



Oglala Sioux Tribe

P.O. Box 2070, Pine Ridge, S.D. 57770
Direct: 605-867-8487 - Cell Phone: 605-407-1231
Fax: 605-867-6076
E-mail: kevink@ogla.org



Office of the President
Kevin Killer

Written Testimony of Oglala Sioux Tribe President Kevin Killer

to the

U.S. House of Representatives Subcommittee for Indigenous Peoples of the United States

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

Oversight Hearing

September 20, 2022

My name is Kevin Killer, and I am the President of the Oglala Sioux Tribe of the Pine Ridge Indian Reservation. Thank you to the Subcommittee for this important opportunity to provide testimony regarding the potentially devastating effects of the United States Supreme Court's recent decision in *Oklahoma v. Castro-Huerta*.¹ Prior to becoming President of my Tribe, I served in state government as a South Dakota State Representative for eight years and a South Dakota State Senator for over two years. I am deeply familiar with the complex jurisdictional issues that arise in Indian Country,² from the perspective of both Tribal and state governments. Communication and coordination between separate sovereigns are key to effective governance, but central to those efforts must be an understanding of and respect for Tribal sovereignty.

As a sovereign nation preexisting the federal and state governments, we continue to assert our inherent right to make our own laws and have our people and reservation lands be governed by them. The extension of state criminal jurisdiction in Indian Country without tribal consent in *Castro-Huerta* is an egregious affront to tribal sovereignty and violation of our treaty rights, which Congress can and should rectify by legislation.

I. *Castro-Huerta* Misapplies Basic Principles of Federal Indian Law

The majority in *Castro-Huerta* held for the first time that states have criminal jurisdiction, concurrent with the jurisdiction of the federal government (and in some cases involving domestic

¹ 597 U.S. ___, slip op. (2022)

² The definition of Indian Country in 18 U.S.C. § 1151(a) includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation."

violence, concurrent with the jurisdiction of tribal governments³), over crimes committed by non-Indians against Indians in Indian Country.⁴ The majority was wrong. As the dissent pointed out, "truly, a more ahistorical and mistaken statement of Indian law would be hard to fathom."⁵

The majority's novel interpretation contravened centuries-old precedent. The majority's approach was so egregious, in fact, that Justice Gorsuch writing in dissent questioned the ability of the present Court to carry out the duties of the United States Government. He stated that "[o]ne can only hope the political branches and future courts will do their duty to honor this Nation's promises even as we have failed today to do our own."⁶ I come before you today to ask this Congress to do just that.

As Committee Chairman Raúl Grijalva aptly summarized:

The majority decision in *Castro-Huerta v. Oklahoma* is outright colonialism. It brazenly overwrites foundational Federal Indian law that has consistently reinforced tribal governments' inherent right to self-governance. The ruling contends that tribes cannot be trusted to exercise their sovereign authorities over criminal matters, an offensive argument that reeks of paternalism.⁷

Chairman Grijalva called on "colleagues on both sides of the aisle" to "heed Justice Gorsuch's urging to 'honor this nation's promises' to tribes."

This decision is an alarming and unsupported expansion of state power in Indian country by judicial fiat.⁸ The Constitution itself—to which the states agreed to adhere as a condition of admission to the United States—makes clear that states have no role in Indian affairs. Since 1790, beginning with the Trade and Intercourse Acts, Congress has time and again reinforced these constitutional limits, shielding Tribes from state interference. In the Cherokee cases of the

³ See 25 U.S.C. § 1304 (recognizing and affirming that the inherent powers of self-government of participating Tribes include "the inherent power ... to exercise special [domestic] violence criminal jurisdiction over all persons").

⁴ 597 U.S. at 24–25 (majority opinion).

⁵ *Id.* at 12 (Gorsuch, J., dissenting).

⁶ *Id.* at 42 (Gorsuch, J., dissenting).

⁷ Press Release, Representative Raúl Grijalva, Chair of the House Natural Resource Committee, Chair Grijalva Statement on SCOTUS Decision in *Castro-Huerta v. Oklahoma* (June 30, 2022).

⁸ It should be pointed out that Congress knows how to use its constitutional authority to expand state criminal jurisdiction on Indian reservations. See 18 U.S.C. § 3243, which provides as follows:

Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.

This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

The *Oklahoma v. Castro-Huerta* decision is a usurpation of Congress' authority in this regard.

