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# Alert | American Indian Law

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## *McGirt v. Oklahoma*: Understanding What the Supreme Court's Native American Treaty Rights Decision Is and Is Not

### Media Coverage of *McGirt:* 'Dewey Defeats Truman'

Confusion permeates the public arena as to what the U.S. Supreme Court recently did – and didn't do – by ruling in favor of the Muscogee (Creek) Nation, a federally recognized Native American tribe, and against the state in *McGirt v. Oklahoma*.[1] Not since a grinning incumbent President Harry S. Truman hoisted *The Chicago Daily Tribune's* "Dewey Defeats Truman" special edition on Nov. 3, 1948 – proclaiming his "loss" to New York Gov. Thomas E. Dewey – have so many commentators missed what really happened and why it matters.

Banner headlines in *The Washington Post* ("Half of the Land in Oklahoma Could Be Returned to Native Americans") and elsewhere are wrong: *McGirt* has nothing to do with land ownership. Rather, the Court determined which governments in Oklahoma are permitted to exercise criminal jurisdiction over Native American tribal members (or "Indians," the term used by Congress) who allegedly perpetrate violent crimes, or are the victims of them, committed within the boundaries of the Creek Nation's reservation. That and four other Indian reservations in what is now Eastern Oklahoma were permanently protected by

[1] No. 18-9526, 591 U.S. ____ (decided July 9, 2020).

treaty in 1866 between the United States government and five tribes (Creek, Cherokee, Chickasaw, Choctaw, and the Seminole Tribe of Oklahoma). Yet Congress, which according to longstanding Supreme Court precedent has supreme supervisory authority over Native American tribes (a 19th Century legal principle known as the "plenary power doctrine," reaffirmed in *McGirt*), violated this solemn promise when it opened these same lands to non-Indian settlement. This was key to the federal government's push to make Oklahoma – the former Indian Territory, to which those and many other tribes had been forcibly relocated from the Eastern and Southern Coasts in the "Trail of Tears" of the early 19th Century – the 46th state in 1907.

## Why *McGirt* Does Not Affect Land Ownership

Today, the reservation lands guaranteed to the five tribes in the 1866 treaty area are almost entirely owned by non-tribal members as private property. This is the legacy of the Oklahoma Enabling Act of 1906 as well as various Congressional allotment acts – or so-called "Indian homesteading" laws – in which treaty lands held by tribes were parceled out to individual tribal members, with the bulk of the remaining lands declared surplus and sold to non-Indians. *McGirt* does not alter land ownership, but it does uphold the 1866 treaty in another way. In a 5-4 decision, the Court held that the Creek Nation's 1866 treaty area, which includes the City of Tulsa and about one-third of the state, was never eliminated (the legal term in the Court's precedent is "disestablished") for purposes of the Creek Nation's exercise of its inherent sovereign power to prosecute crimes involving Indians. More specifically, an 1885 statute, the Major Crimes Act (MCA)[2] permits the federal government to exercise criminal jurisdiction over certain felonies arising on Indian reservations.

Under the MCA, federal officials – including the Federal Bureau of Investigation's Indian Country Crimes Unit; the United States Attorney's Offices; and U.S. Magistrate Judges and U.S. District Court Judges – may exercise criminal jurisdiction concurrently with tribal governments within the exterior boundaries of about half of the Indian reservations in the United States. The MCA only comes into play when members of federally recognized Indian tribes are either the alleged perpetrators or victims of the specific offenses listed in the MCA. The Supreme Court has long held that there is no double jeopardy when such concurrent jurisdiction is exercised by tribes and the federal government over the same or similar criminal offenses. Just as it is with federal and state prosecutions, the separate sovereigns each have the right to enforce their own criminal laws.

## The Supreme Court's Decision

The *McGirt* dispute arose within this complex jurisdictional context. Jimcy McGirt, a citizen of the Seminole Tribe of Oklahoma, had been tried and convicted in Oklahoma state court of perpetrating sex crimes against a child. In a series of cases, McGirt and other tribal members filed post-conviction challenges to the state's authority to prosecute, try and convict them, arguing that the 1866 treaty reservation had never been disestablished by Congress and remained subject to concurrent federal-tribal criminal jurisdiction.

Writing for the majority, Justice Neil Gorsuch agreed with McGirt and the Creek Nation, which had intervened in the case, that the state lacked criminal jurisdiction. Rejecting arguments from Oklahoma and the United States, which had also intervened, the Supreme Court ruled that only the federal government, the Creek Nation, or both could prosecute McGirt and other members of federally recognized Native American tribes for MCA offenses arising within the 1866 treaty area. In reaching this result,

[2] 18 U.S.C. Section 1153.

