SUPREME COURT OF THE UNITED STATES

No. 03–107

UNITED STATES, PETITIONER *v.* BILLY JO LARA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[April 19, 2004]

JUSTICE SOUTER, with whom JUSTICE SCALIA joins, dissenting.

It is as true today as it was in 1886 that the relationship of Indian tribes to the National Government is "an anomalous one and of a complex character." *United States* v. *Kagama*, 118 U. S. 375, 381. Questions of tribal jurisdiction, whether legislative or judicial, do not get much help from the general proposition that tribes are "domestic dependent nations," *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17 (1831), or "wards of the [American] nation." *Kagama, supra*, at 383. Our cases deciding specific questions, however, demonstrate that the tribes do retain jurisdiction necessary to protect tribal self-government or control internal tribal relations, *Montana* v. *United States*, 450 U. S. 544, 564 (1981), including the right to prosecute tribal members for crimes, *United States* v. *Wheeler*, 435 U. S. 313, 323–324 (1978), a sovereign right that is "inherent," *ibid.*, but neither exclusive, *Kagama*, *supra*, at 384–385 (federal criminal jurisdiction), nor immune to abrogation by Congress, *Wheeler*, *supra*, at 323 ("the sufferance of Congress"). Furthermore, except as provided by Congress, tribes lack criminal jurisdiction over non-Indians, *Oliphant* v. *Suquamish Tribe*, 435 U. S. 191, 212 (1978), and over nonmember Indians, *Duro* v. *Reina*, 495 U. S. 676, 685, 688 (1990).

Of particular relevance today, we held in *Duro* that

because tribes have lost their inherent criminal jurisdiction over nonmember Indians, any subsequent exercise of such jurisdiction "could only have come to the Tribe" (if at all) "by delegation from Congress." *Id.,* at 686. Three years later, in *South Dakota* v. *Bourland,* 508 U. S. 679 (1993), we reiterated this understanding that any such "delegation" would not be a restoration of prior inherent sovereignty; we specifically explained that "tribal sovereignty over nonmembers cannot survive without express congressional delegation, and is therefore *not* inherent." *Id.,* at 695, n. 15 (emphasis in original, citation and internal quotation marks omitted).[1] Our precedent, then, is that any tribal exercise of criminal jurisdiction over nonmembers necessarily rests on a "delegation" of federal power and is not akin to a State's congressionally permitted exercise of some authority that would otherwise be barred by the dormant Commerce Clause, see *New York* v. *United States*, 505 U. S 144, 171 (1992). It is more like the delegation of lawmaking power to an administrative agency, whose jurisdiction would not even exist absent congressional authorization.

It is of no moment that we have given ostensibly alternating explanations for this conclusion. We have sometimes indicated that the tribes' lack of inherent criminal jurisdiction over nonmembers is a necessary legal consequence of the basic fact that the tribes are dependent on the Federal Government. *Wheeler*, *supra*, at 326 ("[The tribes' inability to] try nonmembers in tribal courts. . . . rest[s] on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to deter-

---

[1] *Bourland* was a civil case about the regulation of hunting and fishing by non-Indians. Its applicability in the criminal context is presumably *a fortiori.*

mine their external relations"); *Oliphant*, 435 U. S., at 210 ("By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States . . ."). At other times, our language has suggested that the jurisdictional limit stems from congressional and treaty limitations on tribal powers. See *id.*, at 204 ("Congress' various actions and inactions in regulating criminal jurisdiction on Indian reservations demonstrated an intent to reserve jurisdiction over non-Indians for the federal courts"); *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U. S. 845, 853–854 (1985) ("In *Oliphant* we . . . concluded that federal legislation conferring jurisdiction on the federal courts to try non-Indians for offenses committed in Indian Country had implicitly pre-empted tribal jurisdiction"). What has never been explicitly stated, but should come as no surprise, is that these two accounts are not inconsistent. Treaties and statutes delineating the tribal-federal relationship are properly viewed as an independent elaboration by the political branches of the fine details of the tribes' dependent position, which strips the tribes of any power to exercise criminal jurisdiction over those outside their own memberships.

What should also be clear, and what I would hold today, is that our previous understanding of the jurisdictional implications of dependent sovereignty was constitutional in nature, certainly so far as its significance under the Double Jeopardy Clause is concerned. Our discussions of Indian sovereignty have naturally focused on the scope of tribes' inherent legislative or judicial jurisdiction. *E.g.*, *Nevada* v. *Hicks*, 533 U. S. 353 (2001) (jurisdiction of tribal courts over civil suit against state official); *South Dakota* v. *Bourland, supra* (tribal regulations governing hunting and fishing). And application of the double jeopardy doctrine of dual sovereignty, under which one independent sovereign's exercise of criminal jurisdiction does

not bar another sovereign's subsequent prosecution of the same defendant, turns on just this question of how far a prosecuting entity's inherent jurisdiction extends. *Grafton* v. *United States*, 206 U. S. 333, 354–355 (1907). When we enquire "whether the two [prosecuting] entities draw their authority to punish the offender from distinct sources of power," *Heath* v. *Alabama*, 474 U. S. 82, 88 (1985), in other words, we are undertaking a constitutional analysis based on legal categories of constitutional dimension (*i.e.*, is this entity an independent or dependent sovereign?). Thus, our application of the doctrines of independent and dependent sovereignty to Indian tribes in response to a double jeopardy claim must itself have had constitutional status. See *Wheeler*, 435 U. S., at 326 (holding that tribes' inability to prosecute nonmembers "rest[s] on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations").

