No. _____

# In The
# Supreme Court of the United States

THOMAS LEE MORRIS and
ELIZABETH S. MORRIS,

*Petitioners,*

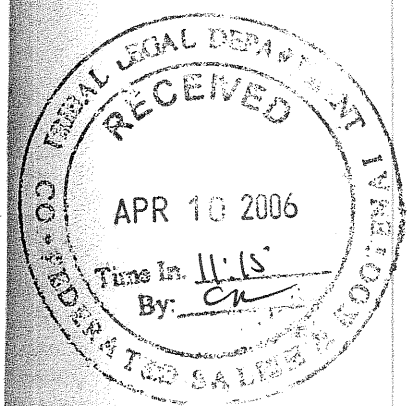
vs.

TANNER, Judge, Judge of the Confederated
Salish and Kootenai Indian Tribal Court
for the Flathead Reservation, and
UNITED STATES OF AMERICA,

*Respondents.*

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

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether a federal statute, 25 U.S.C. §1301(2), violates the fundamental constitutional right of American Indians, who are citizens of the United States, to equal protection under the law guaranteed by the Fifth Amendment of the Constitution by subjecting nonmember Indians, but no other similarly situated nonmembers of a different race, to criminal prosecution and punishment by Indian tribes, the judicial proceedings of which are not constrained by the Constitution?

2. Whether the same federal statute violates the fundamental right of citizens of the United States to due process of law guaranteed by the Fifth Amendment of the Constitution by subjecting them to criminal prosecution and punishment by extraconstitutional sovereigns, Indian tribes, within the borders of the United States but unconstrained by the Constitution, which sovereigns, because of their racially and ethnically exclusive nature, deny them the right of full and equal participation in their political life?

## PARTIES TO THE PROCEEDINGS

In addition to the Petitioners, Thomas L. Morris and Elizabeth S. Morris, and the Respondent, Judge Tanner, of the Tribal Court of the Confederated Salish and Kootenai Tribes, the United States intervened in this matter as a Defendant on March 14, 2002.



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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Thomas Lee Morris and Elizabeth S. Morris hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals is unreported, but found at *Morris v. Tanner*, 160 Fed. Appx. 600 (9th Cir. 2005) (unpublished). It is reproduced in the Appendix at App. 1-3. The opinion of the District Court is reported as *Morris v. Tanner*, 288 F.Supp. 2d 1133 (D. Mont. 2003). It is reproduced in the Appendix at App. 28-29.

The opinion of the Court of Appeals in *Means v. Navajo Nation*, also relevant to this case, is reported as *Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005). It is reproduced in the Appendix at App. 57.

## JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered December 22, 2005. A timely petition for rehearing and rehearing *en banc* was denied on December 22, 2005. This Court, in an order dated March 13, 2006, allowed Petitioner Morris up to and including April 6, 2006, in which to file this Petition for Writ of Certiorari. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. *Fifth Amendment*: The Fifth Amendment to the United States Constitution provides that: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . " U.S. Const. amend. V.

B. *25 U.S.C. § 1301*: For purposes of this title [25 U.S.C. §§ 1301, et seq.], the term –

> 1) "Indian Tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;
>
> 2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;
>
> 3) "Indian court" means any Indian tribal court or court of Indian offense; and
>
> 4) "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, United States Code, if that person were to commit an offense listed in that section in Indian country to which that section applies.

25 U.S.C. § 1301.[1]



## STATEMENT OF THE CASE

The federal district court for the district of Montana had jurisdiction over this matter under 28 U.S.C. § 1331. The Ninth Circuit Court of Appeals had jurisdiction to review that decision under 28 U.S.C. § 1292. The Ninth Circuit's decision in this case was dictated by its decision in *Means v. Navajo Nation*, 432 F.3d 924 (2005), App. 57-79, in which it provided its substantive constitutional analysis.[2] The Ninth Circuit denied Mr. Means' petition for rehearing and rehearing *en banc* on March 22, 2006. In both *Means* and *Morris*, the plaintiffs presented challenges to the 1990 Amendments based on their Fifth Amendment equal protection and due process rights. *Means*, 432 F.3d at 929, *Morris*, 160 Fed. Appx. at 600.

