

# American Indian Law Review

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Volume 46 | Number 1

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2022

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### Recommended Citation

Adam Goodrum, *Meeting the McGirt Moment: The Five Tribes, Sovereignty & Criminal Jurisdiction in Oklahoma's New Indian Country*, 46 AM. INDIAN L. REV. 201 (2022), <https://digitalcommons.law.ou.edu/ailr/vol46/iss1/7>

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## MEETING THE *MCGIRT* MOMENT: THE FIVE TRIBES, SOVEREIGNTY & CRIMINAL JURISDICTION IN OKLAHOMA'S NEW INDIAN COUNTRY

*Adam Goodrum\**

### *Introduction*

In the summer of 2020, the U.S. Supreme Court issued a decision that has been hailed as a significant victory for supporters of tribal sovereignty.<sup>1</sup> The Court held that a significant portion of the land in Oklahoma is an Indian reservation.<sup>2</sup> In a letter to Oklahoma's congressional delegation, a coalition of Native organizations asserted that "[t]he Court's affirmation of sovereignty was a win for every tribal nation in the United States, as well as communities that neighbor tribal nations."<sup>3</sup>

In *McGirt v. Oklahoma*, the Court concluded that the Muscogee (Creek) Nation's reservation in eastern Oklahoma, first created in the nineteenth century, was never disestablished by Congress.<sup>4</sup> Because only tribes and the federal government have jurisdiction over crimes committed in Indian Country by or against Native Americans, the holding means that the State of Oklahoma does not have criminal jurisdiction over Native Americans who commit crimes within the boundaries of the Muscogee (Creek) Nation's reservation—a sizeable portion of the state that includes much of the city of Tulsa.<sup>5</sup> The decision's effects were felt beyond the boundaries of Muskogee Nation's reservation because four other tribes in Oklahoma have

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First place winner, 2020-21 *American Indian Law Review* National Writing Competition.

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1. Letter from Fawn Sharp, President, Nat'l Cong. of Am. Indians, et al., to the Honorable Jim Inhofe, U.S. Senator 2 (Aug. 13, 2020), [https://www.ncai.org/policy-issues/land-natural-resources/Joint\\_Tribal\\_Organizations\\_Letter\\_Defending\\_Historic\\_McGirt\\_Decision\\_8-13-2020.pdf](https://www.ncai.org/policy-issues/land-natural-resources/Joint_Tribal_Organizations_Letter_Defending_Historic_McGirt_Decision_8-13-2020.pdf).

2. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020).

3. Letter from Fawn Sharp et al. to Jim Inhofe, *supra* note 1, at 2.

4. 140 S. Ct. at 2482.

5. *Id.* at 2460.

treaty agreements with the U.S. government that are similar to the Muscogee (Creek) Nation's.<sup>6</sup> If those treaties also do not include language that disestablishes the tribes' reservations, then the State of Oklahoma has been unlawfully exercising criminal jurisdiction over nearly the entire eastern half of the state since its admission to the Union in 1907.<sup>7</sup>

*McGirt* has forced federal, state, and tribal governments to confront changes to the ways laws are enforced and how offenses are prosecuted in a wide swath of the state, which is home to 1.8 million people.<sup>8</sup> In the coming months, federal law enforcement agencies and U.S. Attorneys as well as tribal police forces and prosecutors will be newly responsible for administering justice for a significant portion of Oklahoma's population in the eastern part of the state.

Although tribal criminal jurisdiction often will be concurrent with the federal government and will generally extend only to offenses committed by Native Americans against other Native Americans, the expanded authority is a victory for tribal sovereignty. The Five Tribes—the Muscogee (Creek) Nation, the Cherokee Nation, the Chickasaw Nation, the Choctaw Nation, and the Seminole Nation—are well-positioned to exercise criminal jurisdiction within the historic boundaries of their reservations.

