COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL MEANS, Petitioner/Appellant. v. NAVAJO NATION, federally recognized Indian Tribe; and HONORABLE RAY GILMORE, Judge, United States District Court, Chinle, Navajo Nation, Arizona. Respondents/Appellees,	)	Case No. 01-17489 United States District Court Case No. 99-CV-1057-PCT-EHC-SLV

APPELLANT'S OPENING BRIEF

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Dated April 4, 2002

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I.. JURISDICTION

Russell Means, an Oglala-Sioux Indian, filed a Petition for Writ of Habeas Corpus and/or Prohibition with the United States District Court in Arizona under the Indian Civil Rights Act following his challenge to the jurisdiction of the Navajo Nation courts to assert criminal jurisdiction over him. Exhaustion of remedies was completed through the Navajo Supreme Court. Mr. Means initiated a proceeding on June 15, 1999, before the United States District Court pursuant to Title 25 U.S.C. § 1303, Title 28 U.S.C. §§ 2241(c)(1) and (3); United States Constitution, Article 1, § 8, cl. 3, and § 9, cl. 2.

The United States District Court denied the Petition filed by Russell Means on September 20, 2001. Mr. Means, pro per, filed a timely notice of appeal on October 18, 2001. This Court has jurisdiction over this appeal pursuant to the statutes set forth above and also under Title 28 U.S.C. §§ 1291 (District Court decision), 1331 (federal question), and 2253-55 (habeas corpus).

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Do the courts of the Navajo Nation, a "foreign, domestic" sovereign which is recognized, empowered, and restricted by the Treaty of 1868 with the United States, have criminal jurisdiction over Russell Means, a nonmember Indian?

2. Does the Navajo Treaty of 1868 determine the jurisdictional issue in

dispute and vest jurisdiction with the federal government?

3. Does the Indian Commerce Clause, Article 1, § 8, cl. 3, provide Congress with the power to grant the Navajo Nation with jurisdiction over nonmember Indians?

4. Did Congress, by amending the Indian Civil Rights Act to provide Indian tribes with jurisdiction over nonmember Indians, abrogate the Navajo Treaty of 1868?

5. Can Congress lawfully vest Indian nations, which are not subject to the United States Constitution, with criminal jurisdiction over nonmember Indians who are citizens of the United States?

6. Did Congress delegate authority to the Navajo Nation to exercise criminal jurisdiction over nonmember Indians?

7. Does Title 25 U.S.C. § 1301(2) (1990), granting criminal jurisdiction to Indian nations over nonmember Indians, violate the equal protection provision of the Fifth Amendment to the United States Constitution as well as the Indian Civil Rights Act, Title 25 U.S.C. § 1302(8)?

III. STATEMENT OF THE CASE AND COURSE OF PROCEEDINGS

Mr. Means filed a habeas corpus proceeding with the United States District Court, in part, under the Indian Civil Rights Act, Title 25 U.S.C. § 1303, challenging the jurisdiction of the Navajo Nation to prosecute Mr. Means, a United States citizen, for misdemeanors that allegedly occurred within the exterior boundaries of the Navajo

Nation. The United States District Court denied Mr. Means' Petition without a hearing and Mr. Means has filed a timely notice of appeal with this Court. His appeal raises substantial legal issues, including several constitutional issues.

On December 28, 1997, the Navajo Nation charged Mr. Means with threatening Leon Grant, committing a battery upon Leon Grant, and threatening Jeremiah Bitsue in violation of the Navajo Nation Code. Mr. Means filed a motion to dismiss the charges because of lack of jurisdiction and a motion to dismiss the charges due to constitutional violations. His motions were denied by Honorable Ray Gilmore, Judge, Chinle District Court. The Navajo Nation accepted jurisdiction to review the issue of jurisdiction and affirmatively decided that the Navajo Nation had criminal jurisdiction to prosecute Russell Means in a written decision issued on May 11, 1999. The Navajo Nation found that it had criminal jurisdiction over both nonmember Indians and non-Indians who reside on the Navajo Nation [C.I. 2].

> The petitioner [Russell Means] belongs to the classification *hadane* [in-law] and not that of nonmember Indian. One can be of any race or ethnicity to assume tribal relations with Navajos.

Means v. District Court, No. SC-CV-61-98, slip op. at p. 19 (Nav. Nat. S. Ct. 5/11/99) [C.I. 2]. The decision is analyzed in Section VI(A), *infra*.

Mr. Means initiated a Verified Petition for Writ of Habeas Corpus and/or for Writ of Prohibition with the United States District Court on June 15, 1999. The parties

stipulated that two of the original Respondents could be dismissed. [C.I. 16, 17]. Mr. Means also filed a Motion for Preliminary Injunction, which was supported by an extensive memorandum. [C.I. 3-4].

The Navajo Nation filed a response to the Petition on August 2, 1999. The federal Magistrate ordered the Nation to submit a supplemental answer, which was filed on September 21, 1999. [C.I. 19, 21]. The Magistrate then requested an expanded record and memoranda on the issue of whether Mr. Means was "in custody" for purposes of federal habeas jurisdiction. [C.I. 23]. Both parties submitted memoranda. [C.I. 32, 33]. Magistrate Verkamp then issued a recommendation that the Petition be denied because of the lack of physical restraint against Mr. Means. [C.I. 35]. Mr. Means filed an objection on October 12, 2000. [C.I. 36]. Judge Carroll did not accept the Magistrate's Report and Recommendation, but found that significant restraint existed against Mr. Means, which vested the Court with habeas corpus jurisdiction. Judge Carroll also granted a preliminary injunction in favor of Mr. Means. [C.I. 37].

On May 23, 2001, Magistrate Verkamp issued a Report and Recommendation that Mr. Means' Petition be denied on the merits [C.I. 38]. Once again, Mr. Means filed an objection. [C.I. 42]. Judge Carroll then ordered both parties to submit supplemental memoranda addressing the decision by this Court in the case of *United States v. Enas*, 235 F.3d 662 (9th Cir. 2001) and the Navajo Treaty of 1868.

Supplemental memoranda were filed by both parties on September 10, 2001. [C.I. 44-45]. On September 20, 2001, Judge Carroll issued an order approving the Second Report and Recommendation of Magistrate Verkamp and denied Mr. Means' Petition. A judgment was issued denying the habeas petition. [C.I. 46-47]. Mr. Means filed a timely notice of appeal on October 18, 2001 [C.I. 48]. No cross-appeal has been filed. On October 18, 2001, Mr. Means also filed a motion to stay the proceedings in the Navajo Tribal Court pending this appeal, which was denied as moot on April 2, 2002, because the parties stipulated to a stay in the Chinle District Court.

IV. STATEMENT OF FACTS

Russell Means is a citizen of the United States. He is a member of the Oglala-Sioux tribe of Indians. He is a permanent resident of Porcupine on the Pine Ridge Sioux Indian Reservation. [C.I. 1]. Russell Means is not a member of nor is he eligible for membership in the Navajo Nation or Navajo Tribe of Indians. Membership within the Navajo Nation is conditioned upon no less than one-fourth degree of Navajo blood, may not take place by adoption or custom, and does not exist for a person who is a member of another Indian Nation or Tribe. *See*, Title 1 N.N.C. §§ 701-03 [Ex. R. pp. 119-20].

On December 28, 1997, the Navajo Nation charged Russell Means with three offenses: (1) threatening Leon Grant, his father-in-law and a member of the Omaha

tribe of Indians; (2) committing a battery upon Leon Grant, and (3) threatening Jeremiah Bitsue, a Navajo Indian. The three charges were filed against Mr. Means before the Chinle District Court, Navajo Nation. [C.I. 1-2]. After Mr. Means filed motions to dismiss with the Chinle District Court, Judge Gilmore held a hearing where Mr. Means testified as the only witness. [C.I. 2]. Based upon substantial ethnological research, Mr. Means testified that American Indians constitute a separate race. [C.I. 20. Ex. R. pp. 50, 56-58, 71]. Mr. Means was married to Gloria Grant, a Navajo Indian and lived on the Navajo Indian Reservation from 1987 through most of 1997. Mr. Means moved from the reservation shortly before the incident involving Mr. Grant and Mr. Bitsue occurred [C.I. 1].

As a nonmember Indian living on the Navajo Indian Reservation, Mr. Means could not start a business or obtain employment. [Ex. R. 52-53, 73-77, 80-81]. He was treated the same as a non-Indian. As a nonmember, Mr. Means could not run for political office on the Navajo Nation, could not become a judge within the Navajo Nation, could not become a council delegate, etc. Mr. Means could not vote in tribal elections. He could not participate in the democratic processes of the Navajo Nation.

V. SUMMARY OF ARGUMENT

In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the United States Supreme Court held that Indian tribal courts do not possess criminal jurisdiction over

non-Indians. More than a decade later, the United States Supreme Court held that *Oliphant* and other authority "compels the conclusion that Indian tribes lack jurisdiction over persons who are not tribe members." *Duro v. Reina*, 495 U.S. 676, 691 (1990).

Congress then amended the Indian Civil Rights Act (ICRA) ostensibly to provide that Indian tribal courts shall possess criminal jurisdiction over nonmember Indians, but not over nonmember non-Indians. *See*, Title 25 U.S.C. § 1301(2) (1990). The grant of criminal authority over U.S. citizens to Indian governments without constitutional protection is an unlawful delegation of authority without adequate standards. It is not authorized under the "commerce" clause applicable to Indian tribes.

> Our cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right. Cf. *Reid v. Covert*, 354 U.S. 1 (1957). We have approved delegation to an Indian tribe of the authority to promulgate rules that may be enforced by criminal sanction in *federal* court, *United States v. Mazurie*, 419 U.S. 544 (1975), but no delegation of authority to a tribe has to date included the power to punish nonmembers in *tribal* court. We decline to produce such a result through recognition of inherent tribal sovereignty.
>
> Tribal authority over members, who are also citizens, is not subject to these objections. Retained criminal jurisdiction over members is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent. This principle finds support in our cases as decided under provisions that pre-date the present federal jurisdictional statutes.

