



Department of Justice

STATEMENT FOR THE RECORD

BEFORE THE

**COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE FOR INDIGENIOUS PEOPLES OF THE UNITED STATES
U.S HOUSE OF REPRESENTATIVE**

AT A HEARING ENTITLED

“Examining *Oklahoma v. Castro-Huerta*: The Implications of the Supreme Court’s Ruling on Tribal Sovereignty”

SUBMITTED

OCTOBER 20, 2022

Statement for the Record
House Natural Resources Subcommittee on Indigenous Peoples of the United States
September 20, 2022 Hearing “Examining *Oklahoma v. Castro-Huerta*: The
Implications of the Supreme Court’s Ruling on Tribal Sovereignty”

Thank you for the opportunity to submit this Statement for the Record in support of the September 20, 2022 oversight hearing entitled “Examining *Oklahoma v. Castro-Huerta*: The Implications of the Supreme Court’s Ruling on Tribal Sovereignty.”

BACKGROUND

As stated in President Biden’s January 2021 Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships,¹ “American Indian and Alaska Native Tribal Nations are sovereign governments recognized under the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. It is a priority of my Administration to make respect for Tribal sovereignty and self-governance, [and] commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations ... cornerstones of Federal Indian policy.” These are precisely the foundational principles that have long guided the Department of Justice’s efforts to promote public safety in Tribal communities. The Department remains steadfastly committed to furthering our government-to-government relationship with each Tribe and to respecting and supporting Tribes’ authority to exercise their inherent sovereign powers, including powers over both their citizens and their territory.²

The Supreme Court ruling in *Oklahoma v. Castro-Huerta* that the States have jurisdiction over crimes by non-Indians against Indians without express Congressional authority corrodes the fundamental sovereign right of Tribes to determine the appropriate means for securing the public safety for their people and to govern their lands. It may also confuse an already complex jurisdictional scheme and significantly increase the potential for conflict between sovereigns, which could render more complicated each sovereigns’ ability to keep the peace and protect the inhabitants of Indian country.

SUPREME COURT DECISION IN *OKLAHOMA V. CASTRO-HUERTA*

The State of Oklahoma charged Victor Manuel Castro-Huerta, a non-Indian living on the Cherokee Nation reservation in Oklahoma with criminal child neglect. The victim was a member of the Eastern Band of Cherokee Indians. After his conviction in state court, Castro-Huerta appealed the decision, and while his appeal was pending the Supreme Court decided *McGirt v. Oklahoma*.³ In *McGirt*, the Supreme Court held that Congress did not disestablish the

¹ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/>

² <https://www.govinfo.gov/content/pkg/FR-2014-12-12/pdf/2014-28903.pdf>

³ 140 S. Ct. 2452 (2020)

Muscogee Creek Nation reservation in eastern Oklahoma when Oklahoma became a State. As a result, the Muscogee Creek Nation reservation remained Indian country, and the United States had jurisdiction over crimes committed there by Indians under the Major Crimes Act, 18 U.S.C. § 1153, even on non-Indian lands. Based on the *McGirt* decision, the Oklahoma Court of Criminal Appeals (“OCCA”) later concluded that due to its similar history the Cherokee Nation reservation also remained intact.⁴

In the wake of *McGirt*, Castro-Huerta challenged his state conviction asserting that the State of Oklahoma lacked criminal jurisdiction to prosecute him. The OCCA agreed.⁵ The state sought certiorari arguing that it had inherent jurisdiction to prosecute non-Indians who commit crimes against Indians in Indian country.

