NO. 03-35922

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS LEE MORRIS, a minor child, by and through his guardians, his natural parents, ELIZABETH S. MORRIS and ROLAND J. MORRIS, SR.;	)	DC# CV 99-00082-DWM District of Montana, Missoula
Plaintiffs-Appellants,	)	
v.	)	APPELLANTS' INITIAL BRIEF
Judge Tanner, Judge of the CONFEDERATED SALISH AND KOOTENAI INDIAN TRIBAL COURT for the FLATHEAD RESERVATION,	)	
Defendant-Appellee,	)	
UNITED STATES OF AMERICA,	)	
Defendant Intervenor - Appellee.	)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA, MISSOULA DIVISION

Jon Metropoulos
GOUGH, SHANAHAN, JOHNSON & WATERMAN
33 South Last Chance Gulch
P. O. Box 1715
Helena, MT 59624
Telephone (406) 442-8560

Facsimile (406) 442-8783
Attorneys for Appellants

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I. STATEMENT OF JURISDICTION

The lower court had jurisdiction under 28 U.S.C. § 1331 over the federal question whether the 1990 amendments to section 1301, (Pub.L. No. 101-511, S. 8077 (1990))[1] of the Indian Civil Rights Act, ("ICRA"), 25 U.S.C. §§ 1301-1341, are unconstitutional because they consign nonmember Indians[2], who are citizens of the United States, (Act of June 2, 1924, 43 Stat. 253, codified at 8 U.S.C. § 1401 (b)), and no other nonmembers, to criminal prosecution and punishment by Indian tribes, the judicial proceedings of which are not constrained by the Constitution, of which they are not members. The lower court denied Appellants' (hereinafter collectively referred to in the singular for convenience as "Morris") motion for summary judgment and granted Defendant Tanner's ("Tanner") motion for summary judgment as well as the United States' motion to dismiss. The lower court's decision is appealable. Under 28 U.S.C. §1292, this Court has jurisdiction

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[1]The 1990 amendments contained a sunset provision and lapsed on October 18, 1991. After the passage of a few days, Congress re-enacted them without substantive change, Pub. L. No. 102-137, 105 Stat. 646 (1991), deleting only the sunset provision. *See Means v. N. Cheyenne Tribal Court*, 154 F.3d 941, 951, n. 4 (9th Cir. 1998). For the reasons stated in *Means*, they are referred to in this brief as "the 1990 amendments." *Id.*

[2] "A predicate word about terminology. The Supreme Court has recognized three categories of criminal defendants in tribal court: 'members' (of the prosecuting tribe), 'non-member Indians,' and 'non-Indians.' *Duro v. Reina*, 495 U.S. 676, 684-85 (1990)." *U.S. v. Enas*, 255 F.3d 662, 664 n. 1, (9th Cir. 2001) *en banc*.

of this appeal of the lower court's order, entered October 28, 2003. The notice of appeal was timely filed October 31, 2003 in accordance with FRAP 4(a)(1)[3].

II. ISSUES PRESENTED

A. Whether the 1990 amendments violate the fundamental right of Indians to equal protection of the law guaranteed by the Fifth Amendment?

B. Whether the 1990 amendments violate the fundamental right of Indians to due process of law guaranteed by the Fifth Amendment of the Constitution?

III. STATEMENT OF THE CASE

A. Nature of the Case

Thomas Lee Morris, now 21 years of age, is an Indian enrolled as a member of the Minnesota Chippewa Tribe, Leech Lake Reservation, Minnesota[4]. He is not

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[3]By request of the parties, the Court delayed briefing of this appeal pending the United States Supreme Court's decision in *U.S. v. Lara*, 541 U.S. ___, 124 S.Ct. 1628 (2004). The Court decided *Lara* April 19, 2003, a fact Morris reported to this Court by status report dated April 20, 2004. This brief is filed May 19, 2004, pursuant to this Court's order of April 26, 2004.

[4] Thomas Morris had not reached majority when this litigation began. For that reason, and because his parents, Roland and Lisa Morris, were responsible for additional costs that might be incurred from a conviction for a crime–to wit, increased insurance costs–they too are plaintiffs in this case. Thomas remains living in their household and they continue to pay the insurance premium on the vehicle he drives.

a member of the Confederated Salish & Kootenai Tribes ("Tribes"), headquartered in Pablo, Montana, within the Flathead reservation. He has been cited with allegedly committing a crime under the Tribes' laws, and the Tribes have asserted jurisdiction to prosecute and punish him. He and his parents seek injunctive relief and a declaration of unconstitutionality of the 1990 amendments to ICRA, which enabled the Tribes to prosecute him despite the Supreme Court's decision in *Duro*, 495 U.S. at 695-96. E.R. 81.

Morris stated four counts in their complaint for equitable relief. First, Morris asserted that under federal common law, specifically, *Duro,* 495 U.S. at 695-96, the Tribes "lack jurisdiction over the criminal complaint against Morris because they do not have retained inherent sovereign authority over non-members of the Tribes for criminal purposes. . . ." E.R. 006. In count two, Morris alleged that the exercise of tribal court criminal jurisdiction over him, "whether it derives from the (1990 amendments) or from federal common law," violates his right to due process under the Fifth Amendment of the Constitution. E.R. 007. In count three, Morris alleged that the 1990 amendments also violate his rights to equal protection. E.R. 007-008. In count four, Morris alleged that the 1990 amendments are unconstitutional because their enactment violated the principle of separation of powers. E.R. 008.

B. Course of Previous Proceedings

1. Round One

June 13, 1999 Thomas Morris was cited for a criminal traffic violation--speeding[5]--he allegedly committed in Ronan, Montana, which is located within the exterior boundaries of the Flathead Reservation in northwest Montana. E.R. 005.

Because he is an Indian, under the 1990 amendments he was required to appear and enter a plea and stand for trial in the Tribes' court. Under the Tribes's law, the alleged offense is a crime[6].. Law and Order Code of the Confederated

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[5] While this particular accusation is not itself momentous, determining whether Congress can select nonmember Indians, and only Indians, for criminal prosecution in the courts of sovereigns which exclude them from full and equal rights of political participation on the ground of their ethnicity and which sovereigns and courts are unbounded by the Constitution is momentous indeed. In a civil context, the Flathead Tribes' own Appellate Court recognized this, stating "[t]he exercise of tribal jurisdiction over non-Indians is replete with constitutional issues." *Middlemist, et. al. v. Pablo*, et. al., 23 ILR 6141, 6143 n. 5 (1996). If it is worth judicial resources to protect tribal sovereignty over civil traffic offenses within a reservation, *Confederated Tribes of the Colville Reservation v. Wash.*, 938 F.2d 146, 148 (1991), Morris submits the protection of individual rights from congressional acts based explicitly on racial grounds and consigning U.S. citizens to prosecution and punishment by non-constitutional tribunals is at least as important. *Duro v. Reina*, 495 U.S. 676 (1990).

