

Policy Brief

A Congressional Fix for *Oklahoma v. Castro-Huerta*

Summary

In 2022, the United States Supreme Court's decision in *Oklahoma v. Castro-Huerta* upended centuries of federal Indian law when it ruled that both federal and state authorities hold concurrent jurisdiction over non-Indians who commit crimes against Indians on Tribal lands. This ruling created immediate and far-reaching threats to Tribal criminal and civil jurisdiction. Congress has both the power and obligation to reverse this harm by passing a legislative fix to *Castro-Huerta*.

What is *Oklahoma v. Castro-Huerta*?

In 2020, the Supreme Court's decision in *McGirt v. Oklahoma* affirmed the treaty reservation borders of the Muscogee (Creek) Nation, determining that almost half of the state of Oklahoma is considered Indian country. The state responded by filing more than thirty petitions asking the Court to reconsider *McGirt* or narrow its reach by granting the state jurisdiction over crimes committed by non-Indian perpetrators against Indian victims on Indian lands. *Castro-Huerta* was one of those petitions.

As part of their continued efforts to narrow the Court's ruling in *McGirt*, Oklahoma's petition asserted that the State needs concurrent jurisdiction in order to protect Native victims and argues that the "Court has never squarely held that States do not have concurrent authority to prosecute non-Indians for state-law crimes committed against Indians in Indian country."

Through the [VAWA Sovereignty Initiative](#), NIWRC filed an [amicus brief](#) arguing that Congress has exclusive power to decide which sovereign exercises criminal jurisdiction over crimes committed on Tribal lands, and furthermore, when Congress has exercised this power by granting states this jurisdiction,¹ Tribal Nations in those states have historically received notably fewer resources to combat violence against Native people.

The Court granted the state of Oklahoma's petition for writ of certiorari and, in a 5-4 decision, overturned long-established principles of federal Indian law by ruling states have concurrent jurisdiction alongside the federal government to prosecute non-Indians who commit crimes against Indians on Indian lands.

¹18 U.S. Code § 1162

What is at risk?

The implications of the *Castro-Huerta* decision are broad and compounding, reaching far beyond the state of Oklahoma. The rationale used by the Court to manufacture this legal authority calls into question Congress's exclusive role to legislate over Indian affairs, threatening Congress's ability to effectuate the United States' trust duties and obligations to Tribal Nations, and ultimately upsets the balance of powers established in the U.S. Constitution. *Castro-Huerta* sets a dangerous new framework that renders Tribal sovereignty subservient to state sovereignty, where states can claim authority over any domain in which Tribal sovereignty and state interests intersect. NIWRC already sees this framework at work in the following ways:

- **Public Safety and Criminal Jurisdiction**: District Attorneys are already withholding Violence Against Women Act (VAWA) cases from Tribal Nations. Additionally, federal agencies are expressing a dangerous willingness to shift their trust responsibilities to the state. The Court's decision in *Castro-Huerta* creates incentives to starve out and diminish Tribal jurisdiction and authority, while allowing the federal government to skirt its federal trust responsibility. Even Tribal Nations with strong existing relationships with state and county law enforcement are one election or change in administration away from losing that cooperation, creating even more instability in public safety in Indian country. Tribal sovereignty cannot rest on the goodwill of individuals.
- **Tribal Taxation**: Recently, the Oklahoma Supreme Court cited *Castro-Huerta* as the basis for allowing the state to tax a Tribal citizen living and working on her Tribe's Reservation in defiance of hundreds of years of U.S. Supreme Court precedent, concluding that states have no authority to tax the income of Tribal citizens living and working on Tribal lands (*Stroble v. OK Tax Commission*).
- **Child Welfare**: An Oklahoma Supreme Court decision, *In re SJW*, recently applied the Supreme Court's decision in *Castro-Huerta*, a matter concerning criminal law, to a child welfare case in which the Court concluded that Tribal Nations no longer have exclusive jurisdiction over adoption cases concerning their own citizens within the borders of their reservations under the Indian Child Welfare Act (ICWA). The Court reached this decision by citing *Castro-Huerta* despite Congress's clear intent for Tribal Nations to exercise jurisdiction under ICWA to the exclusion of states. It is clear that courts are applying *Castro-Huerta* to override the plain language of statutes passed by Congress.
- **PL 280 Retrocession**: The Supreme Court's decision in *Castro-Huerta* potentially extends state jurisdiction outside of the rubric of PL 280 and creates a question as to whether the mechanisms within PL 280 for retrocession are still available for Tribes. As Professor Carole Goldberg stated during the September 20, 2022, hearing before the Subcommittee on Indian and Insular Affairs, even if a Tribe is currently satisfied with its PL 280 status, the Court's reading and dismissal of Congress's 1968

amendment to PL-280 most likely closes off the option of pursuing retrocession should a Tribe choose to do so.