This Article will demonstrate that the *McGirt* decision was a victory for tribal sovereignty by showing that the Five Tribes are likely to exercise criminal jurisdiction over their historic reservation lands in the near future and are prepared to administer justice through tribal law enforcement and tribal courts. Part I of this Article will begin with a summary of the Supreme Court's *McGirt* decision, with a focus on how the Court determined that the Muscogee (Creek) Nation has a reservation for criminal jurisdiction purposes. Part II will then provide an overview of the relevant laws that comprise the criminal jurisdiction "maze"<sup>9</sup> in Indian Country, including the Major Crimes Act, which gives the federal government jurisdiction over serious offenses committed in Indian Country exclusive of

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6. *Oklahoma History Supplemental*, CHOCTAW NATION (Dec. 30, 2020), <https://www.choctawnation.com/ok-history-supplemental>.

7. 43 U.S.C. § 944; *Negonsott v. Samuels*, 507 U.S. 99, 102–03 (1993).

8. Lawrence Hurley, *U.S. Supreme Court Deems Half of Oklahoma a Native American Reservation*, REUTERS (Jul. 9, 2020), <https://www.reuters.com/article/us-usa-court-oklahoma/u-s-supreme-court-deems-half-of-oklahoma-a-native-american-reservation-idUSKBN24A268>.

9. Elizabeth Reese, *Welcome to the Maze: Race, Justice, and Jurisdiction in McGirt v. Oklahoma*, U. CHICAGO L. REV. ONLINE (Aug. 13, 2020), <https://lawreviewblog.uchicago.edu/2020/08/13/mcgirt-reese/> ("The civil and criminal jurisdictional rules governing Indian Country are so complicated that they're commonly described as a 'maze.'").

the states, and recent statutory expansions of tribal criminal jurisdiction. Part III of the Article will then show that the negative consequences of *McGirt* predicted by the State of Oklahoma have not come to fruition, nor are they likely to come to pass. Finally, the Article in Part IV will demonstrate that the sovereignty of all Five Tribes will likely expand under *McGirt* and that the tribes have the capability to administer justice within their historical reservation boundaries.

## II. *McGirt v. Oklahoma*

At the trial court level, *McGirt v. Oklahoma* did not seem eyebrow-raising, much less transformational. An Oklahoma state court jury found a man, Jimcy McGirt, guilty of three serious sexual offenses and imposed a state prison sentence.<sup>10</sup> McGirt appealed his conviction years later.<sup>11</sup> On appeal, McGirt did not contest his guilt, argue that his conviction was based on faulty evidence, nor that his conviction violated his constitutional rights.<sup>12</sup> Rather, he argued that the State of Oklahoma lacked jurisdiction to try him in its court system.<sup>13</sup> McGirt contended that he should have been tried in a federal court instead of state court because he is Native American and because he committed his crimes in Indian Country.<sup>14</sup> As the Court points out, “State courts generally have no jurisdiction to try Indians for conduct committed in ‘Indian Country,’” which includes land designated as reservations.<sup>15</sup> Ultimately, his case placed the federal-tribal-state jurisdiction patchwork front and center before the Supreme Court.

McGirt was charged in 1997 with three sex offenses: first-degree rape, lewd molestation, and forcible sodomy.<sup>16</sup> McGirt’s victim testified that when she was four-years old, McGirt, who was married to the girl’s grandmother, forced the girl to touch his genitalia and molested her.<sup>17</sup> The

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10. KaraLee Langford, *Supreme Court to Take Up Jurisdiction on Tribal Lands Again with McGirt v. Oklahoma*, TULSA WORLD (Feb. 26, 2020), [https://tulsa-world.com/news/supreme-court-to-take-up-jurisdiction-on-tribal-lands-again-with-mcgirt-v-oklahoma/article\\_2061d672-ebe5-5c53-93bf-d53315596028.html](https://tulsa-world.com/news/supreme-court-to-take-up-jurisdiction-on-tribal-lands-again-with-mcgirt-v-oklahoma/article_2061d672-ebe5-5c53-93bf-d53315596028.html).

11. *Id.*

12. *Id.*

13. Brief for Petitioner at 1, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526), 2020 WL 583959, at \*1.

14. *Id.* at 44, 2020 WL 583959, at \*44.

15. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020) (citing *Negonsott v. Samuels*, 507 U.S. 99, 102–03 (1993)).