Duro v. Reina, 495 U.S. 676, 693-94 (1990).

Congress has created a distinction between nonmember Indians and nonmember non-Indians based upon race or ethnicity that not only violates the equal protection provisions of the Indian Civil Rights Act, but violates the Fifth Amendment as well. Therefore, the statute passed by Congress must fail [*See*, Title 25 U.S.C. §§ 1301(2), 1302(8), and the Equal Protection, Due Process Clause of the Fifth Amend., U.S. Const.] Moreover, as noted by the Supreme Court, Congress simply cannot subject citizens of the United States to criminal jurisdiction before non-constitutional forums.

The Navajo Treaty of 1868 expressly provides for federal jurisdiction over intertribal offenses. The 1990 amendments to the ICRA did not express an intent to abrogate the Navajo Treaty nor dozens of other, similar treaties. As a result, the Treaty of 1868 must prevail. *Mnenominie Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968). Surprisingly, the Second Report and Recommendation did not even analyze the Navajo Treaty of 1868, which controls the outcome of this case.

The recent movement by Congress to "recognize" inherent tribal jurisdiction over nonmember Indians is inconsistent with history and the prior actions of Congress. In the end, Congress has discriminated against Indians in order to placate tribal governments. It has subjected U.S. citizens to criminal jurisdiction by a foreign power in an unlawful manner. Nonmembers may not participate in the political processes of

foreign tribes. The actions of Congress and Indian tribes also violate the "equal protection" provisions of the Fifth Amendment (due process clause) and the Indian Civil Rights Act. The 1990 amendments to the ICRA do not constitute permissible, preference legislation authorized under *Morton v. Mancari*, 417 U.S. 535 (1974).

VI. ARGUMENTS

The standard of review is *de novo* for all arguments. No hearing was held by the District Court and all issues were resolved as a matter of law.

A. The Navajo Nation Does Not Have Criminal Jurisdiction Over Nonmember Indians According to The Navajo Treaty of 1868, Which Controls The Outcome of This Case

The United States Supreme Court held in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), that Indian tribes did not possess criminal jurisdiction over non-Indians. In *Duro v. Reina*, 495 U.S. 676 (1990), another case arising from this Court, the Supreme Court held that Indian tribes do not possess criminal jurisdiction over nonmember Indians. In response, Congress amended the Indian Civil Rights Act (ICRA) with the intent to give Indian tribes the power to exercise criminal jurisdiction over all Indians, but not non- Indians. Title 25, U.S.C. § 1301(2) (1990). This case challenges the constitutionality and lawfulness of the congressional amendments to ICRA as well as the legality and constitutionality of criminal prosecution of Russell Means, an Oglala-Sioux Indian, by the Navajo Nation.

Judge Gilmore found that the Navajo Treaty of 1868 vested the Navajo Nation with criminal jurisdiction over nonmember Indians by implication. The Supreme Court of the Navajo Nation reached the same decision, but its logic and conclusions are quite tortured. The Navajo Supreme court relied upon fragmented quotes from persons who attended the execution of the Navajo Nation Treaty of 1868, but avoided the plain language of the treaty. Even so, the quotes relied upon by Chief Justice Yazzie support the right of exclusion (which continues as preserved), not the right to exercise criminal jurisdiction over nonmembers [C.I.2] [Ex. R. pp. 22-45].

The Navajo Supreme Court expressly avoided issues that must be decided by this Court, namely the constitutionality of the post-Duro amendments to the Indian Civil Rights Act. Title 25, U.S.C. §§ 1301(2) and (4) (1990). [*Means v. District Court*, at n. 3]. The Navajo Supreme Court not only decided that it had inherent authority to prosecute nonmember Indians, but the same authority to exercise criminal jurisdiction over non-Indians despite the 1990 amendments to the ICRA as well as the *Oliphant* and the *Duro* decisions by the United States Supreme Court. [*Ibid.*].

Finally, the Navajo Supreme Court dismissed the issue of equal protection (disparate treatment of nonmember Indians v. nonmember non-Indians) by holding that any "hadane" or "in-law" becomes a member of or assumes a "clan relation" with the Navajo Nation and is thereby subject to the jurisdiction of the Navajo Nation.

Although the *Means* opinion by Chief Justice Yazzie fails to identify any benefits from the clan relation, it states that "reciprocal obligations" stem from the "clan relation", including the "duty to avoid threatening or assaulting a relative by marriage (or any other person)." Yet, the Navajo Tribal Code indicates the opposite:

> No Navajo law or custom has ever existed or exists now, by which anyone can ever become a Navajo, either by adoption, or otherwise, except by birth.
>
> All those individuals who claim to be a member of the Navajo Nation by adoption can be declared to be in no possible way an adopted or honorary member of the Navajo People.

Title 1 N.N.C. § 702. A member of another tribe cannot be a member of the Navajo Nation. At least one-fourth degree of Navajo blood is required for one to be eligible for membership. [Title 1 N.N.C. § 701]. Mr. Means cannot even be an "honorary member." [Ex. R. p. 120].

Judge Gilmore found that Mr. Means had implicitly "consented" to the criminal jurisdiction of the Navajo Nation by his marriage to Gloria Means, a member of the Navajo Nation, his residence on Navajo Nation land, and because he had "constructive notice that his entry was subject to the criminal jurisdiction of this Court." As a result, "he was deemed to have consented to the jurisdiction of this Court by virtue of that entry." [C.I. 2, Order Denying Motion to Dismiss at p. 7]. The Navajo Supreme court reached the same conclusion despite the fact that Russell Means no longer resided on

the Navajo reservation when the alleged incidents occurred on December 28, 1999. Once again, "consent" was predicated upon the status of Means as an "in-law" or "hadane".

> We previously held, in *Navajo Nation v. Hunter*, 6 Nav. R. _____, No. SC-CR-07-95 (decided March 8, 1996) the Navajo Nation has criminal jurisdiction over individuals who "assume tribal relations." How does that comply with the indications in the *Duro* decision that intermarriage alone does not constitute sufficient consent for criminal jurisdiction?
>
> * * *
>
> We find that petitioner, by reason of his marriage to a Navajo, long-time residence within the Navajo Nation, his activities here, and his status as a *hadane*, consented to Navajo Nation criminal jurisdiction. This is not done by "adoption" in any formal or customary sense, but by assuming tribal relations and establishing familial and community relationships under Navajo common law.

Means v. District Court of the Chinle Judicial District, slip op. at pp. 16-18 (No. SC-CV-61-98 dated May 11, 1999) [Ex. R. pp. 38-40]. In other words, nonmembers can "consent" as a legal fiction to the burdens of tribal membership, but cannot obtain the benefits. The United States Supreme Court has concluded otherwise:

> Retained criminal jurisdiction over members is accepted by our precedents and justified by the voluntary character of tribal membership and the noncommitant right of participation in a tribal government, the authority of which rests on consent.

Duro v. Reina, 495 U.S. 676, 694 (1990).

> The petitioner [Russell Means] belongs to the classification *hadane* and

> not that of nonmember Indian. One can be of any race or ethnicity to assume tribal relations with Navajos.

Means at p. 19 [Ex. R. p. 41]. The decision by the Navajo Supreme Court not only clashes with *Duro v. Reina*, but also with *Oliphant* and the 1990 amendments to the ICRA.

When Congress attempted to overrule *Duro v. Reina*, 495 U.S. 676 (1990) by amending the Indian Civil Rights Act [Title 25 U.S.C. § 1301(2) (1990)], it did not modify or abrogate the Navajo Treaty of 1868. Unless Congress stated or disclosed an express intention to abrogate or modify the Navajo Treaty, it must be concluded that Congress did not intend to modify it. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968). As a result, the law that expressly controls the outcome of Mr. Means' case is indeed the Navajo Treaty of 1868. Despite the tortured interpretation of the Treaty by the Navajo Supreme Court, there is no doubt that the Navajo Nation does not have criminal jurisdiction over nonmembers by clear and unambiguous expressions in the Navajo Treaty.

> The assumption of intertribal jurisdiction by the United States is even more explicit in treaties signed between 1825 and the end of the treaty period in 1871 [which includes the Navajo Treaty of 1868].
>
> Treaty provisions during the same period are quite explicit in calling for identical treatment of non-Indians and nonmember Indians for crimes by or against tribal members. Thus, the federal government assumed jurisdiction over nonmember crimes.

> There can be little doubt that these treaties contemplated equal treatment of nonmember Indians and non-Indians as regards crimes by or against tribal members. [footnotes omitted].

K.J. Ehrhart, *Jurisdiction Over Nonmember Indians on Reservations*, 1980 Ariz. State L.J. 727, 738-40. There is no doubt that the Navajo Treaty of 1868 must be the centerpiece of this Court's analysis of jurisdiction in the first instance. Surprisingly, the Treaty is not even mentioned in the Second Report and Recommendation of Magistrate Verkamp, which was adopted by Judge Carroll [C.I. 38, 46].

> 'Indian law' draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text, form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978). There is no doubt that the Treaty of 1868 unequivocally and permanently disposes of the issue of Navajo Nation jurisdiction over nonmember Indians, who are citizens of the United States.

The "treaty with the Navaho, 1868", explicitly provides for federal criminal jurisdiction (not Navajo jurisdiction) involving any crime by a nonmember of the tribe or by a Navajo member against any nonmember (both non-Indian and nonmember Indian):

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person

> or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished **according to the laws of the United States,** and also to reimburse the injured persons for the loss sustained [emphasis added].
>
> If the bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indians; subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, **deliver up the wrongdoer to the United States, to be tried and punished according to its laws . . .** [emphasis added].