In *United States v. Lara*, 541 U.S. 193 (2004) (Breyer, J. writing for the majority; Stevens, J. concurring in the opinion; Kennedy, J. and Thomas, J. concurring, separately, in the judgment; Souter, J. dissenting), the Court

[1] The act of Congress specifically at issue is the amendment of 25 U.S.C. § 1301 embodied in the Act of November 5, 1990, §§ 8077(b)-(d), 104 Stat. 1892-1893 (temporary legislation until September 30, 1991), as made permanent by the Act of October 28, 1991, 105 Stat. 646, which added the recognition and affirmation of a tribe's inherent power to prosecute "all Indians," in subsection (2), and added subsection (4). They are referred to herein as the 1990 Amendments.

[2] Consequently, the citations to the lower court's opinion in this Petition reference the Circuit's *Means* decision.

reserved from decision these two challenges to the 1990 Amendments. In *Lara*, the Court held they are not a delegation of federal power but a Congressional revival by recognition of tribal inherent sovereign power that overruled this Court's holding in *Duro v. Reina*, 495 U.S. 676 (1990). In *Duro*, the Court had held tribes lack jurisdiction to prosecute non-member Indians, just as it had previously held tribes lack the authority to prosecute non-member non-Indians. *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978). The 1990 revival of this inherent tribal power, the Court held in *Lara*, meant that the Fifth Amendment double jeopardy proscription did not prevent a subsequent federal prosecution.

The particular questions reserved in *Lara* were: (1) whether a Congressional statute "recogniz[ing] and affirm[ing]" the "inherent" authority of a tribe to bring a criminal prosecution against Indians who are not members of that tribe but no non-Indian person violates the fundamental right of equal protection; and (2) whether this statute violates the fundamental right of all citizens to due process, because it subjects citizens of the United States to criminal trial and punishment, including imprisonment, by an "extraconstitutional," "third sovereign", *Lara*, 541 U.S. at 212-13 (Kennedy, J. concurring), within the borders of the United States but not created or authorized by the Constitution, that does not afford defendants all the rights provided by the Bill of Rights and, in fact, excludes them from political participation in the tribe's affairs on the basis of their race or ethnicity.[3]

[3] Indian tribes are racially exclusive because no person who is not an Indian may be a member of an Indian tribe. They are ethnically exclusive because their membership is restricted further, excluding even Indians who are not descended from the appropriate tribe or tribes. Thus, qualification for tribal membership is expressed in terms

(Continued on following page)



The United States and tribal defendants argue the distinction is "political," not racial, relying on this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974) (federal employment preference for Indians in the Bureau of Indian Affairs was not racial discrimination but was reasonable and rationally designed to further Indian self-government). They argue this is so because the 1990 Amendments swept into Tribes' criminal jurisdiction Indians who are enrolled members of a tribe and perhaps other racial "Indians," but not all Indians.

The Ninth Circuit recognized "the equal protection argument has real force." App. 69. It noted:

> [A]lthough the 1990 Amendments permit the Navajo tribe to criminally prosecute its own members and members of other Indian tribes, the Navajo tribe cannot constitutionally prosecute whites, blacks, Asians, or any other non-Navajos who are accused of crimes on the reservation. (Citing *Oliphant*, 435 U.S. at 194.) This makes Means' case different from, say, an Alaskan who threatens and batters his father-in-law in Los Angeles, and then is prosecuted by the

of "blood quantum." *See* Constitution of the Confederated Salish and Kootenai Tribes, as amended, Title I, Ch. 1, Part 1, requiring one-quarter "Salish or Kootenai blood" to be a tribal member (Section 2), and defining "Indian Blood," unless the context requires otherwise, as meaning "the blood of either or both the Kootenai or the Salish Tribes of the Flathead Reservation." Using their own inherent sovereign power, of course, tribes have been authorized to further limit membership in ways repugnant to the Constitution based on immutable factors. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), holding the equal protection guarantee in ICRA did not allow a federal remedy against a tribal membership law that excludes the children of female members who marry outside the tribe but extends membership to the children of male members who marry outside the tribe. *Id.* at 51-55.

> State of California. Not only can an Alaskan become a Californian, but the State of California, although "sovereign," nonetheless is bound by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Although he is Indian, Means is nonetheless a citizen of the United States, entitled to the full protection of the United States Constitution. But unlike states, when Indian tribes exercise their sovereign authority they do not have to comply with the United States Constitution.[4] As an Oglala-Sioux, Means can never become a member of the Navajo political community, no matter how long he makes the Navajo reservation his home.

