

To: Committee on Natural Resources, Subcommittee for Indigenous Peoples of the U.S.
From: Carole Goldberg, Jonathan D. Varat Distinguished Professor of Law Emerita, UCLA
Re: Questions for the Record
Date: October 4, 2022

Questions from Rep. Teresa Leger Fernández

1. Can you speak more on the findings and verdicts of the Indian Law and Order Commission?
 - a. How do these bipartisan efforts compare to the Court's recent ruling in *Castro-Huerta*?

In 2013, following extensive nation-wide and Indian country-wide consultations, the bipartisan Indian Law and Order Commission issued its unanimously endorsed report, [A Roadmap for Making Native America Safer](#). Chapter One of the Commission's report was entirely devoted to criminal jurisdiction questions, and includes a chart (Figure 1, page 7) entitled "General Summary of Criminal Jurisdiction on Indian Lands." That chart clearly shows crimes by non-Indian offenders against Indian victims falling within exclusive federal jurisdiction – a widespread understanding of the law, until the Supreme Court made its misguided ruling in *Castro-Huerta* allowing concurrent state jurisdiction over such offenses.

The Commission's recommendations regarding criminal jurisdiction in Indian country point in exactly the opposite direction from the jurisdictional outcome established in *Castro-Huerta*. *Castro-Huerta* allows for greater state jurisdiction in Indian country than was previously understood to exist, including by the Commission (see above), the United States Department of Justice (from which the Commission took its chart), and the most respected treatise in the field of federal Indian law, Cohen's Handbook.¹ In stark contrast, the recommendation of the Indian Law and Order Commission was to cut back sharply on state criminal jurisdiction in Indian country. The following excerpts from the Executive Summary of the Commission's report specify how and why state jurisdiction should be reduced.

While problems associated with institutional legitimacy and jurisdictional complexities occur across the board in Indian country, the Commission found them to be especially prevalent among Tribes subject to P.L. 83-280 or similar types of State jurisdiction. Distrust between Tribal communities and criminal justice authorities leads to communication failures, conflict, and diminished respect....

Ultimately, the imposition of non-Indian criminal justice institutions in Indian country extracts a terrible price: limited law enforcement; delayed prosecutions,

¹ The most recent edition of this treatise states unequivocally: "The Major Crimes Act and the Indian Country Crimes Act (ICCA) create federal criminal jurisdiction that is exclusive of the states; that is, if federal jurisdiction exists under one or both of those two statutes, the states lack concurrent criminal jurisdiction to prosecute the same conduct." Nell Jessup Newton et al., Cohen's Handbook of Federal Indian Law (2012), at 763 (citations omitted).

too few prosecutions, and other prosecution inefficiencies; trials in distant courthouses; justice system and players unfamiliar with or hostile to Indians and Tribes; and the exploitation of system failures by criminals, more criminal activity, and further endangerment of everyone living in and near Tribal communities. When Congress and the Administration ask why the crime rate is so high in Indian country, they need look no further than the archaic system in place, in which Federal and State authority displaces Tribal authority and often makes Tribal law enforcement meaningless.

The Commission strongly believes, as the result of listening to Tribal communities, that for public safety to be achieved effectively in Indian country, Tribal justice systems must be allowed to flourish, [and] Tribal authority should be restored to Tribal governments when they request it....

Congress should clarify that any Tribe that so chooses can opt out immediately, fully or partially, of ... congressionally authorized state jurisdiction.... (Executive Summary, p. ix)

The Commission's recommendation included a requirement that any Tribe opting out of state jurisdiction must afford defendants all rights protected under the United States Constitution, subject to very limited review in a newly-constituted federal appellate court, the U.S. Court of Indian Appeals. Furthermore, any such Tribe would no longer be subject to sentencing limitations established in the Indian Civil Rights Act.

The body of the Commission's report further elaborates on the failings of existing state criminal jurisdiction in Indian country:

Because Tribal nations and local groups are not participants in the decision making, the resulting Federal and State decisions, laws, rules, and regulations about criminal justice often are considered as lacking legitimacy. As widely reported in testimony to the Commission, nontribally administered criminal justice programs are less likely to garner Tribal citizen confidence and trust, resulting in diminished crime-fighting capacities. The consequences are many: victims are dissuaded from reporting and witnesses are reluctant to come forward to testify....Potential violators are undeterred. (p. 4)

...State government authority often appears even less legitimate to Tribes than Federal government authority. The Federal government has a trust responsibility for Tribes, many Tribes have a treaty relationship with it, and there is an established government-to-government relationship between Tribes and the Federal government....