See, Article I of the Navajo Treaty of 1868, 15 Stat. 668 [Ex. R. pp. 110-11]. Contrary to the analysis by Chief Justice Yazzie, the Navajo Treaty expressly provides for federal jurisdiction over alleged crimes by nonmembers. The Treaty provision alone grants federal jurisdiction over intertribal offenses "without the aid of further legislation" R.N. Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, Vol. 17, Ariz. L. R. 951, n. 157 (1975), citing *Ex Parte Crow Dog*, 109 U.S. 556 (1883).

More than two decades ago, one objective scholar reviewed Indian treaties to determine their jurisdictional impact. Mr. Ehrhart expressly concluded that numerous treaties with provisions similar or exactly the same as the Navajo Treaty of 1868 expressly provided for federal criminal jurisdiction over offenses committed by one tribal member against a member of another tribe. In other words, the federal

government assumed jurisdiction over intertribal crimes. Ehrhart, *supra*, at p. 738. Mr. Erhart's article has been relied upon by the United States Supreme Court. *Duro*, 495 U.S. at 690. Russell Means is a member of an Indian tribe subject to the same treaty language.[1] Congress cannot by implication overrule a prior Indian treaty. We submit that it is impossible to find that the Navajo Nation has criminal jurisdiction over Russell Means, a United States citizen and a member of another Indian tribe who is subject to the control and jurisdiction of the United States, without expressly abrogating the Navajo Treaty of 1868. It is surprising that the District Court could resolve the issues in this case without even addressing the Navajo Treaty of 1868, its meaning, and its obvious conflict with the 1990 amendments to ICRA.

In a recent decision from the Federal Circuit construing the language of the Navajo Treaty of 1868, Senior Circuit Judge Nichols interpreted the Treaty consistently with Mr. Erhart and Professor Clinton. *Tsosie v. United States*, 825 F.2d 393 (Fed. Cir. 1987). The Navajo Nation had been at war with the United States from 1863 until the Treaty was negotiated in 1868. Although Chief Justice Yazzie believed that the right of the Navajo Nation to repel attacks by other Indian tribes constituted a grant of criminal jurisdiction over nonmember Indians, Judge Nichols properly noted that the

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[1] *See*, the Treaty with the Sioux, 4/29/1868, 15 Stat. 635. He is "among other people subject to the authority of the United States."

Navajo Nation could only repel a war-like attack to the borders of the Navajo Nation, but pursuit and retaliation was left to the United States Army. Moreover, "[t]he 'bad men' clause dealing with wrongs to the Navajos is not confined to the United States government employees, but extends to 'people subject to the authority of the United States'. This vague phrase, to effectuate the purposes of the Treaty, could possibly include Indians hostile to the Navajos whose wrongs to Navajos the United States will punish and pay for: thus the need for Indian retaliation would be eliminated." *Tsosie* at p. 395. The Federal Circuit rejected arguments by the government that the "bad men" clauses have become obsolete. Instead, Judge Nichols concluded that the provisions may not only be enforced, but that an individual Indian may bring a civil claim to enforce the treaty provisions. Judge Nichols concluded that persons subject to the authority of the United States most likely included "Indian nonmembers of the Navajo Tribe, but subject to the United States law." *Tsosie* at p. 400. The Court of Claims has similarly concluded that the "bad men" language of the Treaty expressly includes other Indians as "other people subject to the authority of the United States." *Hebah v. United States*, 428 F.2d 1334, 1340 (Ct. of Claims 1970) (including Indian police officers). Indeed, the language from the nine treaties ratified during 1868 was eventually included in an act that authorized civil actions before the Court of Claims, Act of March 3, 1981, c. 538, 26 Stat. 851; *Marks v. United States*, 161 U.S. 297

(1896).[2] A valid claim existed if a depredation was committed by an Indian or Indians belonging to a tribe at peace with the United States.

It is impossible to avoid the conclusion that the Navajo Treaty of 1868, if applied to the facts of this case, unequivocally vests criminal jurisdiction with the United States. It is equally clear that this issue has never been decided by this Court. We submit that "politically correct" decisions favoring "Indian tribes" do not provide sound legal analysis nor do they properly consider the rights of individual Indians.

Treaties with Indian tribes are accorded the same dignity as treaties with foreign nations. *United States v. 43 Gallons of Whiskey*, 93 U.S. 188 (1876). Although Indian treaties are generally construed in favor of the Indians, both parties to the debate before this Court are either Indians or an Indian tribe. "Further, the courts will not find that Indian treaties have been abrogated by later treaties or legislation unless there is a clear and specific showing in the later enactment that abrogation was intended." Felix S. Cohen, *Handbook of Federal Indian Law*, Chap. 2, p. 63 (Michie Co. 1982); *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Washington v. Fishing Vessell Ass'n*, 443 U.S. 658 (1979); Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation*, 63 Cal. L.R. 601 (1975).

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[2] *Also see, e.g.*, Treaty with the Ute Indians, Marc. 2, 1868, 15 Stat. 620; Treaty with the Sioux Indians, Apr. 29, 1868, 15 Stat. 635; Treaty with the Cheyenne Indians, 15 Stat. 649; Treaty with the Kiowas and Comanches, Oct. 28, 1867, 15 Stat. 581-82.

There is no doubt that this Court must now consider the issue not reached by the *en banc* Ninth Circuit in *Enas* (double jeopardy does not apply to federal prosecution of a nonmember because tribal prosecution by an Indian tribe established by executive regulation had inherent authority). In the context of civil jurisdiction, the United States noted that general principles of Indian law must bow to specific treaty provisions.

> Our holding in *Worcester* [*v. Georgia*, 6 Peters 515, 561 (1832)] must be considered in light of the fact that "the 1828 Treaty with the Cherokee Nation . . . guaranteed the Indians their lands would never be subjected to the jurisdiction of any State or Territory." *Organized Village of Kake v. Egan*, 369 U.S. 60, 71, 7 L.Ed.2d 573, 82 S. Ct. 562 (1962); cf. *Williams v. Lee*, 358 U.S. 217, 221-22, 3 L.Ed.2d 251, 79 S. Ct. 269 (1959) (comparing Navajo Treaty to the Cherokee Treaty in *Worcester*).

Nevada v. Hicks, 121 S. Ct. 2304, n. 4, 150 L.Ed.2d 398, n. 4 (2001). An intention to alter a treaty by legislation must be explicit. *Menominee, supra.*

> Although Indian treaties are to be interpreted, so far as possible, as Indians understood them, they "cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties."

United States v. Consolidated Wounded Knee Cases, 389 F.Supp. 235, 240-41 (D. Neb. and S.D. 1975), *citing Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943). The Supreme Court has held that an Indian treaty must be honored as a contract. *Tsosie v. United States*, 825 F.2d 393, 397 (Fed. Cir. 1987), *citing Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443

U.S. 658, 675, 690 (1979) (absent explicit statutory language, the Court has been extremely reluctant to find Congressional abrogation of treaty rights). An individual Indian is considered a third-party beneficiary to an Indian treaty. *Tsosie* at 397. Congress may abrogate Indian treaty rights only if it has clearly expressed its intent to do so. *United States v. Dion*, 476 U.S. 734, 738-40 (1986). "There must be 'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.'" *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-03 (1999). The Federal Circuit expressly concluded that the provision covering intertribal offenses and "wrongs" to Navajos by nonmembers "is not preempted and is still in effect." *Tsosie*, 825 F.2d 393, 403 (Fed. Cir. 1987). As a result, the Navajo Nation does not enjoy criminal jurisdiction over Russell Means, a nonmember Indian.

The 1990 amendments to the ICRA do not expressly consider nor express an intent to abrogate treaty rights and provisions. While Congress apparently intended to re-write the historical references and guidance provided by the United States Supreme Court in *Duro v. Reina*, 495 U.S. 676 (1990), Congress expressed no intent to abrogate literally dozens of Indian treaties when it amended the ICRA. It would be an ironic conclusion indeed if this Court found that Congress silentlyand impliedly abrogated

dozens of Indian treaties in its haste to find a "*Duro* fix" by amending civil rights legislation originally intended for the benefit of individual Indians (rather than Indian tribes).

B. The Historical Record For Indian Nation Criminal Jurisdiction Over Nonmembers Is Inconsistent With The 1990 Amendments to The ICRA

1. *Duro v. Reina* Decided The Issue of Retained Sovereignty Over Nonmembers

The United States Supreme Court squarely held that Indian tribal courts do not possess criminal jurisdiction over nonmember Indians as a matter of retained, sovereign power.

> The question we must answer is whether the sovereignty retained by the tribes in their dependent status within our scheme of government includes the power of criminal jurisdiction over nonmembers.
>
> We think the rationale of our decisions in *Oliphant* and *Wheeler*, as well as our subsequent cases, compels the conclusion that Indian tribes lack jurisdiction over persons who are not tribe members.

Duro v. Reina, 495 U.S. 676, 684-85 (1990).[3]

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[3]Tribal authorities generally did not utilize penal sanctions prior to contact with Anglo-American laws and culture. The exercise of criminal jurisdiction, including the imposition of fines and imprisonment, by tribal governments is a contemporary phenomenon. F. Cohen, *Handbook of Federal Indian Law* at p. 335 (1982 ed.). Nevertheless, tribal courts exercise criminal jurisdiction over their own members based upon a concept of personal rather than territorial sovereignty.

2. As Reflected in *Duro v. Reina*, Indian Nations Did Not Historically or Legally Possess Criminal Jurisdiction Over Nonmembers: Indians Are Not All Alike.

The Navajo Nation Supreme Court's arguments regarding the inherent power of Indian tribal governments over nonmember Indians is historically and legally incorrect. The majority in *Duro* noted the same conclusion. "Respondents and *amici* [tribes] argue that a review of history requires the assertion of jurisdiction here. We disagree." *Duro v. Reina*, 495 U.S. 676, 688 (1990); *Oliphant* at 208. The intrinsic limits of tribal court jurisdiction summarized in *Oliphant* were recognized by the Eighth Circuit in *Greywater v. Joshua*, 846 F.2d 486 (8th Cir. 1988).

