COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE FOR INDIGENOUS PEOPLES OF THE UNITED STATES
Oversight Hearing on *Examining Oklahoma v. Castro-Huerta: The Implications of the Supreme Court's Ruling on Tribal Sovereignty*
Responses to Questions from the Committee

Questions from Rep. Teresa Leger Fernández

1. In your testimony, you note that the *Castro-Huerta* ruling implies that Congress has been "spinning its wheels" for decades in the passage of legislation that grants State jurisdiction over certain crimes committed in Indian Country.
    a. Can you elaborate on this idea?

Certainly, and thank you for the question. In at least nine statutes between 1940 and 1994, Congress gave particular states jurisdiction over "offenses committed by *or against* Indians" on various reservations in the states.[1] But *Oklahoma v. Castro-Huerta* holds that states always already had jurisdiction over offenses "against Indians," meaning that in repeatedly adding those two words to the statute, Congress was actually doing nothing. The majority opinion acknowledged the argument that these words were "pointless surplusage if States already had concurrent jurisdiction over crimes committed by non-Indians against Indians in Indian country," and that the words suggested that "Congress must have assumed that States did not already have concurrent jurisdiction over those crimes."[2] But the majority declared these arguments irrelevant because "assumptions are not laws" and the statutes granted states jurisdiction over other actions in Indian country.[3] In other words, the majority finds that Congress did nothing in including these two words again and again over five decades, that doing so was based on Congress's mistaken understanding of the law, but that's okay because those statutes did other things which were not "pointless surplusage."

Questions from Rep. Raúl M. Grijalva

1. Your written testimony traces nearly 200 years of federal Indian legal precedent that existed before the Castro-Huerta ruling.
    a. What does it mean for the U.S. Supreme Court to ignore well-established legal history in this way?

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[1] See Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162; 25 U.S.C. §§ 1321) ("P.L. 280"); Mohegan Nation of Connecticut Land Claims Settlement Act, 108 Stat. 3501 § 6(a) (1994); Seminole Indian Land Claims Settlement Act, 101 Stat. 1556 § 6(d)(1) (1987); Florida Land Claims Settlement Act, 96 Stat. 2012 § 8(b)(2)(A) (1982); 62 Stat. 1224 (July 2, 1948) (granting New York jurisdiction); 62 Stat. 1161 (June 30, 1948) (granting Iowa jurisdiction over the Sac and Fox Reservation); 62 Stat. 827 (June 25, 1948) (reenacting Kansas authorization); 60 Stat. 229 (1946) (granting North Dakota jurisdiction over the Spirit Lake Reservation); 54 Stat. 249 (1940) (granting Kansas jurisdiction).
[2] Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2500 (2022).
[3] *Id.*

Thank you for the question. Whenever the U.S. Supreme Court ignores legal history in this way, it violates the legal building blocks of the rule of law and separation of powers. This is always dangerous, but it is particularly so for Indigenous peoples.

Tribal sovereignty is desperately vulnerable to shifting political tides. Congress has plenary power over all aspects of tribal sovereignty. It may break treaties, take tribal territories, and change jurisdiction at will. Because Indigenous people make up less than 3% of the United States population, moreover, political power is often against them. The saving grace is that (1) only Congress has the power to diminish tribal sovereignty, and (2) there must be clear evidence of its intent to do so. As the Supreme Court has repeatedly recognized, "proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."[4]

But the Court flipped the script in *Oklahoma v. Castro-Huerta*. It started from the presumption that states have plenary authority in Indian country, and that Congress had to act explicitly to keep state authority out. Even worse, it held that it alone—not Congress, to which the Constitution entrusts this authority, not the Executive Branch, which fulfills the trust responsibility to tribal people, not even unanimous Supreme Court opinions from 1832, 1946, and 1959—could decide whether federal law limited state intrusions on Indian affairs. That is "at odds with the Constitution, which entrusts Congress with the authority to regulate commerce with Native Americans."[5] It is also at odds with the fundamental legal doctrines that protect tribal peoples—and treaty promises to them—from the worst excesses of colonial domination.

Thank you again for your attention to this issue.

Bethany Berger
Wallace Stevens Professor
University of Connecticut School of Law
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[4] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978); *see also* McGirt v. Oklahoma, 140 S.Ct. 2452, 2462 (2020) ("This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties. Lone Wolf v. Hitchcock, 187 U.S. 553, 566–568 (1903). But that power, this Court has cautioned, belongs to Congress alone. Nor will this Court lightly infer such a breach . . ."); Michigan v. Bay Mills Indian Community, 572 U.S. 782, 790 (2014) ("Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government.").

[5] *McGirt* at 2462 (citing U.S. Const., Art. I, § 8)