

Oklahoma v. Castro-Huerta
Listening Sessions
Summary Report
November 29, 2022

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I. Introduction

On September 26 and 27, 2022, the Department of Justice (DOJ) and the Department of the Interior (DOI) hosted telephonic listening sessions to hear from Tribal leaders, advocates, academics, and community members regarding the impacts of the June 29, 2022, Supreme Court decision in *Oklahoma v. Castro-Huerta* on Tribal communities.

This Report summarizes the comments received during those listening sessions. DOJ and DOI continue to consider all comments received and the comments will inform any action taken by DOJ and DOI in response to the *Castro-Huerta* decision.

II. Background

In 2015, the State of Oklahoma charged Victor Manuel Castro-Huerta, a non-Indian person living on the Cherokee Nation reservation in Oklahoma, with criminal child neglect. The victim was a member of the Eastern Band of Cherokee Indians. After his conviction in state court, Castro-Huerta appealed the decision and, while his appeal was pending, the Supreme Court issued *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), holding that Congress had never disestablished the Muscogee (Creek) Nation reservation in eastern Oklahoma and that, as a result, the State of Oklahoma lacked jurisdiction to prosecute crimes committed by or against Indians within the reservation.¹

In the wake of the *McGirt* decision, Castro-Huerta challenged his conviction, arguing that the State of Oklahoma lacked criminal jurisdiction to prosecute him for his offense against an Indian victim in Indian country. The Oklahoma Court of Criminal Appeals agreed.² The State then asked the Supreme Court to review the decision, arguing that the State had inherent jurisdiction to prosecute non-Indian defendants who commit crimes against Indian victims in Indian country. The Supreme Court granted the State's request to review the ruling.

On June 29, 2022, the Supreme Court held that the General Crimes Act (18 U.S.C. § 1152) does not preempt or otherwise limit state criminal jurisdiction to prosecute non-Indian defendants who commit crimes against Indian victims in Indian country. In so holding, the Court rejected the United States' longstanding 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 delegated such authority.³ The Court also made clear that its

¹ Based on the *McGirt* decision, the Oklahoma Court of Criminal Appeals later concluded that the Cherokee Nation reservation also remained intact and that the State of Oklahoma similarly lacked jurisdiction to prosecute crimes committed by or against Indians within that reservation. *Hogner v. State*, 2021 OK CR 4, ¶ 18, 500 P.3d 629, 635.

² *Castro-Huerta v. State*, No. F-2017-1203, 2021 WL 8971915 (Apr. 29, 2021).

³ Br. for United States, No. 21-429, *Oklahoma v. Castro-Huerta* (filed April 2022), available at https://www.supremecourt.gov/DocketPDF/21/21-429/1220251/20220404203500611_1-429bsacUnitedStates.pdf

decision was not limited to the State of Oklahoma but instead “applies throughout the United States.”⁴

The Supreme Court left open the possibility that Congress, exercising its plenary power over Indian affairs, could abrogate its decision by legislation.⁵ Unless Congress acts, however, “States may exercise jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.”⁶

III. September 2022 Listening Sessions

On August 29, 2022, DOI Assistant Secretary – Indian Affairs Bryan Newland and DOJ Director of the Office of Tribal Justice Tracy Toulou announced through a letter to Tribal leaders that the DOJ and DOI would be conducting joint virtual listening sessions on the impact of the *Castro-Huerta* decision on Tribal communities. The letter requested input on the following questions:

1. What is the impact of this Supreme Court decision on your law enforcement or justice systems?
2. Does this decision impact standing cooperative agreements or processes with state or federal agencies? If so, how?
3. What has been the reaction to the *Castro-Huerta* decision in your Tribe? Do you have views about concurrent state criminal jurisdiction in Indian country?

The virtual listening sessions were held on September 26, 2022, from 3:00 PM to 5 PM ET and September 27, 2022, from 3:00 PM to 5:00 PM ET.

Altogether, approximately 425 Tribal leaders, advocates, and community members participated in the listening sessions.

- On September 26, there were 249 total attendees.
- On September 27, there were 176 total attendees.

DOJ and DOI also received a total of 17 written comments in response to the August 29, 2022, letter.

⁴ See *Castro-Huerta v. Oklahoma*, 597 U.S. (2022), slip op. at 24 n.9.

⁵ See *id.*, slip op. at 6; see also *id.* (Gorsuch, J., dissenting), slip op. at 41.

