[10] As a result, Congress may govern "Indians" through "legislation that might otherwise be constitutionally offensive." Yakima Indian Nation, 439 U.S. at 500-01.[11]

In Keys, this Circuit rejected the proposition that another criminal statute applicable to "Indians," 18 U.S.C. 1152, violated the equal protection clause, citing Antelope. Keys, 103 F.3d at 761. This Circuit has repeatedly held that laws governing "Indians" refer to separate sovereigns and are as a rule subject only to rational basis review. Artichoke Joe's California Grand Casino v. Norton, 353 F.3d 712, 735 (9th Cir. 2003); Williams v. Babbitt, 115 F.3d 657, 663-64 (9th Cir.

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[10] As explained by Cohen's Indian Law Treatise, "tribal membership is a bilateral relation, depending for its existence not only upon the action of the tribe but also upon the action of the individual concerned. Any member of any Indian tribe is at full liberty to terminate his tribal relationship whenever he so chooses." Felix S. Cohen, Handbook of Federal Indian Law 135 (1942 ed.). A member, of course, cannot avoid prosecution for an alleged crime by surrendering membership after the fact.

[11] Simmons v. Eagle Seelatsee, 244 F. Supp. 808, 814 (D. Or. 1965), aff'd, 384 U.S. 209 (1966), which Means cites for the proposition that laws governing Indians are impermissibly race-based, Brief at 44, in fact holds precisely the opposite – that the definition of Indian status relies in part on Indian ancestry, but that such reliance is permissible.

1996) (noting possible limitations to this principle); Sqauxin Island Tribe v. Washington, 781 F.2d 715, 722 (9th Cir. 1986); Alaska Chapter, Associated General Contractors of America v. Pierce, 694 F.2d 1162, 1167-69 (9th Cir. 1982); United States v. Decker, 600 F.2d 733, 740 (9th Cir. 1979).

Contrary to Means' suggestion, Brief at 45, rational basis review applies both to laws conferring benefits on Indians and to those that may impose some burdens. In Duro, the Court expressly said that Congress has "broad authority" to "impose burdens or benefits" on federally recognized Tribes. Duro, 495 U.S. at 692. To the extent that the ICRA amendments might be thought to impose burdens on Indians by subjecting them to different jurisdictional rules, the Supreme Court has upheld the Major Crimes Act, 18 U.S.C. 1153, against equal protection challenge. Antelope, 430 U.S. at 646-647. That statute, like ICRA, establishes distinctive criminal jurisdiction rules for Indians. In Fisher, the Court similarly upheld exclusive Tribal court jurisdiction over certain child custody disputes, noting that the legislation eliminated a state-court forum, but enhanced Tribal self-government. Fisher, 424 U.S. at 390-391. In any event, as discussed in Part II.B, the ICRA amendments provide nonmember Indians with substantial benefits, in addition to any burdens they may create.

The Supreme Court reaffirmed the distinctive analysis governing legislation

directed at federally recognized Tribes and Tribal members in Rice v. Cayetano, 528 U.S. 495 (2000). That case invalidated a program according special treatment to Native Hawaiians on Fifteenth Amendment grounds, but specifically distinguished classifications directed towards Indians, which it found are based on the sovereign status of Tribes, and thus are not racial in character. Id. at 519. The Court emphasized that such statutes do not "single[] out identifiable classes of persons solely because of their ancestry or ethnic characteristics." Id. at 515 (emphasis added; citation omitted), and cited Antelope with approval as an example of permissible Federal regulation of Tribes, describing that case as upholding "exclusive federal jurisdiction over crimes committed by Indians in Indian country." Id. at 519 (also citing Mancari and numerous other decisions).

Means' citation to Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), is inapposite. That case involved preferences in government contracting available on the basis of "race-based" criteria, 515 U.S. at 207, not Tribal affiliation. Adarand thus did not affect the distinctive analysis applicable to statutes directed at Tribes and Tribal members. To the extent that Means is speculating that the Supreme Court might overrule Mancari, not only did Rice reject that proposition, but such speculation is out of place. This Court is bound to follow applicable Supreme Court authority until it is overruled by the Supreme Court itself. Agostini

v. Felton, 521 U.S. 203, 227 (1997) ("[L]ower courts should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").[12]

Nor did Duro affect Mancari or Antelope. When Duro was decided, Congress had not spoken directly to the jurisdictional rules applying to nonmember Indians; the issue was instead governed by federal common law. The Court specifically said in Duro that it was leaving the issue of jurisdiction over nonmember Indians to Congress, and declined to express any view on possible due process and equal protection challenges to Tribal court jurisdiction. Id. at 698-99. Now that Congress has spoken, this Court should grant the ICRA amendments the full deference due to statutes governing Indian affairs.

B. The ICRA Amendments Are Rationally Tied to the Fulfillment of Congress's Obligations Toward Indians

Congress has "the power and the duty of exercising a fostering care and protection over all dependent Indian communities." United States v. Sandoval, 231 U.S. 28, 45-46 (1913); Board of County Comm'rs v. Seber, 318 U.S. 705, 716

[12] This Court's discussion of Adarand in Williams v. Babbitt, 115 F.3d 657, 665 (9th Cir. 1997), must be read in light of the Supreme Court's subsequent decision in Rice. Williams also dealt with isolated circumstances involving Alaska Natives and areas outside of Indian country. See Artichoke Joe's, 353 F.3d at 735 (distinguishing Williams on this ground). Moreover, Williams applied Adarand only indirectly, through the doctrine of constitutional doubt, and specifically declined to reach the merits of the constitutional issue.