Why is immediate action needed?

The Supreme Court decided *Oklahoma v. Castro-Huerta* nearly four years ago. Every day, new cases are filed and decided under a framework that subordinates Tribal authority to state power, further calcifying this framework into case law and compounding its damage to Tribal sovereignty. Tribal Nations are at risk of engaging in costly litigation as they attempt to limit the application of *Castro-Huerta* in their own communities, which will likely result in disparate decisions in federal courts across the United States. Courts are already applying *Castro-Huerta* beyond criminal law and using it to override plain statutory language, circumventing Congress's exclusive authority over Indian affairs. The federal government has used it as an excuse to pull back resources from Indian country, resulting in less funding for Tribal law enforcement and public safety, putting Native women and children at risk for further harm. The Court's decision in *Castro-Huerta* has exacerbated the issues that have plagued Indian country for decades. A congressional legislative fix would save Tribes from costly litigation stemming from this decision and would, more importantly, protect Tribal sovereignty.

What is the solution?

A national coalition of Tribal Nations and organizations led by the National Indigenous Women's Resource Center, with the support of the Native American Rights Fund and Muscogee (Creek) Nation, has put forward a legislative proposal: *The Inter-Tribal Legislative Proposal to Improve Public Safety in Indian Country*, rooted in the decade-old findings of the bipartisan Tribal Law and Order Commission, which concluded that empowering Tribal governments is the only viable path to truly increasing public safety and quality of life in Indian country. This proposal includes three core reforms:

1. Reaffirm congressional plenary authority over Indian affairs: Where *Castro-Huerta* circumvents Congress's exclusive authority to legislate over Indian affairs, this legislative proposal reestablishes that Congress, and Congress alone, determines when and whether states may exercise jurisdiction on Tribal lands. By restoring that constitutional balance, the proposal protects the full range of Tribal civil and criminal jurisdiction from state encroachment.
2. Restore full Tribal authority to protect Native people and communities: The current limitations placed on Tribal authority prevent Tribal Nations from protecting both Indians and non-Indians. While the Violence Against Women Act attempted to close some of the legal loopholes where Native women and children continue to be victimized at higher rates than other populations in the United States, gaps still exist in Tribal criminal jurisdiction over non-Indians. This legislative proposal would fully restore the inherent

authority of Tribal Nations to protect everyone living within their borders and prevent abusers from exploiting Tribal communities as safe havens for their crimes, including drug crimes. It also lifts the sentencing caps that currently prevent Tribal courts from imposing sentences proportionate to serious crimes, creating long-overdue parity with state and federal courts.

3. Restore Tribal decision-making under Public Law 280: This legislative proposal adopts Justice Gorsuch's proposed amendment to PL 280, as outlined in his *Castro-Huerta* dissent, preserving the longstanding principle that states may not exercise jurisdiction on Tribal lands without Tribal consent and explicit congressional authorization. Critically, it also preserves the PL 289 Retrocession pathway, ensuring any Tribal Nation that wishes to reclaim jurisdiction from the state retains the legal ability to do so in the future.

What will the legislation *not* do?

This legislative proposal will not dictate or demand any new requirements for Tribes, beyond what they knowingly agree to. This proposal protects the right of each Tribal Nation to make its own decisions. No Tribal Nation is required to exercise any new jurisdiction, and no existing agreements or arrangements with local, state, or county law enforcement agencies will be affected.

How will funding be addressed?

Although this legislative proposal may not include resource allocation, waiting for full funding to be secured before pursuing a legislative fix makes Tribal sovereignty contingent on the federal government's willingness to fulfill funding obligations it has evaded for decades.

History demonstrates that Tribal jurisdiction and funding advance together. When Congress restored Tribal authority to prosecute non-Indians under the Violence Against Women Act in 2013, funding was inadequate. Tribal advocates responded by demanding more funding, and by 2022, Congress increased VAWA funding for Tribes by 500%. Tribal jurisdiction creates the legal foundation from which funding advocacy is possible because, without it, there is no leverage to demand more resources.