

This Land Is Whose Land? The *McGirt v. Oklahoma* Decision and Considerations for Congress

July 24, 2020

On July 9, 2020, the Supreme Court announced its [decision](#) in *McGirt v. Oklahoma*—hailed by [some](#) as the “most significant Indian Law case of the century.” In a 5-4 ruling, the Court held that land reserved for the Muscogee (Creek) Nation in the 19th century remained “Indian country” for criminal jurisdiction purposes. In an opinion authored by Justice Neil Gorsuch, the Court held that Congress had established a reservation for the tribe (Creek Nation). Despite creating the State of Oklahoma and limiting tribal sovereignty within that area in the intervening years, the Court further held that Congress had never *disestablished* the Creek reservation in eastern Oklahoma. This Legal Sidebar explains the origins of the case, sketches the contours of the decision, explores what remains undecided or unknown, and discusses what Congress could do to clarify, change, or cement this new status quo.

How the Question Came to the Supreme Court

In 2018, the Supreme Court granted certiorari to consider [an appeal](#) from an Oklahoma death penalty case involving Patrick Murphy, a Creek Nation member. Murphy [killed](#) a fellow tribal member in eastern Oklahoma. The validity of Murphy’s murder conviction turned on whether he committed his crime on the Creek reservation—a reservation that Oklahoma argued no longer existed.

Justice Gorsuch recused himself from the *Murphy* case—[presumably](#) because he participated in discussions about it while he [was a judge](#) on the Tenth Circuit Court of Appeals. When the 2018 Term expired without a decision, many commentators [assumed](#) the remaining eight members of the U.S. Supreme Court (Court) had split 4-4 and tabled the case rather than issue an opinion without a majority.

In the 2019 Term, although *Murphy* was due to be reargued, the Court decided to hear [another case](#)—in which all nine Justices would participate—that raised a similar question. Jimcy McGirt, a member of the Seminole Nation of Oklahoma, was convicted for serious crimes committed in a part of Oklahoma that he claimed was within the still-existing Creek reservation. McGirt argued that the Major Crimes Act barred Oklahoma from prosecuting him for those crimes. The question facing the Court, then, was whether the

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Major Crimes Act applied in this case—and the answer to that question depended on whether Creek land in Oklahoma was “Indian country.”

The Major Crimes Act and the Definition of Indian Country

States [generally](#) may not prosecute Indians for crimes committed in Indian country, absent a grant of jurisdiction from Congress. Most relevant to this case, the [Major Crimes Act](#) reserves federal jurisdiction over certain serious crimes, like murder and kidnapping, committed by an Indian within Indian country. Exceptions such as those created by [Public Law No. 83-280](#) have extended state criminal jurisdiction over major crimes in some states, but not Oklahoma.

In *McGirt*, Oklahoma argued that eastern Oklahoma had always been exempt from the Major Crimes Act because of its unique history, but the Court squarely [rejected](#) that proposition: “When Oklahoma won statehood in 1907, the [Major Crimes Act] applied immediately according to its plain terms.” Oklahoma could not identify any subsequent grant of jurisdiction. Thus, so long as McGirt committed his crimes in Indian country, Oklahoma lacked the authority to prosecute him.

The relevant [federal criminal statute](#) defines “Indian country” to mean (1) all land within an Indian reservation, (2) all dependent Indian communities, and (3) all Indian allotments that still have Indian titles. An area qualifies as Indian country if it fits within [any](#) of these three categories, meaning a formal designation of Indian lands as a “reservation” is sufficient, but [not necessary](#), for those lands to be considered Indian country. Accordingly, the Court examined whether the Creek lands in Oklahoma were once, and continued to be, a reservation.

The Establishment of a Creek Reservation

The Oklahoma land where McGirt and Murphy committed their crimes has a complex history. As the Court put it, “One thing everyone can agree on is this history is long and messy.” In the 1820s, the federal government relocated the Creek Nation and several other tribes (often referred to collectively as the Five Tribes) to what is now present-day Oklahoma. As part of that relocation, the government [signed a series of treaties](#) with the Five Tribes, ultimately giving them a vast area of land in present-day Oklahoma in exchange for the cession of [tribal homelands](#) further east. That tract of land was reduced by later treaties. The [final reduction](#) occurred after the Civil War, when the Treaty of 1866 required each of the Five Tribes to surrender the “[west half](#)” of their new lands.