The Supreme Court granted certiorari. The United States filed an amicus brief in support of Castro-Huerta and participated at oral argument. The United States, as well as Castro-Huerta, argued that under the General Crimes Act, 18 U.S.C. 1151, the historical context of its enactment, and numerous Supreme Court decisions construing that provision, federal jurisdiction is exclusive of state jurisdiction in Indian country over crimes committed against Indians unless Congress has granted the State such jurisdiction by statute. This argument followed the principle that absent authority conferred by Congress, States only have criminal jurisdiction over crimes committed by non-Indians against non-Indians or victimless crimes committed by non-Indians in Indian Country.⁶

The Supreme Court held in Oklahoma’s favor that States have certain inherent authority over the Indian country within their borders and that the General Crimes Act does not preempt state authority to prosecute non-Indians who commit crimes against Indians in Indian country. As a result, the decision has upended the settled understanding that states lacked such criminal prosecutorial authority in Indian country.⁷ Under this ruling, States now possess criminal authority in Indian country when the perpetrator is non-Indian.

The *Castro-Huerta* decision is already the subject of public criticism by both Tribal government leaders and by legal scholars.⁸ While *Castro-Huerta* is a criminal case involving a

⁴ *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶ 15, 497 P.3d 686, 689.

⁵ *Castro-Huerta v. State*, No. F-2017-1203 (Apr. 29, 2021).

⁶ *United States v. McBratney*, 104 U.S. 621 (1881).

⁷ *Worcester v. Georgia*, 31 U.S. 515 (1832).

⁸ The Supreme Court previously held that state criminal law does not apply in Indian country, *Worcester v. Georgia*, 31 US 515 (1832). However, Congress, exercising its plenary power over Indian affairs, can confer criminal jurisdiction on states and on occasion has done so via legislative enactment. The Supreme Court has held that states have criminal jurisdiction over

non-Indian defendant, States may argue that it has broader implications.

TRIBAL RESPONSE

The Departments of Justice and the Interior held joint listening sessions on September 26-27, 2022, to discuss with Tribal representatives the implications of this decision and the impact on Tribal communities. More than 500 people participated in these discussions, the majority of whom participated on behalf of a Tribe. The Departments are still receiving written comments and processing feedback received during these listening sessions. Several clear themes have emerged from our discussions and in analyzing written comments received thus far:

1. This decision was characterized as an attack on Tribal sovereignty by Tribes and Tribal advocates that participated in the discussions or submitted written comments.
2. Participating Tribes and Tribal advocates expressed immediate concerns about the confusion that this decision injects into an already complex jurisdictional and operational landscape.
3. Participating Tribes and Tribal advocates also expressed significant concerns about the long-term implications of this decision, and have already seen signs that some States will rely on this decision to interfere in Tribal operations and functions outside of criminal jurisdiction.
4. Although there appears to be some difference in opinion on ideal timing and scope, the participating Tribes and Tribal advocates called for a legislative fix.
5. Participating Tribes and Tribal advocates also called for guidance from federal agencies clarifying relevant processes and protocols post-*Castro Huerta*.

NEXT STEPS

The Departments of Justice and the Interior will continue to coordinate as we receive written comments and evaluate the need to clarify or adjust our respective agencies' policies or operations. The Department of Justice will continue to seek formal and informal input from Tribes as we strive to meet the public safety needs of our Tribal partners and honor our treaty and trust responsibilities.

crimes committed by non-Indians against non-Indian victims in Indian country; *US v. McBratney*, 104 US 621 (1881); *Draper v. US*, 164 US 240 (1896). Crimes by or against Indians are subject to federal and/or tribal jurisdiction. Prior to the *Castro-Huerta* decision, the presumption was that states possessed no criminal jurisdiction over crimes committed by or against Indians unless Congress conferred such authority upon a state. In *Castro-Huerta*, the Supreme Court changed that analysis with respect to crimes committed by non-Indians against Indians.

CONCLUSION

The Supreme Court decision in *Oklahoma v. Castro-Huerta* upends important consistent jurisdictional understandings and the operational status quo across Indian country. Some of the most vulnerable and historically underserved citizens of this country may be impacted while law enforcement and justice systems adjust to align with the new jurisdictional reality imposed by the Supreme Court.

This decision, however, does not erode the Department of Justice's commitment to our mission to uphold the rule of law, keep our country safe, and to protect civil rights. Nor does this decision erode our commitment to honor our treaty and trust responsibilities, to promote public safety in Native communities, and to respect and support Tribes' authority to exercise their inherent sovereign powers.