



## U.S. Department of Justice

Office of Tribal Justice

Room 2318, RFK Main Justice Building  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530-0001

(202) 514-8812  
OTJ@usdoj.gov

### **UPDATED U.S. DEPARTMENT OF JUSTICE TRIBAL CONSULTATION ON POSSIBLE LEGISLATION TO ADDRESS THE SUPREME COURT'S DECISION IN *OKLAHOMA V. CASTRO-HUERTA***

January 3, 2025

Dear Tribal Leader,

The Department of Justice (Department) and the Department of the Interior held joint listening sessions on September 26-27, 2022, to discuss with Tribal representatives the implications of the *Castro-Huerta* decision and the impact on Tribal communities. During those discussions and in subsequent meetings Tribes and Tribal advocates have called on the executive branch to develop a legislative proposal that would restore the balance of jurisdiction that was in place before the Supreme Court's decision in *Oklahoma v. Castro-Huerta*. We are pleased to invite you to participate in a virtual government-to-government consultation on whether the Department should support such a proposal and, if so, what form the proposed legislation should take.

A framing paper outlining issues for discussion and providing background information follows this letter. The Department initially announced consultation sessions for January 9 and 10, 2025, but must cancel the January 9 session in observance of the passing of former President Carter. The Department has added additional sessions to ensure sufficient opportunities to participate for those who wish to do so. Please [register](#) for any or all of the following sessions:

**Friday, January 10, 2025, 3-5pm Eastern**

**Wednesday, February 5, 2025, 3-5pm Eastern**

**Thursday, February 6, 2025, 3-5pm Eastern**

Please note that you will be asked to provide your name, professional affiliation, and email when you [register](#). If you have already registered and wish to update your submission you may either use the registration link or email OTJ@usdoj.gov with your updated registration request. These sessions will be closed to the press.

We also welcome your written comments by March 6, 2025, which can be submitted either by email to OTJ@usdoj.gov or by mail to Office of Tribal Justice, U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001.

If you have any questions regarding this consultation or need any accommodation to participate in either session, please contact OTJ at [OTJ@usdoj.gov](mailto:OTJ@usdoj.gov), or by phone at 202-514-8812. We look forward to your participation in this important Nation-to-Nation consultation.

Sincerely,

*Daron T Carreiro*

Daron T. Carreiro  
Acting Director  
Office of Tribal Justice

**U.S. DEPARTMENT OF JUSTICE  
TRIBAL CONSULTATION ON POSSIBLE LEGISLATION TO ADDRESS THE  
SUPREME COURT’S DECISION IN *OKLAHOMA V. CASTRO-HUERTA***

**FRAMING PAPER**

**BACKGROUND**

On June 29, 2022, the Supreme Court held that the General Crimes Act (18 U.S.C. § 1152) does not preempt or otherwise limit a state’s inherent criminal jurisdiction to prosecute non-Indian defendants who commit crimes against Indian victims in Indian country, and that states thus have concurrent jurisdiction over such crimes. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022). The decision upended nearly 200 years of settled understanding and rejected the United States’ position that, under the General Crimes Act, federal jurisdiction is exclusive of state jurisdiction in Indian country over crimes committed against Indian victims unless Congress has statutorily provided for state authority.<sup>1</sup> The Court’s decision was not limited to the State of Oklahoma and “applies throughout the United States.”<sup>2</sup>

Congress, exercising its plenary power over Indian affairs, could address this decision by legislation.<sup>3</sup> Unless Congress acts, however, many States may now generally exercise jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country without any authorization from Congress or any consent from the governing Tribal nations.

**2022 LISTENING SESSION**

The Department of Justice (Department) and the Department of the Interior (DOI) held joint listening sessions on September 26-27, 2022, to discuss with Tribal representatives the implications of the *Castro-Huerta* decision and the impact on Tribal communities. More than 500 Tribal leaders and other Tribal representatives participated in these discussions. Several clear themes emerged from our discussions and in analyzing written comments:

1. Tribes and Tribal advocates viewed this decision as an attack on Tribal sovereignty.
2. Tribes and Tribal advocates expressed immediate concerns about the confusion that this decision injects into an already complex jurisdictional and operational landscape.
3. Tribes and Tribal advocates expressed significant concerns about the long-term implications of this decision and had already seen signs that some States will rely on this decision to interfere in Tribal operations and functions outside of criminal jurisdiction.
4. Tribes and Tribal advocates called for a legislative fix, although opinions differed at the time as to the ideal timing and scope of such legislation.
5. Tribes and Tribal advocates also called for guidance from federal agencies clarifying relevant processes and protocols post-*Castro-Huerta*.

---

<sup>1</sup> Br. for United States, *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022), available at [https://www.supremecourt.gov/DocketPDF/21/21-429/220251/20220404203500611\\_21-429bsacUnitedStates.pdf](https://www.supremecourt.gov/DocketPDF/21/21-429/220251/20220404203500611_21-429bsacUnitedStates.pdf).

<sup>2</sup> See *Castro-Huerta*, 142 S. Ct. at 2504 n.9.

<sup>3</sup> See *id.* at 2493-2494; see also *id.* at 2527 (Gorsuch, J., dissenting).

