No. 01-6553

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL L. ENAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment permits a member of a federally recognized Indian Tribe to be prosecuted for the same offense by the United States and by a Tribe other than his own.

IN THE SUPREME COURT OF THE UNITED STATES

No. 01-6553

MICHAEL L. ENAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals sitting en banc (Pet. App. A1-A17) is reported at 255 F.3d 662.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 2001. Pet. App. A1. The petition for a writ of certiorari was filed on September 25, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was convicted in the White Mountain Apache Tribal Court of assault with a deadly weapon and assault with intent to cause serious bodily injury. He was subsequently indicted in the United States District Court for the District of Arizona on the same charges

under 18 U.S.C. 113(a) and 1153. The district court dismissed the indictment on double jeopardy grounds. The court of appeals reversed and remanded for trial. Pet. App. A1-A17.

1. As this Court has noted, "[c]riminal jurisdiction over offenses committed in 'Indian country' 'is governed by a complex patchwork of federal, state, and tribal law.'" Negonsott v. Samuels, 507 U.S. 99, 102 (1993) (quoting Duro v. Reina, 495 U.S. 676, 680 n.1 (1990)); see also Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978). A crime committed in Indian country may be prosecuted by the United States, the State, or the Tribe, depending, among other things, on the nature of the crime, the identities of the perpetrator and the victim, and the existence of specific statutory or treaty provisions addressing the subject.[1]

Federal authority to prosecute crimes involving Indians in Indian country is governed primarily by two statutes. The Indian Country Crimes Act, 18 U.S.C. 1152, provides that the federal criminal laws that apply in enclaves under exclusive federal jurisdiction apply within Indian country with certain exceptions. Section 1152 does not apply to offenses committed by one Indian against the person or property of another Indian; nor does it apply when the Indian committing the offense has previously been punished under tribal law. The Indian Major Crimes Act, 18 U.S.C. 1153, does not contain either exception. Section 1153 enumerates 14 offenses (including various

---

[1] "Indian country," which is defined in 18 U.S.C. 1151, includes "all land within the limits of any Indian reservation." 18 U.S.C. 1151(a).

forms of aggravated assault) that, if committed by an Indian in Indian country, are subject to the same laws and penalties that apply in areas of exclusive federal jurisdiction.[2]

State authority to prosecute crimes involving Indians in Indian country is generally preempted as a matter of federal law. See, e.g., Negonsott, 507 U.S. at 103; United States v. Kagama, 118 U.S. 375, 384 (1886). States, however, possess jurisdiction over crimes committed by non-Indians against non-Indians in Indian country. See United States v. McBratney, 104 U.S. 621 (1882). Congress has plenary authority to alter the balance of federal and state criminal jurisdiction in Indian country, Negonsott, 507 U.S. at 103, and has done so with respect to some States. Most notably, Public Law 280 granted a number of States the authority to exercise criminal jurisdiction in Indian country and made 18 U.S.C. 1152 and 1153 inapplicable in those areas. Pub. L. No. 83-280, 67 Stat. 588 (codified, as amended, at 18 U.S.C. 1162, 28 U.S.C. 1360).[3]

Indian Tribes have the power, by virtue of their retained inherent sovereignty, to prosecute their own members for violations of tribal law, including offenses that also may be prosecuted by the United

---

[2] Title 18 does not define an "Indian" for purposes of Sections 1152 and 1153. As an enrolled member of a federally recognized Tribe, petitioner undisputedly is an "Indian" for purposes of those provisions. See United States v. Antelope, 430 U.S. 641, 646-647 n.7 (1977); see also p. 18 note 9, infra.

[3] Arizona has not assumed criminal jurisdiction in Indian country under Public Law 280. See Confederated Bands & Tribes of Yakima Indian Nation v. Washington, 550 F.2d 443, 445 n.3 (9th Cir. 1977).

States under 18 U.S.C. 1153. Wheeler, 435 U.S. at 323-324.[4] In Oliphant, however, this Court held that Tribes have been divested of their inherent power to prosecute non-Indians and thus are precluded, as a matter of federal law, from bringing such prosecutions unless authorized by Congress. 435 U.S. at 206-212. In Duro, 495 U.S. at 687-688, the Court further held that Tribes have also been divested of their inherent authority to prosecute Indians who are members of other Tribes, i.e., "non-member Indians."