1830s, the Supreme Court held that states have no jurisdiction in Indian country.⁹ In the 1886 case of *United States v. Kagama*, which upheld the Major Crimes Act, the Supreme Court noted this about the states: "Because of the local ill feeling, the people of the States where [Indian tribes] are found are often their deadliest enemies."¹⁰

Only during the "termination era" of the 1950s and the passage of Public Law 83-280 (P.L. 280) in 1953 did Congress—for the first time—grant special permission to a small group of states to exercise jurisdiction in Indian Country. P.L. 280 allowed additional states the option of assuming jurisdiction, but in 1964, the Oglala Sioux Tribe and other tribes of the Great Sioux Nation united to defeat a South Dakota referendum asserting state jurisdiction over our reservations under P.L. 280 by a 3 to 1 margin.¹¹ The Oglala Sioux Tribe, Rosebud Sioux Tribe, Cheyenne River Sioux Tribe, and Standing Rock Sioux Tribe preserved that victory in federal court when the State sought to assert jurisdiction over state highways running through our reservations.¹² Congress amended P.L. 280 in 1968 to prevent states from assuming jurisdiction without tribal consent.¹³ This amendment reflected a shift in national policy away from "termination" and towards policies promoting tribal self-government and self-reliance, free from state interference and control. Thus, with the exception of P.L. 280, the legislative and judicial history of the United States shows a concerted effort by both Tribal Governments and the Federal Government to keep states out of Indian Country.

Indian tribes are "self-governing political communities that were formed long before Europeans first settled in North America."¹⁴ Indian tribes retain the sovereign status of "domestic dependent nations,"¹⁵ and continue to "possess[] attributes of sovereignty over both their members and their territory."¹⁶ Indian tribes have a government-to-government relationship with the United States,¹⁷ but they are in no way "dependent on" or "subordinate to" the states.¹⁸

In *McGirt v. Oklahoma*,¹⁹ the Court did its job and got it right. In *McGirt*, the Court held that the state of Oklahoma lacked criminal jurisdiction over offenses committed by a non-Indian on the Muscogee (Creek) Reservation.²⁰ While the *McGirt* decision was limited to major crimes

⁹ See, e.g., *Worcester v. Georgia*, 31 U.S. 515 (1832) (holding that a Georgia criminal statute applied to non-Indians on an Indian reservation was unconstitutional).

¹⁰ 118 U.S. 375, 384 (1886).

¹¹ South Dakota Secretary of State, Ballot Question Titles and Election Returns 1890-2020, *South Dakota Political Almanac*, 42, <https://www.sdsos.gov/elections-voting/assets/BallotQuestions.pdf> (last visited Sep. 15, 2022).

¹² *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (1990), cert. denied, 500 U.S. 915 (1991).

¹³ 25 U.S.C. § 1326.

¹⁴ *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985).

¹⁵ *Oklahoma Tax Comm'n v. Citizen Band, Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). Accord, *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

¹⁶ *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982), quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975). Accord, *Worcester v. Georgia*, 31 U.S. at 557.

¹⁷ This relationship has been recognized in treaties, statutes, Executive Orders, and otherwise. See, e.g., 25 U.S.C. §§ 3601(1), 3701(1); Executive Order 13175, 65 F.R. 67249 (Nov. 9, 2000); Executive Memorandum, 59 Fed. Reg. 22951 (April 29, 1994).

¹⁸ *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980).

¹⁹ 591 U.S. ___, slip op. (2022).

²⁰ *Id.* at 36 (majority opinion).

committed in Indian country, its reasoning was grounded in the fact that Congress agreed to a treaty with the Muscogee (Creek) Nation that explicitly stated that "no portion" of the Muscogee (Creek) Reservation "shall ever be embraced or included within, or annexed to, any Territory or State."²¹ That language, the Court in *McGirt* correctly held, was an "assur[ance]" that the Muscogee (Creek) Nation has a "right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any State."²² Ultimately, the Court in *McGirt* did what the Court in *Castro-Huerta* failed to do: it respected its own precedent, the authority of Congress to legislate on Indian affairs, and tribal sovereignty and self-governance.²³

The State of Oklahoma, we understand, filed more than 60 cases to get the U.S. Supreme Court to revisit *McGirt*. As the dissent in *Castro-Huerta* dutifully noted we are here because "[w]here [the Court's] predecessors refused to participate in one State's unlawful power grab at the expense of the Cherokee, today's Court accedes to another's."²⁴

Congress must recognize the Court's failure in *Castro-Huerta* and respond swiftly and conclusively—as it has the authority to safeguard against the severe injustices and negative ramifications created by this decision and the mountains of hardship and litigation that it will cause.