16. Langford, *supra* note 10.

17. Curt Killman, *Prosecution Rests in Retrial of Jimcy McGirt, Man at Center of Landmark Supreme Court Decision*, TULSA WORLD (Nov. 6, 2020), <https://tulsa-world.com/>

state court sentenced him to 1,000 years in prison for the rape and molestation charges and to life without parole for the forcible sodomy charge.<sup>18</sup>

At the heart of McGirt's argument on appeal was the Major Crimes Act's provision of exclusive jurisdiction to the federal government for certain serious crimes when they are committed by an Indian in Indian Country.<sup>19</sup> The crimes over which the federal government has exclusive jurisdiction include several sexual offenses.<sup>20</sup> McGirt's crimes are included in the Major Crimes Act (MCA), and McGirt is an enrolled member of the Seminole Nation of Oklahoma.<sup>21</sup> His appeal turned on whether the land on which McGirt committed his offenses—which was within the historic boundaries of the Muscogee (Creek) Nation's reservation—is Indian Country.<sup>22</sup> Thus, McGirt's argument implicated the interests of the Muscogee (Creek) Nation because he argued that the land on which he committed his crimes was part of the tribe's reservation and that the reservation was never disestablished by Congress.<sup>23</sup>

If McGirt was correct, and the Muscogee (Creek) Nation's reservation was never disestablished, then the State of Oklahoma did not have the authority to prosecute crimes committed by Indians—including McGirt—in a large swath of the eastern part of the state, an area that includes a significant portion of the city of Tulsa.<sup>24</sup> Victory for McGirt and the Muskogee (Creek) Nation would mean that the federal government and the tribe—not local district attorneys—would share criminal jurisdiction and responsibility for prosecuting crimes committed within reservation boundaries.<sup>25</sup>

In order to determine the status of the land where McGirt committed his crimes, the Court had to decide whether the Muscogee (Creek) Nation reservation ever existed and, if so, whether Congress ever disestablished the

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news/local/crime-and-courts/prosecution-rests-in-retrial-of-jimcy-mcgirt-man-at-center-of-landmark-supreme-court-decision/article\_de6342a2-1f5e-11eb-bb0c-23d66ec7c75c.html.

18. Langford, *supra* note 10.

19. Brief for Petitioner, *supra* note 13, at 1, 2020 WL 583959, at \*1.

20. 18 U.S.C. § 1153; *see also Negonsott*, 507 U.S. at 102–03 (noting state courts generally do not have jurisdiction to try Indians for crimes committed in “Indian country”).

21. McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020).

22. *Id.*

23. *Id.* at 2459–60.

24. *Id.* at 2460.

25. *Id.*

reservation.<sup>26</sup> That inquiry required the Supreme Court to look back nearly two hundred years.<sup>27</sup>

First, the Court determined that the tribe historically had a reservation.<sup>28</sup> The United States and the Muscogee (Creek) Nation entered into treaties in 1832 and 1833 when the tribe was removed from its ancestral homelands in the southeastern United States.<sup>29</sup> The treaties “solemnly guarantied” land and “establish[ed] boundary lines which . . . secure a . . . permanent home to the whole Creek Nation of Indians.”<sup>30</sup> Although the 1832 and 1833 treaties between the tribe and the U.S. government did not employ the word “reservation,” the language was similar to that used in other treaties that the Court has determined to be sufficient to establish a reservation.<sup>31</sup>

The Court found that a third treaty from 1866 between the United States and the Creek Nation “left no room for doubt.”<sup>32</sup> The 1866 treaty stated that the tribe would give up additional land to the U.S. government but that what was left would “be forever set apart as a home” for the Creek Nation.<sup>33</sup> The Court found further support for its conclusion that Congress established a reservation for the Creek Nation in several nineteenth century statutes that “expressly referred to the Creek Reservation.”<sup>34</sup> Finally, the Court noted that an 1856 agreement guaranteed the Creek Nation would be “secure[] in the unrestricted right of self-government” and that “‘no portion’ of the Creek Reservation ‘shall ever be embraced or included

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26. *Id.* at 2462–63.