(1943). This power includes the authority to furnish needed "protection" to reservation Indian communities by recognizing in Tribes the authority to prosecute members of other Tribes for offenses committed on their reservations. The ICRA amendments must also be evaluated in light of the presumption of constitutionality afforded to Congressional action, Walters v. Nat'l Ass'n of Radiation Survivors, 468 U.S. 1323, 1324 (1984); Confederated Tribes of Siletz Indians of Oregon v. United States, 110 F.3d 688, 693 (9th Cir. 1997), and Congress's especially broad authority over Indian affairs. Congress had ample reason to enact the ICRA amendments, which serve to maintain order on reservation lands and to enhance Tribal sovereignty, and the amendments are fully consistent with equal protection.

1. The ICRA Amendments Promote Law Enforcement In Indian Country

The ICRA amendments protect Indians, as well as others who reside in or visit Indian country, against lawlessness by nonmember Indians. After Duro, no sovereign had jurisdiction to prosecute certain misdemeanor offenses committed by nonmember Indians. In most areas of Indian country, states lack criminal jurisdiction over crimes committed by or against Indians, absent special authorization by Congress. 18 U.S.C. 1152; United States v. McBratney, 104 U.S. 621 (1881). Federal jurisdiction over crimes committed within Indian country by Indians against Indians is limited (with a few exceptions not relevant here) to

federal laws of nationwide applicability and specific felonies enumerated in 18 U.S.C. 1153. United States v. Begay, 42 F.3d 486, 498 (9th Cir. 1994).

Reservations often have large nonmember Indian populations, averaging 12%. S. Rep. No. 102-153, App. E at 58 (1991) (appended). After Duro limited Tribal criminal jurisdiction to offenses committed by the Tribe's own members, the result was a "jurisdictional void" when nonmember Indians committed misdemeanors, with associated serious risks to law and order. H.R. Rep. 102-61 at 4 (1991), 1991 U.S.C.C.A.N 373 (appended). As a result, Congress found, "[r]emote reservations with high rates of intermarriage with other tribes were facing chaos." Id.

"The protection of the [reservation] community from disturbances of the peace and other misdemeanors is a most serious matter." Duro, 495 U.S. at 696. Minor crimes can have a highly disruptive effect on reservation communities, and addressing them serves to prevent more serious offenses. United States Department Of Justice, Policing On American Indian Reservations ix (July 2001) (http://www.ncjrs.org/pdffiles1/ nij/188095.pdf). Department of Justice studies indicate that American Indians currently suffer violent crime at rates more than twice the national average, and are especially subject to minor crimes like simple assault and drug and alcohol offenses. Lawrence A. Greenfield and Steven K.

Smith, American Indians and Crime (Bureau of Justice Statistics 1999). The Navajo Supreme Court's opinion in Means discusses the "serious criminal and social problems" addressed by the Navajo judicial system. 26 I.L.R. at 6084-85.

Congress considered at length which sovereign should fill this jurisdictional gap, and found that Tribes were best suited to do so. S. Rep. No. 102-168, supra, at 3-4; H.R. Rep. No. 102-61, at 7 (1991), 1991 U.S.C.C.A.N 376. The Departments of the Interior and Justice testified in support of reinstating Tribal jurisdiction, stating that United States Attorneys had limited resources and Tribes were best suited to address this category of offenses. The Duro Decision: Criminal Misdemeanor Jurisdiction in Indian Country: Hearing Before the House Comm. on Interior and Insular Affairs, 102d Cong. at 7, 12 (April 11, 1991) (hereinafter "House Hearing").

States likewise supported this approach. Five western state legislatures (Arizona, Montana, Nevada, North Dakota, and South Dakota) enacted measures calling on Congress to make the ICRA amendments permanent. S. Rep. No. 102-153, at 4-5 (1991); S. Rep. No. 102-168, at 4 (1991). The International Association of Chiefs of Police enacted a similar resolution. Id. Congress found that, even where resources and jurisdiction exist, State law enforcement officials may be reluctant to become involved in law enforcement matters in Indian country, and

sometimes "refused to exercise jurisdiction over criminal misdemeanors." S. Rep. No. 102-168, at 4 (1991).[13]

By contrast, Tribes were uniformly willing to take responsibility for these cases. See S. Rep. No. 102-153, App. E (1991). Senator Inouye said that Congress had not been "able to find any Indian tribe opposed to this measure." Impact of Supreme Court's Ruling in Duro v. Reina: Hearing on S. 962 and S. 963 Before the Senate Select Comm. on Indian Affairs, 102d Cong. pt. 2 at 65 (June 12, 1991) (hereinafter "Senate Hearing"). Congress found that nonmember Indians are closely integrated into reservation affairs, substantially more so than are non-Indians:

> Non-tribal member Indians own homes and property on reservations, are part of the labor force on reservations, and frequently are married to tribal members. Non-tribal members receive the benefits of programs and services provided by the tribal government. Their children attend tribal schools, and their families receive health care services in tribal hospitals and clinics.

S. Rep. 102-153 at 7 (1991); H. R. Rep. No. 102-61, at 4 (1991), 1991

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[13] The views of States and Tribes are relevant because Congress is ordinarily reluctant to modify the scope of a State's jurisdiction without its consent, and likewise reluctant to modify jurisdiction in Indian country without the consent of affected Tribes. See, e.g., 25 U.S.C. 1321 (requiring a Tribe's consent before retrocession of jurisdiction to a State). If States are unwilling to assume jurisdiction, Congress has limited authority to compel them to bring enforcement actions. Printz v. United States, 521 U.S. 898 (1997) (Tenth Amendment prohibits Federal commandeering of State law enforcement officials).

U.S.C.C.A.N. at 373; House Hearing at 92, 117; Senate Hearing at 44. The Navajo Supreme Court noted the "high rates of intertribal intermarriage" among Indians as one source of this phenomenon. Means, 26 I.L.R. at 6085. Means is therefore incorrect in suggesting, Brief at 52, that Congress acted arbitrarily in reinstating Tribal jurisdiction over nonmember Indians but not over non-Indians.

