No. 03-107

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY JO LARA

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

REPLY BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Miscellaneous: Page

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Respondent does not dispute that the text of 25 U.S.C. 1301(2), as amended in response to *Duro* v. *Reina*, 495 U.S. 676 (1990), can be read *only* as a restoration of Indian Tribes' own sovereign power to prosecute members of other Tribes. Although respondent urges the Court to uphold Section 1301(2) as a delegation of federal power—and further argues that the Spirit Lake Nation's exercise of that power creates a double jeopardy bar to the United States' prosecution in this case—an Act of Congress cannot be construed contrary to its express terms, even to save it from asserted constitutional invalidity.

Moreover, respondent does not provide any reason seriously to question Congress's constitutional authority to enact the post-*Duro* amendment to Section

1301(2). He does not, and cannot, identify any provision of the Constitution that addresses the extent to which Tribes may continue to exercise sovereign powers after their incorporation into the United States. This Court has recognized that Congress, in the exercise of its plenary authority over Indian affairs, may determine the scope of tribal power. In the exercise of that authority, Congress may modify or repeal limits on a Tribe's power within its own reservation that had previously been imposed by Act of Congress or treaty, or that had been recognized by this Court as a matter of federal common law against the backdrop of federal laws and treaties. The result is the same as when Congress, in Public Law 280, lifted the limitation under federal law on the exercise of jurisdiction by certain *States* on Indian reservations and authorized those States to exercise their own sovereign powers to bring prosecutions in cases involving Indians.

The fact that tribal members are United States citizens does not, as respondent asserts, prevent Congress from affording them a special status with distinct attributes, such as being subject to prosecution by another Tribe for an offense committed on that Tribe's reservation. The Indian Civil Rights Act of 1968, 25 U.S.C. 1301 *et seq.*, requires that defendants in tribal court be accorded most of the protections that the Constitution extends to defendants in state and federal court, and provides for federal habeas review of tribal court convictions. The mere possibility that a defendant in a particular case might be denied a protection in a tribal prosecution that the Indian Civil Rights Act or the Constitution might require does not provide any basis for invalidating Section 1301(2) on its face. In such a case, the defendant may pursue a federal habeas action to challenge the legality of his conviction.

Even if the Court were to hold that Section 1301(2) exceeds Congress's authority under the Constitution, that would not call respondent's federal prosecution into question. It would mean only that respondent's earlier tribal prosecution was beyond the jurisdiction of the Spirit Lake Nation, because Section 1301(2) did not validly restore the Nation's sovereign power to prosecute non-member Indians. Whether or not the tribal prosecution was valid, it was conducted by a sovereign separate from the United States, and thus cannot operate as a double jeopardy bar to the federal prosecution in this case.

I. RESPONDENT CANNOT JUSTIFY CONSTRUING THE POST-*DURO* AMENDMENT AS ANYTHING OTHER THAN A RESTORATION OF TRIBAL SOVEREIGN POWER

Section 1301(2), as amended after *Duro*, states that Tribes' "powers of self-government" include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2). Respondent essentially concedes that Section 1301(2), by its express terms, authorizes Tribes to exercise *only* their own sovereign power, *not* delegated power of the federal government itself, to prosecute crimes committed on their reservations by members of other Tribes. See, *e.g.*, Resp. Br. 24 ("Congress believed it could 'restore' tribal sovereignty and overrule the Court's holding in *Duro*."). Section 1301(2)'s textual recognition of such criminal jurisdiction exclusively as an "inherent power of Indian Tribes" and a "power[] of *self*-government" permits no other construction.[1]

[1] According to respondent, regardless of the implications of the post-*Duro* amendment for other Tribes, the amendment cannot

That conclusion is confirmed by the legislative record, which makes clear that the post-*Duro* amendment "is not a delegation of this jurisdiction but a clarification of the status of tribes as domestic dependent nations." H.R. Conf. Rep. No. 261, 102d Cong., 1st Sess. 3-4 (1991); see, *e.g.*, H.R. Rep. No. 61, 102d Cong., 1st Sess 7 (1991) (stating that the amendment "is not a federal delegation"); 137 Cong. Rec. 10,712-10,714 (1991) (statement of House floor manager) (explaining that the amendment "recognizes an inherent tribal right which always existed," and "is not a delegation"); see also U.S. Br. 18-19. Respondent does not dispute

