

# Public Land & Resources Law Review

---

Volume 0 *Case Summaries 2020-2021*

Article 2

---

9-8-2020

## McGirt v. Oklahoma

Allison Barnwell

*Alexander Blewett III School of Law at the University of Montana*, [allison.barnwell@umontana.edu](mailto:allison.barnwell@umontana.edu)

Follow this and additional works at: <https://scholarship.law.umt.edu/plrlr>

 Part of the [Administrative Law Commons](#), [Agriculture Law Commons](#), [Animal Law Commons](#), [Cultural Heritage Law Commons](#), [Energy and Utilities Law Commons](#), [Environmental Law Commons](#), [Indian and Aboriginal Law Commons](#), [Land Use Law Commons](#), [Law and Race Commons](#), [Natural Resources Law Commons](#), [Oil, Gas, and Mineral Law Commons](#), [Science and Technology Law Commons](#), and the [Water Law Commons](#)

---

### Recommended Citation

Barnwell, Allison (2020) "McGirt v. Oklahoma," *Public Land & Resources Law Review*. Vol. 0 , Article 2.  
Available at: <https://scholarship.law.umt.edu/plrlr/vol0/iss13/2>

This Case Summary is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Public Land & Resources Law Review by an authorized editor of The Scholarly Forum @ Montana Law.

## *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020)

Allison Barnwell

The United States Supreme Court ruled that large areas of Oklahoma, including much of the City of Tulsa, are reservation land. The case arose from an Oklahoma state court's conviction of Jimcy McGirt on several criminal offenses. Mr. McGirt argued the State of Oklahoma lacked jurisdiction to prosecute because he was an enrolled member of the Seminole Nation of Oklahoma and committed his crimes on the Creek Reservation. Under the Major Crimes Act, only the federal government has the power to try tribal members for crimes committed on reservation lands. In a five to four decision, the Court held that Congress never disestablished the Creek Reservation, and therefore, Oklahoma had no jurisdiction over Mr. McGirt.

### I. INTRODUCTION

*McGirt v. Oklahoma*<sup>1</sup> is Mr. McGirt's pro se post-conviction appeal from his Oklahoma state court conviction for several serious sexual crimes.<sup>2</sup> Mr. McGirt is an enrolled member of the Seminole Nation of Oklahoma,<sup>3</sup> and on appeal, Mr. McGirt argued the State of Oklahoma had no right to prosecute the crimes he committed in Northeastern Oklahoma because the area where he committed the crimes was reserved to the Muscogee Creek Tribe ("the Tribe").<sup>4</sup> Under the Major Crimes Act ("MCA"), states generally have no jurisdiction to prosecute tribal members for crimes committed in "Indian country."<sup>5</sup>

### II. FACTUAL AND PROCEDURAL BACKGROUND

In 1832, the Tribe entered into a treaty with the United States for land in Oklahoma in exchange for the Tribe's ceding of "all lands in the East."<sup>6</sup> The United States government promised land to the Tribe for a "permanent home to the whole Creek Nation."<sup>7</sup> Oklahoma courts,

---

1. *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

2. *Id.* at 2459.

3. *Id.*

4. *Id.*

5. *Id.* (citing 18 U.S.C. §1153(a) (2018); *Negonsott v. Samuels*, 507 U.S. 99, 102–03 (1993)).

6. *Id.* at 2460 (citing to Treaty with the Creeks, Arts. XIV, Mar. 24, 1832, 7 Stat. 366, 367 [hereinafter 1832 Treaty]). The Muscogee Creek people were forced to cede "all their land, East of the Mississippi" in exchange for the treaty promise that "the Creek country west of the Mississippi shall be solemnly guaranteed to the Creek Indians." 1832 Treaty, Arts. I, XIV, 7 Stat. 366, 368. The Creek people left their ancestral homes in Georgia and Alabama in what is known as the Trail of Tears to arrive in Northeastern Oklahoma. *McGirt*, at 6.