Congress found that Tribes were well suited to bringing these prosecutions, as they have a strong interest in maintaining law and order, an understanding of local conditions, and readily accessible courts:

> The vast and often remote areas of which some Indian reservations consist make it difficult and expensive to transport defendants, victims, witnesses, and law enforcement officers to handle the arraignments, trials and sentences which are involved in the prosecution of such minor offenses. Judicial efficiency is not only promoted when the local tribal court can adjudicate these infractions, but the appropriate deterrent effect and greater community awareness are achieved when the administration of justice on this level occurs within the community where the offenses were committed.

H.R. Rep. 102-61 at 3 (1991), 1991 U.S.C.C.A.N. at 372-73. In sum, Congress had substantial reasons to reaffirm Tribal jurisdiction.

2. The ICRA Amendments Advance Tribal Sovereignty While Fully Protecting Rights of Political Participation

Tribal authority to assert criminal jurisdiction over nonmember Indians is a longstanding aspect of Tribal sovereignty. Congress may properly act to enhance Tribal sovereignty, and did so in reaffirming this inherent Tribal power. Moreover,

the ICRA amendments do not impair the interests of nonmember Indians like Means. Means has full rights of political participation in his own Tribe. Another Tribe may assert criminal jurisdiction over him without according him voting rights, just as Arizona may assert criminal jurisdiction over a citizen of New Mexico without according a corresponding right to vote. Furthermore, nonmember Indians do receive important benefits from Tribes; for instance, nonmember Indians have equal access to federally funded Tribal services. In any event, Tribal membership is elective, as is presence on Tribal lands.

a. The ICRA Amendments Enhance Tribal Sovereignty By Reaffirming Long-Understood Inherent Tribal Authority

The Supreme Court "has repeatedly emphasized that there is a significant geographical component to tribal sovereignty." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980); Lara, 126 S. Ct. at 1636 (ICRA amendments "concern[] a tribe's authority to control events that occur upon the tribe's own land"). In particular, Tribes have long-standing and recognized authority to exercise criminal jurisdiction over all Indians on reservation lands. The Conference Report on the ICRA amendments specifically concluded that "tribal governments have always held" the right to exercise such jurisdiction, as a matter of Tribal "inherent authority." H.R.Conf. Rep. No. 102-261 (1991), 1991 U.S.C.C.A.N 379 (appended).

Historical evidence supports this view. During the period surrounding the ratification of the Constitution, the United States entered into a number of treaties authorizing Tribes to "punish * * * or not, as they please," "any citizen of the United States, or other person not being an Indian" who settled on tribal lands. Treaty with the Cherokee, Aug. 7, 1790, Art. VIII, 7 Stat. 39.[14] Those treaties specifically authorize punishment of non-Indians but do not mention nonmember Indians (who generally were not United States citizens at that time), implying that Tribal authority to punish such persons was unquestioned.

When Congress extended criminal jurisdiction to Indian country in 1817, it specifically provided that "nothing in this act shall be so construed as to * * * extend to any offence committed by one Indian against another, within any Indian boundary." Act of March 3, 1817, ch. 92, sec. 1, 3 Stat. 383 (1817). This further indicates that Federal law has long been predicated on the assumption that it is within the authority of Tribes to punish crimes committed by one Indian against another, irrespective of Tribal membership.

Agreements entered into among Tribes during the nineteenth century recognized this Tribal authority. In 1886, after certain eastern Tribes had been

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[14] See Treaty with the Creeks, Aug. 7, 1790, Art. VI, 7 Stat. 35; Treaty with the Chickasaw, Jan. 10, 1786, Art. IV, 7 Stat. 24; Treaty with the Choctaw, Jan. 3, 1786, Art. IV, 7 Stat. 21; Treaty with the Cherokee, Nov. 28, 1785, Art. V, 7 Stat. 18; Treaty with the Wyandot, Jan. 21, 1785, Art. V, 7 Stat. 16.

removed to the Indian Territory, those Tribes entered into a compact that provided, inter alia, that "[i]f a citizen of one Nation commits wilful murder, or other crime within the limits of another Nation, party hereto, he shall be subject to the same treatment as if he were a citizen of that Nation." Compact of the Five Civilized Tribes, Mar. 15, 1886, Sec. 4, reprinted in 1 Vine Deloria, Jr. & Raymond J. DeMallie, Treaties Between Indian Nations: Treaties, Agreements, and Conventions, 1775-1979, 742 (1999) (Indian Treaties).[15] Such treaties were not essential to the exercise of such Tribal authority, but instead demonstrate the existence of that authority and provide for its application.

The Attorney General acknowledged Tribes' authority to exercise criminal jurisdiction over members of other Tribes in an 1883 opinion, which concluded that the United States did not have the authority under a treaty with the Arapahoe Tribe to prosecute an alleged murder of an Arapahoe Indian by a Creek Indian within the territory of the Pottawatomie Tribe. 17 Op. Att'y Gen. 566 (1883)

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[15] Virtually identical provisions appeared in at least two earlier Tribal compacts. See Compact Between the Cherokee, Creek, Chickasaw, and Seminole, Nov. 8-15, 1859, Art. 4, Indian Treaties, 739; Compact Between the Cherokee, Creek, and Osage, July 3, 1843, Sec. 5, Indian Treaties, 737; Treaty Between the Osage and the Delaware, Shawnee, Kickapoo, Wea, Piankeshaw, and Peoria, Oct. 7, 1826, Art. 3, Indian Treaties, 693 (providing that members of one Tribe would not hunt on land in the State of Missouri and the Territory of Arkansas reserved for the other Tribe "under the penalty of any injury they may receive on said reservation").