The interest of the United States in protecting its own citizens, emphasized in *Oliphant* at pp. 204 and 210, applies with equal force to Russell Means as it did to the non-Indian petitioners in *Oliphant*. As a United States citizen,[4] he is entitled to the same constitutional safeguards and protections as non-Indians. See *Oliphant* at 211.

Oliphant emphasized the injustice that non-Indians would face if they were subjected to criminal trials not by their peers, not by the customs of their people, but by a different race and culture, according to the law of an alien societal state. *Oliphant* at 210-211. Similar racial and cultural differences exist between different Indian

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[4]All Indians became citizens of the United States by an act of Congress in 1924. See Title 8, U.S.C. § 1401(b).

peoples or tribes as well as between Indians and non-Indians. See *Greywater* at 493.

> The cultural and legal diversity among the Indian tribes is in many instances as great as that between an Indian tribe and non-Indians.

K.J. Erhart, *Jurisdiction Over Nonmember Indians on Reservations*, 1980 Ariz. State L.J. 727 at 755.

Nonmembers, like Russell Means, are not eligible for tribal membership in the Navajo Nation. They cannot vote in elections held by the Navajo Nation or hold elected office. The same impediments to a fair, constitutionally sound trial were significant in *Oliphant* (at 191, n 4.).

> A tribe's additional authority comes from the consent of its members, and so in the criminal sphere membership marks the bounds of tribal authority.
>
> The special nature of the tribunals at issue makes a focus on consent and the protections of citizenship most appropriate . . . It is significant that the Bill of Rights does not apply to Indian tribal governments. *Talton v. Mayes*, 163 U.S. 376 (1896). The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts. . .
>
> Our cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right. *Cf. Reid v. Covert*, 354 U.S. 1 (1957). . . .
>
> Tribal authority over members, who are also citizens, is not subject to these objections . . . This is all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our

constitutional system. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 172-173 (1982). (STEVENS, J., dissenting)

Duro v. Reina, 495 U.S. 676, 693-94 (1990).[5]

C. Criminal Jurisdiction from a Historical Perspective: Indian Treaties, Early Statutes, and Administrative Law Compel The Conclusion Reached In *Duro*

Contemporary case law establishes that the extent of criminal jurisdiction held by Indian tribes ends where the reach of state governments begins, specifically with nonmembers. A historical review of the relationship between federal, state, and tribal governments also reveals that non-Indians and nonmember Indians were treated similarly for purposes of criminal jurisdiction.

> "Indian law" draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.

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[5]The same points were highlighted by the Supreme Court in *Montana v. United States*, 450 U.S. 544 (1980). It held that the Crow Tribe could properly regulate hunting and fishing by nonmembers on land belonging to the tribe or held by the United States in trust, but that it had no power to do so on lands that had passed from the tribe and were now held in fee by nonmembers (through allotment). See *Montana* at p. 564-65, and n. 8 & 9.

The sovereignty of Indian tribes encompasses limited criminal jurisdiction over its own members and civil jurisdiction over its own territory. *See Strate v. A-1 Contractors*, 520 U.S. 438, 117 S. Ct. 1404 (1997). *Also see*, MacKay, *Indian Self-Determination, Tribal Sovereignty, and Criminal Jurisdiction: What About the Nonmember Indian?*, 1988 Utah L.R. 379, 391 (1988); *Nevada v. Hicks*, 150 L.Ed.2d 398 (2001); *Atkinson Trading Co. v. Shirley*, 149 L.Ed.2d 889 (2001).

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978). Although the federal government was most concerned with controlling violence between Indians and white frontier persons, treaties gradually tended to treat non-Indians and nonmember Indians similarly. The concern of the United States with intra-Indian offenses increased with the Western movement and the closing of open space between the two cultures. Although provisions of treaties varied, the federal government generally exercised jurisdiction over offenses involving any of its own citizens.[6]

1. Indian Treaties

The first treaty negotiated by the United States was with the Delaware Nation on September 17, 1778, 7 Stat. 13. The treaty with the Delaware is unique in its use of language of international diplomacy. It provided that "neither party shall proceed to the infliction of punishments on the citizens of the other . . . until a fair and impartial trial can be had by judges or juries of both parties. . .." See Article IV. Subsequent treaties provide for federal jurisdiction over offenses committed between Indians and

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[6]Although many commentators have reviewed Indian treaties over the years, our research reveals that only one has reviewed them with the express purpose of discovering the treatment of nonmember Indians in comparison to treatment accorded to non-Indians. See K.J. Erhart, *Jurisdiction Over Nonmember Indians on* Reservations, Ariz. State L.J., 727-756 (1980). Mr. Erhart concludes that "[t]reaty provisions during this same period are quite explicit in calling for identical treatment of non-Indians and nonmember Indians for crimes by or against tribal members." At 739-40.

citizens of the United States.[7]

The exercise of federal jurisdiction over offenses by or against any United States citizen is significant. If the provisions of the early treaties were applied, an alleged offense by Russell Means on the land of another tribe would fall directly under federal jurisdiction.

However, treaty provisions soon began to provide for federal criminal jurisdiction over offenses committed by or against tribal members, as opposed to Indians generally, which involved United States citizens. "Consideration of subsequent treaty provisions makes clear the intent of Congress to assume jurisdiction over intertribal crimes." Erhart, *supra*. at p. 738.[8]

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[7]*See, e.g.*, Treaty with the Shawnees, Jan. 31, 1786, art. 3, 7 Stat. 26 (Any Indians of the Shawnee Nation or other Indians residing in their towns who commit murder or robbery "or do any injury" to United States citizens shall be delivered to the United States. In turn, any citizen of the United States who injures any Indian of the Shawnee Nation or other Indians residing in their towns and under their protection shall be punished according to the laws of the United States); Treaty with the Creeks, Aug. 7, 1790, art. 8 & 9, 7 Stat. 37 (similar language); Treaty with the Cherokees, July 2, 1791, art. 10 & 11, 7 Stat. 40-41 (same as above). *See* K.J. Erhart, *supra*., at no. 70.

[8]*See, e.g.*, Treaty with the Wyandots, Jan. 9, 1789, art. 5, 7 Stat. 29 (The treaty provided for federal jurisdiction over offenses by tribal members against any citizen of the United States or by any United States citizens against tribal members.); Treaty with the Six Nations, Jan. 9, 1789, "Separate Article", 7 Stat. 34-35 (same as above); Treaty with the Choctaw, Sept. 27, 1830, art. 6-8, 7 Stat. 334 (Any party of the Choctaws who commits acts of violence upon a United States citizen shall be punished by the laws of the United States. "All acts of violence" committed against "people of the Choctaw Nation either by citizens of the United States or neighboring tribes of red people" shall be referred to the President of the United States for punishment.).

2. Congressional Treatment of Jurisdiction Prior to 1990

Early trade and intercourse acts were generally understood to follow the jurisdictional schemes of treaties. Intertribal jurisdiction rested with the federal government.

> First, in accordance with the prevailing policy of permitting the tribe to resolve **intratribal matters**, the Act provided that federal jurisdiction would not "extend to any offense committed by one Indian against another, within any Indian boundary." . . . Additionally, the 1817 Act stated that it should **not be construed to negate** any contrary jurisdictional arrangements contained in **prior treaties**. The substance of the 1817 Act was incorporated into Section 25 of the first permanent Indian Trade and Intercourse Act of 1834. [emphasis added].

R.N. Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective, supra.*, at pp. 959-60. *Also see*, F. P. Prucha, *American Indian Policy in the Formative Years – The Indian Trade and Intercourse Acts* (1790-1834) at pp. 188-194 (Univ. Of Neb. Press, 1962).

Professor Clinton points out that several treaties during the middle 1800's grant jurisdiction to the federal courts over crimes between Indians. "Such provisions failed to indicate whether coverage was limited to intertribal crimes or also included crimes occurring within a single tribe." However, Clinton cites the case of *Ex parte Crow Dog*, 109 U.S. 556, 566-67 (1883), for the proposition that the treaties did not grant

federal jurisdiction over *intratribal* crime.[9]

As the century progressed, tribal sovereignty continued to diminish, while federal jurisdiction into Indian country expanded. In 1871, Congress ended the treaty period by declaring that "no Indian nation or tribe . . . shall be acknowledged . . . as an independent. . . tribe or power with whom the United States may contract by treaty."[10] Congress passed the Major Crimes Act in 1885.[11] It granted jurisdiction to the federal and territorial courts to try crimes by and against Indians on reservations. It has been expanded several times and is now embodied within Title 18 U.S.C. Sec. 1153.[12]

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[9]R.N. Clinton, *supra,* at n. 29 and p. 956.

[10]Act of March 3, 1871, Ch. CXX, 16 Stat. 566 (now 25 U.S.C. Sec. 71).

[11]Act of March 3, 1885, Ch. 341, Sec. 9, 23 Stat. 385. Professor Clinton notes that passage of "[t]he Federal Crimes Act thus apparently reversed the long standing federal policy of permitting tribal self-government and punishment of intratribal offenses." See R.N. Clinton, *supra*, at p. 964.

[12]Also see, e.g., *Report from the Office of Indian Affairs*, S.D. No. 1, 24th Cong., 2d Sess., at pp. 380-407 (1936) (A key role of the federal government was to preserve peace on the frontier between the several tribes and to establish an amiable relationship between them.); *Protection of Western Frontier*, H.D. No. 59, 25th Cong., 2d Sess. (1838) (Military posts are necessary in Indian territory to maintain peace among the Indians and to protect "feebler tribes against the stronger and more warlike nations that surround them which the United States are bound to do by treaty stipulations."); Debates of Congress, Gale and Seatons Register, at pp. 4763-4779 (June 25, 1834). Congress understood the "customs of the tribe" relating to criminal jurisdiction to be that of a blood-avenger that utilized crude revenge to settle disputes. Cong. Record-House, January 9, 1885, at p. 934.