*Id.* at 932.

Notwithstanding this, the Ninth Circuit found *Morton v. Mancari*, 417 U.S. 535 (1974), held "that federal statutory recognition of Indian status is 'political rather than racial in nature,'" despite noting that *Mancari* concerned the "distinguishable context of Indian employment preferences by the federal government." *Means*, 432 F.2d at 932. *See also Duro*, 495 U.S. at 689-90 (emphasizing the importance of the distinction between Congressional and administrative provisions treating Indians "as a single large class with respect to *federal* jurisdiction" as opposed to

[4] Original footnote: "*See Talton*, 163 U.S. at 382-85, 16 S.Ct. 986; *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476-77 (9th Cir. 1980). Although the Indian Civil Rights Act imposes due process limitations upon Indian tribes, 25 U.S.C. § 1302(8), not all the constitutional restraints are imposed. They are statutory, not constitutional, and the sole remedy for violations is habeas corpus. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-57, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978)." *See also Nevada v. Hicks*, 533 U.S. 353, 383-85 (2001) (Souter, J. concurring, joined by Kennedy, J. and Thomas, J.).



"*tribal* power to treat Indians by the same broad classification.") Rejecting the argument that *Mancari* had been "undermined" by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), because, it noted, the Court and the Ninth Circuit continue to "rely" on *Mancari*, the Circuit Court held it was "bound to follow it under the doctrine of *Agostini v. Felton*," 521 U.S. 203, 237 (1997).[5] As support for this proposition, the lower court cited *Rice v. Cayetano*, 528 U.S. 495, 518-22 (2000), without addressing the fact that this Court, in *Rice*, and in *Mancari*, carefully noted "the case was confined to the authority of the BIA, an agency described as 'sui generis.'" *Rice*, 528 U.S. at 520; citing *Mancari*, 417 U.S. at 554. *See also Duro*, 495 U.S. at 689-90, noting same distinction.

The Ninth Circuit rejected the facial due process challenge out of hand, describing it as having "no force." App. 75. The Circuit held:

> Although the U.S. Constitution does not bind the Navajo tribe in the exercise of its own sovereign powers, (citing *Talton v. Mayes*, 163 U.S. 376, 382-85 (1896),) the Indian Civil Rights Act confers all the criminal procedure protections on Means that he would receive under the Federal Constitution, except for the right to grand jury indictment and the right to appointed counsel if he cannot afford an attorney. (Citation omitted.)

[5] *Agostini* reaffirmed that "'[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which **directly controls**, leaving to this Court the prerogative of overruling its own decisions.'" *Agostini*, 521 U.S. at 237, quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). (Emphasis added.)

> The right to grand jury indictment would not pertain regardless, because Means is charged with a misdemeanor. (Citation omitted.) The right to appointed counsel is conferred by the Navajo Bill of Rights to any person within its jurisdiction. (Citation omitted.) Thus as a facial matter, Means will not be deprived of any constitutionally protected rights despite being tried by a sovereign not bound by the Constitution.

App. 75-76.

The Ninth Circuit did not address the issues raised by a federal statute subjecting U.S. citizens to criminal trial and punishment by an extraconstitutional sovereign unconstrained by the Constitution and which, by its very nature, excludes them from participating in its political life because of their race or ethnicity. Thus, it did not address the "elementary principle" of the "constitutional structure and the consent upon which it rests," which guarantees "political freedom" and liberty. *Lara*, 541 U.S. at 213 (Kennedy, J. concurring). *See also Duro*, 495 U.S. at 694, quoting from the dissent of Stevens, J. from the decision in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 172-73 (1982), noting that nonmembers of a tribe "have not given the consent of the governed that provides a fundamental basis for power within our constitutional system."

