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**Testimony of the  
Ute Indian Tribe of the Uintah and Ouray Reservation**

**House Natural Resources Committee  
Subcommittee for Indigenous People of the U.S.  
Oversight Hearing on Examining *Oklahoma v. Castro-Huerta*:  
The Implications of the Supreme Court's Ruling on Tribal Sovereignty**

**September 27, 2022**

Chair Leger Fernandez, Acting Ranking Member Obernolte and Members of the Subcommittee, the Ute Indian Tribe of the Uintah and Ouray Reservation appreciates the opportunity to provide this testimony on “Examining *Oklahoma v. Castro-Huerta*: The Implications of the Supreme Court’s Ruling on Tribal Sovereignty.” The decision is a clear attempt by an activist Court to rewrite the Constitution and hundreds of years of Congressional acts and Court precedent. The Court’s decision flips this history, laws, and the United States relationship to Indian tribes on its head.

Congress must quickly act to correct this deeply flawed decision that impacts every tribe in the United States. Justice Gorsuch laid out a road map for Congress to take this action in his strongly worded dissenting opinion. All Congress needs to do is amend 25 U.S.C. § 1152 to clarify that state authority is preempted. This will close the door to Justice Kavanaugh and the Court’s attempt to create new authority for states over Indian tribes and Indian country.

**Introduction and Action Needed**

On June 29, 2022, Justice Brent Kavanaugh issued a decision in the Supreme Court case *Oklahoma v. Castro-Huerta* that usurps Congress’s plenary authority over Indian tribes and attempts to legislate from the bench. The decision conflicts with the Constitution, laws passed by Congress, and more than 200 years of long settled federal Indian law. Instead, Justice Kavanaugh and the Court created new authority for states to have concurrent jurisdiction to prosecute non-Indians for crimes committed against Indians in Indian country.

The decision also creates an unfunded mandate for states to provide law enforcement and criminal prosecutions across more than 56 million acres in 35 different states. Prior to this decision these crimes were prosecuted by federal and tribal law enforcement based on long settled law, as well as new authorities and resources provided by Congress in the recently passed Tribal Law and

Order Act (TLOA) and Violence Against Women Act (VAWA). The decision will increase crime in Indian country and conflicts with the efforts in Congress to affirm the criminal jurisdiction of tribes and ensuring a tribal role in protecting their members and culture.

The decision conflicts with the clear direction of Congress to support federal and tribal law enforcement. It also immediately sets the states and tribes at odds, as tribes have a direct interest in providing safety and security for Indians. Many tribes have already been moving to accept Congress's expanded jurisdiction over crimes in Indian country and have their law enforcement recognize federal law enforcement as well.

The decision also runs counter to the government-to-government and trust relationship between tribes and the Federal government. The decision attempts to view tribes as a racial group as opposed to independent political sovereigns. The decision attempts to erase the sovereignty of tribal governments which existed long before the United States was founded. Instead, Justice Kavanaugh and the Court are seeking a return to outdated federal policies that attempted to terminate tribal governments or "solve" the so-called Indian problem.

Congress must take action to correct the Court's egregious error which overstepped its authority. Before the impacts of this decision reach too far, Congress should simply clarify 18 U.S.C. § 1152 which was first passed by Congress in 1817. As further set out below, Congress only needs to add the phrase, "*and shall apply to preempt the application of State law and prosecutorial jurisdiction,*" to the statute. This clarification would affirm that the federal government and Indian tribes have exclusive jurisdiction over crimes in Indian country where the victim was Indian.

In his strongly worded dissenting opinion, Justice Neil Gorsuch expressed shock and the Court's unfounded arguments and laid out a road map for Congress to enact legislation to fix the Court's decision. Congress should follow his lead and take action that will close the door to Justice Kavanaugh and the Court's attempt to create new authority for states over Indian tribes and Indian country.