II. *Castro-Huerta* Violates Our Treaties and Other Federal Law

The Oglala Sioux Tribe has an established nation-to-nation relationship with the federal government. Our treaties have long addressed matters of jurisdiction to resolve disputes and address those who would encroach on the rights of our Tribe or our citizens.

Article 4 of the 1825 Treaty between the Sioune (Cuthead Yantonai) and Oglala Bands of Sioux Indians provides in part as follows:

[T]he Sioune and Ogallala bands bind themselves to extend protection to the persons and the property of the traders, and the persons legally employed under them, whilst they remain within the limits of their particular district of country. And the said Sioune and Ogallala bands further agree, that if any foreigner or other persons, not legally authorized by the United States, shall come into their district of country, for the purposes of trade or other views, they will APPREHEND such person or persons, and deliver him or them to some United States' superintendent, or agent of Indian affairs, or to the commandant of the nearest military post, to be dealt with according to law.²⁵

Other Sioux tribes also have their own 1825 treaties with identical language.

²¹ *Id.* at 6 (majority opinion) (quoting art. IV, 11 Stat. [699]).

²² *Id.* at 6 (majority opinion).

²³ *Id.* at 1 (majority opinion) ("Because Congress has not said otherwise, we hold the government to its word.")

²⁴ 597 U.S. at 2 (Gorsuch, J., dissenting).

²⁵ 7 Stat. 252.

Article 1 of the 1868 Fort Laramie Treaty also provides in part as follows:

If bad men among the whites, or subject to the authority of the United states, shall commit a wrong on the person or property of an Indian, the United States will, upon proof being made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished in accordance with the laws of the United States, and also to reimburse the injured person for the loss sustained.²⁶

The above treaty provisions are still valid under existing law,²⁷ and when read together, clearly vest authority in the Oglala Sioux Tribe to apprehend and deliver bad white men over to the superintendent or agent of Indian affairs. Tribes have long had our own ways of addressing crime,²⁸ and our treaties were meant to honor and protect those ways of governing our lands.

Our treaties do not allow the State of South Dakota to come onto our reservation and apprehend and take non-Indians accused of committing a crime against a tribal member or other Indian on the reservation, then try that person before a non-Indian jury.

Under the U.S. Constitution, treaties are the supreme law of the land, yet the Supreme Court has now purported to wash away these treaty provisions unilaterally, undermining not only tribal sovereignty, but the roles of both the Legislative and Executive branches of the United States Government.

Further, the 1889 South Dakota Enabling Act expressly disclaims any and all authority of the state over our Tribe. Specifically, it states:

That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States[.]²⁹

There is no ambiguity here, and the State of South Dakota agreed to this provision set forth by Congress in order to be welcomed into the United States. Nearly identical language is included in the South Dakota Constitution.³⁰

²⁶ 15 Stat. 635.

²⁷ see 25 U.S.C. § 71 and 25 U.S.C. § 5128.

²⁸ See, e.g., *Ex parte Crow Dog*, 109 U.S. 556 (1883).

²⁹ 25 Stat. 676, Sec. 4.

³⁰ S.D. Const. art. XXII.

Additionally, as discussed above, South Dakota was not a mandatory P.L. 280 state,³¹ and Sioux tribes were able to organize and defeat state jurisdiction over criminal causes of action in a state-wide referendum vote in 1964.³² Moreover, under a 1968 amendment to P.L. 280 contained in the 1968 Indian Civil Rights Act, states can no longer assume criminal jurisdiction on Indian reservations without the consent of the affected Tribes in a referendum vote held by the Secretary of Interior.³³

We also note that in 1977, the American Indian Policy Review Commission (AIPRC), which Congress created to examine the problem of United States Indian policy and make recommendations for change, began its report with a discussion of policy for the future, which stated:

The fundamental concepts which must guide future policy determinations are:

That Indian tribes are sovereign political bodies, having the power to determine their own membership and power to enact laws and enforce them within the boundaries of their reservations....³⁴

The poorly reasoned *Castro-Huerta* decision flouts this wise policy guidance, creating an urgent need for Congress to help tribes protect their governmental authority against state encroachment.