27. *Id.*

28. *Id.* at 2462.

29. *Id.* at 2459; *Muscogee (Creek) Nation History*, MUSKOGEE NATION, <https://www.mcn-nsn.gov/culturehistory/> (last visited Oct. 30, 2021) (noting that the tribe’s homeland since before AD 1500 included portions of Alabama, Georgia, Florida, and South Carolina).

30. Treaty with the Creeks, art. XIV, Mar. 24, 1832, 7 Stat. 368 [hereinafter 1832 Treaty with the Creeks]; Treaty with the Creeks, pmb., Feb. 14, 1833, 7 Stat. 417 [hereinafter 1833 Treaty with the Creeks]. Creek Indians was the name applied to the Muscogee people by British traders and adopted by the United States government throughout the nineteenth century. See *Creek (Mvskoke)*, OKLA. HIST. SOC’Y, <https://www.okhistory.org/publications/enc/entry.php?entry=CR006> (last visited Jan. 30, 2022).

31. *McGirt*, 140 S. Ct. at 2461 (“[A] grant of land ‘for a home, to be held as Indian lands are held,’ established a reservation . . . .”) (quoting *Menominee Tribe v. United States*, 391 U.S. 404, 405 (1968) (internal quotation marks omitted)).

32. *Id.*

33. *Id.* (quoting Treaty Between the United States and the Creek Nation of Indians, art. III, June 14, 1866, 14 Stat. 786).

34. *Id.*

within, or annexed to, any Territory or State.”<sup>35</sup> Justice Gorsuch wrote for the majority and concluded, “Under any definition, this was a reservation.”<sup>36</sup>

Having determined that the Creek had a reservation, the Court moved on to consider whether Congress ever disestablished the tribe’s reservation.<sup>37</sup> The Court observed that its precedent is clear: “[C]ourts have no proper role in the adjustment of reservation borders. . . . [O]nly Congress can divest a reservation of its land and diminish its boundaries.”<sup>38</sup> As with the creation of a reservation, there are no magic words that Congress must employ to disestablish a reservation.<sup>39</sup> However, to do so, Congress must be unambiguous about its intention.<sup>40</sup>

Oklahoma argued that Congress disestablished the Creek Nation’s reservation during the Allotment Era.<sup>41</sup> In 1901, the United States and the Creek Nation agreed to allot 160-acre parcels of tribal land to the tribe’s members.<sup>42</sup> Oklahoma’s allotment argument boiled down to the assertion that by divvying up tribal lands and providing title to individual tribal members, Congress disestablished the tribe’s reservation.<sup>43</sup> But without a statute clearly expressing congressional intent to disestablish a reservation, allotment of a tribe’s reservation is insufficient to disestablish.<sup>44</sup> In fact, “allotment . . . is completely consistent with continued reservation status.”<sup>45</sup> Furthermore, “[f]or years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected that argument.”<sup>46</sup> Absent explicit disestablishment, allotment merely opened reservation land to non-Indian ownership.<sup>47</sup>

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35. *Id.* (quoting the Treaty of 1856, art. IV, XV, Aug. 7, 1856, 11 Stat. 700).

36. *Id.* at 2462.

37. *Id.*

38. *Id.* (second alteration in original) (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)).

39. *Id.* at 2462–63 (noting “discontinued,” “abolished,” or “vacated” can all indicate disestablishment of a reservation (citing *Mattz v. Arnett*, 412 U.S. 481, 504 (1973))).

40. *Id.* at 2463.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 2464 (citing *Mattz*, 412 U.S. at 497).

45. *Mattz*, 412 U.S. at 497.

46. *McGirt*, 140 S. Ct. at 2464.

47. *Seymore v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356–58 (1962).

