Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

SCOTUS Bolsters State Criminal Jurisdiction on Tribal Lands

July 1, 2022

Rejecting the view that states lack criminal jurisdiction on tribal reservations unless Congress specifically grants such jurisdiction, on June 29, 2022, the Supreme Court announced in *Oklahoma v. Castro-Huerta* that "the default is that States have criminal jurisdiction in Indian country unless that jurisdiction is preempted." In practice, this decision will allow Oklahoma—and likely other states that choose to follow Oklahoma's lead—to prosecute crimes involving non-Indian perpetrators within reservations and other Indian lands, even when the victims are members of federally recognized tribes.

Legal Background

In the 2020 case of *McGirt v. Oklahoma*, the Supreme Court decided that land reserved for a tribe in Oklahoma remained "Indian country" for criminal jurisdiction purposes. Explaining that "[s]tate courts generally have no jurisdiction to [prosecute] Indians for conduct committed in 'Indian country'" absent congressional authorization, the Court overturned the petitioner's Oklahoma state conviction.

In the wake of *McGirt*, the State of Oklahoma filed dozens of petitions for certiorari asking the Supreme Court to reconsider its ruling and to address additional jurisdictional questions. The Court ultimately granted certiorari in *Oklahoma v. Castro-Huerta* to answer the question of whether states have inherent authority to prosecute *non-Indians*—that is, persons who are not members of a federally recognized tribe—who commit crimes against Indians in Indian country (though the Court declined Oklahoma's invitation to consider overruling *McGirt* outright).

The Majority Opinion

In a 5-4 decision, the *Castro-Huerta* Court concluded that states have inherent criminal jurisdiction over non-Indians, except where such jurisdiction is preempted by (1) federal law or (2) the interests of tribal self-government. Writing for the majority, Justice Brett Kavanaugh acknowledged that this conclusion appears contrary to the holding of one of the foundational federal Indian law cases, *Worcester v. Georgia*. That 1832 case held that Georgia state law had no force within the Cherokee Nation's boundaries. However, in *Castro-Huerta* the Court determined that subsequent judicial holdings had eroded *Worcester*

Congressional Research Service
https://crsreports.congress.gov
LSB10778

v. Georgia, including "the leading case in the criminal context" of *United States v. McBratney*, an 1882 case upholding Colorado state jurisdiction over crimes committed by non-Indians against non-Indians on reservation lands. *McBratney* relied on the "equal footing" doctrine to conclude that Congress's grant of statehood established state criminal jurisdiction over all non-Indians within state boundaries regardless of tribal land status. *McBratney*, however, did not involve a "question . . . as to the punishment of crimes committed by or against Indians." Nonetheless, the *Castro-Huerta* Court invoked *McBratney*—which the Court said "remains good law"—as establishing a principle that "unless preempted, States have jurisdiction over crimes committed in Indian country."

The *Castro-Huerta* Court then laid out two separate principles by which state jurisdiction could be preempted: (1) "by federal law under ordinary principles of federal preemption"; and (2) when such jurisdiction would "unlawfully infringe on tribal self-government." As to ordinary federal preemption, the defendant in *Castro-Huerta* argued that both the General Crimes Act (18 U.S.C. § 1152) and Public Law No. 83-280 (often called "Public Law 280") preempt the Oklahoma criminal laws. The *Castro-Huerta* Court rejected both of these preemption arguments, explaining that the General Crimes Act extended the federal laws applicable in federal enclaves to Indian country but did not expressly *exclude* state law from also applying. Although federal law in federal enclaves is exclusive, meaning that states cannot prosecute violations of state law within those enclaves, the *Castro-Huerta* Court determined that the General Crimes Act did not clearly extend that exclusivity to Indian country. Accordingly, the Court found the General Crimes Act did not preempt Oklahoma from prosecuting its state criminal laws in Indian country.

The Court undertook a similar examination of Public Law 280: even though Public Law 280 provided certain states (other than Oklahoma) with criminal jurisdiction over crimes by and against Indians, which would seem unnecessary if state jurisdiction flowed inherently from statehood, the *Castro-Huerta* Court focused on the lack of an express preemption statement. Because Public Law 280 "contains no language that preempts States' civil or criminal jurisdiction," it could not preempt Oklahoma's exercise of state criminal jurisdiction.

The Court next examined the second category of possible "preemption" it identified: infringement on tribal self-government. As the Court framed it, the question of whether state jurisdiction would infringe on tribal self-government involves a "balancing test" applied to "tribal interests, federal interests, and state interests." This balancing test was adapted from *White Mountain Apache Tribe v. Bracker*, a 1980 tax case evaluating whether Arizona license and fuel taxes were preempted from application to a non-Indian entity's activities on a reservation. In the *Castro-Huerta* Court's view, state criminal jurisdiction over non-Indian defendants neither limited tribal jurisdiction nor subjected tribes or tribal members to state law. Nor, said the Court, would state jurisdiction impede the federal interest in protecting Indian victims because state prosecution would supplement, not supplant, federal authority. Thus, the tribal and federal interests did not outweigh Oklahoma's "strong sovereign interest" in public safety and criminal justice.

Justice Gorsuch's Dissent

Justice Neil Gorsuch, who wrote the majority opinion in *McGirt* just two years before *Castro-Huerta*, authored a dissent that was joined by Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan. Justice Gorsuch wrote that *Worcester v. Georgia* established a "foundational rule": "Native American tribes retain their sovereignty unless and until Congress ordains otherwise." Criticizing the majority opinion as existing "as if by oracle, without any sense of the history . . . and unattached to any colorable legal authority," the dissent accused the majority of trampling "one of the most essential attributes" of tribes' sovereignty—the authority to be the sole source of punishment for crimes by or against one's citizens. In the dissent's view, the "Court has no business usurping congressional decisions about the appropriate

balance between federal, tribal, and state interests," and it suggested that Congress could take action to prevent the majority decision from "sow[ing] needless confusion across the country."

Considerations for Congress

Castro-Huerta appears to broaden states' ability to prosecute crimes committed against Indians in Indian country. In Oklahoma, where *McGirt* led to a shift in prosecutorial burdens from the state to the tribes and federal government, *Castro-Huerta* may presage a shift in the opposite direction. As an initial matter, Congress could reassess near-term appropriations whose budget justifications relied on predictions about surging federal caseloads in Indian country. In the longer term, if Congress wishes to codify either a presumption or an actual grant of state criminal jurisdiction over general crimes committed by non-Indians against Indians in Indian country, it could consider legislation to do so.

If Congress seeks to foreclose or restrict states' exercise of criminal jurisdiction in Indian country, *Castro-Huerta* suggests that an express preemption statement may be needed. Congress could consider amending relevant existing statutes or drafting standalone legislation to establish preemption. For example, the General Crimes Act could be amended to state that the federal laws it references are exclusive of state criminal law in Indian country; or Congress could amend Public Law 280 to say that states lack criminal jurisdiction over crimes by or against Indians in Indian country except where such jurisdiction has been expressly granted by Congress. If Congress were to choose that path, it could also maintain, expand, or eliminate the current requirements that states seeking additional jurisdiction in Indian country must, among other things, obtain tribal consent as outlined in 25 U.S.C. § 1321.

Author Information

Mainon A. Schwartz
Legislative Attorney

Disclaimer