COMMITTEE ON NATURAL RESOURCES SUBCOMMITTEE FOR INDIGENOUS PEOPLES OF THE UNITED STATES

1324 LHOB & CISCO WEBEX
September 20, 2022 at 11:00 a.m. ET

Question for the Record

Oversight Hearing on *Examining Oklahoma v. Castro-Huerta: The Implications of the Supreme Court's Ruling on Tribal Sovereignty*

Mary Kathryn Nagle, Counsel for the National Indigenous Women's Resource Center

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Questions from Rep. Teresa Leger Fernández

1**. Your testimony states that, due to the *Castro-Huerta* ruling, federal authorities will begin to pull their public safety resources out of Indian Country altogether.**

1. **Why do you think this will be the case?**

Answer: The NIWRC has already received reports that individual United States Attorney's Offices (USAOs) are implementing policies to defer prosecution of crimes committed by non-Indians against Indian victims on tribal lands to state law enforcement. Based on this flawed reading of *Castro-Huerta*, the Department of Justice is distancing itself from its trust responsibility to protect the lives of Native women and children. The NIWRC has also received reports that some USAOs see *Castro-Huerta* as an excuse to *not* refer Violence Against Women Act (VAWA) cases to Tribal Nations, and, instead, are instructing the referral of VAWA cases only to local county and state law enforcement. This is a violation of the federal government's trust obligation to uphold tribal self-determination and safety for Native women and children. Recently, the Department of Justice (DOJ) and the Department of the Interior (DOI) held joint-consultations with Tribal Nations on the Supreme Court's decision in *Oklahoma v. Castro-Huerta*. Notably, DOI was represented by a Senate confirmed political appointee. No political appointee from DOJ, however, was present at the consultation. Instead, DOJ was represented by career staff. The NIWRC does not question the dedication or the competency of DOJ career staff personnel. However, the failure of the DOJ to require any of its political appointees to attend the consultations with Tribal Nations indicates, sadly, that addressing and fully understanding the harmful effects of the Supreme Court's decision in *Castro-Huerta* is not a high priority for the Department.

Historically, insufficient federal funding for tribal government institutions has been particularly acute on reservations under concurrent state criminal jurisdiction. Initially this was because Congress, intending "to reliev[e] itself from the financial burdens of its trust responsibility,"[1] did

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[1] *See, e.g.,* Duane Champagne and Carole Goldberg, *A Second Century of Dishonor: Federal Inequities and California Tribes*, Advisory Council on California Indian Policy, 47-59 (1996) www.aisc.ucla.edu/ca/Tribes.htm, ("Federal funding for law enforcement in California, never robust, disappeared almost entirely [after passage of Public Law 280].").

not allocate special funding for those States when enacting Public Law 280 or the various state-specific acts. Later, the Department of the Interior intentionally provided less funding to reservations under concurrent state criminal jurisdiction. *See Los Coyotes Band of Cuahilla & Cupeno Indians v. Jewell*, 729 F.3d 1025, 1031 (9th Cir. 2013) ("OJS must focus its limited dollars to provide direct law enforcement services to tribes in non-Public Law 280 states because state law enforcement is not available for Indian tribes in those states.") (quoting the Bureau of Indian Affairs Deputy Bureau Director of the Office of Justice Services). Indeed, one study found that 91.8% of Tribes in mandatory Public Law 280 States and 82.8% of Tribes in optional Public Law 280 States did not receive any BIA law enforcement funding at all.[2]

2. What would be the result of a federal withdrawal?

Answer: The result of the Supreme Court's decision to grant States criminal jurisdiction over all "Indian country" lands is the reality that crimes committed against Native women and children will be less likely to be prosecuted by federal authorities, and consequently, they will become more likely to occur as the absence of public safety and justice systems in Indian country inevitably leads to an increase in criminal activity. Historically, States with jurisdiction over Indian country lands have elected to *not* dedicate sufficient resources to protecting Native lives on Native lands. On reservations that, prior to *Castro-Huerta*, fell under state jurisdiction, lack of funding for States' assumption of Indian country criminal jurisdiction combined with misguided ideas about the exclusivity of state jurisdiction and the lack of accountability to reservation communities have resulted in problems that include slow response times, irregular and/or infrequent patrolling, poor evidence collection, mistrust in reservation communities, baseless removals of Indian children, and infringements on tribal sovereignty.[3] For instance, since its inception, PL-280 has been criticized for creating "jurisdictional uncertainty" between Tribes and States, the effects of which have resulted in a lack of law enforcement responsiveness due to States' "inability or unwillingness" to perform their mandated responsibilities under the law.[4]