[6] Thomas Morris was recently cited with three other alleged violations of tribal criminal ordinances resulting from a one-vehicle accident west of Ronan. E.R. pp. 112-113. By agreement between Morris and the Tribes, in which Thomas Morris explicitly recognizes prosecution will eventually occur in the correct forum, the prosecution of these charges in tribal court has been suspended pending the outcome of this litigation. E.R. 114-115.

Salish and Kootenai Tribes of the Flathead Reservation (hereinafter "Law and Order Code"), Chapter IV, Code of Tribal Offenses, Section H, Offenses Against Public Order, Health, and Decency, subsection H12, Traffic Offenses, at 45-46.

a) Tribal Court

At his first appearance, June 15, 1999, Thomas Morris presented a motion to dismiss for lack of jurisdiction to the Tribal Court. E.R. 006. He also entered a plea of innocent and requested a jury trial, (E.R. 006), which he would receive if tried in state court because he has a fundamental constitutional right to one under the Montana Constitution. *Woirhaye v. Mont. Fourth Jud. Dist. Ct.*, 292 Mont. 185, 191, 972 P.2d 800, 803 (1998). The Tribal Court, Judge Tanner presiding, denied Morris's motion on August 30, 1999. By agreement of the parties, further proceedings in tribal court have been suspended pending the outcome of this litigation[7].

b) District Court

Thomas Morris and his parents filed the complaint seeking equitable relief from the District Court on June 15, 1999. E.R. 002-014. Tanner served her

[7] In its reply brief submitted on the merits in *Lara*, the United States cited this procedure approvingly as the correct procedure to challenge the constitutionality of the 1990 amendments. *See* Reply Brief for the U.S. in *Lara*, at page 18, filed January 2004. http://supreme.1p.findlaw.com
http://supreme.1p.findlaw.com/supreme_court/briefs//03-107/03-107.mer.pet..rep.html

answer and a motion to dismiss on August 13, 1999. E.R. 018-024 October 5, 1999 the District Court granted Tanner's motion on the ground that the complaint failed to state a claim. E.R. 25-26.

c) Ninth Circuit Court of Appeals

Morris appealed. Noting similarities with *U.S. v. Enas*, *supra*, which it was then considering *en banc*, this Court invited the United States to participate on appeal as an *amicus curiae*.. It did so, filing a brief and participating in oral argument. At oral argument on March 8, 2001, and in its brief, the United States admitted Congress had distinguished among U.S. citizens in the 1990 amendments but argued this represents merely a political, not a racial, classification. Therefore, the U.S. argues strict scrutiny analysis is not required because, it was claimed, only people–not necessarily Indians--who are enrolled members of a federally-recognized tribe were made subject to tribal criminal jurisdiction by the amendments. The United States' argument, in which Tanner joined, was that "'Indian' status for criminal jurisdiction purposes under ICRA requires voluntary affiliation with a federally recognized tribe; it is not dependent on Indian ancestry." U.S. Ninth Circuit Amicus Brief, at 31, citing *Nofire v. U.S.*, 164 U.S. 657 (1897). Consequently, the U.S. claimed the 1990 amendments were not

racially-based because they applied to non-Indians could become tribal members and would then be subject to criminal prosecution by any tribe.

By letter dated April 17, 2001, the United States admitted this is erroneous and the contrary is true: "The general rule is that a non-Indian cannot, through his adoption by a tribe, define himself as an 'Indian' for purposes of determining federal criminal jurisdiction. *See Duro*, 495 U.S. at 694, citing *U.S. v. Rogers*, 45 U.S. 567 (1846)." E.R. 27-74.

In an unpublished memorandum opinion, the Ninth Circuit reversed and remanded to the District Court for resolution of the constitutional issues. E.R. 83. In the course of its memorandum opinion, this Court disposed of Tanner's ancillary arguments because they "lack merit. . . ." E.R.079. The Court held that because Morris is challenging the constitutionality of an act of Congress rather than the jurisdiction of the tribal court the "remedial restraints" of 25 U.S.C. § 1303 do not apply. E.R. 080. Moreover, the Court rejected Tanner's argument that the 1990 amendments are not subject to review because the "Confederated Tribes' exercise of criminal jurisdiction over Morris is not subject to the constraints of the Constitution." *Id.* After the *en banc* decision in *Enas*, the rationale of which the Supreme Court confirmed in *Lara*, "it is undisputed that the Confederated Tribes could not presently exercise criminal jurisdiction over

Morris, a nonmember Indian, in the absence of the 1990 amendments." That enactment, which the Court characterized as "*enabling* the Confederated Tribes' exercise of criminal jurisdiction over Morris," "is subject to constitutional review. . .. ." E.R. 081 (italics in original).[8]

2. Round Two -- Disposition Below

Back in the District Court, the United States was invited to intervene in support of the defendant. *See* E.R. 123, Civil Docket # 33. The parties then submitted cross-motions, Morris and Tanner requesting summary judgment and the United States moving to dismiss the complaint. The District Court ruled for Tanner and the United States, conceiving the legal questions presented thus: "The issue here is preservation, in accordance with the United States' trust obligation, (sic) the independent, quasi-sovereign status of Indian Nations." E.R. 103.

The United States again argued (and Tanner followed), as summarized by the District Court, that the 1990 amendments rest on a political distinction, not a racial one, because "Indian" is defined as an Indian who is a tribal member or is affiliated with a tribe. E.R. 087-088. Consequently, allowing tribes criminal

[8] This Court, in n. 3, recognized that the complaint might encompass a Fifth Amendment due process claim as well as an equal protection claim and directed the lower court to consider the issue. Count II of the Complaint, labeled "Constitutional – Due Process," does in fact state a claim separate from Morris's equal protection claim, embodied in Count III.

jurisdiction over all Indians, the U.S. argued, is rationally related to "the government's goals of Indian self-governance and law enforcement on the reservations." E.R. 088. Moreover, "so many nonmember-Indians live on reservations and partake of tribal services that it is rational for the criminal laws to apply to them as well, in a comprehensive scheme of reservation life." E.R. 088. As to Morris's due process claim, the U.S. argued there is no violation because "[b]y being a tribal member, one chooses to be subject to ICRA in tribal court, not the Bill of Rights."[9] E.R. 088.

In the course of its arguments, *Amicus Curiae* State of Montana made notable concessions. For example, Montana admitted there are "fundamental constitutional issues presented" in this case, E.R. 126, Civil Docket # 64, at p. 4, and agreed "that tribal assertion of authority over **non-Indians** is 'replete with constitutional issues.'" E.R. 126, Civil Docket # 64, at p. 11.[10] Similarly, Montana

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[9]Not surprisingly, the District Court did not rely on the U.S.'s primary argument as to the due process claim because it essentially concedes the match. Below the U.S. argued Congress did not violate Fifth Amendment due process guarantees because in some instances non-constitutional tribunals have been approved in territories that are not part of the United States (and are not slated to become a part) and fundamental rights are not involved. Clearly, this argument by analogy does not apply to Indian reservations which are part of the United States.