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restore criminal jurisdiction to the Spirit Lake Nation, which he contends relinquished that jurisdiction in an 1858 Treaty. See Resp Br. 8-9 n.3; see also Br. of Amici States of Washington, et al., 12-14. In the relevant Article of that Treaty, the signatory bands agreed "not to engage in hostilities with the Indians of any other tribe, unless in self-defence, but to submit, through their agent, all matters of dispute and difficulty between themselves and other Indians for the decision of the President of the United States, and to acquiesce in and abide thereby." Treaty Between the United States and the Sisseeton and Wahpaton Bands of the Dakota or Sioux Tribe of Indians, June 19, 1858, Art. VI, 12 Stat. 1039. That provision is most naturally read as referring to disputes between Tribes *qua* Tribes—hence the provision for referral of the dispute to the President to act on behalf of the United States to mediate between sovereign Tribes—not as referring to prosecution by one Tribe of an individual member of another Tribe who commits a crime on the first Tribe's reservation. And, even if the provision could be read otherwise, such prosecutions could be viewed as falling within the "self-defence" exception, because they protect against threats (such as respondent's assault on a police officer) against the security of the Tribe, its members, and the entire reservation community. Of course, just as Congress can restore criminal jurisdiction that had been lost by Tribes' dependent status alone, Congress can restore criminal jurisdiction lost by treaty.

that such statements accurately and authoritatively reflect the intent of Congress as a whole.

Respondent nonetheless contends that Section 1301(2) may be construed as a delegation of federal power—and should be so construed if it is held invalid, as he urges, as a restoration of tribal power. Respondent makes no attempt to reconcile his "saving" construction with Section 1301(2)'s text and legislative history.[2] Respondent asserts only that such a construction would comport with "the spirit of Congress's intent" that Tribes be able to prosecute members of other Tribes. Resp. Br. 23-24. But "the language of the statutes that Congress enacts provides 'the most reliable evidence of its intent,'" *Holloway* v. *United States*, 526 U.S. 1, 6 (1999) (quoting *United States* v. *Turkette*, 452 U.S. 576, 593 (1981)), and the language of Section 1301(2) negates any suggestion that Congress intended to permit Tribes to prosecute non-member Indians in the exercise of a delegated power of the federal government. As this Court has stated, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law," *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987) (per curiam), when the statutory language and legislative history direct otherwise.

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[2] Respondent suggests that there might be Fifth Amendment due process concerns even if Section 1301(2) were construed as a delegation of federal power. See Resp. Br. 24-25 n.10; but see U.S. Br. 34-43; cf. Br. of Amici National Congress of American Indians 24-29. Whatever the merits of the constitutional concerns identified by respondent and amici with respect to a statute that, contrary to Section 1301(2), actually purported to delegate federal power to Tribes, they suggest that construing Section 1301(2) as a delegation would not, as the court of appeals seemed to believe, avoid constitutional questions entirely.

Construing Section 1301(2) as a delegation of federal power would not, in any event, necessarily advance its primary objectives. See U.S. Br. 19-21, 36-38 (discussing objectives). It would not promote "the congressional policy of Indian self government," *Fisher* v. *District Court*, 424 U.S. 382, 390-391 (1976) (per curiam), if tribal prosecutors and tribal courts were to be treated as mere agents of the United States for the prosecution of non-member Indians. It also would not promote "Congress's desire to maintain and defend order on the reservations" (Resp. Br. 24) if a tribal prosecution of a non-member Indian could operate as a double jeopardy bar to a subsequent federal prosecution for an offense with the same elements, including a greater-encompassing offense. That would pose the risk that non-member Indians who commit serious crimes on the reservation could avoid serving any more than the one-year term of imprisonment that Tribes are authorized to impose for any offense. See 25 U.S.C. 1302(7).[3]