## I. Federal Common Law and Statutory Background.

The Court held in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), that Indian tribes no longer retain inherent sovereign authority to exercise criminal jurisdiction over nonmembers who are non-Indians, *id.* at 194, and that revival of such power would require a



Congressional delegation of federal power. *Id.* at 211-12. In *Duro v. Reina*, 495 U.S. 676 (1990), this Court held that under federal common law Indian tribes also lack this jurisdiction over nonmembers who are Indians. *Id.* at 682. Finding no principled reason for nonmember Indians but not non-Indians to suffer the disability of criminal trial and punishment by an extraconstitutional sovereign, the Court held "Tribe's powers over [nonmember Indians] are subject to the same limitations." *Id.* at 688. While recognizing that Congress might address any "jurisdictional gap" that existed from the lack of tribal criminal jurisdiction over nonmember Indians, *id.* at 692, the Court also noted that "[c]riminal trial and punishment" is a "serious intrusion on personal liberty," and that "[o]ur cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right. *Cf. Reid v. Covert*, 354 U.S. 1 (1957)." *Id.* at 693 (parallel citations omitted).

Before the year was out, in the 1991 Defense Appropriations Act, Pub. L. No. 101-511, §§ 8077(b)-(d), 104 Stat. 1856, 1892-93 (1990), and without holding a hearing, Congress overturned that holding by amending 25 U.S.C. § 1301 to state that the phrase "powers of self-government" "means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians. . . . " The only limit on the term "all Indians" was reference to the case law under 18 U.S.C. § 1153, the Indian Major Crimes Act, defining who is an "Indian."

Decisions under that section, beginning with the seminal case of *United States v. Rogers*, 45 U.S. 567 (1846), make it clear the primary, indispensable and

immutable factor for classification as an "Indian" is racial. As the Court held in *Rogers*, a non-Indian adopted by a tribe may make himself

> . . . amenable to their laws and usages. Yet he is not an Indian; and the exception (in the predecessor to 18 U.S.C. §1153) is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally, – of the family of Indians. . . .

*Rogers*, 45 U.S. at 572-73.

The case law since 1846 has not diverged from this. Rather, the cases consistently note the obvious: the racial aspect of the issue as to who is an "Indian" for purposes of 18 U.S.C. § 1153 is indispensable, while the political aspect – enrollment in a tribe or, indeed, non-enrollment – is not determinative. *See United States v. Broncheau*, 597 F.2d 1260, 1262-63 (9th Cir. 1979) (While enrollment is the common evidentiary means of establishing Indian status, it is not the only means nor is it necessarily determinative.); *U.S. v. Ives*, 504 F.2d 935, 953 (9th Cir. 1974) ("[E]nrollment or lack of enrollment is not determinative of . . . status as an Indian."); *Ex parte Pero*, 99 F.2d 28, 31 (7th Cir. 1938) ("The lack of enrollment . . . is not determinative of status. Only Indians are entitled to be enrolled . . . and the fact of enrollment would be evidence that the enrollee is an Indian. But the refusal of the Department of Interior to enroll a certain Indian as a member of a certain tribe is not necessarily an administrative determination that the person is not an Indian."); *U.S. v. Dodge*, 538 F.2d 770, 786 (8th Cir. 1976) ("The definition of exactly who is and who is not an Indian is very imprecise. (Citation omitted.) Courts have generally followed the test discussed



in *U.S. v. Rogers*, 45 U.S. 567 (1846): in order to be considered an Indian, an individual must have some degree of Indian blood and must be recognized as an Indian.") Thus, it is clear that race is the one indispensable and immutable factor in this determination.[6]

Although the language of the 1990 Amendments referring to "all Indians," by itself, requires no reference to legislative history, the House Report accompanying the amendments, H.R. Conf. Rep. No. 101-938, pt. 2 (1990), 136 Cong. Rec. H13556, H13596 (Oct. 24, 1990), only confirms the point, revealing Congress' intent to make a racial, not political, distinction. The Report noted that the cases under 18 U.S.C. § 1153 "made no distinction regarding the tribal membership of the Indian. The status of non-member Indians . . . was clarified in *U.S. v. Rogers*, 45 U.S. 567 (1846), where the Supreme Court held that the statute applied to Indians as a class, not as members of a tribe, but as part of the family of Indians." U.S. Code Congressional and Administrative News, Vol. 2, 102d Congress, 1st Session, 1991 at 375.