Duro created a potentially significant jurisdictional gap in law enforcement in Indian country with respect to offenses committed by one Indian against another Indian. It appeared possible that neither the United States, the State, nor the Tribe would be able to exercise jurisdiction where the putative defendant was an Indian who was a member of another Tribe and the offense was not among the major crimes enumerated in 18 U.S.C. 1153 (or those federal crimes generally applicable throughout the United States). The Duro Court acknowledged that problem, 495 U.S. at 697-698, but reasoned that it was for Congress, "which has the ultimate authority over Indian affairs," to provide a solution, if appropriate, id. at 698.

Congress quickly closed that jurisdictional gap by amending the Indian Civil Rights Act (ICRA), 25 U.S.C. 1301 et seq., to authorize

---

[4] Generally, with the exception of the crimes enumerated in 18 U.S.C. 1153 and other crimes applicable throughout the United States, Tribes are the only sovereigns that may exercise jurisdiction over crimes perpetrated by Indians against other Indians in Indian country. See Antelope, 430 U.S. at 643 n.1 (noting that 18 U.S.C. 1152 leaves Indian-on-Indian crime within the exclusive jurisdiction of the Tribe); cf. Negonsott, 507 U.S. at 105-106 (recognizing that States may prosecute such crimes if authorized to do so by Congress).

Tribes to exercise criminal jurisdiction over "all Indians." See Pub. L. No. 101-511, Title VIII, § 8077, 104 Stat. 1892-1893 (1990) (codified at 25 U.S.C. 1301(2), (4)) (the 1990 ICRA amendment); see also Pub. L. No. 102-137, 105 Stat. 646 (1991) (permanently enacting the 1990 ICRA amendment, which was originally effective only through September 30, 1991).[5] In pertinent part, the 1990 amendment expanded ICRA's definition of Tribes' "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2). The amendment also defined "Indian" to mean any person who would be subject to federal criminal jurisdiction as an "Indian" for purposes of 18 U.S.C. 1153.

2. Petitioner is an enrolled member of the San Carlos Apache Tribe, which governs the San Carlos Reservation in southeastern Arizona. The events that gave rise to petitioner's prosecutions occurred on the adjoining Fort Apache Reservation, which is governed by the White Mountain Apache Tribe. See Pet. App. A2-A3.

On August 18, 1994, petitioner and other members of his gang

---

[5] ICRA was originally designed, in part, to address the fact that tribal governments are not subject to the constraints of the Bill of Rights and the Fourteenth Amendment. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56-57, 62 (1978). ICRA thus guarantees defendants in tribal criminal proceedings similar, but not identical, protections to those guaranteed defendants in federal and state criminal proceedings, including the rights to due process, equal protection of the laws, trial by jury, and protection against unreasonable searches and seizures and compulsory self-incrimination. 25 U.S.C. 1302(1)-(10); but see Duro at 693 (noting that ICRA does not provide the right to appointed counsel). In addition, ICRA limits the penalties that a Tribe may impose for any offense to a maximum of one year's imprisonment and a $5,000 fine. 25 U.S.C. 1302(7).

harassed Joseph Kessay, a 15-year-old member of the White Mountain Apache Tribe, and his cousin on the Fort Apache Reservation. Petitioner ran after Kessay's cousin, and Kessay came to his cousin's aid. Petitioner stabbed Kessay in the chest and fled. Kessay sustained a four-inch deep knife wound in the left upper chest. Pet. App. A3; Gov't C.A. Br. 3-4.

3. Petitioner was charged in the White Mountain Apache Tribal Court with assault with a deadly weapon and assault with intent to cause serious bodily injury, both in violation of the White Mountain Apache Tribal Criminal Code. Each tribal offense was punishable by a term of imprisonment of up to 180 days and a fine of up to $500. Pet. App. A3; see 25 U.S.C. 1302(7) (prescribing maximum penalties that may be imposed in tribal prosecutions).

Petitioner pleaded guilty in the tribal court to assault with a deadly weapon and was sentenced to 180 days' imprisonment and a $500 fine. While participating in a work-release program, petitioner escaped from tribal custody. After he was apprehended, he pleaded guilty to the other assault charge and to an escape charge, and was sentenced to an additional fine of $680. Pet. App. A3; Gov't C.A. Br. 4-5.