The Court also noted that other reservations in Oklahoma *were* clearly disestablished by Congress.<sup>48</sup> Examples include the Ponca and the Otoe reservations, which were disestablished as part of the allotment process.<sup>49</sup> The Court used the statutes that allotted and disestablished the Ponca and Otoe reservations as further contemporary evidence that Congress could have disestablished the Creek reservation, if it so intended.<sup>50</sup> Because Congress never expressed an unambiguous intention to disestablish the Creek reservation, the reservation continues to exist.<sup>51</sup>

After concluding that the Creek Nation had a reservation and that Congress never disestablished it, the Court addressed Oklahoma's other arguments.<sup>52</sup> The State argued that in addition to allotment there were other federal intrusions on the tribe's sovereignty that indicate disestablishment, including Congress's diminishment of the tribal government's authority.<sup>53</sup> The Court was not persuaded by that argument, and Justice Gorsuch pointed out that while Congress did, in fact, diminish the tribal government's powers, Congress continued to recognize the tribal government.<sup>54</sup> In the Court's eyes, continuing to recognize the tribal government would have made little sense if Congress thought that it had effectively abolished the tribal government.<sup>55</sup>

Oklahoma also contended that historical practices and demographics proved disestablishment.<sup>56</sup> However, the Court dispatched this line of argument by reiterating that statutory text is what must guide: "When interpreting Congress's work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us."<sup>57</sup> Oklahoma did "not point to any ambiguous language in any of the relevant statutes that could plausibly be read as an Act of disestablishment."<sup>58</sup>

Having dismissed Oklahoma's arguments that the Creek Nation's reservation was disestablished by Congress, the Court went on to reject the

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48. *McGirt*, 140 S. Ct. at 2465.

49. *Id.*

50. *Id.*

51. *Id.* at 2464.

52. *Id.* at 2465.

53. *Id.*

54. *Id.* at 2465–66.

55. *Id.* at 2466–67.

56. *Id.* at 2468.

57. *Id.* (citing *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538–39 (2019)).

58. *Id.*



state's alternative arguments.<sup>59</sup> Oklahoma had mounted three alternative arguments: that there was never a Creek reservation in the first place,<sup>60</sup> that the MCA never applied to Oklahoma,<sup>61</sup> and that if the Court held that the Muscogee (Creek) Nation has a reservation, there would be a jurisdictional gap and a high potential for negative policy outcomes and public confusion.<sup>62</sup> The majority found none of these arguments persuasive.<sup>63</sup> Notably, even the dissent did not address the state's first and second alternative arguments.<sup>64</sup>

Because the Muscogee (Creek) Nation has a reservation, according to the Supreme Court, the MCA applies within its boundaries, and thus "[o]nly the federal government, not the State, may prosecute Indians for major crimes committed in Indian Country."<sup>65</sup> Accordingly, McGirt's state court conviction was reversed.<sup>66</sup> Moving forward, the federal government and the tribal government will share responsibilities for enforcing criminal laws and prosecuting offenses within the Muscogee (Creek) Nation reservation.<sup>67</sup>

### *III. Federal and Tribal Jurisdiction in Indian Country*

Criminal jurisdiction in Indian Country is a jurisprudential maze.<sup>68</sup> "Indian Country" is defined by 18 U.S.C. § 1151 and includes reservations, allotted lands, and dependent Indian communities.<sup>69</sup> The federal government, states, and tribes may all play various roles in the prosecution of a crime committed in Indian Country.<sup>70</sup> State and federal jurisdiction is determined by which sovereign has territorial, subject matter, and personal

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59. *Id.* at 2482.

60. *Id.* at 2474.

61. *Id.* at 2476.

62. *Id.* at 2478.

63. *Id.* at 2474, 2476, 2478–79.

64. *Id.* at 2474, 2476.

65. *Id.* at 2478.

66. *Id.* at 2482; D.E. Smoot, *McGirt Found Guilty After Federal Trial*, MUSKOGEE PHOENIX (Nov. 6, 2020), [https://www.muskogeephoenix.com/news/mcgirt-found-guilty-after-federal-trial/article\\_a81b4454-2096-11eb-8a9d-4b0d6da80412.html](https://www.muskogeephoenix.com/news/mcgirt-found-guilty-after-federal-trial/article_a81b4454-2096-11eb-8a9d-4b0d6da80412.html) (stating that McGirt was retried for his crimes in federal court and was convicted by a jury).