[10] While Montana's admission is correct as far as it goes, Morris asserted in their brief, and have all along, the plain fact that there are significant constitutional issues when Tribes assert sovereign authority over **nonmembers, whether they are Indians or not**. To recognize this as to non-Indians but ignore it as to Indians

admitted the 1990 Amendments have "a significant racial component." E.R. 126, Civil Docket # 64, at p. 6.

The lower court held, on the equal protection challenge, that Congress had made a political classification, not a racial one, and therefore only a rational basis was necessary. E.R. 087-088. The District Court characterized *U.S. v. Antelope*, 430 U.S. 641 (1977), as explaining that "federal regulation of Indian crimes was 'rooted in the unique status of Indians as 'a separate people' with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a '"racial group" consisting of "Indians" . . .'". E.R. 100. The District Court admitted, "[t]he distinction is somewhat confusing, of course, because blood quantum is **usually** (sic) an element of tribal membership. However, in this particular instance, CKST (sic) policy prescribes that tribal prosecutions of "Indians" means federally-enrolled Indians."[11] E. R. 100; (emphasis added). In this same vein, the court conceded:

> The political versus racial distinction is not intuitively grasped. However, a consideration of the mutual history

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indicates or perhaps reveals that the thinking of many people, including decision-makers, about individuals who are Indians, remains infected by an odious, biased "significant racial component."

[11] Of course, the Tribes' "policy" is not at issue here. Congress's action is.

> of Indian tribes and European settlers on this continent illuminates the distinction between the treatment of Indians as a political entity and the treatment of, say, African-Americans as a racial group. Indians were here, with fully functioning governmental and juridical institutions, before their contact with European settlers. As time passed, phases of contact, combat, and conquest resulted in varying degrees of negotiation and power struggle between the Europeans and Indians. This situation is entirely distinct from the situation of Africans who were brought to this country enslaved and deprived of their governmental structures before arrival. The rhetoric of race relations derived from the history of African-Americans is only partially applicable to the situation of Indians, and to overlook the crucial differences minimizes the great respect owed to the remaining sovereignty of tribes.

E.R. 101-102.

As to the due process challenge, the lower court held that ICRA's protections, while not equivalent to the Constitution, provide a "sufficient floor," E.R. 105-106, and therefore passes constitutional muster[12]

C. Statement of Facts

1. On June 13, 1999, Thomas Morris was driving his family's vehicle in or near Ronan, Montana. E.R. 005. At or near the intersection of

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[12] The lower court also decided it would not follow this Court's direction to determine whether the 1990 amendments apply to Indians who are not enrolled. E.R. 104, n. 10. Morris respectfully disagrees with the lower court on this point, appeals from its lack of decision, and points out that that determination, as revealed by the argument below, is important to resolving this case.

Terrace Lake Road and Third Street, just east of Ronan, Morris was stopped--that is, temporarily restrained from liberty, (See Law and Order Code, Ch. III, Sec. A2, Definition 28), by a member of the Ronan City Police Department, a law enforcement officer as defined by the pertinent provision of the Law and Order Code, (Ch. III, Sec. A2, Def. 17), for allegedly exceeding the speed limit in that area. E.R. 005. When asked by the officer whether he is a tribal member, Morris responded that he is a member of a tribe in Minnesota, to wit, the Leech Lake band of Chippewa. E.R. 005. The officer so noted on the Complaint against Morris. E.R. 011. The citation required Thomas to make his initial appearance in Tribal Court in two days, on June 15. E.R. 011.

2. The Tribes assert governmental authority over non-member Indians for certain criminal matters, including the one of which Thomas Morris is accused. Law and Order Code, Chapter IV, Code of Tribal Offenses, Section H, Offenses Against Public Order, Health, and Decency, subsection H12, Traffic Offenses, at 45-46. E.R. 004.

3. Non-Indians arrested for allegedly committing misdemeanor offences within the Flathead reservation are not sent to Tribal Court. The determination of whether or not to send an alleged traffic offender to Tribal Court is made, therefore, based on the race of the alleged offender. E.R. 005.

4. Thomas Morris, 16 years old at the time of his arrest, is an Indian but not a member of the Tribes. E.R. 003. At the time of his arrest, he and his family lived and worked near Ronan, Montana, located within the boundaries of the reservation. E.R. 003-004. He now again lives with his family there. The criminal complaint remains pending against him in the Tribes' court. His mother, Elizabeth Morris is not a Native American. E.R. 004. His father, Roland Morris, Sr., is a member of the same tribe as Thomas, the Minnesota Chippewa Tribe, Leech Lake Reservation.

5. According to a 1999 Report by the Department of Interior, there are 556 federally recognized Indian tribes in the United States, with reservations in Maine, Connecticut, New York, Florida, Texas, New Mexico, Arizona, California, Oregon, Washington, and all points in between. 1999 Indian Labor Force Report, U.S. Department of Interior, Bureau of Indian Affairs Office of Tribal Services.

6. According to the 2000 Census, there are 4,119,301 Indians in the United States, of which, according to the Department of Interior, 1,698,483 are enrolled in a tribe. Notably, the U.S. Census Bureau's definition of an "American Indian" states that it refers to people who have native origins and "who maintain tribal affiliation or community attachment." U.S. Department of Commerce,

Economics & Statistics Administration, U.S. Census Bureau, March 2001, Overview of Race & Hispanic Origin.

7. According to the 2000 Census, the total population of the Flathead Reservation is 26,172, of which 6,999 are American Indians or Alaska Natives. www.consus.gov/

8. There are approximately 6,950 enrolled tribal members, of which 4,500 live on the Flathead Reservation. http://indiannations.visitmt.com/flathead.shtm.

9. Congress set aside the Flathead Reservation for the use of a variety of tribes in 1859 when, using its Property Clause powers, Constitution Art. IV, § 3, cl. 2, and Treaty Clause powers, Art. II, § 2, cl. 2, it ratified the 1855 Treaty of Hellgate, 12 Stat. 975.

10. Using its Property Clause powers, Congress opened the Flathead Reservation to nonmember settlement in 1904 when it enacted the Flathead Allotment Act. Act of April 23, 1904, 33 Stat. 302.

IV. STATEMENT

The Morris family is representative of many American families whose members, or some of them, are Indian.[13] Thomas Morris lives with his family in Ronan, Montana, within the

[13] Roland Morris, Thomas's father, is also a member of the Minnesota Chippewa Tribe, Leech Lake Reservation, as are Thomas's four brothers and sisters, ranging in age from 16 to 10 years of age. Elizabeth Morris, his mother, is not Indian, and is, consequently, ineligible for membership in any tribe. This means that for the very same offense Thomas allegedly committed, his mother would be tried in a state court, where, under Montana law she would have the right to a jury trial, *Woirhaye,*, 292 Mont. at 191, 972 P.2d at 803 (1998). and the jury would have to be seated in conformity with state and federal constitutional requirements. *Powers v. Ohio*, 499 U.S. 400 (1991); *Batson v. Kentucky*, 476 U.S.