### **Analysis of U.S. Supreme Court Decision *Castro-Huerta***

In its recent *Oklahoma v. Castro-Huerta* decision, the Supreme Court made an erroneous and egregious departure from over 200 years of settled law. In Justice Kavanaugh's opinion, the Court departed from the longstanding and foundational rule that states do not generally have jurisdiction to prosecute crimes against Indians in Indian country. The decision upset significant cornerstones of the jurisdictional relationship between Indian tribes and states by holding that states have concurrent jurisdiction over such crimes in Indian country. This decision set tribes and states at immediate odds, as tribes have a direct interest in protecting their members and providing security on Indian reservations. As Justice Gorsuch stated in his well-reasoned dissent, it would be hard to fathom "a more ahistorical and mistaken statement of Indian law . . ." *Oklahoma v. Castro-Huerta*, 597 U.S.\_\_\_\_ (2022) (J. Gorsuch dissenting).

The Court's suggestion that criminals will "go free" if states are not able to exercise criminal jurisdiction in Indian country is wrong and is the result of a political campaign by the State of Oklahoma. This has never been the case in Indian country as Congress clearly specified that federal and tribal governments have jurisdiction over these kinds of cases. In addition, the decision is contrary to significant steps taken by Congress in recent decades, through the passage of TLOA and tribal provisions in VAWA, to increase and improve federal and tribal law enforcement.

Justice Kavanaugh's decision to legislate from the bench is having an immense impact on state and tribal government operations across the country while providing no funding to states to fulfill new responsibilities required under the Court's decision. As suggested by Justice Gorsuch in his dissent, Congress must not "stand by as this Court sows needless confusion across the country." *Id.* at 41. A legislative fix to the *Castro-Huerta* decision is needed to uphold the United States' constitutional, treaty, and trust responsibilities to Indian tribes.

### **Federal Constitutional, Treaty, and Trust Responsibilities**

The Constitution recognizes the distinct sovereign authorities of the Federal government, tribal governments, and state governments. Over more than 200 years of treaty making, acts of Congress, and judicial decisions, the United States has exercised and affirmed a treaty and trust responsibility and government-to-government relationship with Indian tribes. This relationship does not include state governments unless specifically authorized by Congress.

In recent decades, Congress worked hard to further secure and support federal and tribal law enforcement responsibilities in Indian country. As noted in support of the Tribal Law and Order Act, "[Y]ears of court decisions and stop-gap legislation have created a jurisdictional mess... The losers are the people of Indian country. The result of these federal laws and Court decisions is that along with the authority that the United States imposed over Indian tribes, it incurred significant legal and moral obligations to provide for public safety on Indian lands." Senate Report No. 111-93 (2009) pg. 4, Tribal Law and Order Act of 2009 (Internal citations omitted). The United States and the Federal government must live up to these responsibilities and not let the Supreme Court rewrite history to force state authorities on tribal members.

The Court's decision giving the states concurrent jurisdiction will result in a decrease in federal prosecutions in Indian country and conflict with Congress's intent in passing TLOA and tribal provisions in VAWA. This will lead to an increase of crime in Indian country and displace the United States' legal and trust responsibilities to provide law enforcement in Indian country. Instead, the Court is creating a role for the states that defies settled, long-standing, and recent laws.

Despite the Court's decision, Indian tribes do not have a treaty and trust relationship with the states, and states are not prepared for the new law enforcement challenges, budget impacts, and legal jeopardy that will come with fulfilling federal responsibilities under the Court's decision.

### **Court Imposed Costs on the States**

As a part of the confusion caused by the Court's decision, state governments lack the budgets and resources to take on new law enforcement responsibilities in Indian country which covers more than 56 million acres in 35 states. Most states are already suffering from short falls in their law enforcement budgets. The Court imposed an unfunded mandate on states to enforce federal and tribal responsibilities in Indian country.

