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UNITED STATES V. LARA AS A STORY OF NATIVE AGENCY

Bethany R. Berger*

Like our ancestors, we must do battle for the rights of our tribes, for our survival as Indian nations and Indian people. Like they did, we must wage war on every front where our rights are threatened. American politics is one such battleground—a vast one, an important one, perhaps the most important one. If we retreat from that theater, can we survive the Armageddon that will then be upon us? America without conscience is Indian Apocalypse Now. Shall we throw in the towel, sit this one out, preach to the choir, rest in the belly of that Great Beast?

No way.¹

Indian tribes are not falling apart in the face of the Supreme Court's virtual attack on tribal sovereignty and jurisdiction Rather, they are uniting to face the Court.²

The Supreme Court's decision in *United States v. Lara*³ must be understood as the product of Indian agency,⁴ a defiant “no way” in the face of American threats to tribal survival.

At first glance, this claim may seem strange. The decision upheld the power of the federal government to criminally prosecute a member of the Turtle Bay Objibwe Tribe. It relied in significant part on the “plenary power doctrine,” according to which “Congress has plenary authority to limit, modify or eliminate

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1. John P. LaVelle, Santee Sioux Professor and proud husband of a Standing Rock Sioux Democratic activist, Connie Bear King, in John P. LaVelle, *Strengthening Tribal Sovereignty Through Indian Participation in American Politics: A Reply to Professor Porter*, 10 Kan. J. L. & Pub. Policy 533, 566 (2001) (emphasis omitted).

2. Tracy Labin, *We Stand United Before the Court: The Tribal Supreme Court Project*, 37 New Eng. L. Rev. 695, 696 (2003).

3. 124 S. Ct. 1628 (2004).

4. The most common use of the phrase “Indian agency” in American Indian Law is to describe the agencies through which representatives of the federal government administered U.S. policy with respect to Indian tribes. This essay uses the alternative meaning of agency, the faculty of acting or exerting power. The history recounted here offers an opportunity to redefine this phrase, commonly associated with a history of federal domination, to signify the control by Indian people of their own fate. I am grateful to Professor LaVelle for this point.

the powers of local self-government which the tribes otherwise possess.”⁵ Plenary power has been decried as a “racist, eurocentric, and ultimately genocidal”⁶ doctrine, deference to which is “closely related to the courts’ failure to protect Indian tribal rights,”⁷ and which reached its full expression in a series of late nineteenth century cases asserting unrestrained federal power over groups considered racially and politically inferior.⁸ Within weeks of the decision, at least one scholar of Indian law and policy called the decision “deeply-distressing,”⁹ and another contributor to this symposium hails it as a “Pyrrhic victory.”¹⁰

An examination of the history and text of the decision, however, reveals that not only did Indian country welcome the decision, but that it is a direct result of fourteen years of tribal and native action, action whose unity and legal and political sophistication fundamentally shaped both the issue before the Court and the Court’s reaction to it.¹¹ The success of this concerted native agency, I will argue, not only must shape our understanding of the *Lara* case, but also may herald new control of Indian peoples over legal doctrines that were created to destroy them.

In this essay, I first discuss the extent to which Indian law has historically been shaped in the absence of the voices or concerns of Indian people. I then acknowledge that while *Lara* may be seen, like so many Indian law cases, as one decided by non-Indian concerns, it significantly departed from this familiar script. In the next two sections, I detail the ways that deliberate action from Indian country transformed the terms of the case and the tone of the decision, first by developing the idea of congressional affirmance of inherent jurisdiction in response to *Duro v. Reina*¹² and securing the passage of this “*Duro* fix” in Congress, and second, by shaping the arguments before the United States Supreme Court in *Lara* so as to ensure both success and promotion of an idea of the tribal-federal relationship more consistent with tribal sovereignty. In

5. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

6. Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence’s Learning to Live with the Plenary Power of Congress Over the Indian Nations*, 30 *Ariz. L. Rev.* 439, 441 (1988).

7. Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 *U. Pa. L. Rev.* 195, 197 (1984).

8. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 *Tex. L. Rev.* 1, 14-15 (2002).

9. David Wilkins, *Justice Thomas and Federal Indian Law—Hitting His Stride*, *Indian Country Today* A4 (May 5, 2004).

10. William Bradford, “*Another Such Victory and We Are Undone*”: *A Call to an American Indian Declaration of Independence*, 40 *Tulsa L. Rev.* 71, 71 (2004).

11. My claim that *Lara* and the *Duro*-fix were the product of Indian agency does not mean that non-Indian people did not make crucial contributions. Nell Jessup Newton, one of the primary shapers of the *Duro*-fix, Congressmen Bill Richardson and Daniel Inouye, crucial sponsors of the law, and Riyaz Kanji, the author of the National Congress of American Indians’ amicus brief in *Lara* are only a few examples of the many non-Indian people that made essential contributions to the result. The significant difference, however, is that they were guided by Indian country and its concerns rather than guiding it, and were invited to participate and help rather than imposing a vision of what Indian country needs.

12. 495 U.S. 676 (1990) (holding that tribes had been divested of inherent jurisdiction over non-member Indians).

conclusion, I discuss what Indian agency may mean for our understanding of Indian law.

I. INDIAN LAW IN THE ABSENCE OF INDIAN VOICES

To a striking degree, federal Indian law has been made in the absence of the voices of the people it most intimately affects. Indeed, many significant principles of Indian law have been decided in the absence of any dispute between the parties at all. For example, although *Fletcher v. Peck*,¹³ the first case discussing Indian rights, stated confidently that Indian title “is a mere occupancy for the purpose of hunting. It is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited,”¹⁴ the case had nothing to do with Indian interests. Instead it concerned the property rights of two white Georgians who are widely agreed to have feigned their dispute in order to bring it before the Supreme Court.¹⁵ Similarly, the 1823 decision *Johnson v. M’Intosh*,¹⁶ in which the Court first began to lay down the principles of federal power over Indian affairs and Indian property, involved a property dispute between two white men, who also, new evidence has shown, feigned their dispute.¹⁷ In the 1846 decision *United States v. Rogers*,¹⁸ as I have argued elsewhere, the Supreme Court began to sketch out a vastly expanded vision of federal power over Indian tribes in a case that involved federal jurisdiction over a white man who had died ten months before the case was even argued.¹⁹ And in the 1883 decision *Ex Parte Crow Dog*,²⁰ the Court first affirmed federal power to pass laws regulating wholly tribal matters²¹ in the criminal prosecution of a man who the executive branch knew had already been punished by his tribe and pursued only to further its campaign to expand federal jurisdiction.²²

13. 10 U.S. 87 (1810).

14. *Id.* at 121.

15. R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* 225 (La. St. U. Press 2001).

16. 21 U.S. 543 (1823).

17. Eric Kades, *History and Interpretation of the Great Case of Johnson v. M’Intosh*, 19 L. & Hist. Rev. 67, 99-101 (2001).

18. 45 U.S. 567 (1846).

19. Bethany R. Berger, “Power Over This Unfortunate Race”: Race, Politics and Indian Law in *United States v. Rogers*, 45 Wm. & Mary L. Rev. 1957, 1999-2000 (2004).

20. 109 U.S. 556 (1883).

21. *Id.* at 572. While the Court held that there was no federal jurisdiction to prosecute a crime between tribal members under the laws currently in effect, it stated that such jurisdiction could be created if there was a “clear expression of the intention of Congress” *Id.*

22. Sidney L. Harring, *Crow Dog’s Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* 100-41 (Cambridge U. Press 1994).