(appended).[16] The Attorney General observed that a federal prosecution of the offense would constitute a departure from "the United States['] * * * general policy" of leaving to Tribes the "redress of offenses committed by members of other tribes." Id. at 568. Although the Pottawatomie Tribe did not have a law that allowed it to prosecute the crime, the Attorney General suggested that either the Arapahoe (the Tribe of the victim) or the Creek (the Tribe of the accused) might have a law that would permit a prosecution. Id. at 570.

A substantial body of evidence presented to Congress confirms this understanding. Professor Richard Collins testified at the hearings on the ICRA amendments that "[i]n the period from the founding of the Republic until the latter part of the last [nineteenth] century," "[t]ribes exercised authority over members of other tribes who married into the tribe, were adopted into its families, or otherwise became part of the tribal community voluntarily," as well as "members of other tribes who voluntarily came to visit or to trade." House Hearing at 155. A number of Tribal leaders testified that their Tribes had continuously, until Duro, exercised criminal jurisdiction over members of other Tribes.[17] Tribal witnesses said that

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[16] The opinion predated the enactment of 18 U.S.C. 1153.

[17] Senate Hearing at 35-36 (Lawrence D. Wetsit, Chairman, Fort Peck Tribal Executive Board) ("The Fort Peck Assiniboine and Sioux Tribes have historically always enjoyed jurisdiction over nonmember Indians on our reservation."); id. at (continued...)

they expected to be subject to other Tribes' laws when they entered their reservations. Senate Hearing at 16, 24.

Congress properly took this historical context into account in enacting the ICRA amendments. The United States has long sought to enhance Tribal sovereignty as part of its distinctive government-to-government relationship with Tribes. Tribal courts in particular play a "vital role" in Tribal self-government,

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[17](...continued)
55 (Harry Smiskin, Tribal Council Member, Yakima Indian Nation) ("[H]istorically, Indians from the entire Northwest came to trade and do business with the Yakima Nation. They were welcome on our lands, and at no time in history has any Indian ever indicated that he should be immune from our tribe's jurisdiction, be it in the historical traditional manner or the more Anglo-type and style of criminal justice now practiced by our courts."); id. at 62 (Robert Lewis, Governor, Pueblo of Zuni) ("We have exercised jurisdiction over non-Zuni Indians for over 450 years within the legal framework of Spain, Mexico, and the United States."); id. at 185-186 (Cheyenne River Sioux Tribe) (describing incident in which Cheyenne authorities punished a violation of Cheyenne law by Sioux living among the Cheyenne); House Hearing 94 (Michael T. Pablo, Chairman, CSK Tribes) ("Historically, the Confederated Salish and Kootenai Tribes have always exercised criminal jurisdiction over" members of other Tribes, whether they permanently resided on the Tribes' reservation or visited for ceremonies and other events.); id. at 102 (Zane Jackson, Chairman, Warm Springs Tribal Council) ("From the time the Warm Springs Reservation was first established by the Treaty of June 25, 1855, our people have exercised jurisdiction over Indians from other tribes who came to visit or live on our reservation. Even before the reservation was created, it was always the traditional law of our people that Indians from other tribes who came into our sovereign territory were subject to our laws."); id. at 178 (Donna M. Christensen, Attorney General, Navajo Nation) ("The Navajo people have interacted with other tribes from the beginning of our history. Not surprisingly, the Navajo people, like other tribes, have always exercised what is known as criminal jurisdiction over nonmember Indians when necessary.").

Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987), and the Supreme Court has found that Congress may properly take the "policy of Indian self-government" into account in expanding the authority of Tribal courts. Fisher, 424 U.S. at 390-91. Congress found that jurisdiction over all Indians within reservation lands was an important attribute of Tribal sovereignty, and acted to reaffirm this historical authority. S. Rep. No. 102-168, at 1 (1991). The Supreme Court found in Lara that such action was an appropriate subject for Congressional action, observing that "Congress's statutory goal – to modify the degree of autonomy enjoyed by a dependant sovereign that is not a State – is not an unusual legislative objective." 124 S. Ct. at 1635.

Means contends that the historical record suggests instead that the United States sought to restrict Tribal exercise of jurisdiction over nonmember Indians. Brief at 25-32. Means supports this claim with quotations discussing the authority of Tribes over their own members, which he cites out of context in an attempt to demonstrate that Tribes lacked jurisdiction over nonmember Indians. See, e.g.,31 n.18. Means discusses Federal jurisdiction over nonmember Indians, but without establishing that this jurisdiction was intended to be exclusive of that of Tribes.[18]

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[18] Means cites a 1980 student comment for the proposition that, in certain treaties signed "between 1825 and the end of the treaty period in 1871," "the federal government assumed jurisdiction over nonmember crimes." Brief at 13-14 (continued...)

b. The ICRA Amendments Protect The Interests Of Nonmember Indians

Means claims that the ICRA amendments improperly subject nonmember Indians to the jurisdiction of a Tribe where they do not have rights of political participation. A Tribe's authority to limit participation in Tribal governance to Tribal members is an inherent attribute of its sovereignty, and indeed "central to [a Tribe's] existence as an independent political community." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978); Williams v. Lee, 358 U.S. 217, 220 (1959) (Tribes have the right to "make their own laws and be ruled by them").

The allocation of voting rights in Indian country on the basis of Tribal membership, rather than domicile, is consistent with equal protection. Cf. Santa Clara Pueblo, 436 U.S. at 72 n.32 (Pueblo may define membership patrilineally, and exclude matrilineal descendants). Nor is there any general requirement that sovereigns extend the franchise to all persons whom they subject to criminal

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[18](...continued)
(quoting K.J. Erhart, Comment, Jurisdiction over Nonmember Indians on Reservations, 1980 Ariz. State L.J. 727, 738-40). The Attorney General's 1883 opinion disagreed with that view; moreover, any such federal jurisdiction would not necessarily have been exclusive of Tribal jurisdiction.