⁶ See *id.*, slip op. 24 n.9.

IV. Summary of Comments Received by Questions Posed

1. *What is the impact of this Supreme Court decision on your law enforcement or justice systems?*

- All of the commenters expressed concern about the negative impacts that the *Castro-Huerta* decision could have on their Tribal communities. These concerns include, but are not limited to:
 - A potential decrease in federal funding and resource availability for Tribal law enforcement and Tribal justice systems resulting in the erosion of public trust, increased victims of crime, and limiting the ability of Tribes to self-govern and protect Tribal citizens in their own territories.
 - A potential decrease in the federal prosecution of major crimes, particularly in relation to violent crimes against Native women and children.
 - The failure of non-Tribal law enforcement agencies to communicate with Tribes about domestic violence incidents involving non-Indian offenders wherein the Tribe has concurrent jurisdiction.
 - A potential overall increase in unpunished crime perpetrated by non-Indian offenders, whether major or non-major, resulting from state and federal officials failing to communicate and coordinate with each other and with Tribes.
 - The potential extension of state policymaking generally onto Tribal lands, further threatening Tribal sovereignty.
 - Increased uncertainty surrounding criminal jurisdiction in Indian country, especially for Tribes with treaties that contain “bad men” clauses.
 - Significant concern that the *Castro-Huerta* decision may be used to limit Tribes’ exercise of special Tribal criminal jurisdiction under the Violence Against Women Act of 2022.
 - The potential for the decision to be applied beyond matters of criminal jurisdiction within Indian country.

2. *Does this decision impact standing cooperative agreements or processes with state or federal agencies? If so, how?*

- The majority of commenters expressed hope that this decision would not impact their federal and state agreements and subsequent resources. However, commenters acknowledged that there is always some uncertainty when a federal or state administration changes.
- While the majority of commenters indicated that they have not yet experienced any negative impacts to current state agreements, they did express concern about how this decision might impact future agreements/renewals. These include:

- Weakened leverage or bargaining power in determining how a state can exercise jurisdiction on Tribal lands.
- The possibility that states may decide that current agreements regarding jurisdiction and law enforcement are void under the decision, or choose not to renew or enter into future agreements.
- Where no agreement is in place, the unauthorized or uncoordinated exercise of criminal jurisdiction by a state law enforcement agency, ultimately threatening the ability of Tribes and states to work collaboratively together to provide for public safety.
- One commentor stated that the decision may provide an opportunity to develop long overdue agreements with both state and federal partners to better administer criminal justice on its Tribal lands.

3. *What has been the reaction to the Castro-Huerta decision in your Tribe? Do you have views about concurrent state criminal jurisdiction in Indian country?*

- The majority of commenters expressed dissatisfaction, disappointment, and anger with the *Castro-Huerta* decision.
- The majority of commenters expressed their concern that the *Castro-Huerta* decision will lead to decreased public safety in Indian country through minimizing Tribal jurisdiction over Tribal lands.
- In the listening sessions and in the written comments provided there was a clear consensus that the decision to allow concurrent state jurisdiction in Indian country is an affront to Tribal sovereignty and self-determination, Tribal treaty rights, and infringes on the foundational principles of federal Indian law.
- Several commenters expressed grave concern about concurrent state jurisdiction in Indian country based on negative experiences under P.L. 280 where in many cases crimes are not prosecuted; state law enforcement agencies lack accountability; and investigative, law enforcement, and Tribal justice system resources are scarce.
- Commenters indicated that coordinated federal, state, and Tribal law enforcement with deference to the Tribe on Tribal lands would support Tribal sovereignty and self-determination.

Additional Comments

- All of the commenters stated that Congress has a constitutional role to determine Tribal, federal, and state jurisdiction in Indian country.
 - The majority of commenters stated the need for Congressional action to fully restore inherent Tribal jurisdiction in Indian country.