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[3] Respondent contends that construing Section 1301(2) as a delegation of federal power would serve the salutary purposes of encouraging communication between tribal and federal prosecutors. See Resp. Br. 4, 31-32. That provides no reason to construe Section 1301(2) contrary to its plain language. Nor does the legislative record suggest that encouraging such communication was among Congress's purposes in enacting the provision. Indeed, Congress would not have wanted to prevent tribal authorities from commencing prosecutions as promptly as they believed appropriate, so as to enhance the effectiveness of tribal law enforcement for punishing offenders and vindicating the interests of the reservation community. Tribal and federal prosecutors engage in extensive ongoing communication and cooperation—and have ample incentive to do so—without the necessity for tribal prosecutors to be treated as agents of the United States for the prosecution of non-member Indians. See, *e.g.*, U.S. Br. at 26, *Inyo*

II. RESPONDENT DOES NOT IDENTIFY ANYTHING IN THE CONSTITUTION THAT PREVENTED CONGRESS FROM RESTORING TRIBES' SOVEREIGN POWER TO PROSECUTE NON-MEMBER INDIANS

A. Although respondent asserts that "[t]he essential issue" in this case is "whether this Court or Congress has the superior power to determine and define the constitutional limits of tribal sovereignty" (Resp. Br. 6), that assertion rests on the erroneous premise that the Constitution dictates whether or not an Indian Tribe may exercise its sovereign power to prosecute an Indian who is a member of another Tribe. No provision of the Constitution addresses that question, and respondent does not attempt to identify one. Nor does respondent refute the extensive historical evidence that Tribes were recognized to retain that power well after the Constitution's ratification—evidence incompatible with respondent's position that something in the Constitution itself circumscribes the scope of retained tribal sovereign powers. See U.S. Br. 28-31 & n.11.[4]

County v. *Paiute-Shoshone Indians*, 538 U.S. 701 (2003) (No. 02-281). Even with the best of intentions and the best of procedures, however, communication is not always assured of being effective and timely, so that a tribal prosecution could occur before a decision had been made whether to pursue a federal prosecution.

[4] Respondent asserts that the historical record is irrelevant because much of it predates Congress's comprehensive grant of United States citizenship to Indians in 1924. See Resp. Br. 18; Act of June 2, 1924, ch. 233, 43 Stat. 253; cf. *Duro*, 495 U.S. at 692 (noting that "[m]any Indians" became United States citizens before that time). Whatever the implications of that statutory grant for individual Indians' relationship to the United States and the States, it cannot be conceived of as triggering some extra-

The error in respondent's position is illustrated by his attempt to analogize the Constitution's treatment of States to its treatment of Tribes. See Resp. Br. 18-19. For example, respondent suggests that, just as "under the Constitution, states may not make treaties with foreign nations," Tribes may not prosecute members of other Tribes. *Id.* at 19. But the Constitution expressly provides that "[n]o State shall enter into any Treaty, Alliance, or Confederation," U.S. Const. Art. I, § 10, Cl. 1, and imposes other explicit textual constraints on States' exercise of sovereign powers. No remotely analogous provision purports to restrict Tribes' prosecutorial power. Cf. *Kiowa Tribe* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 755 (1998) ("[T]ribes were not at the Constitutional Convention."); *Blatchford* v. *Native Village*, 501 U.S. 775, 781-782 (1991). In particular here, there is nothing in the Constitution that affirmatively precludes an Indian Tribe from exercising jurisdiction on its reservation over a member of another Tribe, and Section 1301(2)'s recognition of that power as between Tribes falls well within Congress's plenary power over Indian affairs.