Even where decisions did emerge from real controversies, the controversies were often between non-Indians, and therefore rarely considered Indian or tribal perspectives on the issue. *Utah & Northern Railway v. Fisher*,²³ *Maricopa & Phoenix Railroad Company v. Arizona*,²⁴ and *Thomas v. Gay*,²⁵ a series of late nineteenth century cases that the modern Supreme Court has relied on in breaking down barriers to state jurisdiction in Indian country,²⁶ were tax disputes between states and non-Indian corporations or individuals in which tribes did not participate. Similarly, *Beecher v. Wetherby*,²⁷ upon which the Court would later rely to hold that lands held under aboriginal title were not protected by the Fifth Amendment Takings Clause,²⁸ concerned a timber dispute between two white men.²⁹

Two of the significant exceptions to this rule of Indian absence are also two of the strongest statements of tribal sovereignty yet produced by the courts of the conqueror. *Cherokee Nation v. Georgia*³⁰ and *Worcester v. Georgia*³¹ were the result of concerted Cherokee action to protect sovereign rights, by both the Cherokee leadership and the Cherokee people, for whom the briefs were reprinted in the Cherokee Phoenix, the tribal newspaper. While the decisions can be criticized for articulating a paternalistic relationship between the United States and tribal nations,³² they also constructed a vision of complete independence of tribal territory from state jurisdiction and a federal obligation to protect tribal sovereignty that Congress and the courts have sadly failed to adhere to.³³

Of course, tribal participation is no guarantee of protection of tribal rights. *Lone Wolf v. Hitchcock*,³⁴ which permitted Congress to abrogate treaties largely shielded from judicial review,³⁵ and which was called upon its release the *Dred Scott* for Indian people,³⁶ came after a many year, multi-forum effort by the

23. 116 U.S. 28 (1885).

24. 156 U.S. 347 (1895).

25. 169 U.S. 264 (1898).

26. See *Nev. v. Hicks*, 533 U.S. 353, 363 (citing *Utah Railway* to hold that state law enforcement officials could serve process on Indian lands); *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 483 (1976) (citing *Thomas* to hold that states could tax non-Indians in purchases of cigarettes from tribe); *McClanahan v. Ariz.*, 411 U.S. 164, 171 (1973) (citing *Utah Railway* to support principal that "notions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians"); *Organized Village of Kake v. Egan*, 369 U.S. 60, 72-74 (1962) (citing *Utah Railway*, *Maricopa Railroad* and *Thomas* to hold that Alaska Natives were subject to state fishing regulations).

27. 95 U.S. 517 (1877).

28. *Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 272, 280-81 (1955).

29. *Beecher*, 95 U.S. at 522. See Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 37 *Hastings L.J.* 1215, 1244-45 (1980).

30. 30 U.S. 1 (1831).

31. 31 U.S. 515 (1832).

32. Berger, *supra* n. 19, at 1976; see also *Cherokee Nation*, 30 U.S. 1; *Worcester*, 31 U.S. 515.

33. I argue that the proper reading of the Cherokee opinions suggests a very limited idea of federal power in Indian country in Berger, *supra* n. 19, at 1976-78.

34. 187 U.S. 553 (1903).

35. *Id.* at 568.

36. David E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice* 116 (U. Tex. Press 1997).

Kiowa, Caddo, and Comanche Tribes to prevent allotment of their land.³⁷ Since 1986, tribes have become ever more significant participants in Indian law issues before the courts, yet the tribal success rate in the Supreme Court has dropped below even that of convicted criminals seeking to have their convictions reversed.³⁸ Even when tribal litigants are actively expressing their interests, therefore, those interests are rarely the primary concern of the non-native justices. *Lara*, therefore, was successful not only because tribal voices were not absent, but also because they were able to unify and strategize their presence in a way that was truly new.

II. ADDRESSING THE COUNTER ARGUMENT: *LARA* AS HANDMAIDEN OF NON-INDIAN INTERESTS

One can of course make a plausible argument that *Lara* is simply the same old story, one in which tribal interests happened to win only because it was in non-Indian interests that they do so. First, the decision affirmed the breadth of Congressional power over Indian affairs, a power that it is clearly in federal interests to retain, and that the Court has never seen fit to check. Second, the decision did not affect non-Indian people at all—it simply affirmed the criminal jurisdiction of tribes over Indians from different tribes, jurisdiction that neither the federal government nor the states wanted.³⁹ Third, the decision that Congress can not only place limits on sovereign authority but can also relax those restrictions, particularly when placed in the context of American colonizing actions in Hawaii, the Philippines, and Puerto Rico,⁴⁰ inescapably calls to mind current actions in Afghanistan and Iraq, in which the United States has destroyed national sovereignty with the fervent desire of reshaping it in a more democratic (and America friendly) image.

But this version of *Lara* fails upon closer examination. In particular, the decision was not simply the familiar narrative that Congress can do whatever it wants with respect to Indian tribes, but that because Indian tribes are sovereigns, Congress can, as it does with other sovereigns, relax restrictions on their inherent sovereignty.⁴¹ The Court did not need to go so far to uphold congressional power to enact the *Duro* fix. It could have ruled, as did the Eighth Circuit en banc, that the power Congress had given tribes to prosecute non-members existed, but it was

37. Ann Laquer Estin, Lone Wolf v. Hitchcock: *The Long Shadow*, in *The Aggressions of Civilization: Federal Indian Policy Since the 1880's*, at 215, 216 (Sandra L. Cadwalader & Vine Deloria, Jr. eds., Temple U. Press 1984).

38. David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 Minn. L. Rev. 267, 281 (2001).

39. In the 1991 hearings regarding tribal misdemeanor jurisdiction in Indian country, the federal government, the Conference of Governors of Western States and numerous western state legislatures were actively supporting the bill, with certain western attorneys general the only state or federal officials opposing it, and even they wanted jurisdiction given to the federal government, not the states. H.R. Comm. Int. & Insular Affairs, *Hearing on H.R. 972, The Duro Decision: Criminal Misdemeanor Jurisdiction in Indian Country*, 102d Cong. 8, 12-13, 47, 213, 232, 235 (Apr. 11, 1991) [hereinafter *Duro House Hrg.*].

40. *Lara*, 124 S. Ct. at 1635.

41. *See id.* at 1634-36.

a delegated power, and so did not permit dual prosecutions for the same offense without violating the double jeopardy provisions of the Fifth Amendment.⁴² It could also have held, as urged by amici Idaho, Alabama, Louisiana, Nebraska, South Dakota and Utah, that even if Congress lacked the power to restore inherent authority to tribes to prosecute non-members, as it clearly did not intend to delegate federal power, there was no federal delegation of power so as to implicate the Double Jeopardy Clause, and Lara's claim must therefore be dismissed and brought, if at all, in a habeas challenge to the tribal court conviction.⁴³

The Court could also have suggested, as did the majority opinion of the Ninth Circuit en banc in *United States v. Enas*,⁴⁴ that congressional power to affirm tribal inherent power was based on the historical existence of this power. In other words, because the Supreme Court was interpreting history in holding that tribes had been divested of criminal jurisdiction over non-members, Congress could insert a corrected history.⁴⁵ This path, which would fully vindicate Congressional action in the *Duro* fix, would nevertheless undermine the theoretical analogy between tribes and other sovereigns, like states and colonized nations, which are not imagined to exercise "delegated" power when restrictions on their sovereign authority are relaxed. It would also undermine the idea that Congress could affirm "new" tribal inherent powers,⁴⁶ and suggest instead that a painstaking historical analysis was necessary before existing powers could be expanded.⁴⁷

Along the same lines, the Court could also have suggested that the power to restore tribal authority was limited to tribal jurisdiction over Indians. This too would have vastly limited the scope of the decision, and would have ensured that non-Indians were protected from congressional affirmations of tribal power.