4. a. On June 21, 1995, while petitioner was in escape status from tribal custody, he was indicted in federal district court for assault with a dangerous weapon within Indian country, in violation of 18 U.S.C. 113(a)(3) and 1153, and assault resulting in serious bodily injury within Indian country, in violation of 18 U.S.C. 113(a)(6) and 1153. Both offenses involved the assault on Kessay. Each offense is

punishable by a maximum term of imprisonment of ten years and a maximum fine of $250,000. See 18 U.S.C. 113(a)(3) and (6); 18 U.S.C. 3571(b)(3) (applicable felony fines). Pet. App. A3; Gov't C.A. Br. 5.

The district court dismissed the indictment on double jeopardy grounds. It is undisputed that the tribal charges and the federal charges involved the "same offence[s]," within the meaning of the Double Jeopardy Clause, so that the tribal and federal prosecutions are permissible only if they are by separate sovereigns. See Wheeler, 435 U.S. at 316-318 (applying the dual sovereignty doctrine in the context of successive tribal and federal prosecutions of a tribal member); see also Moore v. Illinois, 55 U.S. (14 How.) 13, 19-20 (1952) (applying the dual sovereignty principle with respect to state and federal prosecutions). The court held that the White Mountain Apache Tribe and the United States are "the same sovereign" in this context, reasoning that a Tribe exercises delegated federal power, not tribal sovereign power, when it prosecutes non-member Indians such as petitioner. Pet. App. A3; Gov't C.A. Br. 5-6.

b. A panel of the Ninth Circuit reversed. The panel recognized that this Court's decision in Duro held that Tribes no longer had the inherent sovereign power to prosecute members of other Tribes. The panel reasoned, however, that Congress, in the 1990 ICRA amendment "recogniz[ing] and affirm[ing]" tribal criminal jurisdiction over "all Indians," prospectively altered the federal common-law relationship between the United States and the Tribes. See 204 F.3d 915, 919 (2000). Accordingly, the panel held that petitioner's tribal and federal prosecutions were undertaken by separate sovereigns for

purposes of the Double Jeopardy Clause. Id. at 920.

c. The court of appeals, sitting en banc, unanimously confirmed the result reached by the panel: that the dual sovereignty principle applies to permit a non-member Indian to be prosecuted successively by the United States and a Tribe for the same offense. Pet. App. A1-A17. Although the majority and the concurrence reached that conclusion by different routes," id. at A16, all 11 members of the en banc court held that Congress may define inherent tribal sovereign power to include the exercise of criminal jurisdiction over non-member Indians for reservation crimes. See id. at A7 (observing that the majority and the concurring judges "agree that Congress has the authority to identify the parameters of tribal sovereignty").

A majority of the court reasoned that Congress could, and did, "replace Duro's historical narrative -- according to which the tribes had no power over nonmember Indians -- with a different version of history that recognized such power to be 'inherent.'" Pet. App. A6. The majority found that "Duro squarely conflicts with the 1990 amendments to the ICRA," but upheld Congress's action "in this narrow context," because "Duro is not a constitutional decision but rather * * * a decision founded on federal common law." Id. at A6-A7, A9-A10.

Four judges issued a separate concurrence. The concurrence viewed Duro as conclusively determining, as of the time of that decision, the federal common-law relationship between the United States and the Tribes and the extent to which the Tribes retained an aspect of their sovereignty. Pet. App. A13. The concurrence reasoned that Congress could prospectively redefine that relationship, and thus could "add[]

to * * * tribal sovereignty by recognizing the tribes' inherent power to prosecute members of other tribes who commit crimes on the reservation." Id. at A15.

ARGUMENT

Petitioner contends (Pet. i, 6-7) that the Double Jeopardy Clause prohibits his successive prosecutions for the same offense by the White Mountain Apache Tribe and the United States. He argues (Pet. 7) that the United States and a Tribe are not separate sovereigns when they prosecute an Indian of another Tribe, because "a tribe's power to prosecute a non-member Indian is not inherent and emanates solely from Congress." The question whether the 1990 ICRA amendment validly recognized or restored the Tribes' authority to exercise criminal jurisdiction over non-member Indians does not warrant the Court's review at this time for several reasons.