Contrary to respondent's assertions, this Court's decisions, including *Duro*, support the conclusion that the scope of tribal powers is not unalterably fixed by the Constitution, but instead is subject to adjustment by Congress. While respondent seeks support from cases holding that Tribes' dependent status precluded their assertion of a sovereign power as against non-members (Resp. Br. 12-15), those are cases in which no Act of Congress or other positive law authorized Tribes to exercise that power. In several such cases, the Court

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textual constitutional limitation on the powers of tribal governments. See p. 13-14, *infra*.

made clear that Congress could authorize the exercise of the "tribal power" at issue. *Montana* v. *United States*, 450 U.S. 544, 564 (1981); see, *e.g.*, *Nevada* v. *Hicks*, 533 U.S. 353, 358-359 (2001); *South Dakota* v. *Bourland*, 508 U.S. 679, 695 (1993). When Tribes regulate the activities of non-members pursuant to authorization from Congress itself, Tribes are not "*independently* * * * determin[ing] their external relations," and thus are not unilaterally acting in a manner "necessarily inconsistent" with their "dependent status." *Montana*, 450 U.S. at 564 (emphases added and deleted) (quoting *United States* v. *Wheeler*, 435 U.S. 313, 326 (1978)).

For reasons previously explained, the Court's use of variants of the word "delegate" to refer to such authorization does not, as respondent assumes (*e.g.*, Resp. Br. 13-15), signify that Congress may not restore Tribes' sovereign powers, but may only delegate to Tribes powers that must be regarded as those of the Federal Government. See U.S. Br. 25-26; see also *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 (1979) ("[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute."). Nothing in those cases turned on whether Congress could authorize an exercise of tribal power as distinguished from federal power. Cf. *Wheeler*, 435 U.S. at 328 n.28 (noting the undecided question whether a Tribe "would necessarily be an arm of the Federal Government" if it exercised criminal jurisdiction that it lost and then "regained * * * by Act of Congress"). Indeed, in a decision cited in the very section of *Duro* on which respondent principally relies (*e.g.*, Resp. Br. 16-17), the Court explained that "the existence of the right in Congress to regulate the manner in which the local powers of [a Tribe] shall be exercised does not

render such local powers Federal powers." *Talton* v. *Mayes*, 163 U.S. 376, 384 (1896) (cited in *Duro*, 495 U.S. at 693).

B. *Duro* is illustrative of this Court's approach to challenges to a Tribe's exercise of a sovereign power in the absence of congressional authorization. In *Duro*, the Court did not identify any provision of the Constitution as compelling its holding that, "[i]n the area of criminal enforcement, * * * tribal power does not extend beyond internal relations among members." 495 U.S. at 688. At the outset of its analysis, the Court observed that "the tribal officials do not claim jurisdiction under an affirmative congressional authorization or treaty provision," *id.* at 684—an observation consistent with the understanding that the question to be resolved in that case was one of federal common law. The Court drew principally upon its earlier decisions addressing the scope of tribal powers in civil and criminal contexts—decisions that did not themselves rest on any provision of the Constitution or suggest that Congress could not expand or contract the particular power at issue. See *id.* at 685-688.

The Court then considered, and ultimately rejected, the argument that "a review of history requires the assertion of jurisdiction" by Tribes over non-member Indians. 495 U.S. at 688. The Court recognized that Acts of Congress had, since the early nineteenth century, provided for federal criminal jurisdiction over crimes between Indians and non-Indians in Indian country, but not over "crimes committed by one Indian against the person or property of another Indian." Act of June 30, 1834, ch. 161, § 25, 4 Stat. 733; see 18 U.S.C. 1152; Act of Mar. 3, 1817, ch. 92, § 2, 3 Stat. 383. And the Court cited in that regard (495 U.S. at 689) its earlier decision in *United States* v. *Rogers*, 45 U.S. (4 How.) 567 (1846),

which observed that the exception in Section 25 of the 1834 Act for Indian-against-Indian crimes "does not speak of members of a tribe, but of the race generally,—of the family of Indians," and concluded that Section 25 was "intended to leave them both, as regarded their own tribe, and *other tribes also*, to be governed by Indian usages and customs." *Id.* at 573 (emphasis added); see *Crimes Committed by Indians*, 17 Op. Att'y Gen. 566, 570 (1883) (stating that a Tribe probably had jurisdiction to prosecute the murder of one of its members by a member of another Tribe) (cited in U.S. Br. 30-31; U.S. Br. at 13, *Duro*, *supra* (No. 88-6546).[5] The Court also discussed the Courts of Indian Offenses, which were established by the Department of the Interior in the absence of tribal courts, and which exercised jurisdiction over all Indian offenders within a reservation. 495 U.S. at 689; see 1 Op. Sol. Dep't of Interior 445, 476 (1934) (noting as one possible basis for Courts of Indian Offenses that they "derive their power from the tribe, rather than from Washington"); accord Felix Cohen, *Handbook of Federal Indian Law* 149 (1942).