- Specifically, commenters noted that Congress should pass legislation to repeal or amend all existing civil and criminal jurisdictional limitations on Indian Tribes imposed by statute (e.g., sentencing limitations as enacted through the Indian Civil Rights Act) or through Court precedent (e.g., *Castro-Huerta* and *Oliphant*) to fully restore Tribes' inherent civil and criminal jurisdiction in Indian Country, clear up jurisdictional confusion, and ultimately provide for increased public safety in Indian country. *See* Appendix for specific legislative proposals.
- Most commenters cited limited public safety funding and resources as a significant concern and called upon Congress to provide increased appropriations to fully fund Tribal justice systems, including but not limited to criminal code updates and development, detention, and rehabilitation facilities; intervention and diversion services; training; and staffing for judges, prosecutors, public defenders, clerks, law enforcement officers, and other necessary justice system positions.
- Some commenters cited the need for Congress to pass legislation to reaffirm Tribal treaty rights.
- A few commenters said that Congress should act to address the *Castro-Huerta* decision only after considering the full scope of concerns related to public safety in Indian country, citing concerns related to budget and resources.
- One commenter stated that Congress should act to fully restore Tribal civil and criminal jurisdiction and that during the transition period of Tribes reassuming their authority, Congress should provide the authority and resources for federal prosecutors to supplement Tribal justice systems to ensure crimes by non-Indians in Indian country are prosecuted.
- Many commenters stated the need for Executive action to affirm the nation-to-nation relationship that Tribes share with the United States, to support Tribal jurisdiction on Indian lands, and to permanently establish the White House Council on Native American Affairs as a permanent federal body focused on protecting Tribal self-determination and sovereignty.
- The majority of commenters expressed their view that there is a critical need for more federal resources for Tribal law enforcement and Tribal justice systems irrespective of the *Castro-Huerta* decision.
- The majority of commenters expressed the sentiment that Tribes are best positioned to make decisions about their local public safety needs and what is best for their communities, and the *Castro-Huerta* decision is limiting their ability to provide for public safety on Tribal lands.

- One commenter stated that it was their view that a lack of federal resources dedicated to the prosecution of crimes in Indian country played a prominent role in the *Castro-Huerta* decision.

V. Conclusion

DOJ and DOI greatly appreciate the time and effort Tribal leaders, advocates, and community members have spent to engage in the listening sessions and provide written comments. In line with the federal government's trust responsibility to Indian Tribes and people, the goal of these listening sessions was to hear from Indian country about the impact of the *Castro-Huerta* decision in order to inform how DOJ and DOI can best work to support Tribal jurisdiction and sovereignty. DOJ and DOI will continue to consider all comments received with this goal in mind.

Appendix

Appendix A: Coalition of Large Tribes (COLT) Resolution 08-16-2022 - #04-2022 (NN-Twin Arrows)

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Coalition of Large Tribes

Blackfeet Nation • Cheyenne River Sioux Tribe • Crow Nation • Eastern Shoshone Tribe
Fort Belknap Indian Community • Mandan, Hidatsa & Arikara Nation • Navajo Nation • Northern Arapaho Tribe
Oglala Sioux Tribe • Rosebud Sioux Tribe • Sisseton Wahpeton Sioux Tribe
Shoshone Bannock Tribes • Spokane Tribe • Ute Indian Tribe

Coalition of Large Tribes (COLT)

Resolution: 08-16-2022- # 04-2022 (NN-Twin Arrows)

Resolution in Support of the Intertribal Legislative Proposal for Addressing Non-Indian Crime in Indian Country

WHEREAS, the Coalition of Large Tribes (COLT) was formally established in early April 2011, and is comprised of Tribes with large land base, including the Blackfeet Nation • Cheyenne River Sioux Tribe • Crow Nation • Eastern Shoshone Tribe • Fort Belknap Indian Community • Mandan, Hidatsa & Arikara Nations • Navajo Nation • Northern Arapaho Tribe • Oglala Sioux Tribe • Rosebud Sioux Tribe • Sisseton Wahpeton Sioux Tribe • Shoshone Bannock Tribes • Spokane Tribe • Ute Indian Tribe and is Chaired by President Kevin Killer, Oglala Sioux Tribe; and

WHEREAS, COLT was organized to provide a unified advocacy base on all issues affecting Tribes that govern large trust land bases and that strive to ensure the most beneficial use of those lands for tribes and individual Indian landowners; and

WHEREAS, a number of COLT member Tribes have participated in the development and advocacy in support of the attached draft Intertribal Legislative Proposal Addressing Non-Indian Crime in Indian Country and believe that the solutions offered in the draft would materially improve public safety in Indian Country, especially for large land-base tribes who suffer from a dearth of law enforcement resources and attention.

NOW THEREFORE BE IT RESOLVED, it is the policy of COLT to support the attached Intertribal Legislative Proposal Addressing Non-Indian Crime in Indian Country- as it might be amended from time to time as Tribes work to see it enacted.