The decision took none of these paths, although any of them would have served immediate federal interests. Instead, it presented tribes as sovereigns with a potential sovereign reach as great as that of states of the union and conquered nations. This fact is neither an accident nor the result of a change of heart by the Supreme Court but is instead the result of deliberate choices and actions by Indian people across the United States.

42. *U.S. v. Lara*, 324 F.3d 635, 640 (8th Cir. 2003).

43. Br. of Amicus Curiae States of Idaho, Ala., La., Neb., S.D., and Utah at 3-4, *Lara*, 124 S. Ct. 1628 [hereinafter *Idaho Br.*].

44. 255 F.3d 662 (9th Cir. 2001).

45. *Id.* at 669-71.

46. There is of course an irony in the suggestion that any tribal inherent powers are "new." Native governments exercised complete sovereignty in what is now the United States long before any representatives of European nations arrived here, a fact that has been acknowledged by the Supreme Court since at least 1831. See *Cherokee Nation*, 30 U.S. at 15 (describing the Cherokee Nation as "[a] people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain").

47. Cf. *Enas*, 255 F.3d at 680 n. 4 (Pregerson, Trott, Tashima & Fletcher, JJ., concurring) (arguing that tribal power need not have historical roots to be inherent).

III. INDIAN AGENCY AND THE *DURO* FIX

The path leading to *Lara* began on June 15, 1984, when Biscuit Brown, a fourteen-year old boy, was shot and killed on the Salt River Pima Maricopa Reservation. Albert Duro was believed to have shot the boy. Although neither Duro nor Brown were members of the Salt River Pima Maricopa Indian Community, they each demonstrated the close links common between tribal communities and the non-member Indians who enter them. Biscuit Brown was a member of the Gila River Pima Maricopa Indian Community, which, although it is a separate federally recognized tribe with a separate reservation, like Salt River is composed of members of the historic Pima and Maricopa tribes. Albert Duro was a member of the Torres Martinez Band of Cahuilla Indians of California, but lived on the Salt River reservation with his Pima-Maricopa girlfriend and worked for the tribe's construction company.⁴⁸ After the federal district attorney declined to prosecute Duro,⁴⁹ the tribe, which had used the profits from tribal economic development projects to enhance its law enforcement capabilities, decided to prosecute him itself.⁵⁰ Duro filed a habeas petition challenging tribal jurisdiction, and on May 29, 1990, the Supreme Court held that the tribe had no criminal jurisdiction over Indians that were not members of their tribes.⁵¹

The reaction in Indian country was immediate. By June 8, 1990, the National Congress of American Indians ("NCAI") had convened a meeting of tribal, Bureau of Indian Affairs, and congressional representatives to discuss the implications of the case and discuss possible legislative responses.⁵² NCAI then organized a June 25, 1990, meeting of tribal leaders from across the country on a fix to the problem.⁵³ Over the course of dozens of meetings that summer, the legislation was re-shaped and Indian communities were mobilized behind the proposal.⁵⁴ According to Virginia Boylan, then Deputy Director and Senior Counsel of the Senate Committee on Indian Affairs, "Millions of people were calling all the time it felt like. . . . The outcry was clear and it was solid and everybody knew we had to fix it."⁵⁵ The response was so fast it caught the Conference of the Western Attorneys General, frequent opponents of tribes in

48. *Duro*, 495 U.S. at 679.

49. Fergus M. Bordewich, *Killing the White Man's Indian: Reinventing Native Americans at the End of the Twentieth Century* 94 (Doubleday 1996).

50. *Id.* at 94-95.

51. *Duro*, 495 U.S. at 679.

52. *Memo re: Meeting in Washington, D.C., to Discuss Duro Case* (June 11, 1990) (copy on file with *Tulsa Law Review*).

53. Memo. from Wayne L. Ducheneaux, Pres., NCAI, to All Tribal Leaders, *Supreme Court Decision In Duro v. Reina* (June 18, 1990) [hereinafter *Ducheneaux Memorandum*] (copy on file with *Tulsa Law Review*).

54. Interview with Nell Jessup Newton, Dean, U. Conn. L. Sch. (October 28, 2004) [hereinafter *Newton Interview*]; see also Nell Jessup Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 *Am. Indian L. Rev.* 109, 110 (1992).

55. Interview with Virginia Boylan, Partner, Carton, Gardner & Douglas, former Dep. Dir. and Senior Counsel, Sen. Comm. Indian Affairs, (Oct. 29, 2004) [hereinafter *Boylan Interview*].

Congress and the courts, off guard. In an August 3, 1990, unanimous resolution, the Attorney General plaintively declared:

WHEREAS, proposals have been made to overturn this decision of the United States Supreme Court as a result of meetings in Washington, D.C., convened less than a month after the decision, wherein representatives of tribal governments and others made their views known; and

WHEREAS, this is the first opportunity that the Western Attorneys General have had to jointly consider a response to the efforts to overturn *Duro v. Reina* and make their views known to Congress and the Governors of their respective states,⁵⁶

they urged Congress to take no action on the proposal, but instead to affirm that the federal government had jurisdiction over misdemeanors by non-member Indians.⁵⁷ The Attorneys General were too late. On November 5, 1990, just six months after the decision, a provision affirming tribal inherent jurisdiction over non-member Indians was enacted as part of a defense appropriations bill.⁵⁸

To placate Senator Slade Gorton, a strong opponent of the bill,⁵⁹ the law was scheduled to expire on September 30, 1991.⁶⁰ On February 19, 1991, Congressman Bill Richardson of New Mexico introduced H.R. 972, which would have struck the time limitation from the bill.⁶¹ Richardson credited Kevin Gover, an attorney for multiple tribes, Philip S. Deloria of the American Indian Law Center, and other New Mexico tribes for their assistance in drafting the legislation.⁶² On April 11, 1991, the House Committee on Insular and Interior Affairs held hearings on the bill.⁶³ By this time, the opposition had marshaled its forces—the Utah Attorney General, on behalf of the Attorneys General from Utah, Montana, Nevada, North Dakota, South Dakota, and Washington,⁶⁴ the Citizens Equal Rights Alliance,⁶⁵ and several western county attorneys,⁶⁶ all registered their opposition to the law. The U.S. Attorney for South Dakota, on behalf of the U.S. Attorneys Subcommittee on Indian Affairs, supported the bill, but testified that it should be tied to broader federal review of tribal court actions.⁶⁷

56. *Duro House Hrg.*, *supra* n. 39, at 56-57.

57. *Id.*

58. Pub. L. No. 101-511, § 8077, 104 Stat. 1856, 1892-1893 (1990). Because it was very late in the session, the law needed to be placed on a vehicle already going through the process. Senator Daniel K. Inouye, an important sponsor of the bill, was chair of the Senate Defense Appropriations Committee, and included the law in the Act. *Boylan Interview*, *supra* n. 55; *see also* Newton, *supra* n. 54, at 111.