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[5] The *Duro* Court did not address the opinion of the Attorney General cited in the text. Nor did the Court discuss another opinion of the Attorney General, which had been cited in *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 199 (1978), in support of the proposition that a Tribe could not prosecute *non*-Indians, the reasoning of which necessarily leads to the conclusion that a Tribe *could* prosecute all Indians within its reservation unless that power had been specifically limited by Congress. See *Jurisdiction of the Courts of the Choctaw Nation*, 7 Op. Att'y Gen. 174 (1855) (reasoning that Tribes retained all powers not from them by the United States, but that the power to prosecute non-Indian citizens of the United States had been withdrawn); Felix Cohen, *Handbook of Federal Indian Law* 147-148 (1942).

The Court reasoned, however, that those statutory and regulatory provisions, being directed at "the Government's treatment of Indians as a single large class with respect to *federal* jurisdiction and programs," were "not dispositive of a question of *tribal* power to treat Indians by the same broad classification," even if they reflected "the tendency of past Indian policy to treat Indians as an undifferentiated class." *Duro*, 495 U.S. at 689-690. The Court also considered several opinions issued by the Solicitor of the Department of the Interior during the 1930s that the Court concluded were not entirely consistent as to the continued existence of an inherent tribal power to prosecute non-member Indians. *Id.* at 691-692; see Br. of Amici Eighteen American Indian Tribes 24-29 (discussing Solicitor's opinions). Nothing in the Court's discussion suggests any *constitutional* impediment to the recognition of such jurisdiction in a Tribe.

The Court did not even refer to the Constitution until the penultimate section of its opinion in *Duro*, which noted various distinctive features of tribal prosecutions, including that "the Bill of Rights does not apply to Indian tribal governments." 495 U.S. at 693. The Court concluded that those features, coupled with the absence of any congressional "delegation of authority to a tribe [that] has to date included the power to punish non-members in *tribal* court," counseled against the Court's *itself* "produc[ing] such a result through recognition of inherent tribal authority." *Id.* at 694. And, although the Court observed that "[o]ur 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," *id.* at 693, the Court did not indicate that any such "constitutional

limitations" would prevent Congress from authorizing a Tribe to prosecute members of another Tribe notwithstanding their American citizenship. Rather, after acknowledging that the fact "[t]hat Indians are citizens does not alter the Federal Government's broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits," *id.* at 692, the Court stated that, "[i]f the present jurisdictional scheme [resulting from its decision] proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs," *id.* at 698.

Congress's "broad authority" to legislate with respect to Indian affairs, *Duro*, 495 U.S. at 692, squarely encompasses the authority to enact the provision at issue here. Section 1301(2), as amended after *Duro*, regulates solely the relationship among Tribes as a class and the Indians affiliated with those Tribes. Just as Congress may, for example, define the attributes of Indians' membership in their own Tribe to include entitlement to services provided by the United States or by another Tribe on whose reservation they reside, see 25 U.S.C. 450j(h), or to employment preferences along with members of that Tribe, see 42 U.S.C. 2000e-2(i); *Dawavendewa* v. *Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1120-1124 (9th Cir. 1998), cert. denied, 528 U.S. 1098 (2000), Congress may define the attributes of Indians' tribal membership to include submission to the criminal jurisdiction of any other Tribe whose laws they violate. Congress's restoration of tribal criminal jurisdiction over nonmember Indians provides important protections to all Tribes and all tribal members. It assures each tribal member that not only his own Tribe, but also any other

Tribe whose territory he may enter, will have the power to address threats to public order and safety that, in Congress's view, could not as effectively be addressed by either the United States or the States.

