2003

Lara: A Constitutional Crisis in Indian Law?

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QUESTION AND ANSWER SESSION

Introduction:

Right now in this program, we are at a spot where we wanted to add an Oklahoma perspective as far as the impact that *United States v. Lara*[1] will have on tribes in Oklahoma. We are fortunate to have several people here in the audience that are either past editors of the *American Indian Law Review* and now Indian law practitioners, tribal officials or skilled attorneys. What I would like to do at this time is open up the floor, and encourage anyone who has strong feelings about this issue and its impact on Oklahoma tribes to come down and speak. The floor is open.

Question:

I am Russ Walker. I am a lawyer in Oklahoma City. I would like to ask Professor Pommersheim what chance do you think there is of passing a constitutional amendment to guarantee tribal sovereignty?

Professor Pommersheim's Answer:

I think that is an excellent, and very practical question. My evasive answer is "I do not know." However, what I really mean is, before you could talk about an amendment, there would have to be much writing and discussion just to get it out as an authentic issue to people in the field of Indian law, to people outside the field of Indian law, and to individual citizens everywhere. That case can be made, and I think that people would be very interested in the proposition. In terms of actually drafting the amendment, getting it approved by two-thirds of Congress and getting it approved by three-fourths of the state legislatures, that, in some ways, is a daunting task. But the first step is to continue developing the dialogue about the possibilities. There is dialogue, both in and out of Indian country, and in and out of Indian law, but I think it is particularly the students who will hopefully get involved and push the possibilities.

This issue raises serious questions. Is Congress or the state legislatures ready to do this? I am not sure, but it is something that needs to be explored. If the answer would be, "No," that would be its own most unfortunate comment. Why would anyone be opposed to it if you could make the case that this measure is truly needed to show respect to tribes in the twenty-first

1. 324 F.3d 635 (8th Cir. 2003), *cert. granted*, 124 S. Ct. 46 (2003).

century, that their sovereignty will be recognized in a way that the dominant society regards as the highest level of recognition — the expressed recognition within the Constitution. If you presented it that way, as a starting point, I do not see how people could be opposed to it. Obviously, people could and would be opposed to it. But as a general proposition, if you can make the case, I think people would respond positively.

Ultimately you get to different issues: what exactly the amendment might say and how states might look at that amendment; how the federal government itself might look at that amendment; how individuals, particularly individuals boasting Indian anonymity and who live in Indian country would view this amendment. Obviously, those would be pivotal concerns. As a general proposition, I would think and hope people would take the position that the amendment is something worth thinking and talking about.

Question:

My name is Diane Hammons. I am a tribal prosecutor for the Cherokee Nation. Professor Robertson, one question that I have that might not be easily answered is how this might affect Oklahoma tribes. You know Oklahoma is different. You always hear that in Indian law. "This applies, except in Oklahoma," and Oklahoma is even different internally except in Eastern Oklahoma or Western Oklahoma. Our jurisdiction is checkerboard. We do not have, in Eastern Oklahoma, large consolidated land bases. We have tracts of Indian country, for example, in our fourteen county area. People come and go in our Indian country regularly. Many of those people are non-Indians and many are non-member Indians. As a tribal prosecutor, one of my immediate fears in hearing about the *Lara* case is our ability to prosecute non-member Indians. If double jeopardy does attach then what is to keep the federal government from saying "You cannot prosecute at all. We will handle that and thank you very much"? Are they going to practically prosecute a public intoxication on an allotment committed by a non-member Indian? The other question, is we have, within our jurisdiction, tribes that do not have land bases. One of those tribes is a band, the United Keetoowah Band of Cherokee Indians, that has the same historical origins as we do; they are federally recognized tribes. If our ability to prosecute this band or their members was limited, that would affect us. I know that the Creeks with the towns might have the same sort of issues. Do you see, in Oklahoma, that the problem might be different?

Professor Robertson's Answer:

Yes, I think it would be different for exactly the reasons that you suggest. It would be a problem that would be shared nationwide by tribes that actively prosecute non-members and non-member Indians. I see three possible practical outcomes. The first possibility would be they decide that the *Duro* override or fix[2] is fine, that tribes have the inherent authority to prosecute non-member Indians. Then, we are where we are, which is tribes continue prosecuting non-member Indians, according to, or within the framework of the Indian Civil Rights Act,[3] but not the Constitution of the United States.

The second possibility is, and this is Alex's argument, that the Court interprets the *Duro* override as a delegation in the sense that they have essentially vested federal power in tribes to prosecute non-member Indians. That would have two consequences, one clear consequence and one probable consequence. The clear consequence is that double jeopardy would be a problem. You would have to engage in the conversation that Alex suggested you might engage in with United States' attorneys, deciding who is going to prosecute a particular criminal defendant. That would become a regular part of life. The second, probable consequence is that the rest of the Bill of Rights would come along as well. There are two problems. The first problem is implementation, which requires resources. The second is a political problem, because if you have a regime now in which non-tribal members are entitled to free counsel in criminal prosecutions and tribal members are not, within a tribal court system, then you are going to almost certainly have unhappy tribal members. They feel that they ought to be entitled to this too, as well as other Bill of Rights protections.