The legislative history reveals the same intent: "Courts have repeatedly held that the term 'Indian' includes any Indian in Indian Country, without regard to tribal membership. (Citations omitted.) [T]he Committee intends to clarify precisely that the inherent powers of Indian tribes includes the authority to exercise criminal misdemeanor jurisdiction over all Indians in Indian country." *Id.* (The rationale provided by Congress for doing this is, essentially, that there was a purported "gap" in

[6] Significantly, beyond race, defining who is or is not an Indian is "very imprecise." *Dodge, supra.*

jurisdiction after *Duro* to prosecute crimes allegedly committed by nonmember Indians on reservations and that these crimes "are the most tedious crimes with which law enforcement officers deal." *Id.* at 373.)

By these amendments, therefore, Congress subjected nonmembers who are Indians, but no others, to trial and punishment, which includes imprisonment for up to one year and a fine of up to $5,000 for each offense, 25 U.S.C. § 1302(7), by Indian tribes using, in that process, their extraconstitutional inherent sovereign power. Thus, they are not constrained by the Constitution but are only limited, to some extent, by ICRA, 25 U.S.C. §§ 1301, *et seq.*, and the only federal remedy is habeas corpus. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978). Congress explicitly specified only members of one race, American Indians, for such treatment. It left nonmembers of any other race but who are no less or more authorized to be on an Indian reservation free from the threat of criminal prosecution by Indian tribes. It appears Congress did so, in large part, to relieve state and federal law enforcement of having to deal with "the most tedious crimes." *Id.*

## II. Proceedings Below.

Petitioner Thomas Morris was cited by a tribal police officer of the Confederated Salish and Kootenai Tribes with a criminal violation – speeding – of the Tribes' code. App. 48. At his first appearance in tribal court, Mr. Morris moved to dismiss the charge on the ground the Tribes lack jurisdiction to try and punish him. The same day, Mr. Morris filed a complaint in federal district court raising the same issues. The tribal court, and the tribal appellate court, ultimately ruled the tribes have jurisdiction to try and



punish Mr. Morris. By agreement of the parties, the prosecution of Mr. Morris in tribal court has been stayed pending the resolution of this matter in the federal courts.

An illustrative and significant factual distinction between prosecution in the CSKT Tribal Court and Montana state district court concerns the right to a jury. If Mr. Morris was prosecuted in state district court, which he will be if this Court rules in his favor, he would have a right, under Montana law to a jury trial, *Woirhaye v. Montana Fourth Judicial District Court*, 292 Mont. 185, 191, 972 P.2d 800, 803 (1998), and the jury would have to be seated in conformity with state and federal constitutional requirements. *Powers v. Ohio*, 499 U.S. 400 (1991); *Batson v. Kentucky*, 476 U.S. 79 (1986). In fact, Thomas' mother, Elizabeth Morris, also a nonmember but not an Indian, would have this right under the same accusation. In Thomas' case, by contrast, simply because he is an Indian, he does not have a right to a jury trial, the trial judge in his case, by tribal statute, must be a tribal member, Law and Order Code of the Confederated Salish and Kootenai Tribe ("CSKT") (2003) 1-2-202(5), and even if tribal law did allow a jury, only tribal members could be seated. *Id.* at 1-2-601.

The federal district court initially declined to address Morris' Fifth Amendment equal protection and due process claims. App. 35. After remand from the Ninth Circuit, App. 19, it held that the distinction Congress made in the 1990 Amendments between nonmember Indians, which it subjected to tribal criminal jurisdiction, and nonmember non-Indians, which it did not treat in this way, is "political" and not "racial." It relied for this holding on *Morton v. Mancari*, 417 U.S. 535 (1974). Consequently, it did not subject the 1990 Amendments to strict scrutiny, requiring

instead only a rational basis, which it found in Congress' policy of promoting tribal self-government.

Morris again appealed. The Ninth Circuit ultimately affirmed the lower court in an Amended Memorandum filed December 22, 2005, but did not issue a substantive opinion, since it was bound by its prior ruling in *Means v. Navajo Nation*, 432 F.3d 924 (2005), filed December 13, 2005. The lower court therefore also rejected Morris' motion for rehearing and rehearing *en banc* on December 22, 2005. On March 22, 2006, it also rejected Means' motions for rehearing and rehearing *en banc*. App. 56. The Circuit's opinion in *Means*, therefore, provides the rationale for its holding in *Morris*.