7. *Id.* at 2459 (citing Treaty with the Creeks, preamble, Feb. 14, 1833, 7 Stat. 418 (1833 Treaty)).

however, refused to recognize parts of the land guaranteed to the Tribe by treaty, including much of the city of Tulsa, Oklahoma. Mr. McGirt committed crimes on land within the historic boundaries of the Creek Reservation, but land not recognized by Oklahoma courts as Indian Territory.<sup>8</sup>

Oklahoma asserted jurisdiction over Mr. McGirt's crimes, and he was convicted in an Oklahoma state court of three sexual offenses.<sup>9</sup> Mr. McGirt's post-conviction petition came nearly a month after the United States Court of Appeals for the Tenth Circuit issued a decision in *Murphy v. Royal*.<sup>10</sup> There, the court held large swaths of land in Northeastern Oklahoma, including some of the same land at issue in *McGirt*, remained a reservation for the Tribe despite Oklahoma's assertion that the Creek Reservation had been disestablished.<sup>11</sup> Mr. McGirt filed his first of several post-conviction petitions in Oklahoma, and he presented arguments based on the Tenth Circuit's holding.<sup>12</sup> When the Oklahoma state courts dismissed Mr. McGirt's appeals, Mr. McGirt appealed his case to the United States Supreme Court.<sup>13</sup>

### III. ANALYSIS

The Court analyzed three arguments raised on review: (1) whether the Creek Reservation was disestablished, (2) whether Congress had established a reservation for the Creek Nation, and (3) whether the MCA applied to Northeastern Oklahoma.<sup>14</sup>

#### A. *Despite Broken Promises to the Tribe, Congress has not Disestablished the Creek Reservation*

The Court began its analysis by noting the multiple treaties establishing the Creek Reservation in Northeastern Oklahoma and explaining the law for disestablishing a reservation.<sup>15</sup> Congress alone holds the power to breach its own promises or treaties, and therefore, only an Act of Congress may disestablish a reservation.<sup>16</sup> Further, Congress must explicitly express its intent to disestablish in legislation as it has done in the past.<sup>17</sup> The Court then dismissed three arguments advanced by

---

8. *Id.* at 2460.

9. *Id.* at 2459.

10. *Id.* at 2460; *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), rev'd sub nom. *Sharp v. Murphy* 589 U.S. \_\_\_\_ (2019).

11. *Murphy*, 875 F.3d at 907–09. The claims in *Sharp* were resolved by the Court's holding in *McGirt*. *Sharp*, 589 U.S. \_\_\_\_ (2019).

12. *McGirt*, 140 S. Ct. at 2460.

13. *Id.*

14. *Id.* at 2459–82.

15. *Id.* at 2460–62.

16. *Id.* at 2462.

17. *Id.* (citing *Solem v. Bartlett*, 465 U.S. 463, 470; *Hagen v. Utah*, 510 U.S. 399, 412 (1994); *Mattz v. Arnett*, 412 U.S. 481, 504, n. 22 (1973); *Nebraska v. Parker*, 577 U.S. 481, \_\_\_\_, \_\_\_\_ (2016) (slip op., at 6)).

Oklahoma attempting to prove that, despite the lack of express congressional intent, the Creek Reservation was nonetheless disestablished.

First, Oklahoma argued the “allotment era,” when Congress pressured tribes to parcel their lands into smaller lots owned by individuals, was Congress’s first step in disestablishing the Creek Reservation.<sup>18</sup> However, the Court explained that absent express congressional intent “the Creek Reservation survived allotment,”<sup>19</sup> and the MCA contemplates private land ownership within reservation boundaries.<sup>20</sup> Congress may have intended allotment to be the first step in ending reservations, but Congress never followed through to disestablish the Creek Reservation. The Court stated that “Congress may have passed allotment laws to create the conditions for disestablishment. But to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination.”<sup>21</sup>

Second, Oklahoma argued Congress’ intrusions on the Tribe’s self-governance during the allotment era was evidence of disestablishment.<sup>22</sup> Over time, Congress stripped away the authority and autonomy of the Tribe, but the Court noted that the laws were only necessary because the Tribe retained its status as a sovereign nation.<sup>23</sup> By 1967, Congress reversed course and began to reestablish tribal sovereignty.<sup>24</sup> The Creek Nation has since ratified a new constitution, established branches of government, and generally governs the Creek Nation democratically.<sup>25</sup> Congress may have taken the first step toward disestablishment with the allotment era, but it did not dissolve the Tribe or disestablish the Creek Reservation.<sup>26</sup>