Flathead Reservation. The Morris family has lived there for more than 15 years, Mr. Morris running an upholstery business and Mrs. Morris working at a variety of jobs, including caring for five children and four minor grandchildren (who are also Indians but not Flathead Indians).

As noted, the Indian members of the Morris family are not members of the Flathead Tribes, nor are they eligible for membership because they lack the Flathead Indian "blood quantum" required. See Constitution of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, as Amended, Title I, Ch. 1, Part 1, requiring one-quarter "Salish or Kootenai blood" to be a tribal member (Section 2), and defining "Indian Blood," unless the context requires otherwise, as meaning "the blood of either or both the Kootenai or the Salish Tribes of the Flathead Reservation." Consequently, they do not participate, and do not have the right to participate, in the political life of the Flathead Tribes. They simply live within the reservation just as the non-Indian population of about 19,000 people live there.

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79 (1986). In Thomas's case, by contrast, simply because he is an Indian, he does not have a right to a jury trial, the trial judge in his case, by tribal statute, must be a tribal member, Law and Order Code of the CSKT (2003) 1-2-202(5), and even if tribal law did allow a jury, only tribal members could be seated. *Id.* at 1-2-601. Moreover, again simply because of his race, Congress in the 1990 amendments subjected him to the court of a sovereign in which, because of his ethnicity–i.e. while he is Indian, he does not have sufficient "blood quantum," Constitution and Bylaws of the CSKT, Art. II, §§ 2 and 6, and to be a Flathead Indian–he cannot fully participate in the tribal political process which develops the law he purportedly must comply with. Thus, because he is ineligible for membership in the Flathead Tribes, he cannot hold tribal office or vote in tribal elections. Consequently, he has no right to participate in the political process by which the very Law and Order Code under which he is being prosecuted was developed and adopted.

The non-Indian population residing on the reservation, however, is free of the threat of tribal criminal prosecution, because of their race–i.e. they are not Indians. Only Indians who are on the reservation, because they live there, are visiting there, or are merely passing through, have that potential burden.[14]

Also, like many American families, the Morrises travel. In the last three years, they have traveled through the Blackfeet reservation in Northern Montana on their way to Canada; and through the Crow reservation in South Central Montana, the Wind River reservation in Wyoming and the Isleta Pueblo in New Mexico on a trip to Mexico. Unlike any non-Indian travelers, while passing through these reservations, the Morrises, with the exception of Lisa Morris, would be subject to the local tribe's criminal jurisdiction under the ICRA amendments.

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[14] Congress's enactment of the 1990 amendments created a unique situation perhaps implicating the fundamental right to travel. See *Saenz v. Roe*, 526 U.S. 489 (1999). For example, a Seminole Indian residing in Florida may well decide to visit Glacier National Park in northwest Montana. Unless he or she chooses the route very carefully, and chooses to take a circuitous route, that person will likely travel, by U.S. highway, either through the Blackfeet reservation or the Flathead Reservation to get there. For the hour or so it takes to drive through one of these reservations, that person, if accused of a misdemeanor crime, would have to vindicate himself or herself in the tribal court, subject to all the local tribe's particular procedures, customs and laws. Since, under the 1990 amendments the tribe would be exercising its inherent sovereign authority, this person would not have the protection of the Constitution. The only reason for this would be that person's race. If his or her spouse was accused of the same crime but, as in the Morris's case, was not Indian, the spouse would be tried in a different court in which all constitutional rights were protected. The only distinction causing this would be the race of each individual. Aside from this explicit racial issue and the equal protection problem it raises, it is difficult to see how such a U.S. citizen's right to travel would not be abridged if whenever he or she entered an Indian reservation Congress subjected them to the power of a non-constitutional sovereign.

V. SUMMARY OF ARGUMENT

A. In *Duro*, the U.S. Supreme Court discussed, without deciding, the constitutional implications of the exercise of tribal criminal jurisdiction over nonmember Indians, in particular the fact that they "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)." The Constitutional significance of the exercise of tribal inherent sovereignty over nonmembers cannot be questioned. Even the Tribes' own appellate court recognized in a case challenging their civil jurisdiction over nonmembers that "[t]he exercise of tribal jurisdiction over non-Indians is replete with constitutional issues." *Middlemist*, 23 ILR at 6143 n. 5, Tribal Appellate Court of the Confederated Salish and Kootenai Tribes of the Flathead Reservation.[15] The Ninth Circuit's decision in *Means* outlined the constitutional challenges that would have to be addressed when, as here, the 1990 amendments were applied prospectively to a nonmember Indian, subjecting him or her to tribal criminal

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[15] *See Duro*, 495 U.S. at 693-94: "Criminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States. 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. . . .

"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, *U.S. v. Mazurie*, 419 U.S. 544 (1975), but no delegation of authority to a tribe has to date included the power to punish non-members in tribal court. We decline to produce such a result through recognition of inherent tribal authority."

jurisdiction in contravention of *Duro*.. *Means*, *supra*, at p. 948, n. 7. This case presents those challenges.

In *Lara* the Supreme Court expressly refrained from analyzing the constitutionality of the 1990 amendments vis-a-vis the rights of the individuals--nonmember Indians--they specifically and intentionally single out for adverse treatment. *Lara*, 124 S.Ct. at 1637-39; and *see* concurrence of Kennedy, J. at 1641. Concurring and dissenting Justices noted the troubling issues that arise when Congress enacts legislation subjecting United States citizens to trial and punishment unbounded by the Constitution. *Lara*, 124 S.Ct. At 1639-1651, Justices Kennedy and Thomas concurring, Justices Souter and Scalia dissenting.

B. The doubts expressed by this Court in *Means* and by concurring Justices in *Lara* are well founded. The amendments are a federal action subject to the limitations of the Constitution, particularly the Fifth Amendment guarantees of equal protection and due process. This case raises the issues whether they transgressed those limitations. The Supreme Court's decision in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), controls the analysis in this case in the first instance and is conclusive. Given that Congress was using its authority provided by the Constitution over federal common law when it removed the obstacle to tribal sovereign power presented by *Duro*, its power to legislate--in this case to classify U.S. citizens along racial lines and subject Indians to significant disabilities--is bounded by the Constitution.

C. Enacting the 1990 amendments, Congress made a racial categorization subject to strict scrutiny. Congress violated nonmember Indians' right to equal protection of the laws because it singled them out for this treatment, based initially and primarily on their race, while treating similarly situated nonmember non-Indians differently and better. Morris respectfully

submits that the 1990 amendments cannot survive equal protection review, either under a strict scrutiny or a rational basis standard. First, the 1990 amendments subject only persons of one race–Indians–to the adverse treatment of trial by sovereigns that exclude them from membership and that are not constrained by the Constitution, including the Bill or Rights. If there is some additional criterion for inclusion in this disfavored class–such as membership in another tribe, as Tanner and the United States have argued–it is insufficient to redeem this racial classification. Primarily, this is so because "political status," insofar as it is relevant, is only one of a number of factors for determining who is an "Indian," none of which is constant except the race of the individual. More importantly, the "political status" argument is misleadingly inaccurate. It has been established since 1846, and is now recognized by all involved, that the term "Indians" employed by Congress does not refer to one's enrollment in a tribe but to their race and racial affiliation.