Quite interesting is that the Majority in *Castro-Huerta* quickly states that the treaties at hand in the case were supplanted by that state's enabling act. Notably, the Majority was solely focused on one particular state in developing its decision. We reiterate that the Majority got it wrong, but we also make clear that nothing has supplanted our treaties. Our treaties reign, and the *Castro-Huerta* decision violates them, specifically the aforementioned extradition provisions. *Castro-Huerta* also violates the tribal consent provision of the Indian Civil Rights Act. The decision should be barred from applying on our Reservation as the Court wholly failed to factor in our unique scenario and relevant documents. This holds true for other Sioux Nation tribes and we have to think for many other Tribal Nations as well. We support Congress stepping up to rectify this poor decision for all Tribal Nations.

III. The Consequences of the Supreme Court Legislating from the Bench

The consequences of letting *Castro-Huerta* stand are dire. The Supreme Court has not only overstepped its authority by legislating from the bench—it has done so with a very limited and narrow focus on the particularities of Oklahoma. This has created bad policy for Oklahoma and everywhere else.

³¹ See 18 U.S.C. § 1162(a).

³² South Dakota Secretary of State, Ballot Question Titles and Election Returns 1890-2020, *South Dakota Political Almanac*, 42, <https://www.sdsos.gov/elections-voting/assets/BallotQuestions.pdf> (last visited Sep. 15, 2022).

³³ 25 U.S.C. § 1326.

³⁴ U.S. Congress, Final Report of the American Indian Policy Review Commission, vol. 1, at 4 (1977).

Perhaps most significantly, states have been empowered to extend their policymaking onto tribal lands. For example, Tribes, states, and the federal government can have significant differences in policy regarding what behaviors should be criminalized. Such concerns are particularly pronounced post-*Dobbs v. Jackson Women's Health Organization*,³⁵ with states empowered to legislate in ever-broader areas of American life.

Additionally, since *Castro-Huerta*, Oklahoma tribes have been advised that federal prosecutions are being referred to the state. We fear the same will happen elsewhere in Indian Country. This should not stand. To Tribes, it appears that federal prosecutors have already been shirking their responsibilities in recent years due to the overwhelming number of criminal cases arising in Indian Country and inadequate funding and staffing to meet these challenges.

From the tribal point of view, the *Castro-Huerta* decision has resulted in major areas of concern thus far in Indian Country at large:

1. Extension of state policymaking onto tribal lands.
2. A visible decrease in prosecutions by the federal government, which has responsibility for the prosecution of Major Crimes on reservations.
3. A potential lack of prosecution of non-Indians in Indian Country generally as state and federal prosecutors point their fingers at each other.
4. A failure to notify Tribes of domestic violence incidents where the Tribe has concurrent jurisdiction to prosecute a non-Indian.
5. The potential application of *Castro-Huerta* to civil matters, although *Castro-Huerta* was only about criminal jurisdiction over non-Indians.

Historically, tribal law and judicial services have been woefully underfunded by Congress. Unfortunately, our Tribe suffers from an inordinate lack of resources for law enforcement and our court system. Federal funding and priorities for prosecutions aimed at reducing non-Indian crime in Indian Country has been equally lacking. Now it would appear some federal authorities serving Indian Country may begin to defer to their state counterparts, resulting in greater danger and less justice for our reservation communities.

The Court's holding in *Castro-Huerta* that states have concurrent jurisdiction further adds to the maze of criminal jurisdiction in Indian Country that the Court has created, complicating the prosecution of crimes in Indian country. We are concerned that *Castro-Huerta* will result in the potential for chaos arising from conflicting tribal, state, and federal laws regarding differing standards when charging and prosecuting crimes. Already, the hodgepodge of criminal jurisdictional authority has harmed, and will continue to harm, tribal communities. According to a report by the U.S. Attorney's Office, at least

³⁵ 597 U.S. ___, slip op. (2022).

[Seventy] percent of violent crimes generally committed against AI/ANs involve an offender of a different race. This statistic includes crimes against children twelve years and older. . . [I]n domestic violence cases, 75 percent of the intimate victimizations and 25 percent of the family victimizations involve an offender of a different race. Furthermore, national studies show that men who batter their companion also abuse their children in 49 to 70 percent of the cases.³⁶

The solution to this jurisdictional maze is not to grant unconstitutional power to the states. Rather, it is to fix the jurisdictional gap following the Court’s decision in *Oliphant v. Suquamish Indian Tribe*,³⁷ which held that tribes lacked criminal jurisdiction over non-Indians.