Justice Gorsuch applied earlier precedent to hold that the 1866 reservation could only be disestablished if Congress did so in explicit terms.

The majority emphasized that because Congress retains plenary power over tribal affairs, Congress may always decide to adjust federal criminal jurisdiction over the treaty area if it so chooses. "On the far end of the Trail of Tears," Justice Gorsuch writes at the outset of the Court's opinion, "was a promise." That promise was a permanent homeland for the Creek Nation, which had been forced to cede its lands in the Eastern United States in exchange for approximately three million acres in the Indian Territory where its citizens could continue to engage in self-governance according to their own laws and institutions, subject to whatever restrictions Congress might ultimately impose.

In dissent, Chief Justice John Roberts and Justices Thomas, Alito, and Kavanaugh concluded that the net effect of a series of Congressional statutes was to disestablish the reservation. The dissenters stressed that for more than a century, the state had exercised criminal authority over crimes arising in the 1866 treaty area. The majority's decision, in their view, not only contradicts this widespread public understanding but could have serious consequences for both criminal and civil jurisdiction in the 1866 treaty area. "Across this vast area," the Chief Justice warned, "the State's ability to prosecute serious crimes will be hobbled and decades of past convictions could well be thrown out. On top of that, the Court has profoundly destabilized the governance of eastern Oklahoma."

The majority devoted a considerable portion of the opinion attempting to refute the dissenters' position that *McGirt* may open a Pandora's box given its potential application to other tribes and treaties. "If we dared to recognize that the Creek Nation was ever disestablished, Oklahoma and dissent warned, our holding might be used by other tribes to vindicate similar treaty promises," the majority wrote. "Ultimately, Oklahoma fears that perhaps 1.8 million of its residents could wind up within Indian country. . . . [Yet e]ach tribe's treaties must be considered on their own terms, and the only question before us concerns the Creek." Moreover, "the MCA applies only to certain crimes committed in Indian country by Indian defendants"; consequently, "the vast majority of prosecutions will be unaffected by what we decide today."

## What Happens Next?

In the weeks following the Court's ruling in *McGirt,* several Native American tribes have begun citing the case to reassert treaty rights in other parts of the United States:

- On July 30, the U.S. Court of Appeals for the Seventh Circuit reversed a lower court's ruling in part based on *McGirt*, concluding that the Oneida Nation of Wisconsin's annual Big Apple Fest does not need a permit from a local village because it takes place in a portion of the Nation's treaty reservation that was never disestablished by Congress.[3] The Oneida Nation and neighboring Village of Hobart have been locked in jurisdictional disputes for years, but the panel's reliance on *McGirt*, if it stands, may have strengthened the Nation's position in future litigation.
- The Little Traverse Bay Bands of Odawa Indians in Michigan has urged the U.S. Court of Appeals for the Sixth Circuit to reverse a ruling that the tribe never had a reservation. The tribe's legal team includes Riyaz Kanji and David Giampetroni of Kanji & Katzen, who represented the Creek Nation in *McGirt*.[4]

[3] *Oneida Nation v. Village of Hobart*, No. 19-1981 (7th Cir. July 30, 2020).
[4] *Little Traverse Bay Bands v. Whitmer*, No. 19-2070 (6th Cir. Aug. 5, 2020).

- Meanwhile, in Oklahoma, the Creek Nation has strongly opposed efforts by state officials – especially Attorney General Mike Hunter – to enlist Congress to clarify, and potentially narrow, the Nation's criminal and civil jurisdiction post-*McGirt*.[5]

The potential longer-term implications of *McGirt* for criminal and civil jurisdiction may well depend on the creativity of advocates seeking to reinvigorate Native American tribal treaty rights. On its face, the Supreme Court's decision is expressly limited to one tribe and one statute. Yet the textualist approach of the *McGirt* majority, along with its strong affirmance of Congressional plenary power over tribes, inevitably invites scrutiny of other treaties between the United States and federally recognized Indian tribes across the country. The fact remains that notwithstanding more than a century of state criminal jurisdiction over the Creek Nation's 1866 treaty area, the Court rejected the invitation to disestablish the reservation absent explicit Congress action to do so. This opens new frontiers for possibly reinvigorating other treaty rights notwithstanding the passage of decades or even centuries.

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[5] Andrew Westney, "Congressional Action on McGirt May Prove Risky for Tribes," Law360 (July 24, 2020).