Means also describes the historical changes in federal policy towards Tribes. In Lara, the Supreme Court discussed those changes and the corresponding variations in the scope of Tribal sovereignty, concluding that this history of adjustments in Tribal sovereignty showed that the the ICRA amendments were within Congress's authority. Lara, 124 S. Ct. at 1635.

jurisdiction. Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 69-74 (1978) (fact that a city's criminal jurisdiction extended to residents of adjoining areas who did not have voting rights did not violate equal protection or due process). Rights of political participation are frequently conditioned on domicile, citizenship status, status as a felon, or other preconditions. Foley v. Connelie, 435 U.S. 291, 296 (1978) (non-citizens may be excluded from jury service); Sugarman v. Dougall, 413 U.S. 634, 647 (1973) (State may exclude non-citizens from holding "important nonelective executive, legislative, and judicial positions," held by "officers who participate directly in the formulation, execution, or review of broad public policy"). Similarly, noncitizens have no entitlement to United States citizenship or political participation (even if they have long been domiciled in the United States), but are nevertheless subject to federal criminal jurisdiction.

Means has a full right to political participation in his own Tribe (as well as in Federal and State political processes). In effect, the ICRA amendments implement a reciprocal understanding among the governments of federally recognized Tribes concerning how their respective members will be treated and protected within one another's territory. The ICRA amendments made clear that Tribal membership entails – as it implicitly did for many years before Duro – that a member is subject to the jurisdiction of other Tribes. Tribes may act on behalf of

their members as parens patriae, for instance in negotiating a settlement or treaty, and the arrangement embodied in the ICRA amendments is binding on Means.

Many Tribes provide nonmember Indians with significant involvement in Tribal affairs, including employment on Tribal government boards and commissions, as Tribal police officers, and as judges or counsel in Tribal court.[19] Federal law also provides other protections to nonmember Indians, requiring for instance that Tribes provide services on a "fair and uniform" basis to nonmembers in order to receive federal funds. 25 U.S.C. 450j(h) (imposing this requirement on Tribes operating certain federally funded programs). There are also limitations on a Tribe's ability to extend employment preferences to its own members. 42 U.S.C. 2000e-2(i); Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 154 F.3d 1117, 1120-1124 (9th Cir. 1998) (specifically addressing preference for members of the Navajo Nation).[20] A nonmember Indian who feels

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[19] Senate Hearing at 44 (nonmember Indians serve on Colville Tribe boards and commissions); id. at 47 (Makah Tribal law permits nonmember Indians to serve as judges and counsel in Tribal court); id. at 55 (Yakima Nation employs nonmember Indians). Some 56% of Tribal police officers are Tribal members, 10% are nonmember Indians, and the remainder are non-Indians. Stewart Wakeling, Policing on American Indian Reservations 25 (Department of Justice 2001).

[20] The Navajo Supreme Court addressed Means' claim that he had difficulty securing employment in the Navajo Nation, stating that "there are many non-Navajo employees of the Navajo Nation (some of whom hold high positions in Navajo government), and non-Navajo businesses operate within the Navajo

(continued...)

he has been discriminated against may also seek relief through an action in Tribal court.

If Means were dissatisfied with a particular policy of the Navajo Nation, he could have – in addition to the remedies outlined above – sought assistance from his own Tribe, which has a government-to-government relationship with other Tribes, in resolving any difficulties he may encounter. Means' right of participation in his own Tribe is thus a structural safeguard of his interests. Cf. Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528, 553 (1985) (noting structural protections for State interests inherent in the federal system). He may also raise his concerns with the United States, which has a broad range of programs in Indian country, and performs oversight over Tribal programs that receive Federal funding.[21] Congress has full authority to provide for additional protections for nonmember Indians, should Congress conclude that such protections are needed.

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[20](...continued)
Nation. The ability to work or do business within the Navajo Nation has a great deal more to do with individual enterprise and talent than preference laws." Means, 26 I.L.R. at 6085.

[21] The United States also provides Tribal judiciaries and law enforcement services with substantial technical assistance and advice. There would be a variety of mechanisms for raising such concerns; for instance, some treaties contain provisions expressly permitting submission of disputes to the United States.

The effects of the ICRA amendments are quite circumscribed. As discussed in Part III below, ICRA provides defendants in criminal proceedings with enforceable rights, including a right of federal habeas corpus review, which would be a vehicle for raising specific equal protection claims (or other claims). Moreover, Tribes may exercise only misdemeanor jurisdiction, with a limit of a one year prison term or a $5,000 penalty, further limiting any potential intrusion on the interests of nonmember Indians. See Lara, 126 S. Ct. at 1636 (noting "limited" effects of ICRA amendments).

To the extent that Means implies that he would receive significantly different treatment in Tribal court, Brief at 32, that assumption is flawed. Tribal judicial systems generally evolved from preexisting courts established by the BIA, and thus "are based on Anglo-American concepts of civil and criminal law, separation of powers, and societal rules." Felix S. Cohen, Handbook of Federal Indian Law, 251, 333-34 (1982 ed.). "For similar reasons, many tribal institutions closely resemble one another." Id.[22] Congress and the Executive have provided substantial assistance to Tribal judicial systems. Indian Tribal Justice Act of 1993,

[22] As to any differences that may exist between Tribal court and State or Federal court, witnesses at the hearings on the ICRA amendments said that they were more comfortable with Tribal court procedures, which conformed more closely to their cultural expectations. Senate Hearing at 16, 24. (Most laypersons find all court procedures unfamiliar, so that it is unclear to what extent any differences have practical implications in any event.)