Moreover, no compelling federal interest has been or can be identified which the racial classification employed by Congress in the 1990 amendments is narrowly tailored to fulfill. Finally, concerning equal protection, the amendments lack even a rational basis, because if there is a problem of misdemeanor crime on reservations committed by nonmember Indians and if there is a "gap" in jurisdiction, the most direct and unoffensive remedy from a constitutional standpoint is for Congress to authorize or if need be require States to fulfill that duty.

D. The rights of Fifth Amendment due process protect citizens of the United States (and others) from prosecution in tribunals not bound by the Constitution except in the most extraordinary circumstances. Apprehending and prosecuting alleged misdemeanor criminals does not present such circumstances. Although the Constitution gives Congress plenary power

over Indian affairs, *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), *Lara*, *supra*, it must exercise those powers within the constraints of the Constitution. Legislation subjecting U.S. citizens to sovereign criminal authority unconstrained by the Constitution to prosecute alleged misdemeanor crimes exceeds Congress' power and violates the Constitution.

VI. ARGUMENT

A. Standard of Review

The standard of review of the constitutionality of the 1990 amendments, is *de novo*. *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1437 (9th Cir. 1996).

B. Statement of the Legal Context

1. In *Duro*, the Court applied the analysis and holding it had reached previously in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) to nonmember Indians. Since there is no principled difference between the situation of nonmember non-Indians and non-member Indians when confronted with the power of a tribal government, the Court found tribes lack the inherent sovereign power to prosecute them for misdemeanor crimes they allegedly committed on a reservation. Substituting governmental ease and expediency for the rights of individual citizens, the U.S. and various tribes had argued against such a holding on the ground that it would create a "jurisdictional gap." The Court declined to subject U.S. citizens to a non-constitutional sovereign that excludes them from its political processes because of their race or ethnicity on this basis. "The exercise of criminal jurisdiction subjects a person not only to the adjudicatory power of the tribunal, but also to the prosecuting power of the tribe, and involves a far more direct intrusion on personal liberties." *Duro v. Reina*, 495 U.S. 676, 688 (1990). The Court further noted:

> "Criminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States. 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. The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members. Indians like all other citizens share allegiance to the overriding sovereign, the United States. 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. While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often "subordinate to the political branches of tribal governments," and their legal methods may depend on "unspoken practices and norms." Cohen 334-335. It is significant that the Bill of Rights does not apply to Indian tribal governments. *Talton v. Mayes*, 163 U.S. 376, 16 S.Ct. 986, 41 L.Ed. 196 (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."

Duro, 495 U.S. at 693.

Consequently, in *Duro*, the Court held:

> "[i]n the area of criminal enforcement . . . tribal power does not extend beyond internal relations among members. Petitioner is not a member of the Pima-Maricopa Tribe and is not now eligible to become one. Neither he nor other members of his Tribe may vote, hold office, or serve on a jury under Pima-Maricopa authority. Cf. *Oliphant*, 435 U.S., at 194, and n. 4, 98 S.Ct., at 1013, and n. 4. For purposes of criminal jurisdiction, petitioner's relations with this Tribe are the same as the non-Indian's in *Oliphant*.. We hold that the Tribe's powers over him are subject to the same limitations." *Duro*, 495 U.S. at 688.

To be sure, the Court noted the possibility that a "jurisdictional gap" could result from its decision, and it noted that Congress has the authority to address any such problem. The Court did not say and surely did not imply that in fashioning a remedy Congress could act without regard to constitutional constraints. Indeed, the Supreme Court, far from finding that Congress's power over Indian tribes allows it to pass legislation violative of the rights of individual Indians, has ruled strongly that Congress remains bound by the Constitution when acting with regard to their rights. *Babbitt v. Youpee*, 519 U.S. 234 (1997); *Hodel v. Irving*, 481 U.S. 704 (1987).

2. Certain members of Congress rushed into the breach to "fix" *Duro*, but it cannot be said the ICRA amendments endured congressional scrutiny prior to enactment. Instead, they were attached as a rider to the 1991 Defense Appropriations Act, Pub. L. No. 101-511, §8077 (b) - (d), 104 Stat. 1856, 1892-93 (1990), with the promise of "comprehensive legislation" to follow. Ex post facto hearings took place the following summer at which not a single witness spoke for individual nonmember Indians. Moreover, no "comprehensive legislation" was considered much less enacted. Instead, the emergency language enacted as a stop-gap in 1990 was simply made permanent. Pub. L. No. 102-137, 105 Stat. 646 (1991).

3. In the 1990 amendments, Congress "hereby recognized and affirmed" tribes' "inherent power" to exercise criminal jurisdiction over *all* Indians," including nonmembers. 25 U.S.C. § 1301(2) (emphasis added).

4. The House Report acknowledged that the statute on which the amendments rely to define "Indian," 18 U.S.C. § 1153, "made no distinction regarding the tribal membership of the Indian. The status of non-member Indians. . .was clarified in *Rogers* where

the Supreme Court held that the statute applied to Indians as a class, not as members of a tribe, but as part of the family of Indians. 45 U.S. 573." The legislative history also notes: "Courts have repeatedly held that the term 'Indian' includes any Indian in Indian Country, without regard to tribal membership. (Citations omitted) [T]he Committee intends to clarify precisely that the inherent powers of Indian tribes includes the authority to exercise criminal misdemeanor jurisdiction over all Indians in Indian country." U.S. Code Congressional and Administrative News, Vol. 2, 102d Congress, 1st Session, 1991 at 375.

Senator Tom Daschle, D-S.D., appended a separate statement to the Conference Committee's Report indicating serious concern for the very constitutional issues raised here but agreeing to the report because of the "urgency of this situation." U.S. Code Cong. Admin. News, Vol. 2., 102d Cong., 1st Sess. (1991) at 382-83. The reason provided by Congress indicated in the legislative history is, essentially, that there was a purported "gap" in jurisdiction after *Duro* to prosecute crimes allegedly committed by nonmember Indians on reservations and they "are the most tedious crimes with which law enforcement officers deal." *Id.* at 373.

5. Using their "inherent power," tribes are not constrained by the Constitution, *Duro*, 495 U.S. at 681, n. 2, citing *Talton v. Mayes*, 163 U.S. 376 (1896), and may mete out punishments for each violation of their criminal codes of up to one year in tribal prison and a fine of $5,000. 25 U.S.C. § 1302(7).