Almost as soon as Congress began granting States this jurisdiction, the affected Tribal Nations began seeking retrocession and repeal,[5] in no small part because the laws that were ostensibly

[2] Vanessa J. Jimenez and Soo C. Song, *Concurrent Tribal and State Jurisdiction under Public Law 280*, 47 Am. U. L. Rev. 1627, 1661 (1998); Carole Goldberg, Duane Champagne, and Heather Valdez Singleton, *Final Report: Law Enforcement and Criminal Justice Under Public Law 280*, 340 (Washington, D.C., U.S. Department of Justice, 2007), http://www.tribalinstitute.org/download/pl280_study.pdf.

[3] Sarah Deer, Carole Goldberg, Heather Valdez Singleton, and Maureen White Eagle, *Final Report: Focus Group on Public Law 280 and the Sexual Assault of Native Women*, Tribal Law and Policy Institute, 2, 6, 8 (2007).

[4] Jimenez and Song, *supra* note 2, at 1635-37.

[5] *See, e.g.,* 34 Fed. Reg. 14,288 (1969) (Quinault); 35 Fed. Reg. 16,598 (1970) (Omaha).

enacted to address "lawlessness" on reservations in many instances increased lawlessness and stultified the development of tribal governmental institutions.[6] Following PL-280's enactment, Tribal Nations located in States exercising PL-280 jurisdiction reported decreases in law enforcement protections and a concomitant increases in lawlessness on their tribal lands,[7] including specifically the Confederated Tribes of the Umatilla Reservation in Oregon,[8] the Tribes in Alaska,[9] and the Tulalip Tribes in Washington.[10]

In response to the public safety concerns expressed by Tribal Nations, as well as the concern that States were obtaining jurisdiction on tribal lands without the consent of Tribal Nations, in 1968, Congress amended PL-280 such that States could no longer exercise this concurrent jurisdiction absent a special election where the majority of the tribal citizens living in the affected area voted in *favor* of state jurisdiction. *See* 25 U.S.C. §§1321, 1326 (defining consent as an election where the "enrolled Indians within the affected area . . . accept such jurisdiction by a majority vote . . . .). Notably, since Congress amended PL-280 in 1968, *no* population of tribal citizens has voted in favor of granting a State PL-280 jurisdiction.[11]

For over half a century now, the States exercising PL-280 jurisdiction over crimes on tribal lands have failed to provide sufficient funding to county and local law enforcement patrolling tribal lands. For instance, as early as 1961, Tribal Nations in Nebraska were being told that local governments did "not have the funds to maintain station deputy sheriffs on their reservations."[12] Washington has likewise failed to adequately fund law enforcement on tribal lands, and in 1988,

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[6] *See* Carole Goldberg, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. Rev. 1405, 1423 (1997) ("With the tribe, the state, and the federal government all hobbled, at least partly, as a result of Public Law 280, the eruption of lawlessness was predictable.").

[7] M. Brent Leonhard, *Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based Grounds*, 47 Gonz. L. Rev. 663, 6599-700 (2011) ("Indian Country crime in some P.L. 280 states became worse than it was under exclusive federal jurisdiction.").

[8] *Id.* at 699-700 ("This was the experience of the Confederated Tribes of the Umatilla Reservation, and a significant reason the Umatilla tribes sought retrocession from Oregon in the 1970s.").

[9] Laura S. Johnson, *Frontier of Injustice: Alaska Native Victims of Domestic Violence*, 8 Mod. Am. 2, 6 (2012) ("The lack of prosecution for serious domestic violence crimes is a source of frustration for Native Alaskan victims and Alaska tribal governments alike.").