59. Interview with Tadd Johnson, Counsel, H.R. Comm. Int. & Insular Affairs (Nov. 3, 2004) [hereinafter *Johnson Interview*].

60. H.R. Conf. Rpt. 101-938 (Oct. 24, 1990).

61. Sen. Rpt. 102-168 at 14 (Oct. 2, 1991).

62. *Duro House Hrg.*, *supra* n. 39, at 106. Deloria thanked him for the recognition, but also mentioned that “[y]our bill is blessedly brief and I don’t know which word I was responsible for in that short bill, but I appreciate the acknowledgement.” *Id.* at 122.

63. *Id.*

64. *Id.* at 45.

65. *Id.* at 66.

66. *Duro House Hrg.*, *supra* n. 39, at 52.

67. *Id.* at 13, 18 (testimony of Philip Hogen, U.S. Atty.).

Indian country was prepared. Opponents of the bill were overwhelmed by witness after witness from Indian organizations and tribes.⁶⁸ By this time numerous non-Indian organizations had submitted resolutions of support as well, including the Conference of Western Governors, several western state legislatures, the Bureau of Indian Affairs, the U.S. Commission on Civil Rights, and the International Association of Chiefs of Police.⁶⁹

Although there was non-Indian support for the law, advocates from within the Indian community were not only the engine of the *Duro* fix but also fundamentally shaped its form. The law represented a new and creative formulation of congressional acts regarding tribal power. In its previous cases, including *Duro*, the Supreme Court had referred only to congressional “delegations” of jurisdiction to Indian tribes.⁷⁰ The initial proposals for the *Duro* fix were that it too “delegate” power to the tribes.⁷¹ But when these proposals got to the American Indian Law Center (“AILC”) in Albuquerque that summer, the proposal changed. In a June 16, 1990, conference organized by the National American Indian Court Judges Association, Deloria, Director of the AILC, expressed concern that truly delegated power would be subject to constitutional restrictions not normally applicable to tribal governments, and that perhaps Congress could instead correct the Court’s understanding of tribal inherent jurisdiction.⁷² On June 25, Deloria laid out the advantages and constitutional basis for such an approach in a letter to the attorneys for the House and Senate Committees on Indian Affairs.⁷³ In the next month, Nell Jessup Newton, a professor of Constitutional and American Indian law, who was teaching in the AILC Pre-Law Summer Institute for native students entering law school, corresponded with Virginia Boylan of the Senate Committee on Indian Affairs to argue for the approach and propose the language that would ultimately become the *Duro* fix.⁷⁴ Together, Deloria and Newton convinced the Indian and legal communities not to rely on the Supreme Court’s language of delegation, but instead to do something wholly new. The ultimate proposal that went to Congress made clear that the law “recognized and affirmed” the “inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians.”⁷⁵ The result was that reached in *Lara*: the Court could only hold that Congress intended that tribes exercising jurisdiction over non-members under the *Duro* fix were exercising

68. See generally *id.*

69. *Id.*; see also Sen Rpt. 102-153 (Sept. 19, 1991).

70. *Duro*, 495 U.S. at 686; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978); *U.S. v. Mazurie*, 419 U.S. 544, 556-57 (1975).

71. *Ducheneaux Memorandum*, *supra* n. 53.

72. Notes of Nell Jessup Newton, *NAIJCA Conference* (June 16, 1990) (copy on file with *Tulsa Law Review*).

73. Ltr. from Philip S. Deloria to Franklin Ducheneaux and Pete Taylor (June 25, 1990) (copy on file with *Tulsa Law Review*).

74. See Ltr. from Nell Jessup Newton to Virginia Boylan (July 13, 1990) (copy on file with *Tulsa Law Review*); Facsimile from Boylan to Newton (July 20, 1990) (copy on file with *Tulsa Law Review*).

75. 25 U.S.C. § 1301 (2000).

inherent tribal, not federal, power, and the Constitution did not prevent this result.

The choices made in drafting the *Duro* fix were not only legally but also politically savvy. Despite anger over *Oliphant v. Suquamish Indian Tribe*,⁷⁶ the 1978 Supreme Court case holding that tribes did not have criminal jurisdiction over non-Indians within their borders, and the widespread agreement that it was inconsistent with past principles of federal Indian law, there was no effort to include criminal jurisdiction over non-Indians in the law. As Deloria testified in 1991, in the year he had been talking to tribal leaders about the *Duro* fix, "I have never once heard a tribal leader suggest that the repeal or overruling by Congress of *Duro* was the first step in a plan to overrule the *Oliphant* case I think we're more politically realistic than that."⁷⁷ In other words, the tribes realized that however flawed the *Oliphant* decision, Congress was not going to give tribes criminal jurisdiction over non-Indians.

This realism was necessary. The choice not to raise the question of criminal jurisdiction over non-Indians took the wind from the sails of anti-tribal activists, like William Covey of the Citizens Equal Rights Alliance, who sought to persuade the panel that opposing the bill "is important to non-Indians, too, because we're next."⁷⁸ It laid the groundwork for this response by Congressman John Rhodes of Arizona:

I just, quite frankly, fail[] to buy into the notion that if we were to pass H.R. 972, we're irrevocably setting ourselves to the path towards extending tribal jurisdiction over non-Indians. I think even Congress can see the difference between trying to patch a hole created by the *Duro* case and extending tribal jurisdiction over non-Indians.⁷⁹

Mr. Rhodes also confirmed that tribes had accurately assessed congressional willingness to overturn *Oliphant* in his subsequent statement: "[n]ow you're going to respond that, yes, legally it can be done . . . and I'm going to say to you I know that, and you know that's factually not going to happen."⁸⁰

Another striking thing about the *Duro* fix is how quickly diverse Indian communities from across the country were able to marshal unified and passionate support for the bill. This was possible not simply because of the mobilizing effect of a decision that "created a class of citizens that were immune from prosecution for criminal violations,"⁸¹ and "upset [Indian] expectations so deeply,"⁸² although these factors surely helped. Rather, it was a product of the culmination of decades of building organizational ties linking tribes and native people throughout the United States.

76. 435 U.S. 191.

77. *Duro House Hrg.*, *supra* n. 39, at 124 (testimony of Philip S. Deloria, Dir., Am. Indian L. Ctr.)

78. *Id.* at 66 (testimony of William H. Covey, Pres., Citizens Equal Rights Alliance).

79. *Id.* at 75 (statement of Congressman Rhodes) (emphasis in original).

80. *Id.*

81. *Id.* at 206 (statement of Delia Carlyle, Chairman Ak-Chin Indian Community).

82. *Duro House Hrg.*, *supra* n. 39, at 153 (testimony of Rick Collins, Prof., U. Colo.).