The Trade and Intercourse Acts were designed to deter violent clashes between white frontierpersons and groups of Indians. But, the provisions of the Trade and Intercourse Acts were never effectively enforced. See F.P. Prucha, *American Indian Policy in the Formative Years -- The Indian Trade and Intercourse Acts* (1790-1834) at pp. 193-203 (Univ. Of Neb. Press 1962). The exception to federal jurisdiction for offenses by "one Indian against another" was understood to preserve tribal sovereignty allowing tribes to punish their own members. F.P.

Congress then moved toward termination and allotment of Indian lands: and assimilation of Indian people into the economic, social, and judicial system of white society. The General Allotment Act of 1887[13] (or Dawes Act) provided for the division of tribal land into individual parcels and declared that allottees would then become United States citizens subject to the jurisdiction of state courts. *See*, generally, Otis, *The Dawes Act and the Allotment of Indian Lands* (U. of Okla. 1973); H. R. Rep. No. 1576 (Lands in Severalty to Indians), 46th Cong., 2d Sess. (1880); S. Doc. No. 12 (Report of the Dawes Commission), 34th Cong., 1st Sess. (1895). Subsequent acts by

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Prucha at p. 211. Of course, the Trade and Intercourse Acts not only preserved, but could not and did not negate, contrary jurisdictional arrangements contained in Indian treaties. R.N. Clinton, *supra*.

The majority of persons living on Indian reservations in this country are non-Indians. Census data reveals that only 49.2 percent of the population living on reservations are American Indians. Only 8 percent are nonmember Indians, while over 35 percent are non-Indians. *See, American Indian Areas and Alaska Native Villages: 1980, Census Population, Supplementary Report, U.S. Dept. of Commerce, Bureau of Census.* Cross deputization of officers has occurred between tribes, county and state law enforcement agencies in Arizona. Ariz. Office of Econ. Planning and Develop., *Critical Issues in Indian-State Relations* at p. 37 (1981). Mutual aid provisions have also been enacted. See A.R.S. §§ 11-952, 13-3872 through 3874. The vast majority of crimes committed against Indians are by non-Indians, not nonmember Indians. U.S. Bur. of J. Stat., Am. Ind. & Crime 7-9 (2/99).

[13]Act of Feb. 8, 1887, Ch. 119, 24 Stat. 388 (now 25 U.S.C. Secs. 331-358).

not possess criminal jurisdiction beyond its own members.[18] Early

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[18](1) The Senate Committee on the Judiciary (1870) was instructed to examine the effect of the Fourteenth Amendment on Indian Tribes. The Committee reviewed federal legislation affecting Indians and the status of Indian tribes. Excerpts from the Committee's report show that Indian tribes, in the view of Congress, held wide jurisdiction over their own members, but not beyond that:

> . . . and although the Indians were thus overshadowed by the assumed sovereignty of the whites, it was never claimed or pretended that they had lost their respective nationalities, **their right to govern themselves** . . .
>
> * * *
>
> On the contrary, they have uniformly been treated as nations, and in that character held responsible **for the crimes and outrages committed by their members**, even outside of their territorial limits. . .. Their right of self-government, and to administer justice among themselves, after their rude fashion, even to the extent of inflicting the death penalty, has never been questioned . . .

S. Rep. No. 268, 41st Cong., 3d Sess., at pp. 2, 9 and 10 (1870).

(2) Extensive hearings were conducted prior to the passage of the Indian Civil Rights Act of 1968 by the Subcommittee on Constitutional rights of the Senate Committee on the Judiciary. The purpose of the Subcommittee's investigation was to determine the treatment accorded to individual Indians in light of their constitutional rights as American citizens.

> . . . it appears that a tribe may deprive **its members** of property and liberty without due process of law . . . [emphasis added].

Summary Report of Hearings and Investigations, Committee Print, 88th Cong., 2d Sess. at p. 4 (1964). Reference was continually made to the members of the tribe, rather than Indians generally. For example:

> Nevertheless, the Indian as a citizen has not been deemed to possess, **in his relationship to his tribal government**, the protections available to other American citizens in their relations with the State and Federal Government [emphasis added].

The Subcommittee discussed the testimony of Judge Shirley Nelson of the Hualapai Tribe (Arizona) to point out the potential problem faced by tribes that do not have jurisdiction over nonmember Indians:

cases display a similar understanding on the part of the judiciary. See, e.g., *Fletcher v. Peck*, 6 Cranch 87, 147 (1810); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Ex Parte Crow Dog*, 109 U.S. 556 (1883); *United States v. Kagama*, 118 U.S. 375 (1886); *In re Mayfield*, 141 U.S. 107 (1891); *Talton v. Mayes*, 163 U.S. 376 (1896); *Ex Parte Kenyon*, 14 F. Cas. 353 (W.D. Ark. 1878).

Shocking abuses on the part of tribal courts that do impose criminal sanctions has been noted by congressional investigations relating to the enforcement of the Indian Civil Rights Act of 1968, Title 25 U.S.C. §§ 1301, *et seq.* See the Congressional Record-Senate, August 11, 1988, at pp. S11652-56 and March 5, 1989, at pp. S2186-92. Administrative decisions also reveal the understanding that Indian

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> Judge Nelson also referred to the **limited power of tribal courts to try offenses committed by Indians who are not members of the tribe** . . . The Federal authorities reasoned that . . . no crime had been committed which was subject to Federal prosecution. Therefore, the offender was allowed to go free; he could not be tried in the tribal court, **which had no power to try a nonmember** [emphasis added].

Ibid. at p. 8.

Tribes did not possess jurisdiction over nonmember Indians.[19]

> Evidence on criminal jurisdiction over nonmembers is less clear, but on balance supports the view that inherent tribal jurisdiction extends to tribe members only . . . Taken together with the general history preceding the creation of modern tribal courts, they indicate that the tribal courts embody only the powers of *internal* self-governance we have described. We are not persuaded that external criminal jurisdiction is an accepted part of the Court's function

Duro v. Reina, 495 U.S. 676, 691-92 (1990).

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[19]Commissioner Price first originated the Court of Indian Affairs in order to combat "heathenish" customs during 1883. The Department of Interior specifically recognized that Courts of Indian Offenses do not rely solely upon the authority of the Secretary of Interior to establish legal validity. Indian tribes have the inherent power to govern their own members. 1 Op. Sol. 531, 536 (1935).

It was understood that Indian tribes maintain the power to regulate domestic relations of its members and to "administer justice with respect to all disputes and offenses of or among the **members of the tribe**, other than the ten major crimes reserved to the federal courts" [emphasis added]. In addition, Indian tribes could "exclude from the limits of the reservation nonmembers of the tribe, excepting authorized Government officials . . .". 55 I.D. 14, 1 Op. Sol. 445 (1934) ("Powers of Indian Tribes"); 1 Op. Sol. 736 (1937). The same problem was subsequently revisited by the Department of the Interior, Acting Solicitor, Frederick L. Kirgis, that the Rocky Boy's Tribe could exclude nonmember Indians from the reservation, but could not prosecute them for criminal offenses. Again, he suggested that the Department of Interior, which "has broad jurisdiction over recognized Indians on Indian reservations", could delegate criminal jurisdiction to the Rocky Boy's Tribe. 1 Op. Sol. 872, 873 (1939); 1 Op. Sol. 891, 894-96 (1939). As a result, tribal governments exercise jurisdiction over their own "members except as may be limited by Federal statutes." 1 Op. Sol. 891, 897 (1939). In turn, federal courts, established under Article III of the United States Constitution, exercise "an absolute and exclusive jurisdiction over any recognized Indian anywhere within Indian country." *Ibid.* At the same time, Indian tribes are allowed to remove or exclude nonmembers of the tribe from the limits of the reservation. 1 Op. Sol. 913, 916 and 928 (1930) (Solic. Margold); *Also see*, 1 Op. Sol. 985 (1940).

Felix Cohen quotes extensively and approvingly from the decision of Frederick L. Kirgis, Acting Solicitor, dated April 27, 1939. 1 Op. Sol. 891 (1939). See F. Cohen, *Federal Indian Law*, at pp. 359-362 (1942 ed.) Mr. Cohen reiterates the position of the Department of the Interior that Indian tribes do not possess "a strictly territorial sovereignty, but primarily a personal sovereignty." *Ibid.* at p. 361.

D. Congress Cannot Delegate Criminal Jurisdiction Over U.S. Citizens of the Navajo Nation Without the Full Panoply of the U.S. Constitution

Congress cannot delegate criminal jurisdiction over U.S. citizens to the Navajo Nation without the full panoply of the U.S. Constitution. *Reid v. Covert*, 354 U.S. 1 (1957).[20] Even if it could, the 1990 amendments to the Indian Civil Rights Act constitute an unlawful delegation.[21] Congress does not have the authority to legislate

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[20]Important constitutional issues arise from criminal prosecutions in the context defined by Navajo law, including the Sixth Amendment right to be tried by an impartial jury of one's peers from a fair cross-section of the community. *Duren v. Missouri*, 439 U.S. 357 (1979); *United States v. Herbert*, 698 F.2d 981 (9th Cir. 1983). "[P]olitical subdivisions may not exclude persons from voting unless the exclusion is strictly necessary to serve a compelling [governmental] interest." *Report of Federal, State, and Tribal Jurisdiction*, Final Report, American Indian Policy Review Commission, at pp. 585-86 (1977) (separate view of Vice-Chairperson), citing *Avery v. Midland County*, 390 U.S. 374 (1968); *City of Phoenix v. Koladziajski*, 399 U.S. 204 (1970).

[21]Judicial review is one type of check used to keep the powers of the branches balanced and within their constitutional limits." K. Whitney Rogers, "*Sublegislative Delegation:" Examining Its Constitutionality in Pennsylvania and the United States*, Vol. 1, No. 1, Widener Journal of Public Law, at p. 210 (1992).

> With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to carefully crafted restraints spelled out in the Constitution.
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> * * * *
>
> There is unmistakably expression of a determination that legislation by the national congress be a step-by-step, deliberate and deliberative process.