[10] Wendy Church, *Resurrection of the Tulalip Tribes' Law and Justice System and its Socio-Economic Impacts*, 15 (2006) (M.A. thesis, The Evergreen State College), https://www.tulaliptribes-nsn.gov/Base/File/TTT-PDF-TribalCourt-TulalipHistoryOfLaw ("[L]aw enforcement prior to retrocession [w]as ineffective and the county's lack of interest in enforcing the law on the reservation, and also tribal people not trusting the county. This left the Tribes in a state of lawlessness.") (quoting former Tulalip Chief Judge Gary Bass).

[11] Leonhard, *supra* n. 7, at 702.

[12] 5 U.S. Comm'n on Civil Rights, Justice: 1961 Comm'n on Civil Rights Report 148 (1961).

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Percy Youckron, Chairman of the Chehalis Business Council, and Robert Joe, Sr., Chairman of the Swinomish Indian Senate, wrote to Senator Bob McCaslin that:

> Currently, the state of Washington, through the local county is responsible for [law enforcement services]. Historically this arrangement has not been successful for most reservations; partially due to . . . constrained County law enforcement budgets.[13]

In Alaska, another PL-280 State, Alaska Natives suffer disproportionately high rates of violence. Alaska has jurisdiction, but Alaska has declined to dedicate sufficient resources to protect Alaska's Native populations—something tribal leaders in Alaska have repeatedly asked the federal government to address.[14]

Where states and local entities are hostile towards Tribal Nations, Native victims may be used as bargaining chips to resolve disputes because there is no trust relationship. For example, the Mille Lacs Band of Ojibwe and Mille Lacs County in Minnesota have been involved in an ongoing boundary dispute. In 2016, the County terminated, without notice, its cooperative policing agreement with the Band that had been in place for 25 years. Because of the termination, over one hundred tribal citizens died during the two years that police calls went unanswered.[15]

The State of Montana, which exercises concurrent jurisdiction over crimes committed against Indians on the Flathead Reservation, has fared no better. Just this year, Lake County, Montana sent a demand letter to Governor Greg Gianforte requesting that the State allocate funding to address the "severe impact" concurrent state criminal jurisdiction is having on the county budget, as the county has been unable to adequately fund law enforcement on the Flathead Reservation.[16]

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[13] Letter from Percy Youckton, Chairman Chehalis Business Council, and Robert Joe, Sr., Chairman Swinomish Indian Senate, to Senator Bob McCaslin in support of retrocession of state criminal jurisdiction (Feb. 1, 1988) (on file with author).

[14] *See, e.g.,* U.S. Department of Justice Office on Violence Against Women, *2022 Tribal Consulation Report* 28 (2022), https://www.justice.gov/ovw/page/file/1481661/download (testimony of Vivian Korthuis, Chief Executive Officer of the Association of Village Council Presidents) ("Alaska is also a PL-280 state, meaning the federal government . . . transferred that authority to the State. However, State law enforcement is largely absent in our villages.").

[15] Oklahoma v. Castro Huerta: Bad Facts Make Bad Law, Wayne Ducheneaux, Native Governance Center (Jul. 14, 2022), https://nativegov.org/news/castro-huerta/.

[16] Letter from Reep, Bell & Jasper, P.C. to Governor Greg Gianforte (Feb. 8, 2022), https://bloximages.chicago2.vip.townnews.com/helenair.com/content/tncms/assets/v3/editorial/d/25/d25d3df9-c757-552f-9d9e-9e4c8cf46daa/6206fa6f2d1fa.pdf.pdf. Some of the funds that Lake County requests are for the Lake County jail, which services the Flathead Reservation. It is estimated that the Lake County jail releases about 80 people per month who have been arrested on felony warrants due to overcrowding. Seaborn Larson, Independent Record, (Feb. 13, 2022), https://helenair.com/news/state-and-regional/govt-