The third possibility is that they are going to declare the *Duro* override invalid, that they are going to say there is no way on this legislative historical record that Congress intended to delegate: that construction is too strained. What they intended to do is to recognize inherent power, and they cannot do that. The whole line from *Oliphant v. Suquamish Indian Tribe*[4] on down would be entrenched and then we would be back to *Duro*, which says to the tribal court they do not have the jurisdiction to prosecute these people. Thus, we have a jurisdictional void; if the *Duro* override is taken out of the books entirely, you will have a class of non-member Indians who

2. Duro v. Reina, 495 U.S. 676 (1990).
3. 25 U.S.C. § 1302 (2000).
4. 435 U.S. 191 (1978).

can freely commit misdemeanors on Indian country belonging to some other tribe and, assuming they are offenses against other Indians, there would be no sovereign with the power to prosecute. That is a problem that I think Congress did and would again find intolerable, and they would be obliged to do something to correct it short of reinstating the *Duro* override, which they would have just been told is either invalid under the Constitution, the constitutional framework, or for some other reason.

The likeliest legislative fix is the easiest one to imagine, which would be to simply reissue the *Duro* override or fix, minus the word "inherent" and make it a clear delegation. Then, we would be back in my second scenario. You would have a fix that had certain unpalatable elements to it.

Those are the three possible solutions based on what I know about this case in the Supreme Court, and those are the universal scenarios. They would have a special application in Oklahoma because you do have so many tribes so close to each other, so you have a lot of intertribal activity, individuals doing things in other peoples' lands that you might not see elsewhere. For folks such as yourself, this could be especially problematic.

That is one of the things that I found very interesting in this case. The government did take this all-or-nothing approach because, under their approach, if they lose, then we have this jurisdictional gap; it was interesting to hear Mr. Kneedler talk about how the Justice Department makes its decisions. If the tribes had been appealing this they would have wanted to save jurisdiction and not create a jurisdictional loophole, for no matter how long it lasts. I agree, I do not think Congress is going to let it last for very long but at some point if you throw the baby out with the bath water there is going to be the same problem that there was in *Duro*. I do not know how the Supreme Court or Congress will treat that. Hopefully, everybody has their ducks in a row when this decision comes out and it is not a problem that tribal prosecutors will have to deal with for very long.

Question:

My name is Paul Foster. I am a local attorney. I practice law in Norman, Oklahoma and I am also an Alum of this great University and this law school.

I have an answer to the constitutional question as just another white guy with a wife with Indian ancestry through the paternal side of her family — a very distinguished Indian ancestry, in fact. Her family is credited for naming Oklahoma, and was the Chief of the Choctaw tribe. I have an

interest in this, and have an answer to the constitutional question that was asked earlier.

This is America, and when it becomes financially important enough, the constitutional issue will get addressed. That is my personal view. I realize that I am in a university where such talk is not always that welcome, but the reality is that it is going to become very important. I am a banking law practitioner. I was General Counsel for the Bank Commission of Oklahoma for ten years. I saw the question of Indian sovereignty come up in our office. The issue that arose came from individuals who claimed to be a tribal bank. They were on Indian land. They had a trailer, a word processor, and a fax machine with a phone line. There were various approaches to this, but the question that came up in the banking department was, "What, if anything, can we do about, or should we do about these issues?" I was counsel for the banking department at the time, I cannot discuss my attorney-client confidences. What I can tell you is that a number of tribes have begun acquiring banks through the establishment of holding companies. The Federal Reserve deals with this issue. What I see in this jurisdictional issue are the Indian tribes consistently being asked to waive their sovereignty in order to get into the banking business. There are no other countries that I know of that sponsor banks, or are behind banks, that are asked to do this, only, as far as I know, the Indian tribes. The tribes are acquiring more and more banks, as I believe they should. I represent one of them and I think that what we are going to see are these jurisdictional questions that are becoming more and more financially significant. I was fascinated to hear the Solicitor General's history and the contexts that bring these issues up.

I think that, financially, this is going to become an issue that requires a better approach than what has been adopted up to this time. I am not suggesting that they should or should not be challenged at this time. As for Mr. Reichert, I was impressed to hear him because he is surrounded by that milieu of this intellectual constitutional discussion. He has a client to represent. I am in the same position as a private practitioner. I have a client to represent. What is best for my client may or may not be the challenge of this approach from the Federal Reserve. But the reality is that the Federal Reserve regulates our economy. They are in charge of our economy and they know it. They have immense power and they require these waivers of sovereign immunity. I understand why, and we understood why, and my client was willing to do it and did it to get into the business. But at some point someone is going to stand up and say, "No. We are not going to waive anything, and we are going to acquire this bank anyway or this holding company or whatever and then we are going to have to deal with this." I

know that this is different from what you came to hear from what has been discussed, but the economics and the financial aspects of this are going to become very real, I believe, in the next five to ten years, maybe sooner.

From this point, the symposium shifted to its final speaker, Mr. Dan Murdock from the Oklahoma Bar Association.