First, the court of appeals' decision in this case does not conflict with the decision of any other court of appeals. The only other court of appeals to consider the question divided evenly in an en banc decision, thereby affirming the district court's rejection of a non-member Indian's double jeopardy challenge to his sequential tribal and federal prosecutions for the same offense. United States v. Weaselhead, 165 F.3d 1209 (8th Cir. 1999) (en banc). This Court denied the defendant's petition for certiorari. 528 U.S. 829 (1999). See also United States v. Archambault, No. CR 00-30089, 2001 WL 1297767 (D.S.D. Oct. 18, 2001) (rejecting non-member Indian's double jeopardy challenge to successive tribal and federal prosecutions).

Second, whether or not all aspects of the court of appeals'

reasoning are correct, the court reached the correct result: that the United States and the Tribe each exercise their own sovereign authority in prosecuting a non-member Indian for an offense committed on the Tribe's reservation.

Third, even if the Court were to agree with petitioner that Congress cannot restore the criminal jurisdiction that the Tribes were held to have lost in Duro v. Reina, 495 U.S. 676 (1990), that would not preclude the present federal prosecution of petitioner. It would instead mean that the tribal court acted without jurisdiction, and thus that jeopardy did not attach in that court for purposes of the Double Jeopardy Clause.

1. The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The dual sovereignty doctrine permits successive prosecutions by separate sovereigns for offenses that consist of the same elements, because transgressions against the laws of separate sovereigns do not constitute the "same offence" for purposes of the Double Jeopardy Clause. See United States v. Wheeler, 435 U.S. 313, 316-318 (1978); see also Heath v. Alabama, 474 U.S. 82, 88 (1985) ("When a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'").

In Wheeler, this Court considered whether the United States could prosecute a member of the Navajo Tribe under 18 U.S.C. 1153 for the same conduct for which he had been prosecuted by the Tribe. 435 U.S. at 314. The Court reasoned that the issue turned on the ultimate

"source of [a Tribe's] power to punish tribal offenders: Is it part of inherent tribal sovereignty, or an aspect of the sovereignty of the Federal Government which has been delegated to the tribes by Congress?" Id. at 322. The Court concluded that, when a Tribe prosecutes a tribal member for violating tribal law, "the tribe acts as an independent sovereign, and not as an arm of the Federal Government," id. at 329, and thus that the federal prosecution is permissible under the dual sovereignty doctrine.

The Wheeler Court recognized that Tribes, before their incorporation into the United States, possessed "the full attributes of sovereignty," including "the inherent power to prescribe laws for their members and to punish infractions of those laws." 435 U.S. at 322-323. In contrast, the Court said, the sovereignty that Tribes retain today "is of a unique and limited character," existing "only at the sufferance of Congress and subject to complete defeasance." Id. at 323. In the exercise of its "plenary" power over Indian affairs, the United States has, by treaty and statute, expressly divested Tribes of certain powers, while confirming or restoring others. Ibid. In addition, certain powers are deemed to have been implicitly surrendered as a consequence of Tribes' "incorporation within the territory of the United States." Ibid. But "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." Ibid. The Court concluded that Tribes' sovereign power to exercise criminal jurisdiction over their own members had not been extinguished by Congress or surrendered incident to Tribes' entering into a dependent

relationship with the United States. Id. at 323-328. "Since tribal and federal prosecutions are brought by separate sovereigns," the Court said, "they are not 'for the same offence,' and the Double Jeopardy Clause thus does not bar one when the other has occurred." Id. at 329-330.

The Wheeler Court distinguished criminal jurisdiction over tribal members from criminal jurisdiction over non-Indians, which was at issue in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). There, the Court held that the judicial recognition of an inherent power to prosecute non-Indians no longer existed because, "[b]y 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 except in a manner acceptable to Congress." Id. at 210. The Court thus concluded that Tribes could not exercise such jurisdiction absent a "treaty provision or Act of Congress." Id. at 196 n.6.

In Duro, the Court considered the unresolved issue at the "intersection" of Wheeler and Oliphant -- namely, whether Tribes retained the inherent power to prosecute Indians who are members of other Tribes. 495 U.S. at 684. As in Oliphant, the Court held that the judicial recognition of such an inherent power would be inconsistent with Tribes' dependent status, and thus that Tribes could not exercise that attribute of sovereignty, at least absent some affirmative action by Congress. Id. at 684-696.