Several Tribes also reported that *Castro-Huerta* has negatively impacted their cross-deputization, cross-jurisdictional, and other cooperative law enforcement agreements with states, including by weakening the Tribes' bargaining positions in those agreements, which prior to *Castro-Huerta* were an important part of successful law enforcement and criminal justice schemes on many reservations.

### **PROPOSED LEGISLATIVE FIXES**

As noted earlier, Congress can address criminal jurisdiction in Indian country by legislation. The Department of Justice is considering whether to support a legislative proposal to restore the previous balance of jurisdiction in Indian country and, if so, what form that legislation should take. Appendix A provides two draft proposals for Tribal review and consideration. Proposal 1 was drafted by the Department. Proposal 2 was drafted and adopted by the National Congress of American Indians (NCAI) with a proposed Department edit highlighted in Appendix A.

Both proposals in Appendix A make clear that States lack jurisdiction over crimes within Indian country committed by or against Indians, unless expressly authorized by federal statute. Both proposals also state that unless otherwise authorized by federal statute, States must (1) ensure compliance with the procedures for obtaining Tribal consent of the impacted Indian Tribe as outlined in 25 U.S.C. § 1321, and (2) where applicable, comply with 25 U.S.C. § 1324, before a State may exercise such jurisdiction. Proposal 1 contains two additional clarifications. First, Proposal 1 expressly clarifies that the provision does not impact federal or Tribal jurisdiction in Indian country. Second, Proposal 1 makes clear that the provision would apply prospectively.

In addition to differences in potential language outlined above, we note that there have been differing views regarding where such a legislative proposal should be located within the U.S. Code. Potential placements include within the Indian Civil Rights Act of 1968 (25 U.S.C. § 1321 et seq.), within Public Law 82-280 (18 U.S.C. § 1162), or elsewhere within Title 18. The Department is considering where such a proposed amendment should be placed; the proposals in Appendix A consider two different placements, but the Department is interested in hearing from Tribes about these options and about other ideas.

### **QUESTIONS FOR DISCUSSION**

The following questions are not intended to limit discussion; the Department welcomes any question or topic of interest to participants.

1. Is legislation addressing the *Castro-Huerta* decision necessary and/or helpful? What positive and/or negative impacts have you seen in the wake of *Castro-Huerta*? Do you have any proposals or suggestions to address any public safety concerns that may arise if state resources are not available to supplement federal and tribal resources?
2. What are your reactions to the legislative proposals included at Appendix A?
  - a. Are the proposals clear?
  - b. Do the proposals sufficiently address your Tribal community's concerns?
  - c. Are there additional points or clarifications that you would like to see included in either proposal?
3. If the Department supports such legislation, where would you recommend it be placed within the U.S. Code?

4. Have states' responses to *Castro-Huerta* implicated Tribes' efforts to exercise special Tribal criminal jurisdiction, as provided in the Violence Against Women Act (VAWA)? Has any failure to coordinate posed an obstacle to Tribes that are seeking to exercise VAWA's special Tribal criminal jurisdiction?
5. How has *Castro-Huerta* affected state actions --- are states prosecuting cases that they did not previously prosecute? Are states sharing information and coordinating as to the appropriate venue for particular enforcement actions?
6. How are states handling enforcement when a Tribal member produces Tribal identification?
7. Should the Department take any further actions to address issues that have arisen as a result of the *Castro-Huerta* decision?

## APPENDIX A: DRAFT LEGISLATIVE PROPOSALS

The following proposals are provided for discussion purposes only. In addition to providing feedback on the following draft legislation, consultation participants are welcome to submit additional proposals.

### **Proposal 1 (drafted by the Department):**

Title IV of Public Law 90–284 (commonly known as the “Indian Civil Rights Act of 1968”) (25 U.S.C. 1301 et seq.) is amended by adding at the end the following:

“SEC. 407. REQUIREMENTS FOR STATE CRIMINAL JURISDICTION IN INDIAN COUNTRY.

(a) Except as otherwise authorized pursuant to federal statute, a State shall not have jurisdiction over criminal offenses committed by or against an Indian in Indian country, as defined in section 1151 of Title 18, except to the extent that the State—

(1) complies or has complied with the procedures to obtain the consent of the applicable Indian tribe, as described in section 401(a); and

(2) as applicable, amends or has amended the constitution or statutes of the State pursuant to section 404.

(b) Nothing in this section shall alter the scope of federal jurisdiction or authority or Tribal jurisdiction or authority anywhere in Indian country, as defined in section 1151 of Title 18, or in the Village of the Indian Tribe in Alaska, as provided in section 1305 of Title 25.

(c) This section applies prospectively and does not extinguish any state-law criminal liability previously incurred.

### **Proposal 2 (Drafted by the National Congress of the American Indians with proposed Department edits in italics):**

Section 2 of Public Law 82–280, as amended and codified at 18 U.S.C. 1162, is hereby further amended by adding at the end thereof the following new subsection (e):

(e) Lack of State Jurisdiction Absent Tribal Consent. Except as provided in subsection (a) of Title 18, Section 1162, *or otherwise pursuant to federal statute*, a State lacks criminal jurisdiction over crimes by or against Indians in Indian Country, unless the State complies with the procedures to obtain Tribal consent outlined in 25 U. S. C. § 1321, and, where necessary, amends its constitution or statutes pursuant to 25 U. S. C. § 1324.