



NATIONAL
NATIVE AMERICAN
BAR ASSOCIATION

RESOLUTION OF THE NATIONAL NATIVE AMERICAN BAR ASSOCIATION

RESOLUTION #2023-01

TITLE: Urging Congress and the Federal Government to Consult with Tribal Nations Regarding a Legislative Response to the *Oklahoma v. Castro-Huerta* Supreme Court Decision

WHEREAS, the National Native American Bar Association (“NNABA”) was founded in 1973 and serves as the national association for Native American attorneys, judges, law professors and law students, and NNABA promotes and addresses social, cultural, political and legal issues affecting American Indians, Alaska Natives, and Native Hawaiians;

WHEREAS, the United States has subjected Native Americans to exclusionary policies since the founding of the country, including during passage of the Fourteenth Amendment to the United States Constitution, during which Congress expressly excluded “Indians not taxed” from citizenship along with an ability to participate in the political life of the United States;

WHEREAS, throughout the first century of its history and beyond, the United States carried out a policy of isolation and removal, forcing Tribal Nations to move from their ancestral homelands to lands which were less desirable, because—by way of example only—they were farther removed from non-Native population centers, lacked desirable natural resources, or simply because they represented a much smaller portion of any particular Tribal Nation’s ancestral homelands, opening the remainder to non-Native settlement;

WHEREAS, this system is called the “reservation system” and was broadly harmful to Native Americans because it usually involved terminating any recognized title or legal claim by Native Americans to enormous portions of land with the accompanying ability to conserve, use, or dispose of the land as a particular Tribal Nation saw fit;

WHEREAS, despite this massive reduction of tribal lands, Tribal Nations retained freedom from interference from state jurisdiction on the lands that remained, especially in the then-newly formed states in the Western United States;

WHEREAS, with respect to the Cherokee Nation, the subject of the 2022 *Oklahoma v. Castro-Huerta* Supreme Court Case (No. 21-429, 597 U.S. ___ (2022)), Justice Neil Gorsuch recognized the foregoing legal reality in his dissenting opinion the following “After the Cherokee’s exile to what became Oklahoma, the federal government promised the Tribe that it would remain forever

free from interference by state authorities. Only the Tribe or the federal government could punish crimes by or against tribal members on tribal lands.”;

WHEREAS, Justice Gorsuch’s dissenting opinion reflected the prevailing reality for nearly two hundred years of Federal Indian Law that criminal jurisdiction on the lands of Tribal Nations is held by Tribal Nations themselves and the Federal government, and only particular state governments as outlined in Congressional statute, Public Law 83-280;

WHEREAS, until 2022 the Supreme Court had repeatedly re-affirmed this principle, with roots in the decision *Worcester v. Georgia* (31 U.S. 515 (1832)) which stated that “[t]he Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . . The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the Government of the United States.”;

WHEREAS, the Supreme Court had chipped away at the rule of exclusive Federal and tribal criminal jurisdiction on the lands of Tribal Nations, holding in the 1880s and 1890s that state governments could prosecute non-Indians who committed crimes against non-Indians on the lands of Tribal Nations, but never expanded this jurisdiction to crimes committed by non-Indians against Indians on the lands of Tribal Nations;

WHEREAS, when Congress did provide for concurrent state criminal jurisdiction in Public Law 83-280, it did so explicitly and limited the reach of that jurisdiction to certain states or certain portions thereof;

WHEREAS, Congress had earlier in 2022 acted to protect and reaffirm tribal jurisdiction over certain covered crimes perpetrated by non-Indians in the reauthorization of the Violence Against Women Act, indicating Congressional support for tribal sovereignty and in particular for tribal criminal jurisdiction;

WHEREAS, despite long established legal principles and recent Congressional acts in support of tribal criminal jurisdiction, the majority opinion in *Castro-Huerta* held that “the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country;”

WHEREAS, the Court made it clear that the *Castro-Huerta* decision is not limited to the Cherokee Nation, to Oklahoma more generally, but instead applies “throughout the United States” emphasizing that “[u]nless preempted, States may exercise jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country”;

WHEREAS, the general consensus is one of opposition among Tribal Nations to the *Castro-Huerta* decision, even though there is yet no consensus on the specific actions Congress should take in response to the decision; and

WHEREAS, the *Castro-Huerta* decision has been opposed by other major organizations representing the interests of Native Americans in the United States, including the National Congress of American Indians, the Native American Rights Fund, among others;

NOW THEREFORE BE IT RESOLVED, that the National Native American Bar Association likewise opposes the majority decision in *Castro-Huerta* as contrary to centuries of Federal Indian Law principles and as an affront to tribal sovereignty;

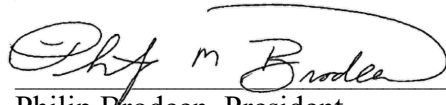
BE IT FURTHER RESOLVED, that the National Native American Bar Association calls upon Congress and the Federal government to engage in a tribal consultation process that at a minimum embodies standards outlined in [Presidential Memorandum on Uniform Standards for Tribal Consultation](#), November 30, 2022, to confer with Tribal Nations regarding the solution to the *Castro-Huerta* decision they believe would best preserve and protect tribal sovereignty;

BE IT FURTHER RESOLVED, that the National Native American Bar Association calls upon Congress and the Federal government to not engage in a “fix” to *Castro-Huerta* without first conducting the aforementioned tribal consultation process; and

BE IT FINALLY RESOLVED, that NNABA supports this resolution as policy until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution 2023-01 was adopted by the Board of the National Native American Bar Association on March 6, 2023, via electronic written consent.


Philip Brodeen, President