As noted above, Congress enacted the 1990 ICRA amendment to restore the criminal jurisdiction that Duro found that Tribes had lost.

The text of the amendment clearly reflects Congress's intent to authorize Tribes to act in their own sovereign capacities, not as instrumentalities of the United States, in prosecuting non-member Indians. The amendment modified ICRA's definition of tribal "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2) (emphasis added). Jurisdiction that is exercised as a "power[] of self-government" necessarily refers to jurisdiction that derives from Tribes' sovereign authority. And Congress expressly "recognized" and "affirmed" the existence of that jurisdiction as an "inherent" tribal power, not as a federal power.

The legislative history of the 1990 ICRA amendment provides additional support for that conclusion. The Senate Report, for instance, explains that the amendment was intended "to recognize and reaffirm the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians." S. Rep. No. 168, 102d Cong., 1st Sess. 4 (1991) (emphasis added). The House Report expressly states that "this legislation is not a federal delegation of this jurisdiction but a clarification of the status of tribes as domestic dependent nations." H.R. Rep. No. 61, 102d Cong., 1st Sess. 7 (1991) (emphasis added); see also H.R. Conf. Rep. No. 261, 102d Cong., 2d Sess. 3 (1991) (the "legislation clarifies and reaffirms the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians on their reservations").[6]

---

[6] The legislative history indicates that Congress may have sought not only prospectively to remove a federal-law impediment to the

Nothing in this Court's decisions precludes Congress from recognizing or restoring an aspect of the Tribes' inherent sovereign power that otherwise could not be exercised after their incorporation into the federal Union. To the contrary, the Court has suggested on several occasions that Congress may authorize an "exercise of tribal power" that would be inconsistent with the dependent status of the Tribes in the absence of such authorization. Just last Term, for example, the Court observed that, "[w]here non-members are concerned, the 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express Congressional delegation.'" Nevada v. Hicks, 121 S. Ct. 2304, 2310 (2001) (quoting Montana v. United States, 450 U.S. 544, 564 (1981)) (emphases omitted).[7]

2. Petitioner argues that the 1990 ICRA amendment cannot be understood as a valid recognition or restoration of tribal sovereign authority to prosecute non-member Indians. His reasoning is unpersuasive.

a. Petitioner initially contends (Pet. 10-14) that Duro's

---

exercise of an inherent sovereign power, but also retroactively to overrule Duro's interpretation of federal Indian law as it stood at the time of the Court's decision. See Pet. App. 14a. As discussed in the text (at 20-21), however, whether the 1990 ICRA amendment could be applied retroactively is not at issue in this case.

[7] The use of the term "delegation" does not imply that the power exercised by a Tribe as a result of congressional action is federal power, rather than sovereign power. Rather, the term encompasses action by Congress that restores to a Tribe inherent sovereign powers that were previously divested. See pp. 20-22, infra.

articulation of the relationship between the sovereign authority of the United States and that of the Tribes is constitutionally based and cannot be altered by Congress. That is incorrect. The Constitution does not define the precise extent of residual tribal sovereignty. Rather, the Tribes' sovereignty has been subject to adjustment by federal treaties and statutes; to the extent that Congress has not spoken to the issue, tribal sovereignty is a matter of federal common law. See Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16-19 (1831) (Marshall, C.J.); see also, e.g., Duro, 495 U.S. at 688-692 (assessing the extent of tribal criminal jurisdiction by reference to non-constitutional sources, including statutes, treaties, and federal court practice); Oliphant, 435 U.S. at 206 (noting that "'Indian law' draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress," which "beyond their actual text form the backdrop for the intricate web of judicially made Indian law"). This Court has "always recognized that federal common law is 'subject to the paramount authority of Congress.'" Milwaukee v. Illinois, 451 U.S. 304, 313 (1981) (quoting New Jersey v. New York, 283 U.S. 336, 348 (1931)). The 1990 ICRA amendment is appropriately viewed as an exercise of Congress's authority to modify federal common law.