In *McGirt*, the State of Oklahoma made an argument it had waived in *Murphy*: that the Creek lands were never a reservation at all, because the treaties predated the widespread use of the term “reservation” and its accompanying policies. The Court, however, found that [argument](#) unconvincing, noting that neither the Solicitor General’s *amicus* brief on behalf of Oklahoma nor the dissent had adopted it. Instead, Justice Gorsuch [wrote](#), it “should be obvious” that “Congress established a reservation for the Creeks” [because](#) of the nature of the promises it made about the land.

The Continued Existence of the Creek Reservation

The question remained, then, whether Congress had ever disestablished the reservation. Though the Creek Nation experienced many changes in its relationship with the federal government—most notably related to tribal governance and a push for individual ownership of the land—the boundaries of its land remained generally unchanged until at least the early 1900s. At that point, Oklahoma began to transition toward statehood, effectively including eastern Indian lands and western non-Indian lands within a single geographic entity. In its brief to the Supreme Court, Oklahoma [claimed](#) that no one (including state law enforcement and prosecutors) had treated the relevant land like a reservation since 1907, after Oklahoma

statehood. It also argued that because Congress broke certain promises in the treaties that had established the reservation, Congress must have intended to disestablish it.

To determine whether Congress intended to disestablish the Creek reservation land, the Court [clarified](#) a three-step test first announced in *Solem v. Bartlett* in 1984. Under the *Solem* framework, courts may examine: (1) the language of the governing federal statute; (2) the historical circumstances of the statute's enactment; and (3) subsequent events, such as Congress's later treatment of an affected area. The *Solem* framework instructs courts to resolve any uncertainty in favor of the tribes: if the evidence is not clear, the reservation continues to exist.

The majority [explained](#) that steps 2 and 3 exist only to clarify statutory texts, so

[t]here is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help "clear up . . . not create" ambiguity about a statute's original meaning And, as we have said time and again, once a reservation is established, it retains that status "until Congress explicitly indicates otherwise."

The Court further [warned](#) that states—"often in good faith, perhaps sometimes not"—have often overstepped their authority in Indian country, underscoring "the danger of relying on state practices" to evaluate reservation status. Thus, the majority concluded, Oklahoma's [arguments](#) that eastern Oklahoma had not been considered or [treated](#) like a reservation for more than a century could not change the Court's [assessment](#) that Congress had "plainly ... left the Tribe with significant sovereign functions over the lands in question." Because, the governing federal statutes plainly did not disestablish the Creek reservation, the *Solem* analysis was finished at step 1 and the area's subsequent treatment was not relevant.

Oklahoma argued that the *Solem* analysis was inapplicable because the Creek land became a "dependent Indian community" rather than a reservation [once](#) the Creek Nation received fee title to its land. But fee title is [not incompatible](#) with reservation status, and the Court rejected the "[untenable](#)" assertion that the Creek Nation's choice to receive fee title to its lands "made their tribal sovereignty easier to divest [rather than harder](#)."

The *McGirt* Dissent

Chief Justice Roberts, joined by three other Justices, dissented from the Court's opinion. In the dissent's [view](#), "Congress disestablished any reservation possessed by the Creek Nation through a relentless series of statutes leading up to Oklahoma statehood," a view which the dissent accused the majority of avoiding by refusing to look at the statutes [cumulatively](#) rather than individually. Then, instead of stopping at the first part of the *Solem* test, the dissent would have proceeded to examine [contemporaneous](#) and [subsequent](#) treatment of the Creek lands, [concluding](#) that "no reservation persisted past statehood."