C. The 1990 Amendments to the ICRA Establish Odious Racial Distinctions among Citizens of the United States, Serve No Compelling Federal Interest, Are Not Narrowly Tailored to Accomplish Any Compelling Federal Interest, and Violate Fundamental Constitutional Rights of Nonmember Indians

In *Adarand*, 515 U.S. 200 (1995) the Supreme Court held federal classifications based on race, even though there may be other explanations or additional factors in favor of the classification, violate the 5th Amendment right to due process unless they withstand strict scrutiny, that is, they serve a compelling governmental interest and are narrowly tailored to further that interest. *Adarand*, 515 U.S. at 235.

Adarand is particularly relevant here for a number of reasons.

First, two of the five justices in the majority wrote concurring opinions to emphasize their view that "government can never have a 'compelling interest' in discriminating on the basis of race . . . ." (Scalia concurring); and that even government classifications based on race that purportedly advance "benign" purposes "raise grave constitutional questions. . . [and] undermine the moral basis of the equal protection principle[,] purchased at the price of immeasurable human suffering. . . ." (Thomas, concurring.) Thus, two of the five justices in the majority thought it important to emphasize that even racially-based classifications intended to redress past racial discrimination by benefitting individuals violate the Constitution.

Second, and even more significantly, the dissenting justices agreed with the majority on an issue central to this case: they too found that federal laws which "impose a special burden on the members of a minority race" are unconstitutional. *See* Dissent of Stevens, J., 515 U.S. at 243. As Justice Stevens said: "There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority." *Id.*

The dissenters in *Adarand*, then, disagreed with the majority only because they viewed the federal act at issue as a "benign," "remedial" measure. *Adarand,* 515 U.S. at 242, 271. Thus, it appears the Court unanimously views federal racial classifications that "impose special burdens" on individuals based on their race as subject to strict scrutiny. As noted, some justices would simply declare all such classifications unconstitutional, dispensing with any need for analysis of whether the classification is "benign" or "burdensome." In this light, the 1990 amendments cannot pass constitutional muster.

First, they plainly do classify citizens on the basis of race.[16] While below Tanner argued the classification is political and not racial, on its face this is absurd. Only Indians are subjected by the 1990 amendments to the criminal prosecutorial power of tribes of which they are not members. Non-Indians, who are similarly situated in all respects, except for their race, are not affected by the amendments. Tanner's argument rested in large part on the Supreme Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974), and this Court's decision in *Rice v. Cayetano*, 146 F.3d 1075 (9th Cir. 1998), which relied on *Mancari,* and held that a voting scheme in Hawaii that allowed only "Hawaiians" to vote in certain state elections did not violate equal protection guarantees because the classification was a political not a racial one. *Cayetano*, 146 F.3d at 1081.

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[16] And, Morris confidently asserts, such classifications are no less odious simply because nonmember Indians are on the wrong end in this case. "Distinctions between citizens solely because of their ancestry are **by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."** *Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1943), quoted in *Cayetano*, 528 U.S. at 517; and *see Korematsu v. U.S.*, 323 U.S. 214 (1944).

While, as Justice Stevens' dissent noted, *Adarand* seriously called into question this reasoning of *Mancari*, particularly when the classification burdens and does not benefit those singled out, the Supreme Court's reversal of this Court in *Rice v. Cayetano*, 528 U.S. 495 (2000), completely eliminated this argument. There the Supreme Court, noting the law at issue in *Mancari* provided a "preference," not a disability to the affected class, found its approval of that classification "confined to the authority of the BIA, an agency described as '*sui generis.*'" *Cayetano*, 528 U.S. at 520, quoting *Mancari*, 417 U.S. at 554.[17] Significantly, the Court noted that neither Congress nor a State may enact legislation, in that case a voting scheme, trammeling basic rights. *Id* at 497.

(". . . Congress may not authorize a State to create a voting scheme of this sort.")

In addition, Tanner's "political status" argument is not even factually correct. As noted, Congress swept "all Indians," 25 U.S.C. 1301(2), into tribes' non-constitutional grasp. This includes Indians who lack the "political status" on which Tanner's argument relieve, i.e., Indians who are not enrolled members of a tribe but who are "affiliated" with one.

In addition, in *Duro*, the Supreme Court already rejected this "political status" argument, albeit not in the course of constitutional analysis. *See* discussion in *The Congressional Response to Duro v. Reina*: *Compromising Sovereignty and the Constitution*, L. Scott Gould, Vol. 28, No. 1, U.C. Davis L. Rev. 53, 69-75, discussing the Ninth Circuit's employment of this "status"

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[17] Contrary to Defendant's earlier assertions, Morris has not argued and does not imply that *Adarand*, *supra*, or *Cayetano*, overruled *Mancari*. Rather, these decisions sharpened the requisite equal protection analysis and, as the Ninth Circuit recognized in *Williams v. Babbitt*, 115 F.3d 657, 665 (9th Cir. 1997), perhaps called *Mancari's* viability into question. But Morris's arguments do not rely, either explicitly or implicitly, on the reversal of *Mancari*.

argument in *Duro v. Reina*, 851 F.2d 1136 (9th Cir. 1988), and its rejection by the Supreme Court in its *Duro* decision, *supra.*

Gould noted that the Ninth Circuit, in rendering its decision in *Duro*, "observed that race alone does not determine whether one is Indian." U.C. Davis L. Rev. at 71. The Ninth Circuit, according to Gould, "[a]ssert[ed] instead that criminal jurisdiction over nonmember Indians should be determined not by race but status . . . ." *Id.* Thus, focusing on the "status" of the individual, the Ninth Circuit in *Duro* looked only for a rational basis for the extension of tribal criminal jurisdiction over nonmember Indians. The rational basis identified in *Duro*, and echoed by Tanner here, was that nonmember Indians should be subject to tribal jurisdiction because to do otherwise would "undermine the governance of tribal communities. A contrary holding, the court observed, would create a jurisdictional void in which neither tribes, states, nor the federal government could try nonmember Indian misdemeanants." (Footnote omitted.) *Id.* at 71.

The Supreme Court rejected this "status test." As Gould put it:

> The Court rejected the Ninth Circuit's contacts-based approached. The test constituted little more than implied consent, and would apply as well to non-Indians, who form the numerical majority on many reservations. Since *Oliphant v. Suquamish* rejected implied consent as a basis for jurisdiction over non-Indians, the similar status of nonmember Indians required a similar result. Observing that *Duro* was not and could not become a member of the Pima-Maricopa Tribe and therefore could neither vote, hold office, nor serve on a tribal jury, the Court determined that Duro's relations with the tribe were the same as the non-Indian's in *Oliphant*. The Court opined accordingly, that the tribe's powers were subject to the same limitations.