When Europeans first came to this continent, most tribal nations considered themselves separate peoples, no more linked than pre-European Union Germans considered themselves linked to the French.⁸³ To a degree, this remains true for members of modern tribes, for whom tribal identity is usually prior to and more important than Indian identity.⁸⁴ But as sociologist Stephen Cornell has documented, in the face of European and American colonialism, and in part through federal actions in placing members of different tribes together in boarding schools, on joint reservations, and in urban centers, members of different tribes came to realize that while they were not the same, they had more in common with each other than with the non-Indian colonizers.⁸⁵ More important, they realized that the same means would often serve their separate interests in tribal survival.⁸⁶

This realization has been accompanied by a flood of new organizations linking Indian people and tribes. The NCAI, the first national supra-tribal organization focused on tribal survival, was founded in 1944.⁸⁷ A myriad of other organizations have followed, including the American Indian Law Center in 1967, the National American Indian Court Judges Association in 1969, the Native American Rights Fund in 1970, as well as a host of regional interest groups harnessing the energies of native nations and Indian people in tandem.⁸⁸

The ties created by these organizations mean that political protest from Indian country is fundamentally different than the failed efforts of tribes to prevent removal, allotment, or termination. When tribes traveled to Washington, D.C., to protest against the allotment policy at the end of the nineteenth century,

83. See Stephen Cornell, *The Return of the Native: American Indian Political Resurgence* 106-07 (Oxford U. Press 1988). Like modern nations, however, there were different kinds of bonds between separate groups, some formed by cultural, ethnic, or religious ties, others by political confederacies. *Id.* at 74.

84. *Id.* at 107.

85. *Id.* at 106-144.

86. *Id.* at 147. Thus, while involvement by Indian activists in American politics is sometimes condemned as an abstraction from membership in sovereign tribal nations, for the participants themselves such activism is often precisely about their tribal identities. Winnebago political activist Frank LaMere, for example, responded to a question about whether "mainstream political involvement tends to dilute Indian people's tribal identity" by saying:

I don't think that could be further from the truth. Our involvement in the political process as Native individuals requires a great deal of responsibility. We must be acutely aware of our tribal interests. We must be careful when we convey our tribal interests. And we must always carefully weigh the risks and consider the outcomes.

It requires that we carry a burden—and one that I take very seriously. We must be more informed than the rest of our Indian brothers and sisters, more informed than others we encounter in the political process, if we are to responsibly carry our tribal interests. We must be more informed, have more resolve, and have an idea about the long-range impact that our work will have on our tribal people for generations to come.

Lavelle, *supra* n. 1, at 559.

87. Cornell, *supra* n. 83, at 119.

88. These organizations have also reached out to develop ties with non-Indian organizations. The American Indian Law Center together with the NCAI, for example, worked with organizations representing state interests to form the Commission on State-Tribal Relations, which held hearings and conferences to find common ground and increase cooperation between states and tribes. Efforts like these laid the groundwork for the state support for both the *Duro-fix* and the tribal position in *Lara*.

some arrived too late to make themselves heard,⁸⁹ and even those that arrived on time spoke as representatives of individual tribes, imperceptible over the voices of the "Friends of the Indian" insisting allotment was in Indian interests.⁹⁰ Similarly, in 1953, when Congress enacted the resolution to terminate the federal relationship with Indian tribes, it did so without debate or even the knowledge of American Indians, and yet with the announced goal of making Indians "free."⁹¹ In part because of the organizational links and expertise developed in trying to halt termination,⁹² political participation by Indian tribes has undergone a sea change. Today, tribes and Indian advocates can share knowledge and economic resources to use their voice most effectively, and can present a unified voice, one that can drown out those that claim to know what Indians really want.

These factors were crucial in the passage of the *Duro* fix. The ability to immediately mobilize the national Indian leadership in the wake of *Duro* and unify it behind a single legislative proposal would not have existed without the extensive links between native communities that had developed since the 1940s. In the congressional hearings as well, the presence of representatives from every sector of Indian country was decisive. When the U.S. Attorney from South Dakota,⁹³ the President of the Citizens for Equal Rights Alliance,⁹⁴ and the Utah Attorney General⁹⁵ expressed concern about depriving non-member Indians of constitutional rights, there was Kevin Gover, a member of the Pawnee Comanche Tribe and an attorney representing multiple tribes, to say that "the Indians who are here before you, we say freely when we go onto another reservation, we are willing to be subject to those laws. That is what we prefer, frankly, to being subject to the States or even to the U.S. courts."⁹⁶ There was Deloria, a member of the Standing Rock Sioux Tribe, to explain the kind of political influence non-member Indians, even without the right to vote, had on reservations, and to say that he had lived on reservations of two tribes of which he was not a member and he "felt safer living on the Pine Ridge Reservation than I certainly do living in Albuquerque, New Mexico sometimes."⁹⁷ There was also the NCAI to present a survey of the high number of non-member Indians on reservations and their integration in tribal communities,⁹⁸ and testimony and written statements from representatives of multiple tribes,⁹⁹ many of them also representing other national

89. Estin, *supra* n. 37, at 216.

90. For a description of the Friends of the Indian and their contribution to the passage of the allotment acts, see Francis Paul Prucha, *Introduction*, in *Americanizing the American Indians: Writings by the "Friends of the Indian" 1880-1900*, at 1, 3-9 (Francis Paul Prucha ed., Harvard U. Press 1975).

91. Gary Orfield, *A Study of the Termination Policy*, in Sen. Comm. Lab. & Pub. Welfare, *The Education of American Indians: The Organizational Question*, 673, 674-75 (U.S. Govt. Prtg. Off. 1970).

92. Cornell, *supra* n. 83, at 124, 126.

93. *Duro House Hrg.*, *supra* n. 39, at 41 (testimony of Philip Hogen, U.S. Atty.).

94. *Id.* at 67 (testimony of William H. Covey, Pres., Citizens Equal Rights Alliance).

95. *Id.* at 46 (testimony of Paul Van Dam, Atty. Gen., Utah).

96. *Id.* at 88 (testimony of Kevin Gover, Atty., Gover, Stetson & Williams).

97. *Id.* at 124-25 (testimony of Philip S. Deloria, Dir., Am. Indian L. Ctr.).

98. The final survey is reprinted in Sen Rpt. 102-153 app. E (Sept. 19, 1991).

99. *Duro House Hrg.*, *supra* n. 39, at 86, 92, 99, 117, 162, 171, 186, 191, 201, 206.

or regional Indian organizations. There could be no question that the people that actually knew what was good for the Indians agreed that the bill was in their interests.

The bill left the House Committee and was passed unanimously by the House on September 25, 1991. Its passage was not so smooth in the Senate. Senator Slade Gorton, the “Indian fighter” from Washington,¹⁰⁰ was strongly opposed to the bill, and would not let it out of the Senate Select Committee on Indian Affairs without both a provision that it would expire in two years and a promise to hold hearings on a bill to provide federal court review of civil claims under the Indian Civil Rights Act.¹⁰¹ In the Conference Committee meetings to resolve the discrepancies between the House and Senate Bills, Representatives Miller, Richardson, and Rhodes refused to accept the sunset provision,¹⁰² and the Senators that had promised Gorton the sunset clause felt they could not go back on their commitment.¹⁰³ During the impasse, the temporary *Duro* legislation expired.¹⁰⁴ Tribes sent a flood of outraged telegrams to the Committee members, and the House representatives held firm.¹⁰⁵ Ultimately, Senator Gorton released his fellow senators from their commitment and the Senate permitted the original House bill to reach the Senate floor.¹⁰⁶ The Senate passed the bill, and the President signed it into law on October 28, 1991.¹⁰⁷ (In a nice coda to this battle, in 2000 Senator Gorton lost his re-election campaign against Democrat Maria Cantwell in a narrow defeat that many attribute to a successful effort from Indian Country to mobilize native voters against him.)¹⁰⁸

The passage of the *Duro* fix was not simply a moment when tribal interests prevailed because they happened to accord with congressional interests, or an isolated instance in which tribal outrage was so unanimous that tribes spontaneously came together to exert their will. Rather, it was the product of many years of building political resources in Indian country, and the impact of those resources in overcoming non-Indian objections. It was a reflection of a significant change in the form of political participation of Indian people, one that not only secured the passage of the *Duro* fix, but also helped to ensure that since 1970, Congress has not passed general legislation regarding Indian tribes over Indian opposition.

