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Symposium Foreword

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SYMPOSIUM: TRIBAL SOVEREIGNTY AND *UNITED STATES V. LARA*

SYMPOSIUM FOREWORD

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On April 19, 2004, the United States Supreme Court handed down its eagerly awaited decision in the case of *United States v. Lara*.[1] *Lara*, like so many cases over the last two hundred years, presented the Court with fundamental questions about tribal sovereignty and yet no tribe was actually a party to the case. Rather, the immediate battle was between the federal government and a man it sought to prosecute for assaulting a federal officer. To resolve the question of whether the federal government's prosecution of Billy Jo Lara was barred by the Fifth Amendment's Double Jeopardy Clause, the Court would be required to confront the difficult issues found at the intersection of tribal criminal jurisdiction, the rights guaranteed to defendants in criminal prosecutions, and the separation of powers between Congress and the Court.

The roots of *Lara* trace back to two decisions issued in 1978 by the U.S. Supreme Court—*Oliphant v. Suquamish Indian Tribe*[2] and *United States v. Wheeler*.[3] In *Oliphant*, the Court ruled that tribes lack criminal jurisdiction over non-Indians. In *Wheeler*, the Court reaffirmed that tribes do possess criminal jurisdiction over their own members and ruled that tribal sovereignty stems from a source other than the sovereignty of the federal government. Accordingly, under the so-called Dual Sovereignty Doctrine, the federal government did not violate the Double Jeopardy Clause when it tried a citizen of the Navajo Nation for a crime after the Navajo Nation had already prosecuted him for the same underlying activity.

With *Oliphant* and *Wheeler* dividing the world of criminal jurisdiction into non-Indians and citizens of the tribe, the inevitable next question was whether

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1. 124 S. Ct. 1628 (2004).
2. 435 U.S. 191 (1978).
3. 435 U.S. 313 (1978).

tribes possess criminal jurisdiction over a person who is Indian, but who is not a citizen of the prosecuting tribe. In *Duro v. Reina*,[4] the Court answered this question by holding that tribes lack criminal jurisdiction over non-member Indians. Because of the complicated nature of criminal jurisdiction in Indian country, the *Duro* decision created a jurisdictional void—a situation in which no government had the ability to prosecute non-member Indians who committed certain crimes in Indian country.

Congress moved quickly to fill this void by enacting what soon became known as the *Duro* fix amendment. This legislation declared that Congress "recognized and affirmed" the "inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians."[5] Questions immediately arose concerning Congress' authority to enact this statute, which was, after all, designed to overturn a decision of the U.S. Supreme Court.

Billy Jo Lara became one of the test cases for the *Duro* fix legislation, and indeed, his situation illustrates the problems caused by the jurisdictional maze that governs criminal jurisdiction in Indian country.[6] Lara is a citizen of the Turtle Mountain Band of Chippewa. He married a citizen of the Spirit Lake Tribe ("Spirit Lake"), and the couple lived on the Spirit Lake reservation. The Spirit Lake tribal police had a number of encounters with Lara, centering on Lara's abuse of his wife, his public intoxication, and his resisting arrest. Spirit Lake eventually ran out of viable options for dealing with Lara and excluded him from its territory.[7] On the night of June 13, 2001, Lara returned to the Spirit Lake reservation, where he became intoxicated. He resisted arrest, eventually punching a Bureau of Indian Affairs ("BIA") officer. BIA officers serve as both tribal and federal law enforcement officers, and thus Lara's punch was a crime against both the tribal and the federal government. Spirit Lake prosecuted Lara first, and he pled guilty in tribal court. When the federal government filed charges, however, Lara argued that the Double Jeopardy Clause barred the federal prosecution. Lara's argument rested on his contention that Congress lacked the authority to enact the *Duro* fix legislation.

Tribes have not always fared well in U.S. Supreme Court cases when tribal sovereignty collides with the issue of a defendant's federally guaranteed rights in a criminal case,[8] and federal statutes have not always fared well when caught in the tug of war between the authority of Congress and the authority of the U.S. Supreme Court.[9] When these factors were combined with a split between the

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4. 495 U.S. 676 (1990).

5. Pub. L. No. 101-511, § 8077(d), 104 Stat. 1893 (codified as amended at 25 U.S.C. §§ 1301-1303 (1988)).

6. I have, of course, stolen shamelessly from the title of Robert N. Clinton's landmark article, *Criminal Jurisdiction Over Indian Lands: A Journey Through A Jurisdictional Maze*, 18 Ariz. L. Rev. 503 (1976).