C. Respondent further asserts that amended Section 1301(2) is unconstitutional because the Indian Civil Rights Act does not specifically require every procedural protection for criminal defendants that is required by the Constitution. Resp. Br. 19-23. Respondent does not contend that any omitted protection would necessarily be implicated in every tribal prosecution of a non-member Indian. Nor does respondent attempt to justify invalidating Section 1301(2) as a facial matter merely because constitutional issues might arise in some of its applications. See *United States* v. *Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

Respondent does not dispute that Tribes are required by the Indian Civil Rights Act—and often by their own constitutions as well—to accord protections to criminal defendants that are comparable, in most respects, to those required of States by the federal Constitution. Respondent, like the Court in *Duro*, focuses solely on the Indian Civil Rights Act's omission of the right to appointed counsel. See Resp. Br. 22; *Duro*, 495 U.S. at 691. Even if the Constitution required that Tribes provide counsel whenever States must do so under the Sixth Amendment, as incorporated through the Fourteenth Amendment (but see U.S. Br. 41 n.14), many tribal prosecutions would not violate that condition. Among such prosecutions would be those in which the defendant was not indigent; or the Tribe

provided counsel, as a number of Tribes do; or the offense was not punishable by incarceration; or tribal authorities agreed to forgo incarceration in the defendant's case. See U.S. Br. 40-41. In other cases, a defendant could seek federal habeas review of a tribal conviction obtained in violation of his rights under the Indian Civil Rights Act (including its due process provision, 25 U.S.C. 1302(8)) or the Constitution.[6] Especially in view of Congress's creation of a specific mechanism to challenge allegedly impermissible exercises of tribal prosecutorial authority in individual cases, the mere fact that Section 1301(2) "might operate unconstitutionally under some conceivable set of circumstances," *Salerno*, 481 U.S. at 745, does not require its invalidation.[7]

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[6] In 1968, when the Indian Civil Rights Act was enacted, this Court had not yet held that the Sixth Amendment right to appointed counsel extends to prosecutions for offenses with a maximum term of incarceration of six months or less. See *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972) (recognizing that right when the defendant is sentenced to any imprisonment). Under 25 U.S.C. 1302(7), as originally enacted, the maximum term of incarceration that a Tribe could impose for any offense was six months. See Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, Pub. L. No. 99-570, Title IV, § 4217, 100 Stat. 3207-146 (increasing maximum from six months to one year to "enhance the ability of tribal governments to prevent and penalize the traffic of illegal narcotics on Indian reservations").

[7] Respondent, who proceeded without counsel in tribal court, does not contend that he asserted a federal right to appointed counsel in that forum, which would have afforded the Tribe the opportunity to consider whether to appoint counsel or to forgo an incarceration penalty. Nor did he bring a federal habeas challenge to his tribal conviction. (In a federal habeas proceeding under Section 1303, the opposing party would be the appropriate tribal official, not a federal official, as respondent mistakenly assumes. See Resp. Br. 30.).

Finally, *Reid* v. *Covert*, 354 U.S. 1 (1957), on which respondent relies (Resp. Br. 11, 22) and which *Duro* cites (495 U.S. at 693-694), does not suggest that Congress may authorize Tribes to prosecute non-member Indians only if it imposes on Tribes the identical requirements that the Constitution imposes on States. *Reid* held that Congress could not subject civilian members of military families stationed abroad to trial by court martial. No single rationale commanded a majority of the Court. Justices Frankfurter and Harlan, who separately concurred in the judgment, suggested that Congress was *not* required to afford all constitutional protections to U.S. citizens who commit crimes abroad (at least when the offense was not a capital one). See 354 U.S. at 44-45 (Frankfurter, J., concurring in result); *id.* at 75-76 (Harlan, J. concurring in result).