100. Lewis Kamb, *Tribes Flex Growing Muscle at Ballot Box: ‘Great Victory’ over Gorton in 2000 Points the Way*, Seattle Post-Intelligencer A1 (Mar. 9, 2004).

101. Newton, *supra* n. 54, at 116; see Sen Rpt. 102-153 at 13 (amendment adding new sunset provision).

102. *Johnson Interview, supra* n. 59.

103. *Id.*

104. Newton, *supra* n. 54, at 116; *Johnson Interview, supra* n. 59.

105. Newton, *supra* n. 54, at 116-17; *Johnson Interview, supra* n. 59.

106. H.R. Conf. Rpt. 102-261 at 1 (Oct. 22, 1991) (Senate recedes from its amendment to the bill); Newton, *supra* n. 54, at 117.

107. Newton, *supra* n. 54, at 117.

108. Kamb, *supra* n. 100, at A5.

Tribes are far from achieving all they want in the legislature. People of native descent are only 1.5 percent of the population of the United States,¹⁰⁹ compose no more than a small minority of the electorate in any state,¹¹⁰ and so, except in very close races, have little electoral muscle.¹¹¹ Nor, in most states, do they have the kind of economic resources that make politicians take notice. While some tribes have made money from casino gaming, the poverty rate among American Indians and Alaska Natives is still about 25 percent, similar to that for Latinos and African Americans.¹¹² Native contributions to federal races, moreover, only make up about 0.2 percent of all contributions, although Native people are 1.5 percent of the population.¹¹³

This lack of electoral muscle is visible in Congress. Congress is still unlikely to restore tribal criminal jurisdiction over non-Indians, and has not yet acted on proposals to reverse judicial decimation of tribal civil and regulatory jurisdiction.¹¹⁴ And while Congress has created many programs to provide services to Indian people and return those programs to tribal control, its unwillingness to appropriate adequate funds for those programs has created what the U.S. Commission on Civil Rights calls a “quiet crisis” in Indian country.¹¹⁵ In addition, given the diversity between and within Indian communities, there continue to be serious and divisive conflicts over both goals and the means to achieve them. But Indian people have come a long way from the “remnants of a race once powerful,” whose claims to the U.S. Congress were based on “their very weakness and helplessness.”¹¹⁶ While they still do not dictate the terms of the debate, they can occasionally guide it to serve their needs. The *Duro* fix is a product of this guidance.

109. U.S. Census Bureau, *The American Indian and Alaska Native Population: 2000*, 5 (Feb. 2002) (available at <http://www.census.gov/prod/2002pubs/c2kbr01-15.pdf>). The same figure for those that indicate Indian or Alaska Native as their only race is 0.9 percent. While many people identifying as native are in fact mixed race, the vast increase in the native population with the new option of designating more than one race on the 2000 census suggests that many people whose primary sense of identity is not native are identifying as part native on the census. *Id.*

110. In Alaska, the state with the largest proportion of people of native descent, native people compose only 19 percent of the population. The next highest proportion is 10.5 percent, in New Mexico, and they compose less than two percent of the population in the vast majority of states, rarely enough to compose a significant voting block. *Id.*

111. The recent election, in which George Bush was reelected and Senator Tom Daschle of South Dakota was defeated, despite a coordinated and successful effort to increase native voting and significant support of the Democratic candidates, shows that even in close races the Indian vote may not be decisive. See e.g. Indianz.com, *South Dakota Tribes Announce Support for Daschle*, www.indianz.com/News/2004/004933.asp (Oct. 22, 2004); Indianz.com, *South Dakota Indian Voter Turnout a Record High*, www.indianz.com/News/2004/005194.asp (Nov. 4, 2004).

112. Am. Indian Graduate Ctr., *American Indian Census Facts: American Indians by the Numbers from Census 2000*, <http://www.aigc.com/articles/ai-census-facts.html> (accessed Nov. 12, 2004).

113. Kamb, *supra* n. 100, at A5.

114. See e.g. Sen. Comm. Indian Affairs, *Hearing on Rulings of the U.S. Supreme Court as They Affect the Powers and Authorities of the Indian Tribal Governments*, 107th Cong. (Feb. 27, 2002).

115. U.S. Commn. Civ. Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* 113 (2003) (available at <http://www.usccr.gov/pubs/na0703/na0204.pdf>).

116. *U.S. v. Kagama*, 188 U.S. 375, 384 (1886).

IV. *LARA* AND INDIAN AGENCY IN THE COURTS

Sadly, winning in Congress is not enough. In the same period in which political unity and activism has fundamentally changed the treatment of Indian people by Congress, the U.S. Supreme Court has taken up the standard as the enemy of tribal rights. As both Congress and the Executive have increasingly expressed support for tribal independence and economic and institutional development, the Court has increasingly ravaged the barriers to state jurisdiction in Indian country and the scope of tribal jurisdiction there. Decisions affecting tribal interests are no longer made in the course of disputes between non-Indians or in the absence of tribal voices, but instead in battles in which tribes themselves are vocal and often initiating parties. Despite this, as documented by Professor David Getches, tribal interests lost in 77 percent of Supreme Court decisions between 1986 (when William Rehnquist became Chief Justice) and 2000, down from a 58 percent win rate between 1969 and 1986, when Warren Burger was Chief Justice.¹¹⁷ To respond to this trend, Indian people are again unifying to share their knowledge and strategic resources, this time in the courts.¹¹⁸ In *Lara*, we see the first significant results of this effort.

In 2002, the Native American Rights Fund and the NCAI created the Tribal Supreme Court Project (“Project”) to respond to the crisis in the Court with the same kind of organizational links and pooling of expertise that have proved so effective in Congress. The Project has built a Supreme Court Project Working Group of hundreds of attorneys and academics to share legal information and experience.¹¹⁹ “An Advisory Board of Tribal leaders” adds political expertise and a tribal perspective to these legal resources.¹²⁰

The Project sometimes calls upon tribes to sacrifice their individual interests when necessary to pursue the collective goals of the project.¹²¹ In particular, because one of the goals of the project is to keep cases unlikely to result in success (most cases in the current Court) out of the Supreme Court, tribes may be asked not to appeal cases in which they have lost, or settle, where possible, cases they have won.¹²² But keeping Indian law issues out of the Court is often not possible. Because the Court has not yet decimated all the fundamental principles of Indian law, tribes often win cases below and do not have the option of choosing not to appeal. Or, as in *Lara*, tribes are not litigants in the action at all and so have even less control over the decision to request certiorari. So many cases are still appealed, and the Court still agrees to hear some of them.

When certiorari is granted in a case involving tribal rights, the Project offers the litigants the resources of the Working Group to try to ensure that the best

117. Getches, *supra* n. 38, at 280-81.

118. Labin, *supra* n. 2, at 696.

119. *Id.* at 697.

120. *Id.* at 698.