25 U.S.C. 3601; Indian Tribal Justice Technical and Legal Assistance Act of 2000, 25 U.S.C. 3561; Wakeling, Policing on American Indian Reservations. Tribal law enforcement and judicial systems are entitled to a presumption of regularity.

Means also argues that the ICRA amendments improperly subject members of one Tribe to the potentially very different customs and norms of another. Means is unsuited to make such an argument, as he lived within the Navajo Nation for many years and cannot claim to be unaware of local cultural norms. Nor has Means identified any distinctively cultural aspects of Tribal court procedure with which he is dissatisfied. Unfamiliarity with local customs is not generally a defense in Federal or State court; in the rare cases in which a defendant's unfamiliarity with the prosecuting Tribe's culture leads to a denial of equal protection or due process, federal habeas review would be available.

In practice, the ICRA amendments provide Means and other nonmember Indians with substantial benefits. The amendments enhance the authority of Means' own Tribe, and also benefit Means by ensuring that he will be protected from the criminal activities of nonmember Indians throughout Indian country. Means was also entitled to Tribal services from the Navajo Nation during the many years that he resided there. Nor can Means claim surprise at being subjected to Tribal jurisdiction; the Navajo Nation accords those married to Tribal members a

special status, "hadane," which entails certain reciprocal obligations and which the Navajo Supreme Court cited as further supporting jurisdiction over Means. Means v. District Court, 26 I.L.R. at 6087. To the extent that Means is dissatisfied with the balance of burdens and benefits associated with Tribal membership, he is free to disclaim that membership, or exercise discretion in entering the lands of other Tribes.

III. The ICRA Amendments Are Consistent With Due Process

Means asserts that the ICRA amendments violate the Due Process Clause because they compel him to defend himself in a forum in which his rights will not be afforded adequate protection. This claim is mistaken. Congress has provided for protection of procedural rights in Indian country through ICRA itself, and Means has not identified any specific procedural right that will not be available in his prosecution.

While the Bill of Rights does not apply of its own force to Indian Tribes, ICRA guarantees protections to criminal defendants in Tribal court that are analogous to virtually all of the protections that the Constitution guarantees to criminal defendants in federal and state court. Congress, based on its "commitment to the goal of tribal self-determination * * * selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the

unique political, cultural, and economic needs of tribal governments." Santa Clara Pueblo, 436 U.S. at 60.

ICRA includes most of the specific protections of the Bill of Rights, as well as a broad guarantee that "[n]o Indian tribe in exercising powers of self-government shall * * * deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 25 U.S.C. 1302(8). The only rights not expressly protected in ICRA that are relevant to Means' criminal prosecution are the right to appointed counsel (ICRA provides a right to counsel, but not to free representation) and to grand jury indictments. As discussed below, Means cannot complain of a violation of either right.

A. Any Challenge Based On Availability of Specific Rights Has Been Waived, And Is In Any Event Premature and Nonjusticiable

Means states generally that he should not be "subject to criminal trial[] by a foreign power which is not subject to the United States Constitution." Brief at 40. However, he identifies no specific constitutional right that is unavailable in the courts of the Navajo Nation. As discussed below, the Navajo Nation provides criminal defendants with broad legal protections, and ICRA provides Means with additional protections. The discussion of due process in Means' brief focuses on the extent of Congress's power to enact the ICRA amendments and whether those

amendments reflect delegated federal power or reaffirmed Tribal authority. Brief at 34-42. The Supreme Court resolved those issues in Lara, 124 S. Ct. at 1632-33, and they are not before this Court. Means' argument is otherwise limited to general references to the lack of constitutional protections in Tribal court, with no specific examples. It follows that any due process claim based on the procedures that will be applied in Tribal court has been waived.

Means does not contest the absence from ICRA of specific provisions addressing grand jury indictments or appointed counsel. Nor could he do so in this context. The Navajo Nation provides indigent defendants with appointed counsel, 1 Nav.Nat.Code 7, so that Means has a right to counsel in Navajo court no different from that in any other United States court. As to grand jury indictments, the Constitution provides a grand jury right only for "infamous crimes," which generally involve penalties exceeding a year's incarceration. United States v. Colt, 126 F.3d 981, 985-86 (7th Cir. 1997); Fed. R. Crim. P. 7(a). Tribal courts lack authority to impose sentences exceeding a year. In any event, this right has not been incorporated into the Fourteenth Amendment's due process clause (and thus need not be observed by the States). Hurtado v. California, 110 U.S. 516, 538 (1884); Apprendi v. New Jersey, 530 U.S. 466, 499 (2000) (Thomas, J., concurring).

Any preenforcement challenge to the procedures applied in the Navajo Nation's courts would also be premature and nonjusticiable. Means' vague allegations of procedural injury fall short of the "actual or imminent, not conjectural or hypothetical" harms required to establish standing to sue. Tyler v. Cuomo, 236 F.3d 1124, 1132 (9th Cir. 2000). Any effort to seek preenforcement review of a prosecution in the Navajo Nation's courts will likewise be unripe absent additional clarity and certainty as to which procedures will be applied in those courts and which procedures Means might seek to challenge. Navegar, Inc. v. United States, 103 F.3d 994, 1001 (D.C. Cir. 1997). To the extent that the specific application of the Navajo Nation's procedures might implicate due process (or other rights), Means remains free to raise those questions through a habeas petition following his prosecution.

B. Means Cannot Prevail On A Facial Challenge

A further defect in Means' claims arises from the fact that this is a facial challenge to the ICRA amendments, brought to the amendments generally rather than a specific application of them. The standard for a facial challenge is exacting: "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S.

739, 745 (1987); Reno v. Flores, 507 U.S. 292, 301 (1993).