## REASONS FOR GRANTING THE PETITION

There is not conflict among the circuits here that Morris can discern, except perhaps the comparison between the fact that Congress must comply with the equal protection and due process clauses when enacting legislation under its general Commerce Clause power with its license, according to the Ninth Circuit and Respondents, under the Indian Commerce Clause resting on the legal fiction that the classification "Indian" is political, not racial. But the equal protection and due process questions reserved from decision in *Lara* concern perhaps the most fundamental structural principles in the Constitution relating to and protecting individual citizens' rights. These are important questions of federal law this Court should settle.



Resolution of the equal protection questions relates directly to only 4.1 million American citizens – Indians. They should not be shunted off the now well-trod and much fought-over road to protection and respect for equal rights on the grounds of a fiction such as that employed here – that the classification "Indians" is not first, foremost, and always a racial classification, but a "political" one. *Adarand*, 515 U.S. at 240 (Thomas, J. concurring); *Lara*, 541 U.S. at 214 (Kennedy, J. concurring).

The due process question is, however, even more compelling, and perhaps more currently at issue for the Nation at large. It asks no less than whether Congress, when exercising well-recognized constitutional powers, may place American citizens outside the protections of the Constitution for purposes of criminal prosecution and punishment for their actions within the confines of the country. This question concerns not aliens or even American citizens who, it might be demonstrated, pose a threat to the Nation and the lives and property of its people through acts of war.

Rather, it concerns American citizens who happen to be on an Indian reservation, whether living there or passing through, and are accused of a misdemeanor, a "tedious" crime other law enforcement, it was claimed, prefer not to handle. U.S. Code Congressional and Administrative News, Vol. 2, 102d Congress, 1st Session, 1991 at 373. This question does not concern "only" Indians. It is separate from the equal protection question. If Congress has the power, constitutionally, to subject Indian citizens to such extraconstitutional treatment, there is no principled reason it would not also have the power to do so with non-Indian citizens, at least in circumstances it deems warranted. Moreover, if it can do so when Americans are

in certain, specified **federal** Indian reservations, there is no reason it could not do so when they are in other, or all **federal** locations, such as Military reservations, territories, wilderness areas, National Parks, or Washington, D.C. Such power is "of major significance to [the] understanding and interpretation of the Constitution . . . and most doubtful" and "unprecedented." *Lara*, 541 U.S. at 211, 212 (Kennedy, J. concurring).

Morris respectfully submits these questions warrant this Court's immediate attention and settling.

If the "fiction" that consent to be a member of one Indian tribe is consent to the inherent sovereign power of all Indian tribes – including their power to imprison – makes "Indian" merely a "political" and not a racial classification, even though only American citizens of the Indian race are adversely impacted, then the 4.1 million Americans who are Indians, and their relatives, should have that explanation from this Court. The public understanding of the law, especially that segment directly and adversely affected by it, deriving from this Court's pronouncements more than any source, is of course vital to our political and legal life. As it is, to the common citizen, the law at issue appears to be a racial classification pure and simple.

Similarly, if Congress has the constitutionally valid power to relegate American citizens to criminal trial and punishment, including potentially imprisonment, by an extraconstitutional tribunal, unconstrained by the Constitution, for mere misdemeanors, American citizens of all races, Indians or not, should know the source, the reason, the location and the limit, if any, of such power.



## I. THE APPARENTLY EGREGIOUS EQUAL PROTECTION AND DUE PROCESS VIOLATIONS AT THE FOUNDATION OF THE 1990 AMENDMENTS WARRANT SETTLEMENT BY THE COURT TO PROTECT OUR JURISPRUDENCE ON THESE FUNDAMENTAL MATTERS.

First, there are American citizens, nonmember Indians, languishing in tribal jail facilities, who were tried and convicted by a sovereign that was not required to comply with the Constitution and which excluded them from full and equal political participation because of their ethnicity – they lacked the requisite amount of "blood quantum" to be a member of that tribe. In almost all cases, if they were allowed a jury under tribal law its venirepersons were, by tribal law, exclusively tribal members – i.e. no person of the defendants race or ethnicity would have been allowed on the panel. Whether these criminal defendants were guilty of crimes or not, their subjection, by Congress, to such "extraconstitutional" power is, if not unjust, begging for explanation as to how it is fair.