NOW THEREFORE BE IT FURTHER RESOLVED, it is the policy of COLT to also support related administrative actions to the same purpose, including but not limited to: (1) seeking a Solicitor's Opinion from the Department of the Interior recognizing and affirming Tribes' inherent sovereign rights to exclude persons from our Reservations, including law enforcement personnel; and (2)



Coalition of Large Tribes

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Shoshone Bannock Tribes • Spokane Tribe • Ute Indian Tribe

seeking a directive from Assistant Secretary for Indian Affairs Bryan Newland instructing the BIA Office of Justice Services not to cooperate with state law enforcement unless and until specifically requested by a Tribe to do so.

BE IT FINALLY RESOLVED, that this resolution shall be the policy of COLT until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

This resolution was enacted at a duly called meeting of the Coalition of Large Tribes held on Navajo Nation, Twin Arrows Casino, 22181 Resort Blvd. Flagstaff, AZ on August 16th, 2022 at which a quorum was present, with the resolution approved unanimously.

Dated this August 16th, 2022

Attest:



Nathan Small, Secretary, Coalition of Large Tribes



Kevin Killer, Chairman, Coalition of Large Tribes

ADDRESSING NON-INDIAN CRIME IN INDIAN COUNTRY

Just as Congress passed the “Duro fix” in 1991, Congress must amend the Indian Civil Rights Act (ICRA) to address a looming public safety crisis. In *Oliphant v. Suquamish Indian Tribe*,¹ the U.S. Supreme Court eliminated tribal criminal prosecutorial authority over non-Indians. In *Oklahoma v. Castro-Huerta*, the Court has given States concurrent jurisdiction with the federal government to prosecute non-Indians who commit crimes against Indians.² Collectively, *Oliphant* and *Castro-Huerta* stripped Indian tribes of criminal jurisdiction over crimes on tribal lands and gave it to States, creating a well-known “maze of injustice” and “undefensible morass.” Resultantly, at least “[Seventy] percent of violent crimes generally committed against AI/ANs involve an offender of a different race. This statistic includes crimes against children twelve years and older. . . [I]n domestic violence cases, 75 percent of the intimate victimizations and 25 percent of the family victimizations involve an offender of a different race. Furthermore, national studies show that men who batter their companion also abuse their children in 49 to 70 percent of the cases.”³ Non-Indian-on-Indian crime on Indian reservations is a crisis.

Congress must reaffirm that Tribal Nations have criminal jurisdiction to punish wrongdoers who commit crimes on tribal lands:

25 U.S.C. §1301 Definitions

For the purposes of this subchapter, the term –

(2) “powers of self-government” means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all ~~Indians~~ persons located on or within “Indian country” as defined by 18 U.S.C. § 1152;

As the *Castro-Huerta* dissenting opinion recognized, the majority’s ruling is “ahistorical and mistaken,” contrary to “a mountain of statutes and precedents making plain that Oklahoma possesses no authority to prosecute crimes against tribal members on tribal reservations until it amends its laws and wins tribal consent.” The *Castro-Huerta* majority offers “contrived interpretations”⁴ of the Court’s longstanding precedents. This results-driven posture is solely aimed at addressing the jurisdictional gap resultant from *McGirt v. Oklahoma* that decided that the Muscogee (Creek) Nation’s reservation had not been disestablished or diminished by Oklahoma’s entry into the Union and therefore, the federal government alone had prosecutorial authority for Major Crimes committed by Indians on the Creek Reservation. *McGirt* affirmed long-understood dividing lines on criminal prosecutorial authority. The *Castro-Huerta* majority invented “inherent” authority for Oklahoma whole-cloth to bridge the perceived gap in prosecutions created by: (1) the Court’s elimination of tribal criminal prosecutorial authority over non-Indians in *Oliphant*; (2) chronic federal dereliction of its Trust and Treaty obligations to secure public safety in Indian Country; and (3) difficulties in coordinating and funding law enforcement activities to respond to the legal structure recognized in *McGirt*.

But two wrongs don’t make a right. The Court was wrong to erase tribal criminal jurisdiction in *Oliphant*—on grounds that such jurisdiction was “inconsistent with [tribes’] status”⁵ as conquered peoples. Tribes are not mere conquered peoples. They are domestic nations that retain all the inherent powers they had as nation-states at the time of the founding of the United States unless and until Congress acts to limit that sovereignty in some way. Time and time again, Congress

¹ 435 U.S. 191 (1978).