I.N.S. v. Chadha, 462 U.S. 919, 959, 103 S. Ct. 2764, 77 L.Ed.2d 317, 349 (1983). Although the Supreme Court has backed away from the "nondelegation doctrine" of earlier times, contemporary cases provide that when Congress is unclear or ambiguous in delegating power, the delegation is unconstitutional. *Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 672, 100 S. Ct. 2844, 65 L.Ed.2d 1010, 1053 (1980) (Rehnquist, C.J., concurring). *Also see*, e.g., *Metropolitan Washington Airports Authority v. Citizens for the Abatement of*

Congress continued to grant criminal jurisdiction to territorial courts.[14]

Although the Indian Reorganization Act of 1934 formally halted the alienation of Indian lands by allotment, the Act did not alter the historical distribution of criminal jurisdiction.[15] The trend against tribal jurisdiction continued with a flood of termination statutes during the 1940's and 1950's.[16] The Select Committee of the Indian Affairs Committee of the House expressly continued the goal of enabling Indian people to take their place "in the white man's community on the white man's level."[17] Both houses of Congress and the Department of Interior shared the same views.

Indian tribes have never been understood to possess criminal jurisdiction over nonmembers. The federal government policed disturbances between Indian tribes throughout the treaty period. Intertribal offenses were treated similarly with offenses by or against non-Indian citizens. In sum, nonmembers and their sub-class, non-Indians, have always been treated alike with respect to tribal criminal jurisdiction.

Congressional history demonstrates its understanding that tribal governments did

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[14]Act of May 2, 1890 (Organic Act for the Territory of Oklahoma), Ch. 182, Sec. 12, 30-31, 26 Stat. 81, 88, 94-96; Act of June 10, 1896 (United States accepts jurisdiction over Sac and Fox Reservations from Iowa), Ch. 398, 29 Stat. 324, 331; Act of Feb. 2, 1803 (Act conferring jurisdiction upon circuit and district courts from South Dakota), Ch. 351, 32 Stat. 793.

[15]Act of June 18, 1934, Ch. 576, 48 Stat. 984 (now codified in scattered sections of Title 25 U.S.C.).

[16]The Termination Acts are listed by R.N. Clinton, *supra.*, at notes 91-95; T.W. Taylor, *The States and Their Indian Citizens* at Appendix B., Table III, and pp. 48-62 (1972).

[17]H.R. Rep. No. 2091, 78th Cong., 2d Sess at p. 2 (1944).

the "inherent" powers of Indian tribes over nonmember, U.S. citizens under the "Indian Commerce Clause." See art. I, § 8, cl. 3; art, II, § 2, cl. 2 of the U.S. Constitution. Congress has authority to regulate "commerce" with Indian tribes, while the Executive Department has the authority to negotiate treaties. The 1990 amendments to the ICRA do not regulate commerce and are not an appropriate exercise of power by Congress. This Court has issued splintered decisions on whether the 1990 amendments to the ICRA constituted delegated authority to Indian Tribes.

> . . . Congress does not have the authority to negate a Supreme Court decision. [*Duro v. Reina*] . . . The 1990 amendments must be treated as an affirmative delegation of power, and must consequently be examined to determine if that affirmative delegation should be applied retroactively or not.

Means v. Northern Cheyenne Tribal Court, 154 F.3d 941, 946 (9th Cir. 1998). *But see*, *United States v. Enas*, 255 F.3d 662 (9th Cir. 2001); *United States v. Archamblault*,

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Aircraft Noise, Inc., 501 U.S. 252, 111 S. Ct. 2298, 115 L.Ed.2d 236 (1991) (the statutorily created Board of Review was unconstitutional because it violated "basic separation of powers principles."); *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 156 Pac. 491 (1916) (the power to grant compensation to defendants because of death by industrial accident could not be vested in an administrative tribunal unless authorized by the Constitution).

Besides clear and explicit statutory authority to support delegation at each step, delegation must be supported by guidelines and, more recently, safeguards. "The existence of *standards* is relevant in assessing the validity of delegation, but the existence of *safeguards* for those whose interest may be affected is determinative." *Meyer v. Lord*, 37 Or. App. 59, 586 P.2d 367, 371 (1978). "A delegation may and should be held unconstitutional when neither the statute nor the agency provides guides for the exercise of discretionary power affecting vital private interests." K. C. Davis, *Administrative Law Treatise (2nd Ed.)*, Vol. 1, Section 3:15 (K. C. Davis Pub. Co. 1978 and 1982 Supp.).

174 F.Supp.2d 1009 (D.S.D. 2001).

In *Reid v. Covert*, 354 U.S. 1 (1957), the Supreme Court questioned the constitutionality of agreements with foreign governments requiring civilian dependents of military personnel to be tried by court martial. As one commentor recently noted:

> The Supreme Court concluded that the Constitution entitled its citizens, even when abroad, to full constitutional protection. The Court, rejecting the proposition that constitutional rights of citizens could be bargained away when dealing with another sovereign, stated:
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> Article VI, the Supremacy Clause of the Constitution declares: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . ." [quoting from *Reid v. Covert*].
>
> *Reid*, therefore, stands for the proposition that if the United States has the power to provide constitutional protections to its citizens, it must do so.
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> It should be noted that although *Reid* was a plurality opinion, it was followed and broadened by *Kinsella v. U.S. ex. rel. Singleton*, 361 U.S. 234 (1960). The decision in *Kinsella* was written by Justice Clark, who wrote the dissenting opinion in *Reid*. *See, Kinsella*, 361 U.S. at 241 n. 6. *Reid* was also followed in *Duro v. Reina*, 495 U.S. 676, 693 (1990).

James A. Poore, III, *The Constitution of the United States Applies to Indian Tribes: A Reply to Professor Jensen*, Vol. 60, Montana Law Review, pp. 17-34, at 25-26 (1999).

> The 'general object' of the congressional statutes to allow Indian nations criminal 'jurisdiction of all controversies between Indians, or where a

> member of the nation is the only party to the proceeding, and *to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side.*' . . .

Oliphant v. Suquamish Indian Tribes, 435 U.S. 191 at 204 (1978) (emphasis added).

The rights of citizenship were emphasized, once again, in *Duro v. Reina*, 495 U.S. 676 (1990).

> We hold that the retained sovereignly of a tribe as a political social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership.
>
> * * *
>
> We hesitate to adopt a view of tribal sovereignly that would single out another group of citizens, nonmember Indians, for trial by political bodies that do not include them. As full citizens, Indians share in the territorial and political sovereignty of the United States.
>
> * * *
>
> Our cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right. Cf. *Reid v. Covert*, [495 U.S. 694] 354 U.S. 1, 77 S. Ct. 1222, 1 L.Ed.2d 1148 (1957).

Duro v. Reina, 495 U.S. 676, 679, 692, 693-94 (1990). Russell Means is a citizen of the United States. He should be treated no different than Mr. Oliphant.

There is no doubt that the 1990 amendments to the Indian Civil Rights Act do not regulate "commerce" with Indian tribes. After ignoring the express language of the

Navajo Treaty of 1868, the Report and Recommendation provides an expansive view of the Indian Commerce Clause that is untenable based upon the plain language of the Constitution. Second, we suggest that the indefensible, expansive interpretation of the Indian Commerce Clause beyond its true meaning is belied by the fact that the United States Supreme Court has repeatedly pulled in the reins on such expansive interpretation of the same clause referring to "commerce . . . among the several states." *See, e.g., United States v. Lopez*, 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995) (possession of gun in local school zone was not economic activity that substantially affected interstate commerce; "commerce" is commercial intercourse). *Also see, Spokane Tribe of Indians v. Washington*, 28 F.3d 991, 997 (9th Cir. 1994) (roughly equating interstate commerce and Indian commerce powers).

Nevertheless, even if this Court buys an expansive reading of the Indian Commerce Clause beyond affairs affecting true "commerce", it is important to note that even ardent supporters of Indian tribal jurisdiction have conceded that the *Oliphant* and *Duro* decisions rest on constitutional principles.

> Even if based on federal common law, it is still very possible that the Court may view its decisions as being 'linked' to the constitution.... The decision may, nevertheless, be constitutionally based, at least in an organic or structural sense. That is because it may be based on the Court's interpretation of the Tribe's status and powers within the constitutional framework. Congress cannot overturn *Duro*'s holding that the tribes cannot assume criminal jurisdiction without Congressional

authorization because that holding is based on the court's interpretation of the constitutional status and powers of the Indian tribes.

Skibine, *Duro v. Reina and the Legislation That Overturned It: A Power Play of Constitutional Dimensions*, Vol. 66, So. Cal. Rev. 767, 782-83 (1993).

The Second Report and Recommendation refers to *Unites States v. Weaslehead*, 156 F.3d 818, 825 (8th Cir. 1998), *on rehr'g*, 165 F.3d 1209 (*en banc*), *cert denied*, 528 U.S. 829 (1999), but only to the dissenting opinion. The majority concluded that Congress could only "delegate" criminal jurisdiction over nonmembers. Congress could not declare sovereignly-based jurisdiction contrary to *Duro v. Reina, supra*. The opinion of the District Court was "affirmed" on an equally divided vote of the *en banc* Court (but the Report and Recommendationdid not even cite the majority District Court opinion); *Mousseaux v. United States*, 806 F.Supp. 1433, 1441-43 (D.S.D. 1992), *aff'd and remanded in part*, 28 F.2d 786 (8th Cir. 1994) (Congress cannot deny *Duro* as a "legal fiction"); *Montana v. Horseman*, 866 P.2d 1110, 1115 (1993) (*Duro* still defines limits of tribal sovereignty).

Congress *may* have the power to limit tribal sovereignty if it expressly abrogates treaty rights (although we do not concede the point), bit it may *not* grant powers to tribes that they do not otherwise possess without federal "delegation", which is then subject to constitutional scrutiny. Indeed, the supposed grant of authority in the 1990

amendments to ICRA is unconstitutional (*Reid, Kinsella, supra.*). *Duro* is a structural, constitutional case.

