



To: House Committee on Natural Resources Republican Members
From: Subcommittee for Indigenous Peoples of the United States Republican Staff; Ken Degenfelder (Ken.Degenfelder@mail.house.gov) and Jocelyn Broman (Jocelyn.Broman@mail.house.gov)
Date: September 19, 2022
Subject: Subcommittee for Indigenous Peoples Oversight Hearing, “*Examining Oklahoma v. Castro-Huerta: The Implications of the Supreme Court’s Ruling on Tribal Sovereignty.*”

The Subcommittee for Indigenous Peoples of the United States will hold a hybrid oversight hearing entitled, “*Examining Oklahoma v. Castro-Huerta: The Implications of the Supreme Court’s Ruling on Tribal Sovereignty*” on **Tuesday, September 20, 2022, at 1:00 p.m. EDT** in 1324 Longworth House Office Building and online via Cisco WebEx.

Republican Members are encouraged to take advantage of the opportunity to participate in person from the hearing room.

Member offices are requested to notify Jocelyn Broman (Jocelyn.Broman@mail.house.gov) **no later than 4:30 p.m. on Monday, September 19, 2022**, if their Member intends to participate in the committee room or remotely from another location. Submissions for the hearing record must be submitted through the Committee’s electronic repository at HNRCDocs@mail.house.gov. Please contact David DeMarco (David.DeMarco@mail.house.gov) should any technical difficulties arise.

I. KEY MESSAGES

- In *Oklahoma v. Castro-Huerta*, the Supreme Court held that states have inherent criminal jurisdiction over non-Indians that committed crimes against Indians within their state territory—including in Indian country within state borders—except where such jurisdiction is preempted by federal law, or the interests of tribal self-government.
- *Castro-Huerta* has a mitigating effect on the Supreme Court’s 2020 decision in *McGirt v. Oklahoma*, where the Court held that the Muscogee (Creek) Reservation was never dis-established, resulting in much of eastern Oklahoma being determined as “Indian country”.
- *Castro-Huerta* changed how criminal jurisdiction had been presumed in Indian country.
- Before *Castro-Huerta*, if a crime was committed by an Indian, or the victim was an Indian, or both perpetrator and victim were Indian, federal or tribal jurisdiction prevailed,

unless a state had explicitly gained jurisdiction through an Act of Congress. After *Castro-Huerta*, there is a presumption that a state has jurisdiction over non-Indian perpetrators, regardless of whether the victim is Indian or not.

- The effect of *Castro-Huerta* is consolidated to Oklahoma currently, due in part because the effect of *McGirt* is in Oklahoma only. However the *Castro-Huerta* decision applicability is nationwide.
- Currently there are no legislative proposals to alter the effect of *McGirt* and *Castro-Huerta* among the Oklahoma tribes and Oklahoma state government. Should Congress act to change the effect of these decisions, it should be done only in coordination with affected states and Indian tribes.

II. WITNESSES

Panel I:

- **The Hon. Bryan Newland**, Assistant Secretary—Indian Affairs, U.S. Department of the Interior, Washington, DC

Panel II:

- **The Hon. Whitney Gravelle**, President, Bay Mills Indian Community, Brimley, MI
- **The Hon. Kevin Killer**, President, Oglala Sioux Tribe, Pine Ridge, SD
- **The Hon. Cheryl Andrews-Maltais**, Chairwoman, Wampanoag Tribe of Gay Head (Aquinnah), Aquinnah, MA
- **The Hon. Teri Gobin**, Chairwoman, Tulalip Tribes, Tulalip, WA
- **Mr. Jonodev Chaudhuri**, Ambassador, Muscogee (Creek) Nation, Okmulgee, OK
- **Ms. Sara Hill**, Attorney General, Cherokee Nation, Tahlequah, OK

Panel III:

- **The Hon. Matt Ballard**, District Attorney, 12th District, Claremore, OK [*Republican Witness*]
- **Mr. Mithun Mansinghani**, Partner, Lehotsky Keller LLP, Oklahoma City, OK [*Republican Witness*]
- **Ms. Carole Goldberg**, Professor of Law, UCLA School of Law, Los Angeles, CA

