Testimony to the Subcommittee for Indigenous Peoples of the United States
Committee on Natural Resources, U.S. House of Representatives

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

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My name is Carole Goldberg, and I am Distinguished Research Professor of Law at UCLA and the Chief Justice of the Courts of Appeal of the Hualapai Tribe and the Pechanga Band of Indians. From 2011-2013, I served as a Presidential appointee to the bipartisan Indian Law and Order Commission, which Congress established in the Tribal Law and Order Act of 2010.

The United States Supreme Court's decision in *Oklahoma v. Castro-Huerta* (June 29, 2022), allowing state criminal jurisdiction over crimes committed by non-Indians against Indian victims within Indian country, got the relevant law entirely wrong. It misread 18 U.S.C. section 1152, which has long been understood to establish federal jurisdiction that preempts state authority over such offenses. Furthermore, it made a mess and mockery of 18 U.S.C. section 1162, commonly known as Public Law 280, in which Congress created a very specific mechanism for states to acquire jurisdiction over crimes committed by or against Indians in Indian country – a mechanism that had not been invoked by the state in *Castro-Huerta*.

Even if one accepts – which I do not – that 18 U.S.C. section 1152 should be read to allow state jurisdiction over crimes by non-Indians against Indians in Indian country, Public Law 280 should have prevented exercise of state jurisdiction in *Castro-Huerta*. The Supreme Court's error in interpreting Public Law 280 is the error I want to focus on, both because it served as a backstop to arguments that section 1152 preempted the state's jurisdiction, and because I have researched and written about Public Law 280 for nearly 50 years.[1] Public Law 280 was enacted by Congress in 1953 as a component of the broader termination policy of that era, naming six states that would acquire jurisdiction immediately, and allowing other states to opt in through specific processes. Responding to criticisms from a wide array of sources, including Tribes, Congress amended Public Law 280 in 1968 to incorporate a further process of Indian consent

[1] See, e.g., Carole Goldberg and Duane Champagne, Captured Justice, Native Nations and Public Law 280 (Carolina Academic Press, 2010 and 2020 editions); Carole E. Goldberg, "Public Law 280: The Limits of State Jurisdiction over Reservation Indians," 22 UCLA Law Review 535 (1975) (cited and relied upon by the United States Supreme Court in *Bryan v. Itasca County*, 426 U.S. 373 (1976) and *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); Carole E. Goldberg-Ambrose, "Public Law 280 and the Problem of Lawlessness in California Indian Country," 44 UCLA Law Review 1405 (1997). I have also drafted sections on Public Law 280 for the leading treatise on federal Indian law, Cohen's Handbook of Federal Indian Law (1982, 2005, and 2012 editions).

before state jurisdiction could be introduced in states that wanted to opt in. Oklahoma was not named in the initial law, and has never opted in under the terms and processes of Public Law 280, either before or after 1968. Indeed, since 1968, not a single Tribe anywhere in the United States has consented to state jurisdiction through Public Law 280.

Ever since Public Law 280 was enacted, the United States Supreme Court has insisted that the law's terms be adhered to strictly before state jurisdiction could take effect. In 1971, in *Kennerly v. District Court*,[2] the Supreme Court disallowed state jurisdiction within a reservation pursuant to a tribal-state agreement because the consent provisions of Public Law 280 had not been followed. Ignoring the ruling in the *Kennerly* decision, *Castro-Huerta* posited that state jurisdiction should be allowed in Indian country because it would not harm tribal interests to add state jurisdiction over non-Indian offenses against Indian victims on top of federal jurisdiction. Assuming, for sake of argument, the correctness of that proposition, it would seem that a tribal-state agreement should also supersede Public Law 280's procedural requirements. But the Supreme Court emphatically rejected that kind of interest-based analysis in the *Kennerly* case, insisting that Public Law 280 be followed. In contrast, *Castro-Huerta* allowed state jurisdiction that is addressed in Public Law 280 to go forward without the state's compliance with the processes built into that law.