121. *Id.*

122. *Id.*

possible argument is presented to the Court.¹²³ It also coordinates a nationwide amicus brief writing network, coordinating tribes and other groups to “ensure that the briefs and the Indian voice receive the Court’s maximum attention.”¹²⁴ The point is not to overwhelm the Court with briefs; rather, “[t]he rationale of the Project is to submit to the Court the fewest number and the highest quality briefs in support of the Indian argument.”¹²⁵

Until *Lara*, the work of the Project has essentially helped to hold the line in Indian law. The year after the Project was created, the Court granted certiorari in three cases, *United States v. White Mountain Apache Tribe*,¹²⁶ *United States v. Navajo Nation*,¹²⁷ and *Inyo County v. Paiute-Shoshone Indians of the Bishop Community*.¹²⁸ *White Mountain Apache* and *Navajo Nation* both concerned the obligation of the United States to pay for the damages caused in violating the federal trust responsibility with respect to tribal property. Although the Court had not ruled on this issue since 1982, trust responsibility was not thought to be a particularly dangerous area for Indian tribes, as it did not involve state rights or tribal jurisdiction over non-members. The Court ruled for the White Mountain Apache Tribe and against the Navajo Nation, a result that did some damage to the trust doctrine, but did not wholly undermine it. *Inyo County* could have been an even more serious blow for the tribes, as it concerned whether a state entity could enforce a search warrant against a tribe concerning alleged off-reservation crimes committed by its members. This case should easily have been decided in favor of the tribes, but as the Court had implied in 2001 that states might be able serve process on Indian individuals on reservation for off-reservation crimes,¹²⁹ there were fears the Court might affirm this power and breach tribal sovereign immunity to extend the power to tribes themselves. Fortunately, the Court punted, deciding that tribes were not “persons” under 42 U.S.C. § 1983, so that the substantive issue was not properly before the Court.¹³⁰ When the year was over, with a win, a loss, and a draw, the Supreme Court Project could point at least to an improved win-loss rate, and no catastrophic damage to tribal rights.

But with *Lara*, a punt was unlikely—the Court had already rejected two petitions for certiorari on the impact of the *Duro* fix on dual tribal-federal prosecutions,¹³¹ and now had a split between two en banc federal circuits. The Working Group fired up, holding dozens of conference calls about who should write amicus briefs and what arguments they should make.¹³² The result was just

123. Labin, *supra* n. 2, at 698-99.

124. *Id.* at 699.

125. *Id.*

126. 537 U.S. 465 (2003).

127. 537 U.S. 488 (2003).

128. 538 U.S. 701 (2003).

129. *Hicks*, 533 U.S. 353, 363-64.

130. *Inyo County*, 538 U.S. at 704.

131. *U.S. v. Enas*, 255 F.3d 662 (9th Cir. 2001) (en banc), *cert. denied*, 534 U.S. 1115 (2002); *U.S. v. Weaselhead*, 165 F.3d 1209 (8th Cir. 1999) (en banc), *cert. denied*, 528 U.S. 829 (1999).

132. Interview with Robert Anderson, L. Prof., U. Wash. (Oct. 29, 2004) [hereinafter *Anderson Interview*].

two briefs, one on behalf of the NCAI, which would make the constitutional arguments in support of construing the *Duro* fix as a valid affirmation of inherent tribal authority, and the other on behalf of eighteen tribes, including the Spirit Lake Sioux Nation where Billy Jo Lara resided, presenting the tribal perspective and the policy arguments in favor of upholding the *Duro* fix as written.

The choices made in these briefs clearly reflect a tribal perspective on both the tribal-federal relationship and the lived realities of reservation communities. In arguing for tribal inherent jurisdiction under the *Duro* fix, the U.S. Attorney in *Enas* had stated that, “Tribal sovereignty is a vessel that Congress may fill or drain at its pleasure,”¹³³ a metaphor which, while it supported congressional power to affirm inherent sovereignty, presented that sovereignty as an insignificant thing, the toy of Congress. The NCAI briefs did not rely on such demeaning metaphors. Instead, relying on arguments made by advocates for the *Duro* fix from the beginning,¹³⁴ they argued that plenary power over tribes was like that over states under the Commerce Clause, and just as states exercised inherent, not delegated, authority when Congress relaxed common law restrictions on state authority, so did tribes under the *Duro* fix.¹³⁵ In addition, the brief stated, although Congress had usually used its plenary power to diminish tribal sovereignty, there was nothing to suggest that “Congress’s authority in this area is a one-way ratchet, permitting diminution of tribal sovereignty but never the recognition or affirmation of it.”¹³⁶ The arguments centered not on the boundless nature of congressional power, but on its relationship to tribal sovereignty: “It is precisely because a Tribe is a sovereign governmental authority that Congress may authorize the Tribe qua sovereign to exercise sovereign powers, rather than to act as a federal agency.”¹³⁷ Congressional action in lifting the common law restriction on tribal jurisdiction no more converted tribes into federal instrumentalities than Public Law 280, lifting common law restrictions on state jurisdiction in Indian country, did for states.¹³⁸

The members of the Working Group also encouraged sympathetic states to submit an amicus brief of their own, with the result that Washington, Arizona, California, Colorado, Michigan, Montana, New Mexico, and Oregon—most of the states with the largest Indian communities in the Nation—filed a brief fully supporting the United States.¹³⁹ The brief was an effective counterweight to the

133. *Enas*, 255 F.3d at 680 (Pregerson, Trott, Tashima & Fletcher, JJ., concurring) (quoting Richard A. Friedman, Counsel for the U.S. in *Enas* and *Lara*) (internal alterations omitted).

134. See Philip S. Deloria & Nell Jessup Newton, *The Criminal Jurisdiction of Tribal Courts over Non-Member Indians: An Examination of the Basic Framework of Inherent Tribal Sovereignty Before and After Duro v. Reina*, 38 Fed. B. News & J. 70, 70-71 (Mar. 1991); *Duro House Hrg.*, *supra* n. 39, at 125-27 (testimony of Nell Jessup Newton, L. Prof., Catholic U.).

135. Br. of Amicus Curiae Natl. Cong. of Am. Indians at 3, *Lara*, 124 S. Ct. 1628 [hereinafter *NCAI Br.*].

136. *Id.* at 4.

137. *Id.* at 4.

138. *Id.* at 5.

139. *Anderson Interview*, *supra* n. 132; see Br. of Amici Curiae States of Wash., Ariz., Cal., Colo., Mich., Mont., N.M., and Or., *Lara*, 124 S. Ct. 1628 [hereinafter *Washington Br.*].

far less supportive brief filed by six other states.¹⁴⁰ Editorial assistance from the members of the working group also helped to ensure that the brief of the sympathetic states did not detract from the focus on tribal sovereignty.¹⁴¹

The NCAI brief also made what I believe was a new argument—that congressional delegation of jurisdiction was potentially more constitutionally problematic than affirmation, because Articles I and III of the U.S. Constitution impose appointment and supervision requirements on courts exercising federal power not met by tribal courts,¹⁴² so that affirmation may have been the only way of meeting the federal goal in the law. This argument may have been particularly designed by the Working Groups' Supreme Court specialists, and was persuasive to Justice Thomas, who concurred in the *Lara* judgment,¹⁴³ despite his usual anti-tribal jurisprudence.