Considerations for Congress

One certain consequence of *McGirt* is that the burden of prosecuting many serious offenses involving Indian offenders or victims in eastern Oklahoma will shift to the federal and tribal governments—at least, absent other federal statutory authority allowing the state to prosecute. Congress could pass a law expressly giving Oklahoma jurisdiction to prosecute the crimes named in the Major Crimes Act, perhaps through a vehicle similar to [Public Law No. 83-280](#). Alternatively, Congress could appropriate funds to offset the financial costs of increased federal and tribal prosecutions, which may include the retrials of individuals who were convicted of major crimes in Oklahoma state courts. The majority and the dissent disagreed about the likely magnitude of this burden. The majority [pointed out](#) that "even Oklahoma admits that the vast majority of its prosecutions will be unaffected" by this ruling, while the dissent [posited](#) that "thousands of convictions ... across several decades" will be drawn into question.

Reprosecutions are unlikely to run afoul of the [Double Jeopardy Clause](#), but could face other hurdles, such as lapsed statutes of limitations or limited resources. *McGirt*'s dissent [noted](#) that the federal government "may lack the resources to reprosecute all of" the convictions unsettled by the majority opinion, and the "odds of convicting again are hampered by the passage of time, stale evidence, fading memories, and dead witnesses," which may also translate to a need for more prosecutorial resources.

Other consequences are less certain. *McGirt* holds only that the Creek reservation remains Indian country for the purposes of the Major Crime Act, but the majority's analysis seems likely to lead to determinations that other Five Tribes' reservations are likewise Indian country, possibly for purposes beyond the Major Crimes Act. An in-depth examination of those possibilities is beyond the scope of this Sidebar, and some of the issues will likely be resolved through litigation. The State of Oklahoma offered a lengthy list of potential legal implications, including new or altered applicability of various federal statutes and programs in areas such as: [homeland security grants](#); [nutritional programs](#); [drug enforcement](#); [tobacco regulation](#); [timber protection](#); [disability programs](#); [schools](#); [highway funding](#); [primary care clinics](#); [cultural artifacts](#); [housing assistance](#); and [historical preservation](#). Some observers [have speculated](#) that the *McGirt* ruling could affect oil and gas regulation in the state. Congress could enact legislation to provide clarity on application of these laws and programs to the Creek or Five Tribes' reservations.

Tax implications are also likely, as states [generally lack](#) authority to tax Indians in Indian country, and tribes [may in some](#) circumstances tax non-Indians on reservation land. The Five Tribes may gain more [exclusive jurisdiction](#) over adoptions and custody disputes involving Indian children, though they have had the right to intervene in such proceedings or petition for transfer regardless of a child's location. Also, at least [one lawsuit](#) has been filed seeking disgorgement of fines and court costs levied by the State of Oklahoma against tribal members found guilty of misdemeanors and traffic offenses.

Some of the open jurisdictional questions may be resolved through agreements and negotiations between states and tribal governments, though congressional actions remain an option. On July 15, 2020, the State of Oklahoma publicly released an apparent [agreement](#) with the Five Tribes titled *Murphy/McGirt* Agreement-in-Principle, which stated that "intergovernmental cooperation will best serve our shared interests in consistency, predictability, and a mutual respect for sovereign rights and interests." The agreement called on Oklahoma's congressional delegation to implement legislation that would primarily restate existing federal Indian law principles, but also provide Oklahoma with jurisdiction over all offenders "with the exception of crimes involving Indians committed on Indian trust or restricted lands"—*i.e.*, on a fraction of the original reservations. However, on July 17, two of the Five Tribes [repudiated](#) the call for federal legislation.

Beyond Oklahoma, *McGirt* may have ramifications for other tribes who were once promised lands by treaty, but whose reservations Congress never clearly disestablished. It is difficult to assess how widespread such cases may be, and each will likely be separately litigated because the *Solem* inquiry, even as clarified by *McGirt*, requires a fact-intensive investigation of the federal actions affecting each tribe. At least one tribe has already invoked *McGirt* in an attempt to reestablish sovereignty that had previously been considered lost.

On the broadest level, the choice of whether to disestablish any reservation still lies solely with Congress. Congress could enact a statute disestablishing the Creek reservation (including or excluding the other Five Tribes' reservations), which would severely limit this decision's applicability in the future. If Congress chooses not to act, the uncertainties of jurisdiction may be settled among Oklahoma and the Five Tribes over time, whether by mutual agreement or through litigation in the courts.

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