Finally, Oklahoma argued for disestablishment by pointing to historic practices and demographics in Northeastern Oklahoma.<sup>27</sup> Oklahoma urged the Court to adopt a three-step rule to find disestablishment by examining the facts of the laws passed by Congress, contemporary events, and later events and demographics.<sup>28</sup> The Court rejected the proposed test and instead cited its responsibility to “follow the original meaning of the law,”<sup>29</sup> and clarified that the only appropriate time

---

18. *Id.* at 2463.

19. *Id.* at 2464.

20. *Id.*

21. *Id.* at 2465.

22. *Id.*

23. *Id.* at 2466 (“And, its own way, the congressional incursion on tribal legislative processes only served to prove the power: Congress would have had no need to subject tribal legislation to Presidential review if the Tribe lacked any authority to legislate.”).

24. *Id.* at 2467.

25. *Id.*

26. *Id.* at 2468.

27. *Id.*

28. *Id.*

29. *Id.* (citing *New Prime Inc. v. Oliveira*, 586 U. S. \_\_ (2019) (slip op., at 6)).

for the Court to look to evidence outside the plain meaning of the statutory language is when an ambiguous statutory phrase or term is in question.<sup>30</sup> According to the Court, Oklahoma failed to raise any ambiguity in the statutes in question.<sup>31</sup>

The Court then addressed the dissent's reasoning. The Court condemned the dissent's use of extratextual evidence, and reaffirmed that the Supreme Court has never found a reservation disestablished without first finding a statute that required disestablishment.<sup>32</sup> Writing for the majority, Justice Gorsuch also rebuked the theory that history and demographics could disestablish a reservation, and noted that the adoption of a proposed test to disestablish a reservation without clear congressional intent would usurp the legislature of its function and "treat Native American claims of statutory right as less valuable than others."<sup>33</sup> Allowing a state to disestablish a reservation through ignoring the law, fraudulently causing Indian landowners to lose titles to their land, and predicting the end of a reservation would be "the rule of the strong, not the rule of law."<sup>34</sup>

*B. Congress Established a Reservation for  
the Creek Nation through Treaties*

Oklahoma next argued that Congress had never actually established a reservation for the Creek in the first place.<sup>35</sup> Instead of being a recognized reservation, Oklahoma proposed that the Tribe qualified as a "dependent Indian community."<sup>36</sup> A "dependent Indian community" status, Oklahoma argued, is more easily lost than a reservation.<sup>37</sup> Oklahoma claimed reservation land must be "reserved from sale."<sup>38</sup> The Creek Nation, unlike other tribes, received a land patent from the United States under the Treaty of 1833, and Oklahoma contended the Tribe's land therefore did not qualify as a reservation because it was not "reserved from sale."<sup>39</sup>

The Court disagreed with Oklahoma's argument, and held that while no specific words are required to establish a reservation, the language in the treaties in question has been repeatedly held to establish a reservation.<sup>40</sup> Further, land held in fee title is not incompatible with reservation status.<sup>41</sup>

---

30. *Id.*

31. *Id.*

32. *Id.* at 2470.

33. *Id.*

34. *Id.* at 2474.

35. *Id.*

36. *Id.*

37. *Id.* at 2475.

38. *Id.*

39. *Id.*

40. *Id.* (citing *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902)).