The Court has also recognized that Congress may, in the exercise of its "plenary" authority over Indian affairs, see Morton v. Mancari, 417 U.S. 535, 551-552 (1974), remove restraints that would otherwise exist under federal law to the Tribes' exercise of their inherent sovereign powers. See, e.g., United States v. Mazurie, 419 U.S. 544, 556-559 (1975) (Congress may authorize a Tribe to regulate the sale of

alcoholic beverages by non-Indians on lands owned by non-Indians within its reservation); Montana, 450 U.S. at 562 ("If Congress had wished to extend tribal jurisdiction [over hunting and fishing within the reservation] to lands owned by non-Indians, it could easily have done so by [a statutory revision]."); cf. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."); Negonsott, 507 U.S. at 103 (Congress has "plenary authority to alter" the allocation of criminal jurisdiction in Indian country). Similarly, when one Congress, with the consent of a Tribe, has terminated federal recognition of the Tribe, a subsequent Congress may repeal the termination Act and reinstate all of the Tribe's preexisting rights and privileges.[8]

The conclusion that Congress can restore a previously surrendered aspect of tribal sovereignty is consistent with the Court's recognition that Congress may restore inherent sovereign powers surrendered by the States when they joined the federal Union. The dormant Commerce Clause, for instance, preempts the States' power to regulate commerce

---

[8] Compare Menominee Tribe v. United States, 391 U.S. 404, 407-408 (1968) (describing Menominee Indian Termination Act of 1954), with Menominee Restoration Act, Pub. L. No. 93-197, 87 Stat. 770 (1973) (codified at 25 U.S.C. 903-903f), and Barker v. Menominee Nation Casino, 897 F. Supp. 389, 393 (E.D. Wis. 1995) (noting that re-recognized Menominee Nation "is a sovereign Indian tribe recognized by the United States government"). See also, e.g., 25 U.S.C. 861(b), (c) (repealing termination of federal supervision over Wyandotte, Ottawa, and Peoria Tribes of Oklahoma and "reinstat[ing] all rights and privileges of each of the tribes * * * and their members under Federal treaty, statute or otherwise"). Congress's authority to restore federal recognition to a Tribe has not been questioned. It has never been suggested that re-recognized Tribes exercise federal, as opposed to tribal, powers when they carry out their governmental activities.

within their borders if to do so would burden interstate commerce. See Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 572-583 (1997). But Congress may remove that federal-law impediment to the States' exercise of their sovereign powers and permit the States to engage in activity that would otherwise be prohibited. See, e.g., Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 421-436 (1946) (concluding that the States regained the authority, as a result of the McCarran-Ferguson Act, 15 U.S.C. 1011 et seq., to regulate insurance in a manner that could otherwise violate the dormant Commerce Clause).

b. Petitioner suggests (Pet. 12-14) that Duro must be understood as "a constitutionally-based decision" in view of its reference to due process and equal protection concerns. See 495 U.S. at 692-696. Petitioner relies, however, on concerns that, while discussed in Duro, were not essential to the Court's holding in that case. The Court did observe that Congress might be constrained by the due process and equal protection guarantees of the Fifth Amendment from subjecting United States citizens to criminal proceedings before a tribunal that does not provide the full panoply of federal constitutional rights. See 495 U.S. at 693-694. But the question whether Congress could constitutionally take that step with respect to tribal courts was not before the Court in that case.

The 1990 ICRA amendment does not, as a facial matter, violate either equal protection or due process. This Court has rejected equal protection challenges to statutes that treat Indians and non-Indians differently -- including statutes governing criminal and civil jurisdiction in Indian country -- where the classification is tied

rationally to the United States' unique trust responsibilities to Indians. In United States v. Antelope, 430 U.S. 641 (1977), for example, the Court upheld 18 U.S.C. 1153, which subjects Indians, but not non-Indians, to federal prosecution for certain offenses committed in Indian country.[9] The Indian defendants in that case argued that their federal convictions "were unlawful as products of invidious racial discrimination," because federal law, in contrast to state law, did not require premeditation and deliberation as an element of first-degree murder. Id. at 644. The Court explained that 18 U.S.C. 1153, like other federal laws that treat Indians differently from non-Indians, is "based neither in whole nor in part upon impermissible racial classifications," but instead is "rooted in the unique status of Indians as 'a separate people' with their own political institutions." Id. at 646-647. The Court noted that the Indian defendants did not seriously contend that the statute failed to satisfy the rational basis standard applicable to non-suspect classifications. Id. at 647 n.8.[10]

---

[9] For purposes of both ICRA and 18 U.S.C. 1153, an "Indian" is a person who not only is of Indian ancestry, but also is affiliated with a federally recognized Tribe. See Antelope, 430 U.S. at 646-647 & n.7; 25 U.S.C. 1301(4) (providing that the same definition of "Indian" applies under ICRA and 18 U.S.C. 1153).