As someone who has studied Public Law 280 and its impact, I emphatically reject the weak reasoning offered in *Castro-Huerta* for refusing to treat Public Law 280 as the sole mechanism for establishing state jurisdiction over the types of offenses, including crimes committed by non-Indians against Indians, referenced in that law. Castro-Huerta acknowledges that this mechanism is still required for states to assume jurisdiction over offenses committed by Indians within Indian country. So why not also require that mechanism for offenses committed by non-Indians against Indians, which are also referenced in Public Law 280? According to Justice Kavanaugh's opinion, Public Law 280 only referred to those non-Indian offenses at the time of the law's enactment in 1953 because Congress was *uncertain* whether state jurisdiction had already been preempted by 18 U.S.C. section 1152, not because federal law *actually* had such preemptive effect. There is no evidence whatsoever in the legislative history of Public Law 280 to support such a claim, and *Castro-Huerta* supplies none. As I have shown in scholarly research, that legislative history is rife with Congressional concern about alleged "lawlessness" in Indian country. If Congress had believed there was some basis for interpreting 18 U.S.C. section 1152 to allow state jurisdiction, it would have mentioned the potential exercise of that jurisdiction as one possible response to the problem. No such mention appears in the record of hearings, testimony, reports, and floor debates. It was taken as given, and rightly so, that without further legislation, states were precluded from exercising jurisdiction over offenses by non-Indians against Indians under 18 U.S.C. section 1152.

In addition to getting the law wrong, Castro-Huerta reflected a misguided policy choice regarding Indian country criminal justice. The federal government has long been aware that state involvement in Indian country criminal justice can jeopardize tribal-federal relations and

[2] 400 U.S. 423 (1971).

interfere with the federal trust responsibility toward Tribes, through biased treatment against Indian victims and witnesses in state courts, as well as biased treatment favoring non-Indian perpetrators in state proceedings. My own research in Public Law 280 states, where state jurisdiction *has* applied, has documented the justifications for these tribal and federal concerns.[3] The potential for concurrent federal jurisdiction over those same offenses, as allowed under *Castro-Huerta*, would not erase concerns about bias and interference with the federal trust responsibility.

A recent and thorough examination of the needs for justice and safety in Indian country has produced unanimous, bi-partisan policy recommendations pointing in the exact opposite direction from the policy choices reflected in *Castro-Huerta*. In the 2010 Tribal Law and Order Act, Congress launched a bi-partisan commission, the Indian Law and Order Commission, to recommend improvements for the justice systems serving Indian country. As a Presidential appointee to that Commission, I participated in Indian country-wide hearings, and contributed to the Commission's 2013 report, A Roadmap for Making Native America Safer. This report was unanimous and bi-partisan in recommending that criminal justice authority be brought closer to tribal communities through enhanced tribal jurisdiction. Some members approached this conclusion from the starting point of tribal sovereignty. Others approached it from the starting point of local control and accountability. But Republican and Democratic appointees alike favored situating criminal justice within tribal authorities, keeping even federal involvement to a minimum, through funding and oversight of individual rights protections. The Roadmap report was also clear in supporting a tribal option to remove existing state criminal jurisdiction in Indian country under Public Law 280. In stark contrast, *Castro-Huerta* produced an expansion of such jurisdiction.

My focus on the erroneous interpretation of Public Law 280 in *Castro-Huerta* underscores that the impact and implications of that opinion extend far beyond a single state. Oklahoma is hardly the only state that was neither named in Public Law 280 nor covered by a properly followed opt-in. Dozens of other states have either failed to opt into Public Law 280, or their previously accepted Public Law 280 jurisdiction has been formally returned (retroceded) to the federal government. The criminal jurisdiction allowed under *Castro-Huerta* affects Indian country in all of them, and should never have been allowed until those states properly follow the mechanisms established by Congress more than fifty years ago. Furthermore, any future retrocession of existing Public Law 280 jurisdiction will be less than complete because of state jurisdiction allowed under *Castro-Huerta*. Finally, every Tribe has to be concerned about the potential for careless extension of the flawed rationale that underlies *Castro-Huerta*.

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[3] See Carole Goldberg and Duane Champagne, Captured Justice: Native Nations and Public Law 280 (2nd ed., Carolina Academic Press, 2020), at pp. 73-118; "Searching for an Exit: The Indian Civil Rights Act and Public Law 280," in K. Carpenter, M.L.M. Fletcher, and A. Riley, eds. The Indian Civil Rights Act at Forty (UCLA American Indian Studies Center, 2012) at 247-272 (documenting complaints of discrimination and abuse by state authorities under Public Law 280).