It is impossible for Congress in 1990 to simply reverse the trend of several decades. If Congress boldly passed legislation violating dozens of negotiated treaties, it is hard to imagine that this or any other court would approve such legislation without finding an expressed intent to abrogate or modify Indian treaties. Indian treaties cannot be overruled implicitly as purportedly done by the 1990 amendments to the Indian Civil Rights Act. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968). The supposed "recognition" in 1990 of Indian nation inherent sovereignty conflicts with decades of contrary legislative intent and action from the "treaty period" through the "termination era" (1778-1968). [*See, supra.*, Section VI(C)(3-4)]. Congress cannot legitimately "recognize" something in 1990 when strong, historical references reveal the opposite recognition over many decades. The "grant" of authority is illegal and disingenuous.

As recognized in *Duro v. Reina*, tribal jurisdiction over nonmembers raises numerous other constitutional issues because citizens of the United States would be subjected to criminal trials by a foreign power which is not subject to the United States Constitution.

Our cases suggest constitutional limitations even on the ability of

> Congress to subject American citizens to criminal proceedings beforea tribunal that does not provide constitutional protections as a matter of right. Cf. *Reid v. Covert*, 354 U.S. 1 (1957). We have approved delegation to an Indian tribe of the authority to promulgate rules that may be enforced by criminal sanction in *federal* court, *United States v. Mazurie*, 419 U.S. 544 (1975), but no delegation of authority to a tribe has to date included the power to punish nonmembers in *tribal* court. We decline to produce such a result through recognition of inherent tribal sovereignty.
>
> Tribal authority over members, who are also citizens, is not subject to these objections. Retained criminal jurisdiction over members is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent. This principle finds support in our cases as decided under provisions that pre-date the present federal jurisdictional statutes.

Duro v. Reina, 495 U.S. 676, 693-94 (1990).[22]

Only "Indians", the ultimate minority in this Country, could be subject to criminal jurisdiction by a foreign power within the geographical boundaries of the United States and yet not be protected by the United States Constitution! The Second Report and Recommendation has engaged in the age-old stereotype that "Indians" receive federal benefits not available to other United States citizens. [*See*, the Report and Recommendation at fn. 5 ("Means should not be able to exercise the rights and

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[22]Contrast the language of Justice Kennedy against the language of Magistrate Verkamp, at fn. 5 of the Second Report and Recommendation. The key fact is not that Mr. Means is an "Indian", but a tribal "member" entitled to participate in the democratic processes of his tribal government.

privileges of being 'Indian' at some times and then argue that he is entitled to be treated as a non-Indian United States citizen when that suits him.")]. To be sure, Mr. Means enjoys privileges as a "member" of the Oglala Sioux Nation; he does not enjoy special privileges as a nonmember "Indian". The old stereotype that individual Indians enjoy special privileges is simply false. Mr. Means should not be forced to give up his constitutional rights as a citizen of the United States in order to enjoy the privileges (and burdens) of tribal membership.

The recent *Enas* decision from this Court is not only inconsistent with this Court's prior decision in the [David] *Means* case, but it has been convincingly limited and implicitly criticized by Judge Adelman, District of Wisconsin. *United States v. Long*, No. 01-CR-102 (E.D. Wis. 1/23/02) (when Congress reinstates power that has previously been extinguished, such power is "delegated", not inherent. [*See*, n. 5 of the decision referencing George Orwell, *1984*, 181-82 (1949), "we do not accept the notion that something has always been so when we know it has not."]. The Navajo Treaty of 1868 was not applicable to *Enas*, but it applies here. We know that the Navajo Tribe had no power to prosecute Mr. Means until Congress bestowed such power upon it in 1990. At the least, the Navajo Tribe lost such power when the Navajo Treaty was enacted into law in 1868. As in *Long*, only delegated authority results. Even Congress can only pass laws, not perform magic.

E. Even "Indians", Singled Out For Detrimental Treatment, Should Be Protected By "Equal Protection"

Nonmember Indians face unlawful discrimination based upon race or ethnicity when they are subjected to the criminal jurisdiction of a foreign Indian tribe, while all other nonmember persons are excluded from tribal jurisdiction, solely because of their status as non-Indians. In other words, the "equal protection" provisions of the ICRA are violated when criminal jurisdiction is imposed against a person solely because he or she is an "Indian". *See*, Title 25 U.S.C. § 1302(8). Congress violates the Fifth Amendment by creating such a distinction by legislation. [Also see, Title 25 U.S.C. § 640 (1982)].

> In suggesting that government entities may avoid the strict scrutiny of the courts by amalgamating racial classifications with other factors, the opinion takes a giant step backward in equal protection analysis. It is an unwise step, one long foreclosed by the Supreme Court. See *id.* (racially discriminatory factor need not be sole or even dominant concern to invoke strict scrutiny . . ."). Under strict scrutiny, it is difficult to perceive a state interest so compelling as to force Indians (but not non-Indians) to submit to the criminal jurisdiction of tribes to which they do not belong. (footnote omitted).

Duro v. Reina, 860 F.2d 1463, 1468 (9th Cir. 1988) (J. Kozinski dissenting from the denial of rehearing *en banc*). The assertion of criminal jurisdiction against nonmember Indians, but not against any other nonmembers, cannot avoid a racial distinction or impact.

> It is plain that Congress, on numerous occasions, has deemed it expedient, and within its powers, to classify Indians according to their percentages of Indian blood. Indeed, if legislation is to deal with Indians at all, the very reference to them implies the use of "a criterion of race". Indians can only be defined by their race. (footnote omitted).

Simmons v. Eagle Seelatsee, 244 F.Supp. 808, 814 (D. Oregon 1965), *affirmed*, 384 U.S. 209 (1966). *Contra, United States v. Keys*, 103 F.3d 758 (9th Cir. 1996). Similarly, a non-Indian cannot become an "Indian" by formal affiliation with or adoption by an Indian tribe. See *United States v. Rogers*, 45 U.S. (4 How) 567, 572-73 (1846).[23]

Traditional equal protection analysis has not generally applied to federal legislation favorable to Indian tribes.[24] In *Morton v. Mancari*, 417 U.S. 535 (1974), the Supreme Court upheld a federal statute granting an employment preference to Indians in the BIA. The Court noted that "an entire title of the United States Code (25

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[23]Jurisdictional statutes which infringe upon fundamental rights or adversely affect "suspect classes" are subject to strict scrutiny. The classification must then be necessary to fulfill a compelling government interest in order to survive equal protection analysis. Suspect classifications include alienage, *Sugarman v. Dugal*, 413 U.S. 634, 642 (1973); national origin, *Hernandez v. Texas*, 347 U.S. 475, 482 (1954); and race, *Koremastso v. United States*, 323 U.S. 214, 216 (1944). A "rational basis" must justify classifications that are not inherently suspect. "Middle tier" scrutiny, however, has developed in recent years and applies most notably to classifications based on gender and illegitimacy. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971) (gender); *Trimble v. Gordon*, 430 U.S. 762 (1977) (illegitimacy).

[24]The United States Constitution does not apply to Indian Tribes. *Talton v. Mayes*, 163 U.S. 376 (1896). *But see*, Poore, *The Constitution of the United States Applies to Indian Tribes*, Vol. 59, Montana Law Review, pp. 51-80 (Winter 1998); and Vol. 60, Montana Law Review, pp. 17-34 (1990).

U.S.C.)" would fall if federal legislation favoring "tribal Indians living on or near reservations" was deemed unconstitutional discrimination. *Ibid.* at p. 552. "Indian preference" was justified by Congress' powers under the commerce clause and its relationship to tribes (quasi-sovereign political entities) as guardian-ward.[25]

The ICRA does not fall within the type of "Indian preference" legislation accorded Indian tribes within the contemplation of *Mancari* and its progeny. Tothe contrary, Congress passed the ICRA to limit the "deprivation of Individual rights by tribal governments" and to confer constitutional rights and protections on American Indians as individuals.[26] Congress originally acted to hold tribes accountable to all individuals under constitutional principles. Traditional "equal protection" analysis should apply.

The focus of *Mancari* on Indians as members of quasi-sovereign tribal entities, rather than as a racial group, also fails to dispose of the need for traditional "equal protection" analysis in this case. The prosecution of Russell Means by the Navajo Nation pits a nonmember Indian against a foreign tribe. Our case does not involve preferential treatment accorded to Indians or tribal members as opposed to non-Indians.

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[25]Also see *Fisher v. District Court*, 424 U.S. 382 (1976); *United States v. Antelope*, 430 U.S. 641 (1977).

[26]Summary Report of Hearings and Investigations by the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, Committee Print, 89th Cong., 2d Sess., at p. 23-24 (1966).

It involves prejudicial treatment against a nonmember Indian, who is similarly situated to non-Indians. Moreover, under the equal protection clause of the ICRA, Congress intended to provide special protections to nonmember Indians.

> The purpose of legislation which singles out Indians should be viewed in the context of the trust relationship which was designed to protect Indians. The logic of *Mancari*, based on the federal guardianship of Indian tribes, is weakened when utilized to uphold prejudicial rather than beneficial treatment of Indians.

Also see F.S. Cohen, *Handbook of Federal Indian Law* at pp. 648, 657-58 (1982 ed).

To be sure, "[t]he principal tenet of the equal protection doctrine is that persons similarly situated should be treated alike under the law.[27] Russell Means is similarly situated to nonmember non-Indians. He cannot participate as a member of the "quasi sovereign tribal entity", which was emphasized by the Supreme Court in *Morton v. Mancari*, 417 U.S. 535, 554 (1974).