- **Ms. Bethany Berger**, Professor of Law, University of Connecticut School of Law, Hartford, CT
- **Ms. Mary Kathryn Nagle**, Counsel, National Indigenous Women Resource Center, Lame Deer, MT

III. BACKGROUND

On June 29, 2022, the Supreme Court of the United States (SCOTUS or the Supreme Court) announced its decision in *Oklahoma v. Castro-Huerta*.¹ The Supreme Court held that states have inherent criminal jurisdiction over non-Indians that committed crimes against Indians within their state territory (including in Indian country within the state’s borders), except where such jurisdiction is preempted by 1) federal law, or 2) the interests of tribal self-government.² *Castro-Huerta* changed how many legal practitioners and experts viewed how jurisdiction was established in Indian country.

This case follows the landmark decision of *McGirt v. Oklahoma*, decided in 2020, which held that Congress had never disestablished the Muscogee (Creek) Nation’s Reservation, and therefore the land remains “Indian country” for the purposes of criminal jurisdiction under the *Major Crimes Act* (18 U.S.C. 1153).³ The direct effect of this case was to overturn Jimcy McGirt’s conviction of child sexual assault from an Oklahoma state court, and resulted in a retrial and conviction in federal court.⁴ The decision also changed the current understanding of what land was Indian country in Oklahoma and has resulted in Oklahoma courts reaffirming the reservations of the Cherokee, Chickasaw, Choctaw, and Seminole nations.⁵ It is believed that *Castro-Huerta* was decided the way it was partially because of the recent impacts of the *McGirt* decision.

Both decisions have had strong reactions from tribal communities, and the effects of the rulings are playing out day-to-day in Oklahoma. While both *McGirt* and *Castro-Huerta* may have implications for other states, the most immediate impact has been in Oklahoma. A *Tulsa World Herald* analysis found that out of 235 inmates released from Oklahoma custody after the *McGirt* decisions, approximately 71 percent had either been charged in

¹ *Oklahoma v. Castro-Huerta*, 597 U.S. ____ (2022). Slip Op. available at https://www.supremecourt.gov/opinions/21pdf/21-429_8o6a.pdf

² *Id.* Slip Op. at 21-22.

³ *McGirt v. Oklahoma*, 591 U.S. ____ (2000). Slip Op. available at https://www.supremecourt.gov/opinions/19pdf/18-9526_9okb.pdf

⁴ Curtis Killman, “Man at center of McGirt landmark legal case sentence to 3 life sentences.” *Tulsa World Herald*. Aug. 26, 2021. https://tulsa-world.com/news/state-and-regional/crime-and-courts/man-at-center-of-mcgart-landmark-legal-case-sentenced-to-3-life-sentences/article_f8109f96-0514-11ec-ada6-7b510f48e987.html

⁵ See *Hogner v. State*, __ P.3d __, 2021 WL 958412 (Mar. 11, 2021) (Cherokee Reservation); *Bosse v. State*, __ P.3d __, 2021 WL 4704316 (Okla. Crim. App. Oct. 7, 2021) (Chickasaw Reservation); *Sizemore v. State*, 485 P.3d 867 (Okla. Crim. App. 2021) (Choctaw Reservation); *Grayson v. State*, 485 P.3d 250 (Okla. Crim. App. 2021) (Seminole Nation).

federal or tribal courts or held on unrelated charges.⁶ Approximately 68 of the 235 inmates released from prison did not have federal or tribal charges filed against them.⁷

History of Criminal Jurisdiction in Indian Country

“Indian country” is a legal term of art that generally refers to all lands within a federal Indian reservation, all dependent Indian communities, and all tribal member allotments.⁸ “Indian” is also a legal term of art for federal and tribal criminal jurisdictional purposes, that generally refers to an individual who is considered a member of a federally recognized tribe.⁹ These definitions assist in determining which entity—state, tribal, or federal—can exercise jurisdiction when matters involve tribes, tribal members, and non-Indians.

Congress and the courts have both waded into the question of who has jurisdiction in Indian country. Congress has plenary power over Indian affairs and legislates under that authority.¹⁰ U.S. federal courts have supplemented and interpreted Congress’s actions or inactions in specific cases as they have emerged.