[10] Similarly, in Fisher v. District Court, 424 U.S. 382 (1976) (per curiam), the Court held that the Northern Cheyenne Tribal Court could exercise exclusive jurisdiction over child custody disputes involving tribal members residing on the reservation. The Court held that denying tribal members access to the state court forum available to non-Indians did not "constitute impermissible racial discrimination," explaining that "such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the policy of Indian self-government." 424 U.S. at 390-391; see also Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 502 (1979) (rejecting a Tribe's equal protection challenge to a State's partial assumption of criminal jurisdiction

The 1990 ICRA amendment's recognition of tribal criminal jurisdiction over "all Indians" is rationally tied to Congress's twin goals of promoting tribal self-government and eliminating a potentially significant jurisdictional gap in law enforcement. See pp. 4-5, supra. Petitioner, who retains "voluntary * * * tribal membership," Duro, 495 U.S. at 694, in a federally recognized Tribe, is entitled to participate in the system of tribal self-government that Congress has sought to advance.

As for due process concerns, ICRA itself guarantees that defendants in tribal court shall not be "deprive[d] * * * of liberty or property without due process of law." 25 U.S.C. 1302(8). While ICRA does not guarantee every right secured by the Constitution, petitioner does not allege that the tribal court deprived him of any such right. Even if a federal due process right not provided by ICRA or tribal law, such as the right to appointed counsel for indigent defendants, must be assured before the tribal court may exercise criminal jurisdiction over a non-member Indian, the solution would not be to disable tribal criminal jurisdiction entirely, but simply to put the Tribe to the election of providing counsel or forgoing the option of incarcerating the defendant. See Argersinger v. Hamlin, 407 U.S. 25 (1972).[11]

---

pursuant to Public Law 280, whereby non-Indians, but not Indians, were subject to state prosecution for crimes committed on trust and restricted land within the reservation, explaining that the jurisdictional scheme was "fairly calculated to further the State's interest in providing protection to non-Indian citizens living within the boundaries of a reservation while at the same time allowing scope for tribal self-government on trust or restricted lands").

[11] A number of Tribes provide counsel to indigent criminal defendants in tribal court as a matter of tribal law. Congress has

In any event, the appropriate way for petitioner or any other non-member Indian to raise an equal protection or due process objection to the exercise of criminal jurisdiction by a Tribe or to the procedures applicable in tribal court is to present those objections in the tribal prosecution. Then, if the tribal court does not provide relief, those objections may be presented to a federal district court on a petition for habeas corpus under 25 U.S.C. 1303 challenging "the legality of [the Indian defendant's] detention by order of an Indian tribe." Petitioner raised no such objections in his tribal court prosecution.

c. Petitioner further contends (Pet. 14-15) that Duro definitively determined the extent of tribal sovereignty as of the date of that decision, and that Congress lacks the constitutional authority retroactively to "overrule" such an interpretation of law by this Court. This case, however, involves only a prospective change in the scope of tribal sovereignty. No issue of retroactivity is presented. See generally Rivers v. Roadway Express, Inc., 522 U.S. 298, 305 (1994) (observing that "the choice to enact a statute that responds to a judicial decision is quite distinct from the choice to make the responding statute retroactive"). Nor is any such issue likely to arise more than a decade after the enactment of the 1990 ICRA amendment.

d. Finally, petitioner contends (Pet. 15-17) that Tribes' power to exercise criminal jurisdiction over non-member Indians may exist

---

authorized funding for entities that provide legal assistance to criminal defendants in tribal court under the Indian Tribal Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559, § 103, 114 Stat. 2778 (codified at 25 U.S.C. 3663).

only by "delegation" from Congress. The use of the term "delegation," however, is consistent with the conclusion that Tribes exercise tribal sovereign power, not federal power, when they prosecute non-member Indians pursuant to the 1990 ICRA amendment. This Court has on several occasions referred to the restoration of tribal sovereign power as a "delegation" by Congress. See Montana, 450 U.S. at 564 (preempted "tribal power * * * cannot survive without express Congressional delegation"); accord South Dakota v. Bourland, 508 U.S. 679, 695 n.15 (1993); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 171 (1982).