The jurisdictional gap following *Oliphant* fueled non-Indian crime in Indian Country, which was eventually addressed in part in 2013 when Congress reauthorized the Violence Against Women Act and included special jurisdictional provisions for qualifying tribes to prosecute non-Indians for certain acts of domestic or dating violence.³⁸ Because the Court has once again issued a decision upending matters of criminal jurisdiction in Indian Country, we again come to Congress seeking a fix. Any such fix must include not only the necessary authorities to undo the jurisdictional maze but also the funding and resources required to carry out those authorities.

Although the majority in *Castro-Huerta* declined to revisit its holding in *McGirt*,³⁹ the State of Oklahoma is nonetheless using the *Castro-Huerta* decision to attempt to reverse *McGirt* by arguing that it has presumptive jurisdiction in Indian country.⁴⁰ Without the intervention of Congress, it is possible that the Court will entertain this argument and unconstitutionally expand the scope of state jurisdiction further.

Moreover, it is conceivable that Oklahoma and other states will continue to find new ways to weaponize the *Castro-Huerta* decision to undermine tribal self-determination and the decisions and intent of Congress. These actions will lead to intensive, drawn-out, and costly litigation, all of which can be avoided by Congress stepping up and telling the Court that the role of legislating is the role of Congress, not the courts.

IV. Congress’ Constitutional Obligation to Correct the Court

For all the reasons herein, I am asking Congress to fulfill its constitutional role—as well as its federal treaty obligations and trust responsibilities—and take swift action to address the disastrous *Castro-Huerta* decision. When one branch of government oversteps its authority in

³⁶ U.S. Attorney General’s Advisory Committee on American Indian/Alaska Native Children Exposed to Violence, *Ending Violence So Children Can Thrive*, November 2014, https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2015/03/23/ending_violence_so_children_can_thrive.pdf (last visited Sep. 15, 2022).

³⁷ 435 U.S. 191 (1978).

³⁸ 127 Stat. 54, codified at 25 U.S.C. § 1304.

³⁹ 591 U.S. at 11 (Gorsuch, J., dissenting).

⁴⁰ Brief of Amicus Curiae State of Oklahoma in Support of Appellee City of Tulsa and Affirmance at 5-9, *Hooper v. City of Tulsa*, No. 22-5034 (10th Cir. Aug. 8, 2022).

contravention of well-established law, it is incumbent on the other branches to protect the country's constitutional balance of power.

Specifically, the Oglala Sioux Tribe asks Congress to:

1. Repeal all existing civil and criminal jurisdictional limitations on Indian Tribes, whether imposed by statute or common law, and allow Tribes the option of fully asserting their inherent civil and criminal jurisdiction throughout our territories;
2. Pass new appropriations designated for the development and enhancement of Tribal court and law enforcement infrastructure throughout Indian Country (including code development, construction, equipment, policies and program development); detention and rehabilitation facilities; intervention and diversion services; training; and staffing (judges, prosecutors, public defenders, clerks, officers, and other necessary positions); and
3. For the transition period during which Tribal governments will be developing their infrastructures, provide Tribes and federal prosecutors the funding and authorization necessary to prosecute and reduce non-Indian crimes committed in Tribal communities, fostering a stronger government-to-government relationship between the United States and Tribes.

The Oglala Sioux Tribe is a part of and supports the Coalition of Large Tribes (COLT) and The Great Plains Tribal Chairmen's Association (GPTCA) in their statements on this matter.

Should Congress choose not to address the jurisdictional gaps following the Supreme Court's decision in *Oliphant* at this time, it should at a minimum restore the pre-*Castro-Huerta* status quo by clarifying that states lack criminal jurisdiction over crimes committed by non-Indians against Indians in Indian Country.

Conclusion. The relationship between our Tribe and the federal government is a bilateral one, and it is enshrined in our Treaties. We urge Congress to enact an *Oliphant* and *Castro-Huerta* fix that would restore jurisdictional authority to Tribes and jurisdictional boundaries on states. Tribal sovereignty must include, at a minimum, the ability to protect our own people from non-Indian predators, and it must be shielded from an extension of state power onto our Pine Ridge Indian Reservation.

We look forward to working with this Subcommittee and Congress overall to address these matters and to ensure that the longstanding nation-to-nation relationship between our governments continues.

Thank You.