That means that there are only two ways that a tribe's inherent sovereignty could be restored so as to alter application of the dual sovereignty rule: either Congress could grant the same independence to the tribes that it did to the Philippines, see *ante*, at 9, or this Court could repudiate its existing doctrine of dependent sovereignty. The first alternative has obviously not been attempted, and I see no reason for us to venture down a path toward the second. To begin with, the theory we followed before today has the virtue of fitting the facts: no one could possibly deny that the tribes are subordinate to the National Government. Furthermore, while this is not the place to reexamine the concept of dual sovereignty itself, there is certainly no reason to adopt a canon of broad construction calling for maximum application of the doctrine. Finally, and perhaps most importantly, principles of *stare decisis* are particularly compelling in the law of tribal jurisdiction, an area peculiarly susceptible to confusion. And

confusion, I fear, will be the legacy of today's decision, for our failure to stand by what we have previously said reveals that our conceptualizations of sovereignty and dependent sovereignty are largely rhetorical.[2]

I would therefore stand by our explanations in *Oliphant* and *Duro* and hold that Congress cannot reinvest tribal courts with inherent criminal jurisdiction over nonmember Indians. It is not that I fail to appreciate Congress's express wish that the jurisdiction conveyed by statute be

---

[2]JUSTICE THOMAS's disagreement with me turns ultimately on his readiness to discard prior case law in this field and, indeed, on his rejection in this very case of the concept of dependent sovereignty. He notes, for example, *ante,* at 6 (opinion concurring in judgment) that the Court in *Heath* v. *Alabama*, 474 U. S. 82, 88 (1985), explained that one act that violates the peace and dignity of two sovereigns constitutes two separate offenses for purposes of double jeopardy. JUSTICE THOMAS then concludes that whether an act violates a sovereign's peace and dignity does not depend (when the sovereign is an Indian tribe) on whether the perpetrator is a member of the tribe. JUSTICE THOMAS therefore assumes that tribes "retain inherent sovereignty to try anyone who violates their criminal laws." *Ante*, at 7. This Court, however, has held exactly to the contrary: a tribe has no inherent jurisdiction to prosecute a non member. In rejecting this precedent, JUSTICE THOMAS implicitly rejects the concept of dependent sovereignty, upon which our holdings in *United States* v. *Wheeler* 435 U. S. 313 (1978) and *Oliphant* v. *Suquamish Tribe* 435 U. S. 191 (1978) rested. Reciting *Oliphant*'s examination of treaties, statutes, and views of the Executive Branch, JUSTICE THOMAS attempts to suggest that these opinions were only momentary expressions of malleable federal policy. But he somehow ignores *Oliphant*'s own emphasis that its analysis did not rest on historical expressions of federal policy; rather, "even ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress. . . . Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers *inconsistent with their status*." *Id.,* at 208 (internal quotation marks and citation omitted; emphasis in original); see also *Duro* v. *Reina,* 495 U. S. 676, 686. There is simply no basis for JUSTICE THOMAS's recharacterization of this clear holding.

treated as inherent, but Congress cannot control the interpretation of the statute in a way that is at odds with the constitutional consequences of the tribes' continuing dependent status. What may be given controlling effect, however, is the principal object of the 1990 amendments to the Indian Civil Rights Act of 1968, 25 U. S. C. §1301 *et seq.*, which was to close "the jurisdictional void" created by *Duro* by recognizing (and empowering) the tribal court as "the best forum to handle misdemeanor cases over nonmember Indians," H. R. Rep. No. 102–61, p. 7 (1991). I would therefore honor the drafters' substantive intent by reading the Act as a delegation of federal prosecutorial power that eliminates the jurisdictional gap.[3] Finally, I would hold that a tribe's exercise of this delegated power bars subsequent federal prosecution for the same offense. I respectfully dissent.

---

[3] JUSTICE THOMAS suggests that this delegation may violate the separation of powers. *Ante*, at 2-3. But we are not resolving the question whether Lara could be "prosecuted pursuant to . . . delegated power," 324 F. 3d 635, 640 (CA8 2002), only whether the prosecution was in fact the exercise of an inherent power, see Pet. for Cert. i, and whether the exercise of a delegated power would implicate the protection against double jeopardy.