Moreover, the 1990 amendments plainly do not, and were not intended to, benefit nonmember Indians. They are just the type of federal action burdening a distinct, disfavored

minority that all the justices in *Adarand* agreed require strict scrutiny. Their effect is most certainly to "perpetuate a caste" system. They place nonmember Indians in a unique and constitutionally indefensible position. To repeat, Indians are U.S. citizens. No decision of any federal court since 1924, the date of enactment of the statute granting citizenship to all Indians, Act of June 2, 1924, ch. 233, 43 Stat. 253, 8 U.S.C. § 1401, has held that being an Indian diminishes the rights these citizens enjoy. To be sure, the Supreme Court in *Mancari*, *supra*, held this fact may allow them to receive certain benefits or preferences, which may be viewed as an enhancement of their rights. And it is plain that as a member of a tribe an individual citizen may receive rights and privileges conferred by the tribe that nonmembers may not. But the 1990 amendments, uniquely among federal enactments, impose heavy burdens on nonmember Indians while not imposing similar burdens on nonmember non-Indians, who are similarly situated in relation to Tribes.

Thus, they, but not nonmember non-Indians, are subject to criminal trial in tribal courts, where, in the case at hand at least,[18] members of the jury must be tribal members. That is, all other races and members of ethnic groups, including the nonmember Indians', are systematically excluded as a matter of law. To subject nonmember Indians to such disabilities while not treating nonmember non-Indians in the same manner plainly subjects the former to "special burdens." *Adarand*, dissent of Stevens, J., 515 U.S. at 244. In light of the fact that penalties tribal courts may levy for convictions are significant intrusions on personal liberties, the 1990 amendments can in no way be characterized as "benign" or "remedial" of past discrimination.

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[18]And in all other cases this writer is aware of.

The holding of *Adarand*, then, controls, and for the 1990 amendments to survive strict scrutiny, at a minimum a compelling federal interest must be shown and it must be demonstrated that the amendments are narrowly tailored to accomplish that goal. This cannot be shown. Holding that strict scrutiny applies to all governmental classifications on the basis of race, the Supreme Court, in *Adarand*, explained why such political decisions require such scrutiny:

> "[p]olitical judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, but the standard of justification will remain constant. This is at is should be, since those political judgments are the product of rough compromise struck by contending groups within the democratic process.[19] When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest."

Adarand, *supra*, at 224 (footnote added).

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[19] Morris respectfully emphasizes that in the political process resulting in the 1990 amendments the power of tribes as political entities prevailed completely, probably because the rights of individual Indians were not represented. At least the legislative history does not reveal any witness spoke for them.

No person who is not an Indian by race is subjected to a tribe's criminal jurisdiction by the 1990 amendments, yet many people who are nonmembers and not Indian–white, black, Asian, Hispanic and other races–are similarly situated to nonmember Indians vis-a-vis tribes. *See* U.S. Consensus Bureau 2000 statistics regarding Flathead Reservation population. Thus, Congress made a plain, explicit racial classification in deciding to subject only nonmember Indians and no others to tribes' criminal jurisdiction. This is not, therefore, a classification based on a nonmember Indian's political status, as Tanner and the U.S. have argued.

The 1990 amendments rely on the definition of "Indian" developed by cases under 18 U.S.C. §1153. Those cases make it clear that one can be an "Indian" for purposes of 18 U.S.C. §1153, and therefore the 1990 amendments, without being a member of a tribe. *U.S. v. Broncheau*, 597 F.2d 1260, 1262-1263 (9th Cir. 1979) ("Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative."); *U.S. v. Ives*, 504 F. 2d 935, 953 (9th Cir. 1974)("[E]nrollment or lack of enrollment is not determinative of . . . status as an Indian."); *Ex parte Pero*, 99 F.2d 28, 31 (7th Cir. 1938) ("The lack of enrollment . . . is not determinative of status. Only Indians are entitled to be enrolled. . . and the fact of enrollment would be evidence that the enrollee is an Indian. But the refusal of the Department of Interior to enroll a certain Indian as a member of a certain tribe is not necessarily an administrative determination that the person is not an Indian."); *U.S. v. Dodge*, 538 F.2d 770, 786 (8th Cir. 1976) ("The definition of exactly who is and who is not an Indian is very imprecise. (Citation omitted.) Courts have generally followed the test discussed in *U.S. v. Rogers*, 45 U.S. 567 (1845): in order to be considered an Indian, an individual must have some degree of Indian blood and must be recognized as an Indian.") Thus, one can be an

"Indian" for purposes of the 1990 amendments and not be enrolled in a tribe but he or she must be of the Indian race.

Since, 1845, the one immutable requirement to be an "Indian" is an immutable racial characteristic: the person's race must be, at least in part, Indian. *U.S. v. Rogers*, 45 U.S. 67 (1845). (By adoption into a tribe a non-Indian does not become an Indian.) Thus, the defendants' primary argument that the 1990 amendments make a political classification–that they subject only enrolled Indians to tribal criminal jurisdiction and non-Indians can be enrolled tribal members–is meritless. The 1990 amendments subject "Indians" to tribal criminal jurisdiction, whether they are enrolled Indians or not, and non-Indians simply do not fall into the category of "Indians," which is first and foremost a racial categorization.

Even assuming, however, that the portion of defendants' argument that is not absurd–i.e. that "Indian" means enrolled Indians–was factually accurate, the classification made by the 1990 amendments would still be racial. If it were true that for purposes of the 1990 amendments an "Indian" has to be enrolled in a tribe, the fact would remain that every one of the people subjected to tribal criminal jurisdiction by those amendments would be, in terms of their race, Indians. At best, then, it might be said that, in that case, the 1990 amendments constitute a racial and political classification. But the fact remains the one immutable requirement is racial.

The conclusion that the amendments violate equal protection guarantees is inescapable. Examining the 1990 amendments in light of, and with respect for, the rights of individuals, rather than as the lower did out of concern to promote tribal sovereignty, reveals the aggrandizement of tribal power at the expense of nonmember Indians blatantly violates the Constitution. *Adarand*, 515 U.S. at 224: "[I]t is the individual who is entitled to judicial protection against classifications

based upon his race or ethnic background because such distinctions impinge upon his personal rights, rather than the individual only because of his membership in a particular group . . . ."

In close analysis of the 1990 amendments, *The Congressional Response to Duro v. Reina: Compromising Sovereignty and the Constitution*, L. Scott Gould, 28 U.C. Davis L. Rev., 53-163 (1994), Professor Gould concluded the 1990 amendments are "inherently racist and should be held unconstitutional." Gould at 63. After an exhaustive survey of tribal inherent sovereignty, the *Duro* decision, and the "*Duro* fix," Professor Gould concluded: "It disserves not only reason, the charge of Congress, and the principles of scholarship, but the Constitution to conceive that [the 1990 amendments are] anything but racist. Group rights of tribes should not be advocated at this cost."[20] Gould at 121.

Neither Tanner nor the United States have offered any demonstration of a compelling state interest this racial distinction serves and that it is narrowly tailored to accomplish that end. But even if Congress had made a political classification, Morris asserts that the Defendants also failed to carry their burden to demonstrate a rational basis, because Congress could easily and without raising any constitutional questions, have enacted a law which would plainly protect all the constitutional rights of all misdemeanor criminal defendants by making it clear that tribes do not have jurisdiction over nonmember misdemeanor defendants on a reservation but states do.

