

## What the Supreme Court's Decision in Castro-Huerta Means for Tribal Sovereignty



By [Hon. Carol E. Heckman \(Ret.\)](#)

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In *Oklahoma v. Castro-Huerta*, decided on the second to last day of the 2021-2022 term, the Supreme Court held 5-4 that Oklahoma had concurrent jurisdiction with the federal government over crimes committed by non-Indians against Indians in Indian Country. According to commentators, this ruling “wip[ed] away centuries of tradition and practice.” In the case, Mr. Castro-Huerta (a non-Indian) was convicted of criminal child neglect of his stepdaughter, a member of the Eastern Band of Cherokee Indians within the reservation boundaries of the Cherokee Nation of Oklahoma. That conviction preceded the court decision in *McGirt v. Oklahoma*, which ruled that the Muskogee Nation reservation had not been disestablished upon the granting of statehood to Oklahoma. As a result of *McGirt*, the reservations of other Oklahoma tribes, including the Cherokee Nation, are now also considered to be Indian country, over which the State lacks criminal jurisdiction unless both victim and perpetrator are non-Indians.

In *Oklahoma v. Castro-Huerta*, the court held that “as a matter of state sovereignty, a state has jurisdiction over *all* of its territory, including Indian country,” suggesting that a state has presumptive jurisdiction to act over Indian country absent federal legislation curtailing that power.

Indian law scholars are rightly concerned about the implications of *Castro-Huerta* in terms of the *McGirt* analysis and the previous precedents. After *McGirt* was decided, in a 5-4 decision, Justice Ginsberg died and was replaced by conservative Justice Amy Coney Barrett. The State of Oklahoma seized upon this opportunity to chip away at *McGirt*.

This decision contains both good and bad news for Indian law commentators. On the one hand, the State of Oklahoma had petitioned the Court to reverse the *McGirt* decision. The Court only accepted review of the narrow issue of whether there is concurrent jurisdiction with the state over crimes committed on Indian country. So, the *McGirt* challenge was, at least for the time being, deflected.

However, the bad news for Indian law practitioners is that the Court, with little historical justification, found that there was a presumption in favor of state law jurisdiction over criminal activity occurring within its borders, even when it occurs on tribal land. This is a significant erosion of tribal sovereignty and as a result has triggered quite a bit of scrutiny by those who practice in that area.

The decision is also a significant departure from prior case law. Since the Court’s 1856 decision in *Worcester v. Georgia*, State law has had only limited applicability in Indian country, absent Congressional authorization. Subsequent Supreme Court decisions diluted the general rule to some extent, allowing state prosecution of non-Indians who commit crimes against non-Indians in Indian country even in the absence of congressional authorization. But in *Castro-Huerta*, the Court *started* its analysis with the *conclusion* that state jurisdiction was presumptive, a conclusion that finds little support in past decisions.

Reversing the clear trend in the law, the majority analyzed the state’s jurisdiction under *White Mountain Apache Tribes v. Bracker*, holding that state jurisdiction in Indian country was only pre-empted when it could meet the test set forth in that case. Finding no pre-emption under either the General Crimes Act or Public Law 280, the Court upheld the state’s ability to prosecute a non-Indian for crimes against Indians in Indian country. It concluded that there was no tribal interest in preventing criminal prosecution of non-Indians, even though the victim was an Indian. The Court therefore upheld the conviction.

The dissent in the case was authored by Justice Neil Gorsuch, the author of the majority opinion in the *McGirt* case and joined by Justices Breyer, Sotomayor and Kagan. It concluded that the majority opinion showed little understanding of the principles of tribal sovereignty and tried to rewrite history.

It remains to be seen how strictly or widely this decision is interpreted, but the presumption of state criminal jurisdiction even over Indian lands has many commentators concerned that the Court’s conclusions could be expanded beyond criminal jurisdiction.

Our [Indian Law](#) practice team will continue to monitor developments from *Oklahoma v. Castro-Huerta* and its impacts on Tribal sovereignty. If you have any questions, please contact Michael Rossetti ([mrossetti@lippes.com](mailto:mrossetti@lippes.com), 202.888.7610 x1601) or Carol Heckman ([heckman@lippes.com](mailto:heckman@lippes.com), 716.853.5100 x1268).

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