² ICRA was amended in 1991 in order to overturn the Supreme Court’s decision in *Duro v. Reina*, 495 U.S. 676 (1990). The *Duro* decision held that tribal courts lack criminal jurisdiction over non-member Indians. Congress overturned the *Duro* decision (the so-called Congressional “Duro-fix”) by adding the language “... and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians” to the definition of “powers of self-government.” This Congressional *Duro*-fix restored tribal court criminal jurisdiction over all Indians (members and non-members).

³ U.S. Attorney General’s Advisory Committee on American Indian/Alaska Native Children Exposed to Violence, *Ending Violence So Children Can Thrive*, November 2014. Available: [Ending Violence So Children can Thrive \(justice.gov\)](https://www.justice.gov/ending-violence-so-children-can-thrive).

⁴ *Torres v. Texas Dep’t. of Pub. Safety*, No. 20-603 (June 30, 2022, Thomas, J., dissenting).

⁵ 435 U.S. at 208.

has safeguarded tribal criminal jurisdiction, not assailed it. The *Castro-Huerta* Court has wrongly encroached on tribal sovereignty by rewriting a revisionist history and satiating colonizers' aspirations—that States have always had jurisdiction in Indian Country—when in fact the opposite has been true from the earliest days of the republic. Long settled law that tribes are territorial sovereigns with power and authority over public safety in Indian Country is based on Treaties, the United States' Trust responsibilities, and Congress' plenary authority over Indian relations enshrined in the Constitution.

Congress can both (a) respect that tribal governments are best positioned to make decisions about their local public safety needs by relaxing previous limitations on the exercise of tribal territorial jurisdiction and enacting the above suggested changes to 25 U.S.C. §1301, and (b) also ensure proper safeguards for individual liberties by enacting a companion amendment:

Any tribe seeking to exercise criminal jurisdiction over person not otherwise provided for by other independent statutory authority may only do so if the due process requirements set forth in 25 U.S.C. § 1302(c) are ensured.

Additionally, we recommend elimination of ICRA's current sentencing limitations, restricting tribes to a sentence of three years for certain crimes, and when stacked with other crimes, nine years total. This proposed amendment would do away with the limitations on tribes' sentencing altogether.

*Subparagraphs (B) through (D) of section 202(a)(7) and section 202(b) shall be eliminated in their entirety.*⁶

Lastly, as outlined in Justice Gorsuch's dissenting opinion, PL-280 should be amended to ensure that the *Castro-Huerta* Court's recognition of a previously unknown State authority in Indian Country does not create confusion or reduce accountability of the federal and tribal governments primarily responsible for Indian Country public safety by limiting States' exercise of criminal jurisdiction on tribal lands to only those circumstances in which they have obtained tribal consent and amended their constitutions in compliance with procedures outlined in § 1324:

§ 1321. Assumption by State of criminal jurisdiction

(a) Lack of State Jurisdiction Absent Compliance with § 1321 and § 1324

Except as otherwise authorized pursuant to, or provided by, law, a State shall not have criminal jurisdiction over a crime committed by or against an Indian 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.

In sum, Congress' enactment of this menu of options, and coordinate appropriation of resources to federal and tribal governments will address the current crisis of non-Indian crime in Indian Country, best ensure Indian Country public safety and accountability, and honor the United States' solemn Trust and Treaty obligations.

⁶ NOTE—this would eliminate the following text (in purple) from ICRA:

- (B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of \$5,000, or both;
- (C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of \$15,000, or both; or
- (D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years; ...

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than \$5,000

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than \$5,000 but not to exceed \$15,000, or both, if the defendant is a person accused of a criminal offense who--

- (1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or
- (2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

Appendix B: Legislative Proposal to Improve Public Safety in Indian Country

Legislative Proposal to Improve Public Safety in Indian Country

In 1991, after the Supreme Court’s ruling in [Duro v. Reina](#), 495 U.S. 676 (1990), Congress sought to clarify various jurisdictional issues created by the decision. This Congressional action is commonly referred to as the “Duro Fix.” The way Congress enacted this language and the statutory placement of this clarifying language provides a helpful guide as to how Congress may address the new jurisdictional complications created by the Court’s recent decisions. A summary of the *Duro*-related language is therefore provided for background purposes to provide context to the 2022 legislative proposal set forth below.