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There can be no question that Montana has failed to allocate sufficient public safety resources to properly effectuate its concurrent jurisdiction on the Flathead Reservation. Furthermore, Montana has done nothing to recognize or address the fact that its county, Big Horn County, has the highest rates of Missing and Murdered Indigenous Persons cases in the United States. In fact, Montana has repeatedly turned a blind eye to the Big Horn County Sheriff's Office, an office that continues to refuse to investigate the innumerable homicides of Native women and girls within its jurisdiction. Because of its willful ignorance and failure to hold its localities accountable, Kaysera Stops Pretty Places, Allison High Wolf, Selena Not Afraid, and many others have yet to receive justice. But as the Supreme Court has previously noted, Montana's failure to fund law enforcement in and around Indian country is not uncommon. *See United States v. Bryant*, 579 U.S. 140, 146 (2016) ("Even when capable of exercising jurisdiction, however, States have not devoted their limited criminal justice resources to crimes committed in Indian country.").

Empirical evidence demonstrates that the Court's decision to grant States criminal jurisdiction over crimes committed against Native victims on tribal lands will only decrease safety for Native people overall. Ultimately, States lack any incentive—and ultimately, any accountability to Tribal Nations—because, in contrast to the federal government, States do not have a trust duty to recognize and protect Tribal Nations and their citizens. *See Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. at 501 ("States do not enjoy this same unique relationship with Indians . . . .").

The NIWRC stands in agreement with the Tulalip Tribes, the Muscogee (Creek) Nation, the Bay Mills Indian Community, the Wampanoag Tribe of Gay Head (Aquinnah), the Choctaw Nation, the Oglala Sioux Nation, and the many other Tribal Nations that have called upon Congress to take action and legislatively address the harms caused by the Supreme Court's decision in *Castro-Huerta*. Specifically, the NWIRC supports the Legislative Proposal to Improve Public Safety in Indian Country, as submitted by the Muscogee (Creek) Nation. The NIWRC also supports the Legislative Proposal put forward by the Tribes that comprise the membership of the Coalition of Large Tribes ("COLT"), Resolution No. 04-2022 (Aug. 16, 2022).[17] Any distinctions in the two proposals are without significance and can easily be resolved during the legislative process.

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and-politics/lake-county-launches-new-bid-to-recover-law-enforcement-costs/article_5e0a6fbe-c1a6-5153-9f50-9009deb0d030.html. Conditions at the Lake County jail were the subject of litigation in the 90s and are currently the subject of dozens of recently filed lawsuits. *See Lozeau v. Lake County*, 98 F.Supp 2d 1157 (D. Montana 2000); *see also Dozens of prisoners file lawsuits for inadequate living conditions*, Valley Journal (Mar. 2, 2022), http://www.valleyjournal.net/Article/26229/Dozens-of-prisoners-file-lawsuits-for-inadequate-living-conditions.

[17] COLT's membership includes the Blackfeet Nation, the Cheyenne River Sioux Tribe, the Crow Nation, the Eastern Shoshone Tribe, Fort Belknap Indian Community, Mandan, Hidatsa & Arikara Nation, the Navajo Nation, the Northern Arapahoe Tribe, the Oglala Sioux Tribe, the Rosebud Sioux

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The NIWRC is hopeful that Congress will act quickly and expeditiously. We simply cannot afford to wait to take action to address the harmful effects of the Supreme Court's most recent decision in *Castro-Huerta*. To be sure, the solutions to the crisis we now face are not new. Over a decade ago, the Tribal Law and Order Act Commission, created through bi-partisan legislation and composed of bi-partisan federal Indian law experts, traveled throughout Indian country studying the public safety crisis and reported one overarching solution: restore tribal jurisdiction and authority. There is no need to wait and there is nothing more to study. The more we wait to take action, the more Native lives are lost.

We thank you for this opportunity to testify and we are happy to answer any additional questions you may have.

Respectfully submitted,

Mary Kathryn Nagle
Counsel
National Indigenous Women's Resource Center

Tribe, the Sisseton Wahpeton Sioux Tribe, the Shoshone Bannock Tribes, the Spokane Tribe, and the Ute Indian Tribe.