7. In Indian cases, this action is often called "exclusion" or "banishment." It is in essence, however, a remedy used by many countries and is more commonly called "deportation."

8. *See e.g. Duro*, 495 U.S. 676; *Oliphant*, 435 U.S. 191.

9. *See e.g. City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding unconstitutional the Religious Freedom Restoration Act).

Eighth and Ninth Circuits,[10] it is no wonder that the Court's decision in *Lara* was awaited with baited breath. But on April 19, 2004, the Court ruled 7 to 2 that the federal prosecution of Lara was not barred by the Double Jeopardy Clause. In other words, the *Duro* fix amendment means what it says and Congress had the authority to enact the legislation.

The first essay in this symposium is by Professor Bethany Berger, who takes us through the birth of both the *Duro* fix legislation and the Tribal Supreme Court Project, two things that proved critically important to the outcome of *Lara*.[11] In the second essay, Professor Kevin Washburn picks up where Professor Berger left off and takes us through a more in-depth examination of the Tribal Supreme Court Project, comparing it to other identity-based social movements of the twentieth century.[12] He concludes by offering some insights into how tribes and the Project can adapt the strategies of these other movements to further achieve their goals.[13]

With this background established, Professor Alex Tallchief Skibine turns our attention in his essay to the actual decision of the Court and the opinions issued by the Justices in the *Lara* case.[14] One theme of his essay, and a theme of the Court's tribal jurisprudence, centers on Congress's plenary power over Indian affairs and how tribes became folded into the body politic of the United States.[15] In the fourth essay, Professor William Bradford takes issue with the plenary power of the United States to incorporate tribal governments and argues it is time for an American Indian Declaration of Independence—for the tribal governments to demand that the United States deal with them as separate sovereigns, not as domestic dependent nations.[16]

Finally, Professor Robert Laurence's essay concludes the symposium with a brain-twisting maze that roams from a first year contracts class to earthquake prediction to Iraq and the Clean Water Act.[17] He then shows us how these disparate items connect to Justice Thomas's concurring opinion in *Lara*, which

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10. *Compare* the Eighth Circuit's decision in *United States v. Lara*, 324 F.3d 635 (8th Cir. 2003) (en banc) (finding a Double Jeopardy bar) *with* the Ninth's Circuit's decision in *United States v. Enas*, 255 F.3d 662 (9th Cir. 2001) (finding no double jeopardy bar).

11. *See* Bethany R. Berger, United States v. Lara *as a Story of Native Agency*, 40 Tulsa L. Rev. 5 (2004).

12. *See* Kevin K. Washburn, Lara, Lawrence, *Supreme Court Litigation and Lessons from Social Movements*, 40 Tulsa L. Rev. 25 (2004).

13. *See id.* For a more in-depth discussion of the challenges various groups face in obtaining favorable legislation and court decisions, and strategies for overcoming those challenges, see Melissa L. Tatum, *Group Identity: Changing the Outsider's Perspective*, 10 Geo. Mason U. Civ. Rights L.J. 357 (2000).

14. *See* Alex Tallchief Skibine, United States v. Lara, *Indian Tribes, and the Dialectic of Incorporation*, 40 Tulsa L. Rev. 47 (2004).

15. *See id.*

16. *See* William Bradford, *"Another Such Victory and We are Undone": A Call to An American Indian Declaration of Independence*, 40 Tulsa L. Rev. 71 (2004).

17. *See* Robert Laurence, *Don't Think of a Hippopotamus: An Essay on First-year Contracts, Earthquake Prediction, Gun Control in Baghdad, the Indian Civil Rights Act, the Clean Water Act, and Justice Thomas's Separate Opinion in* United States v. Lara, 40 Tulsa L. Rev. 135 (2004).

starkly raises questions about the fundamental principles of federal Indian law.[18] Resolving those questions is the key to the future of the field, and Professor Laurence offers some very interesting insights into that process.

All in all, the essays in this symposium take us through not just a look at the *Lara* decision itself, but rather they use *Lara* as a vehicle for examining the current status of federal Indian law, from the practical strategies being used "on the ground" to preserve tribal sovereignty to the theoretical questions about how that sovereignty should be defined and how tribal governments fit (or do not fit) within the structure of the United States. These questions will continue to occupy both attorneys and scholars, not to mention the federal, state, and tribal governments themselves, for years to come.

18. *See id.*