In 2021, the Bureau of Justice Statistics issued a report providing data on state government law enforcement expenses. In 2017:

- County and municipal governments spent nearly \$130 billion on police and corrections.
- In the 20 years from 1997 to 2017, justice system expenditures increased from \$188 billion to \$305 billion.
- States had nearly \$50 billion in direct expenditures for corrections activities, and of this amount, 88% was for correctional institutions.<sup>1</sup>

In addition, the Vera Institute of Justice reported that in 2015 the total cost to house an inmate in state facilities averaged \$33,274.00 a year. Overall, the amounts ranged from a low of \$14,780.00 in Alabama to a high of \$69,355.00 in New York.<sup>2</sup> This unfunded mandate will severely burden the states with increased incarceration and enforcement costs, forcing the states to choose between scrambling for funds, personnel, and infrastructure or hoping the federal government will not decline enforcement. The states interest is overridden by the combined weight of the tribes and federal governments interest in protecting all the citizenry and upholding its legal, treaty and trust relationships with the tribes.

### **Impacts on Indian Country**

The Court's decision to legislate from the bench and upset the long-standing relationship between the federal government and tribal governments, it is having a direct impact on the people of Indian country. There are more than 570 federally recognized tribes, more than 2.6 million Native Americans, and more than 300 reservations in the United States. Since Congress granted the tribes expanded jurisdiction with the TLOA, VAWA, and other legislation Indian country crime has decreased. In 2010 there were 40,666 offenses known to tribal law enforcement, and that number had dropped to 27,119 in 2020.<sup>3</sup> There are multiple examples of the tribes and states

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<sup>1</sup>Emily D. Buehler, Ph.D., BJS Statistician, *Justice Expenditures and Employment in the United States, 2017*, Bureau of Justice Statistics, (Published July 2021) <https://bjs.ojp.gov/library/publications/justice-expenditures-and-employment-united-states-2017>, NCJ Number 256093, Publication Series Justice Expenditure and Employment

<sup>2</sup>Chris Mai and Ram Subramanian, *The Price of Prisons: Prison Spending in 2015*, Vera Institute of Justice, <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending>

<sup>3</sup>*Crime in the United States, Table 11: Offenses Known to Law Enforcement, (2010 and 2020)* Tribal Crime, Bureau of Justice Statistics, <https://bjs.ojp.gov/tribal-crime>

having agreements to assist each other in enforcing law and order because of these efforts, but this has now needlessly been thrown into confusion.<sup>4,5</sup>

The federal government has moral and legal obligations to provide for public safety in Indian Country. The tribes have a direct interest in ensuring the safety and protection of its people. The federal government has long exercised exclusive jurisdiction over crimes in Indian country by non-Indians against Indians. However, the Court's decision will lead to the federal government decline in enforcement in Indian Country, referring this to states to exercise jurisdiction, even when the state is not interested in exercising that jurisdiction.<sup>6</sup> The states that have no trust relationship with the tribes. States that have had a historic record of taking advantage of tribes. In the case of Oklahoma's current political maneuvering, states attempt to show that without the states enforcement only lawlessness exists in Indian country. Lawlessness has never been the case in Indian country.

Tribes have always been sovereigns, with the ability to assert standards of conduct for their societies. This was recognized before the founding of the United States and again in both the Reorganization and Self-determination Eras. The sovereignty of tribes was recognized in Court decisions even in the early 1800s.<sup>7</sup>

This decision throws federal, tribal, and state government relations back to the era where it was acceptable to solve the "Indian problem" by attempting to assimilate tribes, terminate tribal governments, and attempting to force tribes to accept states authority that was clearly refuted in the Constitution and centuries of decisions and legislation. This decision appears to stem from the Court's new attempts to treat tribes as a racial group rather than affirming the political status of tribal governments.

Congress has recognized the direct interest of tribal governments in the public safety of Indians and has in recent decades made a point of ensuring Indian tribes could start exercising criminal jurisdiction over non-Indian offenders where the victim was Indian.<sup>8</sup> "Tribal governments have an inherent right to protect their people..." stated President Obama.<sup>9</sup> A legislative fix to address the Court's decision would affirm and protect Congress's commitment to tribal governments and support tribal law enforcement.