Decided in 1832, *Worcester v. Georgia* was the first instance where the Supreme Court contemplated the effect of federal law on the jurisdiction over Indians on Indian land. In *Worcester*, the Supreme Court held that “Georgia state law had no force in the Cherokee Nation because the Cherokee Nation ‘is a distinct community occupying its own territory.’”¹¹ After the *Worcester* decision, Congress passed the *General Crimes Act* in 1817¹² and the *Major Crimes Act* in 1885.¹³ Both laws establish federal jurisdiction in Indian country and enabled federal law to apply in Indian country and to Indians. In general, tribal jurisdiction has operated concurrently with federal jurisdiction, unless Congress (or the courts) have preempted it.

The Supreme Court has narrowed these general grants of federal and tribal jurisdiction over time. In *United States v. McBratney*, the Supreme Court held that states have exclusive jurisdiction over crimes in Indian country involving non-Indians as both the perpetrator and the victim.¹⁴ In *Oliphant v. Suquamish Indian Tribe*, the Supreme Court held that tribal courts do not have criminal jurisdiction over non-Indian offenders.¹⁵ Congress has changed

⁶ Curtis Killman, “Most released due to McGirt have been charged either federally or tribally, Tulsa World analysis finds.” *Tulsa World Herald*. Jan. 9, 2022. https://tulsa-world.com/news/local/crime-and-courts/most-released-due-to-mcgirt-have-been-charged-either-federally-or-tribally-tulsa-world-analysis/article_96e94b7e-6f30-11ec-992c-9f9ace817196.html

⁷ *Id.*

⁸ 18 U.S.C. §1151. For an overview discussion of types of tribal lands see: CRS “Tribal Lands: An Overview” Oct. 14, 2021. <https://www.crs.gov/reports/pdf/IF11944>

⁹ Dept. of Homeland Security, Federal Law Enforcement Training Centers “Indian Law Handbook” 2nd Ed. March 2017. p. 57-58. available at: <https://www.fletc.gov/sites/default/files/2017%20Indian%20Law%20Handbook.pdf>. (hereinafter “FLETC Indian Law Handbook, 2017”)

¹⁰ U.S. Const. Art. I, Sec. 8 and Art. II, Sec. 2 (historically)

¹¹ *Castro-Huerta*, Slip. Op. at 5 (quoting *Worcester v. Georgia*, 6 Pet. 515, 516. (1832)).

¹² 18 U.S.C. 1152 (also called the *Indian Country Crimes Act*).

¹³ 18 U.S.C. 1153.

¹⁴ *United States v. McBratney*, 104 U.S. 621 (1881)

¹⁵ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

tribal jurisdiction over non-Indian offenders since *Oliphant* for certain crimes, for example, under the 2022 reauthorization of the *Violence Against Women Act* (VAWA).¹⁶ Generally, Congress requires that tribal courts protect certain due process rights for tribal jurisdiction to be extended to non-Indians.¹⁷

Congressional Grants of Indian Country Jurisdiction to States and Public Law 280

Congress has acted to grant certain state criminal jurisdiction in Indian country. Prior to 1953, Congress granted partial jurisdiction in Indian country to California, New York, Iowa, Kansas, North Dakota, Texas, and Connecticut.¹⁸ When Congress passed Public Law 83-280 (commonly referred to as Public Law 280 or P.L. 280) several states (Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin) were required to assume jurisdiction over crimes occurring in Indian country, with some exceptions.¹⁹ This meant the federal government would not exercise federal jurisdiction over crimes in Indian country and the state's law and jurisdiction would prevail, unless the crime involved only Indians within a tribe's reservation.²⁰

Public Law 280 also provided a process for other states to apply state criminal jurisdiction in Indian country. Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington all took advantage of this process.²¹ South Dakota failed to change state law that would allow them to be a Public Law 280 state.²² Congress has acted since Public Law 280 was enacted to enable federal jurisdiction under some circumstances in Public Law 280 states. For example, in the *Tribal Law and Order Act*, Congress allowed tribal governments to request that the Department of Justice reassume federal jurisdiction over that tribe's Indian country.²³ That would allow the federal government to prosecute cases under the *General Crimes Act and Major Crimes Act* within a Public Law 280 state.