Moreover, the Court has recognized in analogous circumstances that, when Congress "delegates" authority to an entity possessing attributes of sovereignty, such as a State, the entity exercises that power in its own sovereign capacity, not as an instrumentality of the federal government. See Prudential Ins., 328 U.S. at 438 (although a state tax on insurance companies was permissible only because of the McCarran-Ferguson Act, the tax was imposed by the State as an "exertion of its own power," and thus was not subject to constitutional constraints on the federal government's taxing power); see also Lake County Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 398-400 (1979) (an agency formed under an interstate compact authorized by Congress acts as a state, not federal, agency); King v. Smith, 392 U.S. 309, 311 (1968) (assuming that state officials act "under color of" state law, within the meaning of 42 U.S.C. 1983, when they administer a federally funded benefit program); see also Pink v. Modoc Indian Health Project, Inc., 157 F.3d 1185, 1188 (9th Cir. 1988) (tribal sovereign authority extends to non-profit corporation

established by Tribes to administer federal program).

3. In any event, even if Congress were constitutionally barred from "recogniz[ing] and affirm[ing]" Tribes' sovereign authority to exercise criminal jurisdiction over "all Indians" on their reservations, 25 U.S.C. 1301(2), petitioner's double jeopardy challenge to the United States' exercise of criminal jurisdiction in this case would fail. Although petitioner suggests that Tribes may exercise criminal jurisdiction over a non-member Indian only as instrumentalities of the United States, nothing in the text, purpose, or legislative history of the 1990 ICRA amendment indicates that Congress intended to make Tribes instrumentalities of the United States for such purposes. Any such action would produce numerous complications for law enforcement in Indian country that Congress could not have intended. Most obviously, Congress would have understood that, if Tribes were acting as instrumentalities of the United States in prosecuting non-member Indians, a potential double jeopardy bar would exist to a federal prosecution after a tribal prosecution for the same conduct. See Wheeler, 435 U.S. at 330-331 (noting incentives that would exist for tribal members to plead guilty to tribal offenses, which carry only misdemeanor-type penalties, in order to avoid prosecution for federal offenses carrying more severe penalties). Yet, Congress gave no indication that it intended to oust federal prosecutorial power in such circumstances.

If Congress's attempt in the 1990 ICRA amendment to recognize tribal sovereignty to prosecute non-member Indians is invalid, that would mean that the White Mountain Apache Tribe lacked criminal

jurisdiction over petitioner. In that event, jeopardy would not have attached in petitioner's tribal prosecution for purposes of the Double Jeopardy Clause. See Mesa v. Ebrahim, 813 F.2d 960, 963 n.5 (9th Cir. 1987), aff'd sub nom. Mesa v. California, 489 U.S. 121 (1989); see also United States v. Phelps, 168 F.3d 1048, 1054-1055 (8th Cir. 1999) (rejecting a double jeopardy challenge to a federal prosecution, which followed a tribal prosecution for the same offense, because the Tribe lacked criminal jurisdiction over a non-Indian defendant). And, if jeopardy did not attach in the tribal prosecution, a federal prosecution would not put petitioner twice in jeopardy, and there would be no double jeopardy bar to this federal prosecution. The court of appeals' reversal of the district court's dismissal of this federal indictment would therefore stand, irrespective of the correctness of the court of appeals' decision on the validity of the 1990 ICRA amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MICHAEL CHERTOFF
Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

DECEMBER 2001

IN THE SUPREME COURT OF THE UNITED STATES

ENAS, MICHAEL L. Petitioner	)	
vs.	)	No. 01-6553
USA	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first class mail, postage prepaid, on this 19th day of December 2001.

SIGMUND G. POPKO
P.O. BOX 877906
TEMPE, AZ 85287-7906

Theodore B. Olson

THEODORE B. OLSON
Solicitor General
Counsel of Record

December 19, 2001