Here, in exercising its "broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits," *Duro*, 495 U.S. at 692, Congress is entitled to some flexibility in its imposition of Bill of Rights-type requirements, so as to accommodate the unique circumstances of Tribes and tribal members. For example, Congress could leave it to individual Tribes to decide in the first instance whether, or in what circumstances, to provide for appointment of counsel, taking into account the nature of the Tribe's judicial system, the availability of resources, and other factors. The equal protection and due process provisions of the Indian Civil Rights Act protect against discriminatory or arbitrary exercises of that authority by Tribes.[8]

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[8] Although respondent raises the prospect of a non-member Indian's being prosecuted by a Tribe with "laws and mores" different from those of his own Tribe (Resp. Br. 22 n.8), such cases

III. RESPONDENT CANNOT JUSTIFY TREATING HIS TRIBAL PROSECUTION, IF BEYOND THE JURISDICTION OF THE TRIBE, AS A DOUBLE JEOPARDY BAR TO HIS FEDERAL PROSECUTION

Because, as previously explained, the post-*Duro* amendment to Section 1301(2) may be read only as a restoration of tribal sovereign power, respondent's tribal prosecution conducted pursuant to Section 1301(2) may be treated only as an exercise of tribal sovereign power for double jeopardy purposes. The Spirit Lake Nation necessarily acted as a sovereign separate from the United States in prosecuting respondent, because neither Section 1301(2) nor any other federal law delegates federal prosecutorial power to Tribes. Even

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are unlikely to arise with any frequency. First, many tribal criminal codes closely resemble federal and state criminal codes, and many tribal courts closely resemble federal and state courts. See Br. of Amici Eighteen Indian Tribes 12-15. Respondent does not suggest, for example, that his own Tribe would view his offense of assault on a police officer any more leniently than did the Spirit Lake Nation. Second, of the non-member Indians who are tried in tribal court, many have lived or worked on the prosecuting Tribe's reservation, and consequently can be expected to be familiar with its "laws and mores." Respondent himself was married to a member of the Spirit Lake Nation and lived on its reservation. See *id.* at 4-5. Third, individuals who commit crimes while temporarily visiting the United States or a State are subject to prosecution there, even if they are unfamiliar with the particular "laws and mores" of the place of prosecution. There is consequently nothing remarkable about allowing a Tribe to prosecute members of other Tribes who come within its reservation, whether on a transient basis or on an extended basis. Finally, in the event that a defendant's unfamiliarity with the prosecuting Tribe's culture leads to a denial of equal protection or due process, federal habeas review is available.

if the tribal prosecution is ultimately held to be invalid because it was not conducted under a constitutional restoration of tribal power, that would not provide any basis on which to recharacterize the tribal prosecution as a federal one and impose it as a double jeopardy bar to the prosecution by the United States in this case.

Respondent cannot escape that conclusion. Although respondent insists that he "was placed in jeopardy during his tribal prosecution" (Resp. Br. 25), that is beside the point, because that prosecution could only have been conducted by a sovereign separate from the United States. If, contrary to the United States' submission, Congress could not constitutionally authorize the Spirit Lake Nation to exercise criminal jurisdiction over respondent as a non-member Indian, respondent's tribal conviction would be void and he could pursue whatever relief the Tribe might provide in such circumstances. Although respondent might then view it as unfair that he served his entire tribal sentence, that is the consequence of not asserting a timely challenge to the Tribe's authority to prosecute him, which could have been raised on federal habeas under Section 1303 or through other available means. See *Morris* v. *Tanner*, No. 99-36007, 2001 WL 832722 (9th Cir. July 24, 2001) (federal constitutional challenge to Tribe's authority to prosecute non-member Indian; tribal prosecution stayed pending federal court resolution), on remand, 288 F. Supp. 2d 1133 (D. Mont. 2003) (upholding 25 U.S.C. 1301(2) against constitutional challenge). Whether or not the tribal conviction was valid, respondent may be able to seek an adjustment of his federal sentence to account for time spent in custody for an offense involving the same conduct. See 18 U.S.C. 3585(b).

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For the foregoing reasons and those stated in the United States' opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

JANUARY 2004