Means cannot meet this standard. There are broad procedural protections available in Tribal court, which will ordinarily prevent procedural violations. Even supposing that section 1301(2) "might operate unconstitutionally under some conceivable set of circumstances," that would not make it facially invalid. Salerno, 481 U.S. at 745. This is especially true in view of Congress's creation of a specific habeas remedy to challenge allegedly impermissible exercises of Tribal prosecutorial authority in individual cases.[23]

C. Adequate Procedural Protections Are Available In Tribal Court

Notwithstanding Means' failure to assert a due process claim, we nevertheless briefly discuss other due process considerations. The analysis of what procedural protections are required in a particular proceeding turns on a contextual, fact-specific inquiry. In some cases, the nature of a prosecution will render a particular procedural measure irrelevant. Moreover, many Tribal constitutions or legal systems offer defendants additional procedural rights.

1. Any Claimed Violation of Procedural Rights Must Be Analyzed In The Context Of A Particular Prosecution And Tribal Legal System

[23] Nor can Means use a facial challenge to cure the nonjusticiability of this case. In a facial challenge to a criminal statute outside of the First Amendment context, "plaintiffs have standing to assert only constitutional interests relevant to their own activities." Washington Mercantile Ass'n v. Williams, 733 F.2d 687, 689 (9th Cir. 1984).

The analysis of any due process claim will depend to some extent on the context of the prosecution in question. In many cases, Tribes will elect to provide more procedural protections than are specifically enumerated by ICRA. Certain Tribes are required by their constitutions or Tribal policy to provide appointed counsel. The Navajo Nation is in that category. See 1 Nav.Nat.Code 7; House Hearing 177 (statement of Navajo Nation); 137 Cong. Rec. 9445 (statement of Senator Inouye) ("[F]ree counsel is provided to indigent defendants by the Ute court and by many tribal courts elsewhere.").[24] The Navajo Nation also permits nonmembers to serve on juries, providing nonmember Indians like Means with an additional procedural safeguard. Navajo Nation v. MacDonald, A-CR-09-90 (Navajo 1991); George v. Navajo Tribe, 2 Nav. R. 1 (Navajo 1979) (finding that ICRA requires this approach); 7 Nav.Nat.Code 654.[25]

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[24] The United States has programs to promote the development of Tribal legal systems, which are expected to increase the availability of appointed counsel and other procedural protections. Congress has specifically authorized funding for legal assistance to indigent defendants. 25 U.S.C. 3663.

[25] Many other Tribes likewise include nonmembers on juries. See, e.g., Impact of the Supreme Court's Ruling in Duro v. Reina: Hearing Before the Senate Select Comm. on Indian Affairs, 102d Cong., 1st Sess. Pt. 1, at 45 (1991) (noting that nonmember Indians and non-Indians are permitted to serve as jurors in Zuni courts); id. at 151 (noting that Makah Tribal law permits nonmember Indians to serve as judges, counsel, or jurors in Tribal court); White Mountain Apache Tribe Rules of Civil Procedure, Rule I-15 (permitting service by nonmembers), http://thorpe.ou.edu/codes/wmtnapache/RulesofCivilProcedure.html#RULE%20I-15 .

Nor will every prosecution implicate every procedural right. For instance, the right to appointed counsel is not available if a defendant is not indigent, the offense is not punishable by incarceration, or authorities agree to forgo incarceration in the defendant's particular case. Argersinger v. Hamlin, 407 U.S. 25 (1972). Tribes may also have sufficient flexibility in their legal systems to allow them to provide a particular procedural protection on request, thereby eliminating any due process question.

2. Judicial Review Is Available to Test the Adequacy of the Process in a Particular Case

Nonmember Indian defendants may seek judicial review of claims relating to particular procedural protections in the context of a specific prosecution. A criminal defendant who claims to have been denied a right in Tribal court to which he was entitled under ICRA or the Constitution must seek relief in the Tribal court system in the first instance. Exhaustion of Tribal remedies is required before invoking federal jurisdiction. National Farmers Union v. Crow Tribe, 471 U.S. 845, 855 (1985). Such exhaustion permits the Tribal judicial system to consider a claim, and will often resolve a procedural violation.

As of 1991, when the ICRA amendments became permanent, 97% of Tribal court systems provided a right of appeal. Senate Hearing at 218. Tribal court decisions applying ICRA have been described as "strongly rights-protective."

Mark D. Rosen, Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act, 69 Fordham L. Rev. 479, 529 (2000). Nor have the federal courts read ICRA's protections narrowly. See, e.g., United States v. Strong, 778 F.2d 1393, 1397 (9th Cir. 1985) (ICRA search and seizure protections equivalent to those of the Fourth Amendment).

Subsequent to exhausting Tribal court remedies, the defendant may then seek federal habeas review. 25 U.S.C. 1303. Congress envisioned that this habeas remedy would provide "a remedy for violations of basic fairness" in Tribal prosecutions. H.R. Rep. No. 102-61 at 6, 1991 U.S.C.C.A.N. at 376. Habeas corpus is the mechanism Congress envisioned for testing particular procedural questions, rather than abstract facial challenges. Santa Clara Pueblo, 436 U.S. 49, 67 (finding Congress intended ICRA violations to be redressed through habeas petitions, not civil actions).[26] There have been comparatively few ICRA habeas

[26] This Court has found that ICRA's habeas corpus remedy is not available where the penalty for a particular offense is a fine, rather than incarceration. Moore v. Nelson, 270 F.3d 789 (9th Cir. 2001). Such penalties are limited by ICRA to $5,000. 25 U.S.C. 1302(7). To the extent that a nonmember Indian is subject to a criminal penalty in Tribal court that raises substantial due process or equal protection concerns, it is possible that a civil action in federal court may be available to review that proceeding. Cf. National Farmers Union, 471 U.S. 845 (1985) (recognizing federal cause of action to determine whether Tribal court has exceeded jurisdiction, subject to exhaustion in Tribal court). Nor would Santa Clara Pueblo, in which the Court found that Congress consciously decided to preclude civil actions to enforce ICRA, necessarily bar such a remedy. The Court (continued...)

petitions filed (or granted), suggesting that Tribal justice systems operate satisfactorily.