...Tribes' widespread disenchantment with State criminal jurisdiction stems from the fact that States often have proven to be less cooperative and predictable than

the Federal government in their exercise of authority....Memories that States and local governments actively sought reductions of Indian territories still engender distrust from Tribal governments and their citizens. (p. 11)

The illegitimacy of state authority affects cases with Indian victims as much as cases with Indian defendants, because cooperation from victims and witnesses is necessary to achieve a successful prosecution. Although there are individual instances of cooperative arrangements succeeding between Tribal and local sheriffs and prosecutors, the Commission's report properly notes that these arrangements are highly contingent on local non-Indian politics and are unstable over time. (p. 15) The findings and recommendations of the Indian Law and Order Commission clearly oppose state criminal jurisdiction in Indian country, calling for Tribes to be able to opt out of such jurisdiction. To the contrary, *Castro-Huerta* expands such jurisdiction.²

2. In your work examining Public Law 280, how will the *Castro-Huerta* ruling affect the State and tribal governments that are currently operating under this law?

Castro-Huerta affirms state criminal jurisdiction – crimes by non-Indians against Indian victims in Indian country – that is largely already allowed under Public Law 280. However, there are limitations on the criminal jurisdiction that states acquire under Public Law 280 that do not seem to operate on the jurisdiction recognized in *Castro-Huerta*. Most significantly, Public Law 280 does not confer jurisdiction on states to impose their “regulatory” laws within Indian country, even if those laws have an associated criminal component.³ Because *Castro-Huerta* relies on “inherent” state jurisdiction rather than a particular statutory grant, it presumably incorporates no such limitation. Thus, even for Tribes already subject to Public Law 280, *Castro-Huerta* likely represents an expansion of state jurisdiction.

Furthermore, *Castro-Huerta* makes retrocession of state Public Law 280 jurisdiction (return of such jurisdiction to the federal government) significantly less beneficial and meaningful for Tribes. Under current law, only states, not Tribal nations, may initiate retrocession. (The Indian Law and Order Commission's recommendations, discussed above, would give control over retrocession to the affected Tribes.) Nonetheless, numerous instances of retrocession – both in the “mandatory” states named in the statute, and in those states that opted in – have occurred.⁴ Before *Castro-Huerta*, it was assumed that retrocession would result in exclusive federal jurisdiction over crimes committed by non-Indians against Indian victims. Since the Supreme Court's ruling in *Castro-Huerta*, state jurisdiction will have a larger role in Indian country even after retrocession, raising all the issues of unfairness and illegitimacy discussed in the report of the Indian Law and Order Commission (see above).

² To be clear, the Commission did not address state jurisdiction over crimes by non-Indians against Indian victims outside of Public Law 280, because it assumed (correctly, in my view) that such state jurisdiction did not exist.

³ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

⁴ See Duane Champagne and Carole Goldberg, *Captured Justice: Native Nations and Public Law 280* (2nd ed., Carolina Academic Press, 2020), at 177-209.

Questions from Rep. Raúl M. Grijalva

1. As your testimony notes, State involvement in criminal justice in Indian Country could jeopardize tribal-federal relations.
 - a. To clarify for the record, does the federal trust responsibility apply to State governments?

With the exception of certain eastern states that signed separate treaties with Tribal nations, states do not have a trust responsibility to those nations. The trust responsibility has consistently been articulated by the Supreme Court as an obligation of the federal government associated with its constitutional authority over Indian affairs and its government-to-government relationship with Tribal nations.⁵ In contrast, the Supreme Court has recognized that states often have interests antagonistic to Tribal nations. According to *United States v. Kagama*, 118 U.S. 375, 383-84 (1886), “These Indian tribes are the wards of the nation.... They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.”

- b. How will this impact the delivery of public safety services post-*Castro-Huerta*?

As I indicated in my written testimony, and as discussed above in relation to the report of the Indian Law and Order Commission, research supports concern that state criminal jurisdiction will result in biased and ineffective law enforcement and criminal justice when non-Indians commit crimes against Indians in Indian country. Loss of respect and cooperation from victims and witnesses because of lack of legitimacy of state institutions can leave crime undeterred. Even if individual localities may sometimes be more diligent and culturally respectful, the problems of illegitimacy, discrimination, and overlapping, confusing jurisdiction will likely be the norm. A particular concern is when multiple jurisdictions defer to each other, each forsaking jurisdiction and leaving crime unattended.

⁵ See Cohen’s Handbook, *supra*, at pp. 412-429 and cases cited therein.