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<sup>4</sup> "TLOA's amendment of 25 U.S.C. § 2809(a)(3), the Indian Law Enforcement Reform Act. It also confirms the [DOJ]'s January 2010 directive that 'tribal governments have the ability to create and institute successful programs when provided with the resources to develop solutions that work best for their communities.'... [T]he passage of TLOA with its provision of enhanced sentencing authority for qualifying Tribal courts means that more cases will be referred to Tribal courts for prosecution." *Id*

<sup>5</sup> *Special Domestic Violence Criminal Jurisdiction Pilot Project Report*, National Congress of American Indians, October 29, 2015

<sup>6</sup> In 2018, approximately 18 percent (179 out of 999) of Indian country declinations were referred to a different jurisdiction. *Indian Country Investigations and Prosecutions 2018*, U.S. Dept. of Justice.

<sup>7</sup> *Johnson v. McIntosh*, 21 U.S. 543 (1823); *Cherokee v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

<sup>8</sup> VAWA, VAWA Reauthorization 2022 and Tribal Law and Order Act

<sup>9</sup> Barack Obama, President of the United States, *President Signs 2013 VAWA – Empowering Tribes to Protect Native Women*, (March 7, 2013).

### Congressional Action and Legislative Fix Needed

Indian country needs a direct and meaningful fix that addresses the very core of what Justice Kavanaugh got wrong in the *Castro-Huerta* decision. This should be a simple amendment that leaves no doubt as to the jurisdiction of the federal government under 18 U.S.C. § 1152 and the lack of state authority. As shown in italics below, 18 U.S.C. § 1152 should be amended to provide:

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to Indian country *and shall apply to preempt the application of State law and prosecutorial jurisdiction*. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the Tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian Tribes respectively.

This simple clarification will restore the balance in Indian country, affirm over 200 years of precedent, and ensure that Indian tribes and the federal government are responsible for prosecuting crimes in Indian country involving Indians. This amendment would also relieve the states of new law enforcement burdens imposed by the Court's decision.

The Tribe does not believe that Congress should attempt a more complicated amendment or one that would also address 18 U.S.C. § 1162 also known as Public Law 280. First, Justice Kavanaugh's decision needs a quick and decisive response. Congress should directly address the flawed logic that forms the basis for his decision.

Second, it is not possible to improve on Public Law 280 with an amendment. Genocidal laws like Public Law 280, that was enacted as a part of the Federal government's policy of terminating Indian tribes, should be left in the past. Attempting to resurrect Public Law 280 with an amendment is not needed and will only modernize policies that should not have been enacted in the first place. As an example, no one is trying to improve on the General Allotment Act and its genocidal dispossession of millions of acres of tribal lands. The same is true of Public Law 280.

As Justice Gorsuch stated in his dissent, due to the Court's "egregious misappropriation of legislative authority 'the ball is back in Congress' court.'" *Id.* (quoting *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U. S. 618, 661 (2007)). We agree. Congress must act quickly to correct the Court's error and restore the federal, tribal, and state relationships set out in the Constitution and enshrined in over 200 years of treaties, Congressional enactments, and judicial decisions. Tribal sovereignty and self-determination are under attack by the Supreme Court and only Congress can address this wrong and ensure that the Supreme Court does not legislate from the bench.

### **Conclusion**

The Ute Indian Tribe asks that the Subcommittee, the Committee, and Congress take action to correct this error and overreach by the Supreme Court of the United States. Congress must defend the actions taken in passing TLOA and VAWA. The resources and jurisdiction in those laws have helped to stabilize relationships between Indian tribes, the Federal government, States. The *Castro-Huerta* decision is a step backwards and an attempt to undermine the direction of Congress.

The simple fix proposed in the Tribe's testimony would allow the United States to meet its treaty and trust obligations and avoid imposing a new burden on states that cannot increase law enforcement budgets. This action is needed to correct the Court and remind the Court that the United States current and most successful federal Indian policies rely on promoting tribal sovereignty and self-determination.