Indians may be the quintessential minority in the United States. Their numbers are small – 4.1 million citizens affiliated with a tribe, according to the latest census, 1.7 million of which are enrolled tribal members[7] – and they are scattered from corner to corner of the country, with 556 federally-recognized tribes residing on

[7] U.S. Department of Commerce, Economics & Statistics Administration, U.S. Census Bureau, March 2001, Overview of Race & Hispanic Origin. Notably, the U.S. Census Bureau's definition of an "American Indian" states that it refers to people who have native origins and "who maintain tribal affiliation or community attachment."

reservations in virtually every state of the Union. They are among the poorest of the poor. In the rural areas of the West, out of sight, many live in forlorn poverty. In many urban areas of the West and beyond, including Seattle, Portland, Albuquerque, Phoenix, Denver, and Minneapolis they are perhaps more prominent as they constitute a disproportionately large number of the homeless and fringe-dwellers. While tribal governments have budgets, departments, police forces and courts, as well as lobbyists and the institutional support of the U.S. Department of Justice, many though certainly not all Indians, as individuals, live in exceedingly difficult straits.

Their interests and rights can easily be overlooked, especially when they are considered as a racial group rather than as individuals. But, as the Supreme Court has rightly found, the 556 tribes are not fungible, *Duro v. Reina*, 495 U.S. 676, 695 (1990), and neither are individual Indians, who should be assumed to be no less desirous or deserving of protection for their individual rights than any other citizen of the United States.

As the Court has stated:

> [I]t is the individual who is entitled to judicial protection against classifications based upon his race or ethnic background because such distinctions impinge upon his personal rights, rather than the individual only because of his membership in a particular group. . . .

*Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995).

Because they are citizens of this country, Indians, in theory, have the opportunity equal to all other citizens and many resident aliens to work their way out of the difficulties in which many of them live. It is up to them as individuals to put this theory into practice. But, Morris submits, the



disability, the odium, of racial classification by the federal government and Congress has had the very adverse effects the Supreme Court has long said our Constitution is meant to protect against. *Adarand*, 515 U.S. at 240-41 (Thomas, J. concurring).

This situation is, in fact, similar to that of indigent criminal defendants, the only group as easily overlooked, perhaps, as nonmember Indian criminal defendants. The Supreme Court recognized that they have fundamental constitutional rights which cannot be ignored simply because of their penury. *Gideon v. Wainwright*, 372 U.S. 335 (1963). In that case the powers of governments were ranged against individuals seeking protection of their rights, whether guilty or not, whether rich or poor. The governments offered intricate legal arguments and what they saw as compelling practical reasons to allow their practices to continue in a manner convenient to their power but in conflict with individual rights. The Court, of course, came down ultimately on the right side, the side of the individual, the side of the Constitution, as amended and improved to the benefit of individuals through long years of struggle. *See Adarand*, 515 U.S. at 240-41.

By contrast, in the nation-threatening circumstances of World War II, Congress provided for the internment of Japanese-Americans. The Supreme Court then approved this. *See Hirabayashi v. U.S.*, 320 U.S. 81 (1943) and *Korematsu v. U.S.*, 323 U.S. 214 (1944). All now recognize the constitutional violations these acts of Congress represented and enabled. The 1990 Amendments differ in principle from the internment laws at issue during World War II only, but significantly, because here Congress has acted not to address perceived threats to the Nation but a perceived gap in policing "tedious" petty crimes.

While Congress committed another shameful act when it passed the 1990 Amendments, this Court can avoid that stain. It should, not only for the benefit of 4.1 million individual citizens of the United States who are Indians, but to preserve from erosion the progress of this Nation under the lofty principles of equality, even if only for so small a minority.

Respectfully submitted,

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*Attorney for Petitioners*
April 2006



**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| THOMAS LEE A MINOR CHILD, a minor child; ELIZABETH S. MORRIS; ROLAND J. MORRIS, SR., his guardians and natural parents,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>TANNER, Judge, Judge of the Confederated Salish and Kootenai Indian Tribal Court for the Flathead Reservation,<br><br>Defendant-Appellee,<br><br>UNITED STATES OF AMERICA,<br><br>Defendant-Intervenor-Appellee | No. 03-35922<br><br>DC No. CV 99-0082 DWM<br><br>AMENDED MEMORANDUM*<br><br>(Filed Dec. 22, 2005) |

Appeal from the United States District Court
for the District of Montana
Donald W. Molloy, District Judge, Presiding

Argued and Submitted March 11, 2005
Seattle, Washington

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.