41. *Id.*

*C. Eastern Oklahoma is Subject to the Major Crimes Act*

Oklahoma next argued the MCA has never applied to the eastern half of Oklahoma because the language of the Oklahoma Enabling Act implies that the State has jurisdiction over all people and several statutes discuss the assignment of cases in court in Indian Territory.<sup>42</sup> Oklahoma posited that it would be unthinkable for Congress to leave a jurisdictional gap under the MCA, where the federal government could not prosecute Indian-on-Indian crimes committed in Indian country, and therefore, Congress must have intended for Oklahoma to assert jurisdiction upon statehood.<sup>43</sup> The Court rejected this argument, because when Oklahoma gained statehood in 1907, the MCA applied.<sup>44</sup> Oklahoma may have continued to try Indians for crimes committed anywhere within Oklahoma, but this practice deviated from the requirements of the MCA.<sup>45</sup> The Court noted jurisdictional gaps under the MCA are common and therefore the gap in jurisdiction did not grant Oklahoma jurisdiction.<sup>46</sup>

*D. Policy Arguments for Disestablishment are not a Legal Basis to Ignore the Law*

Finally, Oklahoma argued that the consequences of finding that the Creek Reservation was intact were so transformative that the Court should find for disestablishment.<sup>47</sup> Specifically, Oklahoma pointed to the possibility of other tribes seeking enforcement of treaty promises, and that nearly half of Oklahoma residents could end up living within Indian country.<sup>48</sup>

The Court was not convinced by Oklahoma's policy arguments, and refuted Oklahoma's claim that finding for Mr. McGirt would have such "transformative" effects as Oklahoma warned.<sup>49</sup> First, the Court noted that other tribes seeking vindication of treaty rights must individually bring claims, because the question before the Court only concerned the Creek Reservation.<sup>50</sup> Second, the majority noted that there are other areas where significant non-Indian populations live in or near reservations without disastrous consequences.<sup>51</sup>

In a sweeping condemnation of the policy reasons put forth by both Oklahoma and the dissent, the Court cautioned that "the magnitude

---

42. *Id.* at 2476.

43. *Id.* at 2476.

44. *Id.* at 2477.

45. *Id.* at 2478.

46. *Id.* (citing *Duro v. Reina*, 495 U.S. 676, 704-706 (1990) (Brennan, J., dissenting)).

47. *Id.*

48. *Id.* at 2479.

49. *Id.*

50. *Id.*

51. *Id.* (describing Tacoma, Washington, and Mount Pleasant, Michigan).

of the legal wrong is no reason to perpetuate it.”<sup>52</sup> The Court outlined why the implications for both criminal and civil law were not relevant to the question before the Court.<sup>53</sup> However, the Court held that the drastic changes Oklahoma warned of were overstated, especially since the Creek Nation already had hundreds of intergovernmental agreements in place with the State.<sup>54</sup>

#### IV. DISSENT

The dissent, written by Chief Justice Roberts and joined by Justices Alito, Kavanaugh and Thomas, disagreed with the Court’s dismissal of the extratextual evidence, and used the three-part test suggested by Oklahoma to determine historic practice and demographics evinced disestablishment of the Creek Reservation.<sup>55</sup> The dissent first looked to Congress’s intention in various statutes passed by Congress, the contemporaneous understanding of the legislation and historical context, and the subsequent understanding of the reservation and pattern of settlement.<sup>56</sup> In light of all the relevant evidence, the dissent concluded that Congress intended to disestablish the Reservation.<sup>57</sup> The dissent finished its opinion by reciting concerns that non-Indians living on reservation land would be burdened by the change in governance.<sup>58</sup>

Justice Thomas joined the dissent and also wrote separately to opine the Court lacked jurisdiction to review the Oklahoma Court of Criminal Appeal’s decision.<sup>59</sup>

#### IV. CONCLUSION

*McGirt* is a landmark Supreme Court case because of the ramifications for the Creek Nation, Oklahoma, and federal Indian law. While Oklahoma argued the consequences of holding for the Tribe would upend Oklahoma law, the Court declined to base its decision on anything but straightforward statutory interpretation. As a result, much of Tulsa is now recognized as Indian Country.

---

52. *Id.* at 2480.

53. *Id.*

54. *Id.* at 2481.

55. *Id.* at 2482.

56. *Id.* (discussing the Act of June 27, 1898 [“The Curtis Act”], §28 and Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137 [“The Five Tribes Act”, among others.]

57. *Id.* at 2489.

58. *Id.* at 2499–2502.

59. *Id.* at 2502–04.