The "equal protection" guarantee of the ICRA has been applied to unequal

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[27]R.W. Johnson and E.S. Crystal, *Indians and Equal Protection*, 54 Wash. L.R. at pp. 590-606 (1979).

treatment taken by tribal governments in the past.[28]

> As a final note, we believe our decision is supported by the fact that, based upon the record, there are significant racial, cultural, and legal differences between the Devils Lake Sioux Tribe and the Turtle Mountain Band of Chippewa Indians. These nonmember Indian petitioners thus face the same fear of discrimination faced by the non-Indian petitioners in *Oliphant*: they would be judged by a court system that precludes their participation, according to the law of a societal state that has been made for others and not for them.

Greywater v. Joshua, 846 F.2d 486, 493 (8th Cir. 1988).

It must be remembered that one of the principal interests of many Indian tribes in the federal government was to provide protection against other tribes. W.T. Hagan, *American Indians* at p. 95 (Univ. Of Chi. 1961).

> This case raised more than a theoretical legal question about which court has jurisdiction; it concerns criminal charges against an individual, Albert Duro. It also concerns other individuals who are or will be in Mr. Duro's situation, facing criminal charges in a court made up entirely of people belonging to another tribe, possibly a hostile one. In Judge Sneed's words, the panel's decision will be consigning such individuals

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[28] *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039 (10th Cir. 1976), rev'd on other grounds, 436 U.S. 49 (1978) (Equal Protection was violated when the offspring of a mixed marriage in which the woman is a Santa Claran are disqualified for membership in the Santa Clara Pueblo, whereas the mixed marriage offspring of a male member suffers no such disability.); *Means v. Wilson*, 522 F.2d 833, 842 (9th Cir. 1975), *cert denied*, 424 U.S. 958 (1976) (intentional interference by the tribal election board with tribal members' right to participate in their government violated equal protection.); *Crowe v. Eastern Band of Cherokee Indians, Inc.*, 506 F.2d 1231, 1237 (4th Cir. 1974) (Tribal member was entitled to procedural due process and even-handed application of tribal customs, traditions, and formalized rules relating to the assignment of tribal land upon the death of her father.); *White Eagle v. One Feather*, 478 F.2d 1311, 1314 (8th Cir. 1973) (The one person, one-vote principle was applicable to tribal elections because of the equal protection clause of the Indian Civil Rights Act.).

"to a tribunal that, on its face, suggests the possibility of prejudice against [them]." 851 F.2d at 1151 (Sneed, J., dissenting).

Duro, 860 F.2d at 1469 (J. Kozinski dissenting from the denial of rehearing *en banc*).

The District Court granted the writ, holding that assertion of jurisdiction by the Tribe over an Indian who was not a member would violate the equal protection guarantees of the Indian Civil Rights Act of 1868, 25 U.S.C. § 1301 *et seq*. [U]nder this Court's holding in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), tribal courts have no criminal jurisdiction over non-Indians. The District Court reasoned that in light of this limitation, to subject a nonmember Indian to tribal jurisdiction where non-Indians are exempt would constitute discrimination based on race. The Court held that Respondents failed to articulate a valid reason for the difference in treatment under either rational-basis or strict-scrutiny standards, noting that nonmember Indians have no greater right to participation in tribal government than on-Indians, and no lesser fear of discrimination in a court system that bars the participation of their peers.

* * *

The Court of Appeals rejected Petitioner's equal protection argument under the Indian Civil Rights Act of 1868. It found no racial classification in subjecting Petitioner to tribal jurisdiction that could not be asserted over a non-Indian. Instead, it justified tribal jurisdiction over Petitioner by his significant contacts with the Pima-Maricopa community, such as residing with a member of the Tribe on the reservation and his employment with the Tribe's construction company. The need for effective law enforcement on the reservation provided a rational basis for the classification. [cite omitted].

* * *

We hesitate to adopt a view of tribal sovereignty that would single out another group of citizens, nonmember Indians, for trial by political bodies that do not include them. As full citizens, Indians share in the territorial

> and political sovereignty of the United States.
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> * * *
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> It is a logical consequence of that decision that nonmembers, who share relevant jurisdictional characteristics of non-Indians, should share the same jurisdictional status.

Duro v. Reina, 495 U.S. 676, 682-84, 693, 695-96, 698 (1990). It is quite clear that nonmember Indians share the same political and legal status within the Navajo Nation as nonmember, non-Indians. It is only members that possess greater political and legal rights. The Court of Appeals from the Ninth Circuit recently found in *Dawavendewa v. Salt River Project*, 154 F.3d 1117 (9th Cir. 1998) that Indians, including members of another tribe, are entitled to equal protection of law.

The often cited case of *United State v. Antelope*, 430 U.S. 641, 646 (1977) is not a genuine case of racial discrimination. The Indians subjected to federal jurisdiction in the *Antelope* case faced the same murder statute as anyone subjected to federal jurisdiction, which did not require premeditation because of a felony-murder provision. The fact that federal law provides for different statutory provisions than state law did not mean that the federal government passed specific legislation which discriminated against a distinct subclass of Indian individuals. Moreover, the line of preferential legislation or *Antelope*-type cases cited by the Flagstaff Magistrate does not even begin

to explore the discriminatory legislation challenged by Mr. Means.[29]

The cases cited in the Second Report and Recommendation do not reach to the issues raised by Mr. Means nor do they involve discriminatory legislation. [Report at p. 10; Ex. R. p. 10]. *United States v. Juvenile Male*, 864 F.2d 641, 645-46 (9th Cir. 1988) (Indian juvenile subjected to federal jurisdiction, like *Antelope*, does not constitute a violation of equal protection); *Kicking Woman v. Hodel*, 878 F.2d 1203, 1205, n. 6 (9th Cir. 1989) (*Antelope* applied. Family member complained that she was required to participate in separate probate action for Indian allotted land outside state court – not a true discrimination case); *United States v. Eagleboy*, 200 F.3d 1137, 1139-40 (9th Cir. 1988) (policy of not prosecuting members of federally recognized tribes not discriminatory because it was a policy of preference encoded as part of trust obligation). None of the cases cited in the Second Report and Recommendation touch upon true discrimination, which Congress frankly has likely not enacted until the "*Duro* fix". As a result, Mr. Means presents a unique issue, perhaps not fully appreciated within the Report and Recommendation.

In order to view a more intensive, enlightened, and contemporary view of equal

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[29] Congress passed a law under its "plenary power" which said that members of federally recognized Indian tribes could be sentenced to death when convicted of murder, but not non-Indians, does anyone doubt that an equal protection violation would exist? The same conclusion follows if nonmember Indian citizens (disenfranchised from the foreign tribe) are subjected to criminal jurisdiction by a foreign tribe, which is not subject to the United States Constitution.

protection and the case of *Morton v. Mancari*, see the decision by the Court of Appeals for the Ninth Circuit in *Williams v. Babbitt*, 115 F.3d 657, 663-66 (9th Cir. 1997), *cert denied*, 523 U.S. 1117 (1997) (*Mancari* limited to "special treatment" or preference legislation, which protects uniquely Indian interests). Analysis of new issues requires more than routine citations to old cases that do not encompass the complexities of the principles or problems at bar. Of course, Congress could not award all "space shuttle contracts" to Indians without violating "equal protection." *Williams*, at p. 665. Similarly, Congress cannot subject nonmember Indians to criminal jurisdiction by a foreign entity not subject to the United States Constitution.

The opinion in *Williams v. Babbitt* also noted that *Mancari* has been limited by the United States Supreme Court case of *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (applying strict scrutiny). Even if the purpose of federal legislation is "remedial", strict scrutiny applies.

This Court stated that even "preference" legislation must now be viewed with "skepticism." 515 U.S. 200, 223 (distinctions between citizens solely because of their ancestry are by their very nature odious to a few people").

> Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial discrimination subjecting that person to unequal treatment under the strictest judicial scrutiny.

Adarand, 515 U.S. 200, 224. The Supreme Court overruled *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) ("benign racial classification by federal government allowed). *Ibid.* The 1990 amendments to the ICRA cannot be justified under strict scrutiny (more non-Indians present on Indian reservations). *See, Bush v. Vera*, 517 U.S. 952 (1996) (gerrymandering).

More non-Indians than nonmember Indians live on Indian reservations. The "*Duro* fix" is not compelling nor narrowly tailored. To be sure, contemporary standards of equal protection, recognized by *Adarand, Duro,* and *Williams*, do not allow wholesale (unnecessary) discrimination against nonmember Indians, especially when they are needlessly subjected to criminal prosecution in an unconstitutional forum by a foreign tribe, which disenfranchises them from its democratic/political processes. The federal government – Congress included – cannot so magically avoid its obligation to exercise federal jurisdiction as mandated by the Navajo Treaty of 1868.

VII. CONCLUSION

The judgment and order of the District Court should be reversed and the case remanded with instructions to grant the petition filed by Mr. Means. The Navajo Nation cannot exercise criminal jurisdiction over him.

Respectfully submitted this 5th day of April, 2002.

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance Pursuant to Federal Rules of Appellate Procedure. Rule 32(a)(7)(B) and (C).

I certify that:

Pursuant to Federal Rules of Appellate Procedure, the attached opening brief is double-spaced and uses a proportionately-spaced typeface, with a typeface of Times New Roman, typeface of 14 points or more, and a word count of 13,997 based on word processing system.

Dated this 5th day of April, 2002.

JOHN TREBON

CERTIFICATE OF FILING

The original and 15 copies of this Opening Brief and the original and five copies of the Excerpt of Record were filed by mail. The Briefs were addressed to the Clerk of the Court of Appeals for the Ninth Circuit and delivered to the United States Postal Service on April 6th, 2002. See Rule 25(a)(2)(B)(i), Federal Rules of Appellate Procedure. They were mailed by first-class mail, postage pre-paid.

Dated this 6th day of April, 2002.

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CERTIFICATE OF SERVICE

Two copies of this Brief and one copy of the Excerpt of Record were deposited for mailing this 6th day of April, 2002, to Donovon Brown, Attorney for Respondents/Appellees,Office of the Prosecutor, P. O. Box 3779, Window Rock, AZ 86515, by first-class mail, postage pre-paid.

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