ICRA also includes a due process provision, 25 U.S.C. 1302(8), which could be construed to provide specific protections that are recognized as essential to due process concerns. For instance, when ICRA was enacted, the Supreme Court had not yet recognized a right to counsel in proceedings resembling those in Tribal court.[27] A defendant could, however, argue that ICRA's due process provision implicitly incorporates such a right. The analysis of such a claim would take broad norms of due process into account, but might also consider the "goal of tribal self-determination" and the "unique political, cultural, and economic needs of tribal

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[26](...continued)
in Santa Clara Pueblo explained that it was rejecting a remedy for "alleged violations of [ICRA] arising in a civil context," 436 U.S. at 67, 71-72, but did not address the context of a criminal fine. The Court need not decide this issue now, particularly as the offenses with which Means is charged are punishable by incarceration.

[27] At the time of ICRA's enactment in 1968, there was a right to appointed counsel in criminal proceedings, but only where the possible term of imprisonment exceeded six months. (The Supreme Court later recognized a right to appointed counsel in any proceeding which may lead to a term of imprisonment. Argersinger, 407 U.S. 25 (1972).) ICRA originally permitted Tribes to impose only up to six months' incarceration, so that the right to counsel would not have been implicated. This later became a one-year maximum. See 25 U.S.C. 1302(7); Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, Pub. L. No. 99-570, § 4217, 100 Stat. 3207-146 (increasing maximum to one year to "enhance the ability of tribal governments to prevent and penalize the traffic of illegal narcotics on Indian reservations").

governments," Santa Clara Pueblo, 436 U.S. at 62-63; United States v. Wadena, 152 F.3d 831, 843-44 (8th Cir. 1998).[28] Although Means has not raised any viable challenge to the procedures applied in the Navajo Nation's courts, there is thus a mechanism to review any such concerns that may arise in proceedings in his case.

3. The Court Should Defer Consideration Of Any Specific Procedural Challenges

The Court should defer consideration of any specific challenges to procedures applied in Tribal court to a future case in which those issues are actually presented. Tribal court proceedings are entitled to a presumption of regularity. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15, 19 (1987) (finding that federal courts should avoid interference with Tribal court proceedings, and rejecting challenge to exhaustion requirement based on alleged "incompetence" of Tribal courts); Senate Hearing at 33-34 (statement of Sen. Inouye) (noting the

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[28] We note that when a Tribe employs informal, non-adversarial processes to enforce its criminal laws, the fairness concerns that require the appointment of counsel in federal or state prosecutions may be diminished. Cf. Gideon v. Wainwright, 372 U.S. 335, 343-345 (1963). A court might conclude that a nonmember Indian effectively consented to proceeding without appointed counsel by choosing to retain membership in his or her own Tribe, while residing among another Tribe and accepting the services that it provides to all Indians. Duro, 495 U.S. at 694 (citing the voluntary nature of Tribal membership as justifying criminal jurisdiction over Tribal members); Hamdi v. Rumsfeld, 124 S. Ct 2633, 2646-2651 (2004) (finding that the analysis of what process is due under the due process clause may depend on a contextual analysis); see also Reid v. Covert, 354 U.S. 1, 44-45 (1957) (Frankfurter, J., concurring); id. at 75-76 (Harlan, J. concurring).

absence of any complaints to the Senate about procedural violations in Tribal judicial systems).

Although procedural violations do occur from time to time in any court system, the speculative possibility of such a violation in Tribal court is not enough to deprive Congress of the power to adopt the ICRA amendments, and cannot support a facial challenge. United States v. Mazurie, 419 U.S. 544, 558 n.12 (1975) (rejecting a challenge based on speculation that Tribal processes might lead to denial of due process or equal protection). Should a particular case raise specific procedural concerns, any associated claims would properly be raised after trial, in the context of that particular case. This would allow the legal issues to be addressed on specific facts, and permit greater remedial discretion.[29]

In sum, the ICRA amendments do not violate equal protection or due process, and should be upheld as within Congress's Indian affairs authority.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the district court.

Respectfully submitted,

[29] If a court found, for instance, that the right to counsel was required on particular facts, the remedy would be to put the Tribe to the election of providing counsel or forgoing the option of incarcerating the defendant. Argersinger v. Hamlin, 407 U.S. 25 (1972).

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STATEMENT OF RELATED CASES

The undersigned, counsel of record for the United States, is aware of one such case, Morris v. Tanner, No. 03-35922 (9th Cir.). The opening and answering briefs in that case have been filed; the reply brief is due to be filed on September 15, 2004. The United States is an intervenor in that matter, and briefed similar equal protection and due process challenges to the ICRA amendments.

_____
R. JUSTIN SMITH

August 30, 2004

CERTIFICATION OF COMPLIANCE REQUIRED BY FED. R. APP. P. 32(a) AND NINTH CIRCUIT RULE 32-1

The undersigned, counsel of record for the United States, hereby certifies pursuant to Fed. R. App. P. 32(a) and Ninth Circuit Rule 32-1 that the attached brief is proportionately spaced, has a typeface of 14 points and contains 13795 words.

_____
R. JUSTIN SMITH

August 30, 2004

CERTIFICATE OF SERVICE

I certify that, on December 15, 2004, a copy of this brief were sent by first class United States mail or by Federal Express to counsel at the following addresses:

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