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[20] Professor Gould admirably and unflinchingly details the 1990 amendments, finding no rationale to rescue them from their constitutional defects (p. 152), noting that "the distinction between many Indians who can be tried pursuant to the law and non-Indians who cannot is essentially racial," (p. 120), and opining, "[s]urely Indians should be entitled to the same constitutional protections as whites and blacks," (p. 121). Clearly, Morris believes many of his judgments support their position. But in fairness, it must be mentioned Professor Gould's writings reveal that he is no opponent of tribal sovereignty.

Certainly "enabling" them to extend their non-Constitutional powers over a class of persons wholly made up of one race, even if there was also an aspect of "political status" to that category, primarily for the convenience of law enforcement officers, is not even a rational basis.

Tanner, the United States and the lower court have suggested that because Indians "consent" to their "political status" by enrolling in a tribe, they need only dis-enroll if they want to have their constitutional rights. This is not only practically infeasible, especially as to un-enrolled Indians, it is unconstitutional.

The meaning of this suggestion is that for a Seminole Indian from Florida to travel to Glacier Park without being in a position where he might suddenly find himself in a court that he not only has no connection to and which excludes people of his ancestry from serving on juries and voting in elections but which also, under settled Supreme Court precedent, is not required to conduct its proceedings in accord with the Constitution, he would first have to renounce his membership in the Seminole Tribe. And if, perchance, the person in question was not a member of a tribe but is Indian, racially speaking, and for example resides among the various Cherokee allotments in Oklahoma, he or she would still be subject to tribal jurisdiction and criminal punishment. In that case, and presumably in the case of the Seminole Indian, they would not only have to renounce tribal membership but move their residence and alter their relations with friends and family – all to ensure they are accorded their constitutional rights as U.S. citizens in a criminal prosecution within the United States but a thousand miles from their home.

The fact is, of the hundreds of tribes in this country there are many different cultures. They range from Florida to Alaska and from Maine to California. They are not fungible. Some share similar cultures, histories and legal regimes. But not all. A broad diversity of cultures,

languages, histories, and legal regimes exists throughout the country. Some neighboring tribes are traditionally enemies whose legendary animosities are even today relevant to their relationships. The only fact that is the same for all Indian Tribes is that their members are racially Indians. Plainly, in throwing them all together Congress based the 1990 amendments on their race only and not any other aspect of identity or even similarity.

D. The 1990 Amendments Violate the Fundamental Fifth Amendment Right to Due Process Because They Subject U.S. Citizens to Trial and Punishment, Including Possibly Incarceration, by Sovereign Governments Within the Territory and Subject to the Power of the United States but Not Required to Comply with Constitutional Guarantees

Only in narrowly defined and extraordinary circumstances may the United States prosecute citizens of the United States in tribunals not required to accord the defendant all the protections of the Constitution and its amendments. *Reid v. Covert*, 354 U.S. 1 (1957); *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). The need or desire to prosecute misdemeanor defendants cannot represent such circumstances. Yet in the 1990 amendments, Congress knowingly subjected U.S. citizens to the power of sovereigns unconstrained by the Constitution. This power is real. Tribes may fine a convicted defendant up to $500 and imprison him for up to a year in Tribal jail for each violation of the tribal criminal code. Consequently:

> "Even the power of Congress over Indians is limited by their rights as U.S. citizens. "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). 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, 95 S.Ct. 710,

> 42 L.Ed.2d 706 (1975), but no delegation of authority to a tribe has to date included the power to punish non-members in tribal court. We decline to produce such a result through recognition of inherent tribal authority."

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

Simply put, Congress cannot constitutionally authorize a political entity within the confines of the United States and under its control to exercise criminal jurisdiction over U.S. citizens without according them the full panoply of basic constitutional rights. First among these are the rights of political participation, *i.e.* consent, from which all other government power flows. *See Duro*, 110 S.Ct at 2064, citing *Reid*, 354 U.S.1 (1957).

In *Duro* the Court cited important, fundamental, constitutional reasons for this. "The exercise of criminal jurisdiction subjects a person not only to the adjudicatory power of the tribunal, but also to the prosecuting power of the tribe, and involves a far more direct intrusion on personal liberties." The Court further noted:

> "Criminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States. 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.
>
> The special nature of the tribunals at issue makes a focus on consent and the protections of citizenship most appropriate. While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often "subordinate to the political branches of tribal governments," and their legal methods may depend on "unspoken practices and norms." Cohen 334-335. It is significant that the Bill of Rights does not apply to Indian tribal governments. *Talton v. Mayes*, 163 U.S. 376, 16 S.Ct. 986, 41 L.Ed. 196 (1896)."

Duro, 495 U.S. at 693.

As a U.S. citizen, Thomas Morris has a constitutional right to be tried, when accused of a crime as he is now, by courts that comply with the law of the land. The Tribal Court does not, nor is it required to. It is unfathomable, and more to the point violates his due process rights, for Congress to simply ignore Morris's rights as a U.S. citizen and subject him to such a tribunal.

Below, Tanner failed to address Morris's due process claim, and the United States essentially conceded it. It argued below that the court should allow such non-constitutional tribunals because in some cases they are allowed in territories of the United States not slated to become part of the United States when fundamental rights are not involved. E.R. 126, Civil Docket # 62. U.S. Response Brief, pp. 17-18. Here, the "territory" at issue has been a part of the United States since 1889 and the rights involved are fundamental. This argument, therefore, is meritless.

VII. CONCLUSION

Morris respectfully asks the Court to reverse the lower court and declare the 1990 amendments unconstitutional as they violate the Fifth Amendment guarantees.

Respectfully submitted this 19th day of May, 2004.

Gough, Shanahan, Johnson & Waterman

_____

Jon Metropoulos
Attorneys for Appellants

STATEMENT OF RELATED CASES

There are no related cases to this matter as defined by Circuit Rule 28-2.6.

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Jon Metropoulos

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE UNDER RULE 32(a)(7)(B)

I certify that the foregoing Appellants' Initial Brief is proportionately spaced (Times New Roman), has at least a 14-point font, and contains approximately 14,000 words.

_____

Jon Metropoulos

CERTIFICATE OF SERVICE UNDER RULE 31(b)

I certify that two copies of the *Appellants' Initial Brief* was mailed, postage prepaid, on the 19th day of May, 2004, and directed to:

Joseph P. Hovenkotter
Confederated Salish and Kootenai Tribes
P O Box 278
Pablo, MT 59855-0278

R. Justin Smith
Attorney, Policy, Legislation and
Special Litigation Section
Envir. & Natural Resources Division
Department of Justice
P. O. Box 4390
Washington, DC 20044-4390

Judy Rabinowitz
Indian Resources Section
Department of Justice
301 Howard Street, Suite 1050
San Francisco, CA 94105
Mike McGarth
Attorney General
Brian M. Morris
Assistant Attorney General
P. O. Box 201401
Helena, MT 59620-1401

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