Duro Congressional Fix

Congress amended the Indian Civil Rights Act in 1991 to overturn the U.S. Supreme Court’s decision in [Duro v. Reina](#), 495 U.S. 676 (1990). The Court had held that tribal courts lack criminal jurisdiction over non-member Indians. Congress subsequently acted to restore tribal criminal jurisdiction over all Indians—including non-member Indians.

Congress overturned *Duro* by adding language to 25 U.S.C § 1301, the definitions section that defines “powers of self-government.” Prior to the *Duro* fix, that section read as follows:

“powers of self-government” means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses

25 U.S.C. § 1301(2). Congress amended this definition to include that powers of self-government “means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.” Thus, overturning SCOTUS’s *Duro* decision and reaffirming that tribal governments possess the inherent power to exercise criminal jurisdiction over all Indians.

Amending the ICRA to Relax Restrictions and Remove Sentencing Limitations

The Indian Civil Rights Act should be amended to relax restrictions regarding tribal authority over non-Indian criminal activity and to remove sentencing limitations. These changes would ensure tribal nations are empowered to exercise criminal jurisdiction over any individual who commits a crime on tribal lands, regardless of whether they are Indian or non-Indian. In furtherance of this goal, the following preamble should be added to the ICRA:

It is the sense of Congress that Indian tribes, as sovereigns that pre-date both the United States and the United States Constitution, maintain their inherent sovereignty to govern and engage in self-government within their territorial borders.

It is the sense of Congress that the treaties the United States has signed with tribal nations, “according to the constitution of the United States, compose a part of the supreme law of the land.” *Worcester v. State of Ga.*, 31 U.S. 515, 531 (1832).

It is the sense of Congress that because the treaties the United States signed with

tribal nations “have been duly ratified by the senate of the United States of America,” and because they acknowledge tribal nations to be “sovereign nation[s], authorised to govern themselves, and all persons who have settled within their territory,” tribal nations are therefore “free from any right of legislative interference by the several states composing [the] United States of America.” *Id.* at 530.

Thus, it is the sense of Congress that state laws “are unconstitutional and void” when they seek to exercise jurisdiction over tribal lands absent legislation from Congress authorizing a state’s exercise of jurisdiction since under the United States Constitution, that power “belongs exclusively to the congress of the United States.” *Id.* at 531.

Much like in the *Duro* fix, Congress should amend 25 U.S.C. § 1301 by adding the red language as follows:

“powers of self-government” means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all persons, Indian and non-Indian, located on or within “Indian country” as defined by 18 U.S.C. § 1151.

25 U.S.C. § 1301 (proposed language).

Moreover, additional language should be added to ensure the protection of non-Indian defendants’ due process rights. Suggested language is as follows:

Any tribal nation seeking to exercise criminal jurisdiction over non-Indian defendants not otherwise provided for by other independent statutory authority may only do so if the due process requirements set forth in 25 U.S.C. § 1302(c) are ensured.

ICRA should also be amended to remove sentencing limitations that restrict tribal nations to sentencing criminals up to three years for certain crimes, and when stacked using the Tribal Law and Order Act, nine years total. The following proposed amendments to [25 U.S.C. § 1302](#) would remove the limitations on tribal sentencing altogether:

(a) In general. – Title II of Public Law 90–284 (25 U.S.C. 1301 et seq.) (commonly known as the “Indian Civil Rights Act of 1968”) is amended by undertaking the following:

Subparagraphs (B) through (D) of section 202(a)(7) and section 202(b) shall be eliminated in their entirety.

These amendments would delete the following subparagraphs of Section 202(a)(7) (provided below in purple):

(B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of \$5,000, or both;

(C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of \$15,000, or both; or

(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

These amendments would also delete Section 202(b) which provides:

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than \$5,000

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than \$5,000 but not to exceed \$15,000, or both, if the defendant is a person accused of a criminal offense who—

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

Justice Gorsuch Proposed Amendment to Pub.L. 83-280 (18 U.S.C. § 1162)

As described in Justice Gorsuch’s dissent, Pub.L. 83-280 must be amended to ensure that states, other than those six states with mandatory criminal jurisdiction under 18 U.S.C. 1162 (a), have no criminal jurisdiction in Indian country unless they have first obtained tribal consent to that state criminal jurisdiction and, where necessary, have amended their state constitutions or statutes to permit that jurisdiction, all in compliance with procedures outlined in 25 U.S.C § 1324. The following is suggested language to implement Justice Gorsuch’s proposed amendment:

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, 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.

* * *