

Congress Should Fix High Court's Tribal Sovereignty Error

By **Sarah Murray, Ryan Smith and Bella Sewall Wolitz** (*Law360* - July 11, 2022)

The U.S. Supreme Court's decision in *Oklahoma v. Castro-Huerta* is being rightly decried as undermining tribal sovereignty.

In *Castro-Huerta*, the Supreme Court abandoned years of precedent and clear congressional direction, holding that the federal government and the state of Oklahoma have concurrent jurisdiction to prosecute crimes committed by non-Native Americans against Native Americans in Indian country.

Writing for the majority, Justice Brett Kavanaugh emphasized the court's holding in terms that fundamentally erode tribal sovereignty: "To be clear, the Court today holds that Indian country within a State's territory is part of a State, not separate from a State." This statement underscores the court's view that states have jurisdiction over Indian Country in the absence of specific rules enacted by Congress.

This is a major departure from well-established federal Native American law and is an attack on tribal sovereignty. Indeed, in his dissenting opinion, Justice Neil Gorsuch stated:

Truly, a more ahistorical and mistaken statement of Indian law would be hard to fathom. ... This Court unravels [Oklahoma's courts] decisions, defies Congress's statutes requiring tribal consent, offers its own consent in place of the Tribe's, and allows Oklahoma to intrude on a feature of tribal sovereignty recognized since the founding.

While *Castro-Huerta* dealt a blow to tribal sovereignty, tribes have tools to respond and repair the damage done by the majority opinion. There are two viable options for tribes, neither of which is mutually exclusive: (1) federal legislation to clarify tribal jurisdiction and (2) intergovernmental agreements with state and local authorities that address criminal jurisdiction.

As a general introduction, it is worth briefly considering that the concept of sovereignty is multilayered.

We speak of states as sovereign even though federal law in many areas, including relations with Indian tribes, preempts state law. In a global world, no sovereign is truly completely isolated from all other sources of legal, economic and military pressure points.

It is extremely problematic when Justice Kavanaugh pronounces that Indian Country is part of a state, since states have often used their powers to try to assert jurisdiction at the expense of tribal members and in favor of non-Native Americans.

That said, tribal sovereignty does not depend on total separation from surrounding sovereigns. The options discussed below can limit the damage from this decision and take steps to preserve and strengthen tribal sovereignty.



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Federal Legislative Responses to Protect Tribal Sovereignty

As Justice Gorsuch points out in his dissent, Congress can, and should, reverse the direct holding of the Castro-Huerta decision by amending Public Law 280 to clarify that a state lacks criminal jurisdiction over crimes against Native Americans in Indian Country unless a state complies with federal procedures for obtaining tribal consent and, where necessary, amends its own constitution or statutes.

This legislative fix would at least restore the previous balance between state, federal and tribal authorities in the realm of criminal law. States like Oklahoma that want more jurisdiction within Indian Country could seek their own separate fixes or follow the procedures in Public Law 280 for obtaining enhanced jurisdiction over criminal prosecutions.

Although ultimately a broader fix to the Major Crimes Act and the court's prior decisions regarding tribal criminal jurisdiction, namely *Oliphant v. Suquamish Indian Tribe* in 1978, are required to address fully systemic failures related to justice and criminal jurisdiction in Indian Country, such a sea change is not on the immediate horizon. Targeted solutions to the immediate attack on tribal sovereignty are more realistic and can restore the status quo.

That said, given the views of the majority of the Supreme Court on tribal sovereignty, tribal leaders could consider a broader fix to protect tribal sovereignty in other areas beyond criminal jurisdiction such as taxation, commercial activities and management of natural resources.

Tribal civil jurisdiction over non-Native Americans is less clear than it could or should be. There are many balancing tests weighing whether a governmental program is important for tribal self-government that create uncertainty over when a tribe can regulate activities such as hunting and fishing, or impose taxes on non-Native Americans doing business in Indian country.

Indeed, Justice Gorsuch noted in his dissent, "In the civil context, Congress has not always provided comprehensive rules allocating jurisdiction. ... But even in the civil context this Court has proceeded against the backdrop of tribal sovereignty." With Castro-Huerta, that backdrop likely changes. Clarifying legislation could help dispel some uncertainty.

Achieving a reasonable degree of agreement among tribal leaders on how to achieve such a jurisdictional fix would be a challenge. Tribes are no more monolithic than any other group of sovereigns and will bring different perspectives and experiences to the table.

But the so-called Duro fix, which rejected a Supreme Court decision that had tried to remove criminal jurisdiction of tribal courts over Native Americans who are members of different tribes, is a potential road map, as is the recent Tribal Law and Order Act, which recognized the right of tribes to prosecute non-Native Americans for certain crimes involving violence against women.

Another precedent is the Indian Gaming Regulatory Act, because it developed means for federal and tribal regulation of Native American gaming that was acceptable to Congress and states in the wake of the Supreme Court's 1987 decision in *California v. Cabazon Band of Mission Indians*.

The Indian Civil Rights Act is another example of Congress working with tribes to balance

concerns about the exercise of tribal sovereignty with due process. Congressional action can help to guide future courts away from the rocky shoals of distrust and ambiguity that produced Castro-Huerta.

Jurisdictional Agreements

Separately, or perhaps in tandem with a larger federal legislative fix or a series of such fixes, tribes could work with state and local authorities on agreements under which law enforcement authority could be shared or divided in ways that make sense in light of local conditions.

Oklahoma, the state that gave rise to the Castro-Huerta decision by arguing that the federal government was not adequately prosecuting crimes by non-Native Americans against Native Americans within Oklahoma Indian Country, does not speak for all states in seeking to play an active role in Indian Country. Many states are glad to have federal and tribal authorities take on responsibilities that can be difficult and expensive.

The federal government could provide encouragement and incentives for these agreements through pilot or grant programs that encourage negotiated agreements. Tribal advocacy organizations could help develop template agreements and broadly share best practices for these agreements. Done right, these agreements help to reinforce tribal sovereignty.

The Path Ahead

While this decision focuses on criminal jurisdiction, tribal jurisdiction over other areas — from taxation to zoning to fishing — could be further eroded unless tribal leaders and those supporting tribal sovereignty develop a vigorous response to this decision.

It is possible for tribes and the U.S. in its role as trustee for tribes to successfully pursue negotiated or political solutions that would effectively overrule Castro-Huerta and stop the current Supreme Court from compounding its error in other contexts.

Ultimately, as Justice Gorsuch put it, the majority decision in Castro-Huerta is "an ahistorical and mistaken statement of Indian law" and "[o]ne can only hope the political branches and future courts will do their duty to honor this Nation's promises even as we have failed today to our own." Congress can and should fix this historical and profound error.

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