Prior to *Castro-Huerta*, if a crime was committed by an Indian, or the victim was an Indian, or both perpetrator and victim were Indian, federal or tribal jurisdiction prevailed, unless a state had explicitly gained jurisdiction through an act of Congress, like through Public Law 280. After *Castro-Huerta*, there is a presumption that the state has jurisdiction over non-Indian perpetrators, regardless of whether the victim is Indian or not.

Considerations for Congress

¹⁶ P.L. 117-103, Division W "Violence Against Women Act Reauthorization of 2022" Sec. 804. VAWA grants tribal courts jurisdiction over non-Indian offenders for under certain covered crimes, like domestic violence, child violence, and stalking.

¹⁷ P.L. 90-284, Sec. 202 (amended through P.L. 117-103 (2022)), requiring certain protections of rights be applied by tribes exercising self-government.

¹⁸ FLETC Indian Law Handbook, 2017. p. 65-66.

¹⁹ FLETC Indian Law Handbook, 2017. p. 66.

²⁰ *Id.*

²¹ *Id.* at 67-69

²² United States Attorney's Office, District of South Dakota "Indian Country" [https://www.justice.gov/usao-sd/indian-](https://www.justice.gov/usao-sd/indian-country#:~:text=South%20Dakota's%20enabling%20legislation%20and,non%2DPublic%20Law%20280%20state.)

[country#:~:text=South%20Dakota's%20enabling%20legislation%20and,non%2DPublic%20Law%20280%20state.](https://www.justice.gov/usao-sd/indian-country#:~:text=South%20Dakota's%20enabling%20legislation%20and,non%2DPublic%20Law%20280%20state.)

²³ P.L. 111-21, Sec. 221.

Castro-Huerta confirms states' inherent ability to prosecute crimes committed by non-Indians against Indians in Indian country. This could have implications for congressional legislation involving Indian country jurisdiction or definitions, including future reauthorizations of VAWA or other legislation dealing with tribal courts. Congress has the authority to explicitly codify either a presumption or an actual grant of state criminal jurisdiction over crimes dealing with Indians that are either charged as perpetrators or are victims of a crime.

Congress could also consider the fiscal implications of more land being considered Indian country and increases in criminal case loads for states and tribes. At an August 4, 2022, oversight hearing in the Senate Judiciary Committee, FBI Director Christopher Wray asked for more support specifically in the FBI Oklahoma City field office in the wake of *McGirt*, stating that criminal cases involving Native Americans increased from approximately 50 cases to thousands.²⁴

McGirt's reaffirmation of the Muscogee (Creek) Reservation may also have implications for tribal sovereignty over tribal land for areas outside of criminal jurisdiction. Indian country as a legal term is used beyond just criminal law. Legal scholars are opining on implications for regulatory law, civil law, and property law.²⁵ Questions about taxation on the newly reaffirmed Oklahoma tribes' reservations have also been raised.²⁶

²⁴ Written Statement of Christopher A. Wray, Director, Federal Bureau of Investigation before the U.S. Senate, Committee on the Judiciary. Aug. 4, 2022. p. 9 <https://www.judiciary.senate.gov/imo/media/doc/Testimony%20-%20Wray%20-%202022-08-04.pdf>.

²⁵ See, e.g. Sarah Roubidoux Lawson and Megan Powell "Unsettled Consequences of the McGirt Decision" *The Regulatory Review* Apr. 1, 2021. <https://www.theregreview.org/2021/04/01/lawson-powell-unsettled-consequences-mcgirt/>

²⁶ Patrick B. McGuigan, "Impact of 'McGirt v. Oklahoma' decision steadily expands into areas beyond criminal law" *The Oklahoma City Sentinel*. Nov. 30, 2021. https://www.city-sentinel.com/townnews/law/impact-of-mcgirt-v-oklahoma-decision-steadily-expands-into-areas-beyond-criminal-law/article_2940c2b4-51f8-11ec-87d6-e7f06880018c.html