In addition, the brief did not dwell on whether the Supreme Court got its history wrong in suggesting that tribes had lost inherent criminal jurisdiction over non-members. In one of the early *Lara* conference calls, the group agreed that they would not rely on this argument in the NCAI brief,¹⁴⁴ even though it had proved successful in *Enas*.¹⁴⁵ The historical argument was left for the brief by the tribes, part of the policy argument for upholding the affirmation, rather than justification for congressional power to do so.¹⁴⁶

The tribes' brief also emphasized the reality of non-member Indians in Indian country, and the tribes' need for reversal of the *Duro* decision "to keep the peace in their communities."¹⁴⁷ The brief of the tribes also gave the fullest descriptions of the facts concerning *Lara*, a prime exemplar of this need—he lived on the reservation of the Spirit Lake Sioux Tribe, abused his Spirit Lake Sioux wife, refused to obey an exclusion order to leave the reservation, and knocked out a federal officer when he and a tribal officer tried to arrest *Lara* for an outstanding warrant and public intoxication.¹⁴⁸

The decision in *Lara* reflected the influence of both of these briefs, citing the tribes' brief for the status of *Lara* in the Spirit Lake Sioux community,¹⁴⁹ and relying, both in oral argument, and in the decision, on the notion that congressional power over tribal sovereignty was not a one-way ratchet.¹⁵⁰ The briefs also appear to have influenced the Court's description of congressional

140. *Idaho Br.*, *supra* n. 43.

141. *Anderson Interview*, *supra* n. 132.

142. *NCAI Br.*, *supra* n. 135, at 27.

143. 124 S. Ct. at 1641-48.

144. *Anderson Interview*, *supra* n. 132.

145. 255 F.3d at 669-71.

146. Br. of Amicus Curiae on Behalf of Eighteen Am. Indian Tribes at 22-29, *Lara*, 124 S. Ct. 1628.

147. *Id.* at 3.

148. *Id.* at 4-6.

149. 124 S. Ct. at 1631.

150. Oral Argument at 33, *Lara*, 124 S. Ct. 1628 (asking respondent: "Where—where do you get the authority for that one-way ratcheting when we've said that Congress has plenary power over the tribes?"); *Lara*, 124 S. Ct. at 1635-36 ("Lara points to no explicit language in the Constitution suggesting a limitation on Congress' institutional authority to relax restrictions on tribal sovereignty previously imposed by the political branches.").

plenary power, which analogized that power to that Congress had with respect to colonized sovereign nations, and part of an ongoing relationship with a sovereign community,¹⁵¹ rather than the creature of tribal dependence and helplessness the Court had described it as in the past.¹⁵² Although early in his career Justice Stevens had expressed concern about subjection of non-members to tribal jurisdiction,¹⁵³ in *Lara* he concurred specifically to reiterate the tribal position that, “[g]iven the fact that Congress can authorize the States to exercise—as *their own*—inherent powers that the Constitution has otherwise placed off limits, I find nothing exceptional in the conclusion that it can also relax restrictions on an ancient inherent tribal power.”¹⁵⁴ Justice Thomas also concurred in the judgment, musing on the inconsistency between unrestrained federal plenary power and tribal sovereignty.¹⁵⁵ Coordinated legal advocacy may finally be having the effect of educating the Court, at least on a case-by-case basis.

V. CONCLUSION: BEYOND *LARA*

The *Lara* decision does not mean that tribes can now rest easy. The Court specifically did not address *Lara*’s equal protection and due process arguments,¹⁵⁶ leaving those open for another litigant. The case did not involve non-Indians or challenge state or federal rights on reservations, classic danger zones for tribes. Rather, it concerned an assertion of federal power over Indian people supported both by the federal government and by several states.¹⁵⁷ We should all, therefore, still celebrate when the Court denies certiorari to review a good decision regarding state jurisdiction in Indian country, as it did in *South Dakota v. Cummings*,¹⁵⁸ and tremble when it grants certiorari to review another, as it did in *Oneida Indian Nation of New York v. City of Sherrill*.¹⁵⁹

But in *Lara*, for the first time in years, we have a Supreme Court decision that alters the judicial description of tribal sovereignty so as to expand rather than

151. *Lara*, 124 S. Ct. at 1634-36.

152. See e.g. *Morton v. Mancari*, 417 U.S. 535, 552 (1974); *Kagama*, 188 U.S. at 384.

153. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 170-73 (1982) (Stevens, J., dissenting).

154. 124 S. Ct. at 1639.

155. *Id.* at 1641-42 (Thomas, J., concurring). I have no doubt that if Justice Thomas were writing on a blank slate, he would eliminate the sovereignty leaving only the power, although stare decisis renders this solution impossible. But this opinion, along with the majority and Stevens opinions, each suggest a more nuanced perspective on the tribal-federal relationship than we have previously seen from this court.

156. *Id.* at 1638-39 (Stevens, J., concurring).

157. See Br. of U.S., *Lara*, 124 S. Ct. 1628; See *Washington Br.*, *supra* n. 139. There were also many non-Indian opponents of a finding of inherent tribal jurisdiction. See Br. of Amicus Curiae Natl. Assn. of Crim. Def. Laws., *Lara*, 124 S. Ct. 1628; Br. of Amicus Curiae of the Citizens Equal Rights Found., *Lara*, 124 S. Ct. 1628; *Idaho Br.*, *supra* n. 43; Br. of Amicus Curiae Thomas Lee Morris, Elizabeth S. Morris, & Roland J. Morris, *Lara*, 124 S. Ct. 1628; Br. of Amicus Curiae of Lewis County, Idaho, Mille Lacs County, Minn., & Thurston County, Neb., *Lara*, 124 S. Ct. 1628.

158. 679 N.W.2d 484 (S.D. 2004), *cert. denied*, 125 S. Ct. 355 (2004).

159. 337 F.3d 139 (2d Cir. 2003), *cert. granted*, *City of Sherrill v. Oneida Indian Nation of N.Y.*, 124 S. Ct. 2904 (2004).

contract it.¹⁶⁰ The catalyst of this decision was not the federal government, the states, or the Supreme Court, but rather the efforts from Indian country to create a new option in the face of judicial divestiture, and ensure that both Congress and the Supreme Court understood and preserved that option.

This success suggests a way that, despite Justice Thomas's comments, plenary power can be made more consistent with tribal sovereignty. It is when, first, it is truly understood as a plenary power to meet Congress's "unique obligation toward the Indians"¹⁶¹ and second, when the contours of that unique obligation are determined in consultation with tribes themselves. The Court has recited variations on the first part of this equation for years, but Congress has never until recently exercised its plenary power consistently with the second part. The story of the *Duro* fix shows why it has begun to: Not because Congress is any more or less interested in what matters to Indians, but because Indian people are demanding that they be consulted, and are doing so with a unity, organization, and political sophistication that makes those demands difficult to ignore. In the *Duro* fix and the *Lara* case, congressional plenary power was "tamed, reined-in, and otherwise expertly handled by 'real Indian people' as a vehicle for strengthening rather than destroying tribal sovereignty."¹⁶² Both in Congress and the Court, it took tremendous energy to handle the plenary power beast and it is still a dangerous one. The full history of *United States v. Lara*, however, provides hope that Indian people can guide that beast to serve their needs.

160. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), was the last significant win in the Supreme Court, and even that case, affirming treaty-preserved hunting and fishing rights were not abrogated in the absence of a clear expression of congressional intent, held the line rather than breaking new ground in Indian law.

161. *Morton*, 417 U.S. at 555.

162. LaVelle, *supra* n. 1, at 538 (internal alterations omitted). Professor LaVelle used this phrase to describe the exercise of American citizenship by Indian people, not the plenary power doctrine, so any disagreements with my perspective on the plenary power doctrine should be directed at me alone.