COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE FOR INDIGENOUS PEOPLES OF THE UNITED STATES
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Responses to Questions for the Record

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

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Questions from Rep. Westerman

1. Lead Up: Other witness statements have stated that Castro-Huerta was decided contrary to standing law. Your statement gave a defense of the decision.

Question: Could you further explain how *Castro-Huerta* is a continuation of the current understanding of criminal jurisdiction in Indian country and not a departure from it?

RESPONSE:

Prior to the decision in *Oklahoma v. Castro-Huerta*, the U.S. Supreme Court had never decided a case challenging the validity of a state conviction of a non-Indian who had committed a crime against an Indian in Indian country. It is thus hard to see how others claim that the decision affirming a state's power to prosecute such crimes was contrary to established law. Instead, that question has been a subject of debate for much of this country's history, until the *Castro-Huerta* decision settled the matter.

For example, in 1835, a federal court of appeals, writing through Supreme Court Justice McLean, recognized state authority to punish its own citizens who committed crimes in Indian country within state borders, as states like New York were doing.[1] In 1855, the U.S. Attorney General similarly acknowledged that states have jurisdiction over "any controversy within state borders to which one of their citizens is a party," even if the other party was a tribal member.[2] As described further below, in 1859, the U.S. Supreme Court upheld New York's ability to enforce its laws against non-Indians who trespass on tribal lands.[3]

These views of state authority continued into the 20th century. In 1941, the North Carolina Supreme Court upheld a state prosecution of a non-Indian who committed a crime against an Indian.[4] The Department of Justice also suggested that states have concurrent authority to

[1] *United States v. Cisna*, 25 F. Cas. 422, 422, 425 (C.C.D. Ohio 1835).

[2] 7 Op. Atty. Gen. 174, 178 (1855).

[3] *New York ex rel. Cuter* v. *Dibble*, 62 U.S. (21 How.) 366 (1859).

[4] *State v. McAlhaney*, 17 S.E.2d 352, 354 (N.C. 1941).

prosecute such crimes in a brief to the Supreme Court in 1946.[5] And that remained the Department of Justice's view in 1979, when the Office of Legal Counsel carefully considered the question and recognized the strong arguments in favor of concurrent state jurisdiction over crimes committed by non-Indians against Indians in Indian country.[6] And while the Department of Justice had abandoned this long-held position by the late 1980s, states had continued to press this position during this period, albeit with little success.[7] But even state court decisions that questioned state authority were not without dissent, with one judge expressing the view that tribal members "are entitled to the protection of our [state] laws" as are any other state citizen.[8] In short, while some claim the question finally answered in *Castro-Huerta* was contrary to settled law from the past 200 years, the historical record is far more complex than those advocates would care to admit.

To be sure, the U.S. Supreme Court in the context of other cases had at times indicated that states might lack jurisdiction over non-Indians who commit crimes against tribal members in Indian country. But prior to *Castro-Huerta*, it had never squarely confronted the question, and many of its decisions indicated the propriety of state jurisdiction over these crimes. As the Supreme Court's opinion in *Castro-Huerta* recounts:

> In 1859, the Court stated: States retain "the power of a sovereign over their persons and property, so far as" "necessary to preserve the peace of the Commonwealth." *New York ex rel. Cutler v. Dibble*, 21 How. 366, 370, 16 L.Ed. 149 (1859).
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> In 1930: "[R]eservations are part of the State within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards." *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651, 50 S.Ct. 455, 74 L.Ed. 1091 (1930).
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> In 1946: "[I]n the absence of a limiting treaty obligation or Congressional enactment each state ha[s] a right to exercise jurisdiction over Indian reservations within its boundaries." *New York ex rel. Ray v. Martin*, 326 U.S. 496, 499, 66 S.Ct. 307, 90 L.Ed. 261 (1946).
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> In 1992: "This Court's more recent cases have recognized the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands." *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 257–258, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992).

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[5] *New York ex rel*. *Ray* v. *Martin,* No. 45-158, U.S. Br. at 15 n.8 (1946).

[6] 3 Op. Off. Legal Counsel 119.

[7] *See State v. Larson,* 455 N.W.2d 600, 601 (S.D. 1990); *Arizona v. Flint*, No. 88-603, Petition for Certiorari (U.S. 1989).

[8] *State v. Greenwalt*, 663 P.2d 1178, 1183, 1184 (Mont. 1983) (Harrison, J., dissenting).

> And as recently as 2001: "State sovereignty does not end at a reservation's border." *Nevada v. Hicks*, 533 U.S. 353, 361, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001).[9]

As the Supreme Court put it in 1882 when examining state jurisdiction over a crime between two non-Indians committed on an Indian reservation, when a state enters the Union, it "has acquired criminal jurisdiction over its own citizens and other [non-Indians] throughout the whole of [its] territory."[10] Reservations, as the Supreme Court stated in 1962, are therefore "part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law."[11]

Much more could be said about why the decision in *Castro-Huerta* is a logical continuation from prior precedent, not a radical and wholly unreasoned departure from it. For that, I would refer the Subcommittee to the Supreme Court's opinion in *Castro-Huerta*, as well as the briefs I co-authored in the matter.[12]

Question: Could you further expand beyond your written testimony, and speak to how you have seen the *McGirt* and *Castro-Huerta* decisions play out day-to-day in Oklahoma?

RESPONSE:

The unfortunate results of *McGirt* on criminal justice have been all-too-real for the victims of crime. I have observed massive decreases in state prosecutions without an equally corresponding increase in tribal and federal prosecution. This is especially true with respect to property crimes. For example, when I looked earlier this year at federal prosecutions in the Eastern District of Oklahoma, prior to the *Castro-Huerta* decision, I could not find a single instance where the federal government had brought a case against a non-Indian for automobile theft or larceny of a tribal member's property. Indeed, essentially all prosecutions of non-Indians by the federal government in the Eastern District involved either aggravated violence or crimes against children. This means all other crimes against Indians by non-Indians in that district—even violent ones—were going without prosecution. And even for crimes that the federal government was prosecuting, there were many instances of federal prosecutors offering plea bargains for relatively short sentences, which is probably a result of those prosecutors being overwhelmed with the volume of cases.

Only a few months have elapsed since *Castro-Huerta* was decided, and because it only affects a subset of crimes impacted by *McGirt*, it will not completely rectify the criminal justice consequences of *McGirt*. But early results are promising. For example, for the third quarter of 2021 (after *McGirt* and the state court decisions implementing it), felony prosecutions in Wagoner County dropped by more than 50% as compared to the same period in 2019. But in that

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[9] *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2493-94 (2022).

[10] *United States v. McBratney*, 104 U.S. 621, 623-24 (1882).

[11] *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 73 (1962).

[12] *See* https://www.supremecourt.gov/DocketPDF/21/21-429/215115/20220228123146151_21-429_petbr.pdf.

same period after *Castro-Huerta* (the third quarter of 2022), felony prosecutions rose almost 25% as compared to the same period in 2021. Put another way, about 20% of the drop in state felony prosecutions caused by *McGirt* has been restored by *Castro-Huerta* in that county.