67. *See* 18 U.S.C. § 1153; *see also id.* § 1152.

68. *See generally* Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976).

69. 18 U.S.C. § 1151.

70. *See* Arvo Q. Mikkanen, *Indian Country Criminal Jurisdictional Chart*, U.S. DEP'T OF JUST. (Aug. 2020), <https://www.justice.gov/usao-wdok/page/file/1300046/download>.

jurisdiction over a party.<sup>71</sup> In addition, in Indian Country, the tribal membership status of the parties, the role of a Native party—perpetrator or victim—and the type of crime charged will affect whether a tribe or the federal government has jurisdiction over the offense.<sup>72</sup>

Several federal statutes govern jurisdiction over crimes committed in Indian Country.<sup>73</sup> First, the Major Crimes Act provides the federal government with exclusive jurisdiction over serious offenses.<sup>74</sup> Offenses included in the MCA, when committed outside of Indian Country, are usually prosecuted as felonies in state courts.<sup>75</sup> Second, the General Crimes Act, also known as the Indian Country Crimes Act, establishes the general parameters of the federal government's and tribal governments' jurisdiction over non-major crimes, including misdemeanors and victimless crimes.<sup>76</sup> Finally, in 2010 and 2013 statutes, Congress provided tribes with the ability to exercise expanded criminal jurisdiction and sentencing authority in some circumstances.<sup>77</sup>

#### A. *The Major Crimes Act*

The Major Crimes Act, a 135-year-old statute, is the cornerstone of federal criminal jurisdiction in Indian Country.<sup>78</sup> Passed in 1885, the MCA provides exclusive federal criminal jurisdiction in Indian Country for certain crimes committed on Indian land by or against an Indian.<sup>79</sup> Congress passed the MCA in response to the Supreme Court's decision in *Ex parte Crow Dog*, in which the Court held that absent a “clear expression of the intention of [C]ongress” to the contrary, the federal government lacked jurisdiction to try an Indian for the murder of another Indian.<sup>80</sup> The MCA, which has been amended over the years to cover additional crimes, is an

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71. *Id.*

72. 18 U.S.C. § 1153; *id.* § 1152.

73. *See, e.g., id.* §§ 1151–1153.

74. *Id.* § 1153.

75. *United States v. Kagama*, 118 U.S. 375, 376–77 (1886); Mikkanen, *supra* note 70.

76. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 9.04 at 765 (Nell Jessup Newton et al. eds., 2019) [hereinafter COHEN'S].

77. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (codified as amended at 18 U.S.C. § 1162); *VAWA 2013 and Tribal Jurisdiction over Crimes of Domestic Violence*, U.S. DEP'T OF JUST. (June 14, 2013), <https://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/vawa-2013-tribal-jurisdiction-over-non-indian-perpetrators-domesticviolence.pdf>.

78. COHEN'S, *supra* note 76, § 9.04, at 767–68.

79. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385.

80. *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883).

expression of Congress's clear intention to establish such federal criminal jurisdiction and remains in effect today.<sup>81</sup>

The original 1885 version of the MCA included seven crimes: "murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny."<sup>82</sup> Today, in addition to the original offenses, the MCA also includes kidnapping, maiming, sexual abuse (chapter 109A), incest, assault with intent to commit murder or assault with a dangerous weapon (chapter 113 felony assault), assault against a person under the age of sixteen, felony child abuse or neglect, and robbery.<sup>83</sup>

Under the MCA, the United States has jurisdiction, "exclusive of the states, over Indians who commit any of the listed offenses, regardless of whether the victim is an Indian or non-Indian."<sup>84</sup> That is, as the Court noted in *United States v. Kagama*, even though "the state and its tribunals would have jurisdiction if the offense was committed by a white man outside an Indian reservation, the courts of the United States are to exercise jurisdiction as if the offense had been committed at some place within the exclusive jurisdiction of the United States."<sup>85</sup>

#### B. *The Indian Country Crimes Act*

The Indian Country Crimes Act (ICCA) establishes federal criminal jurisdiction generally over Indian Country, stating that "the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States . . . shall extend to the Indian country."<sup>86</sup> The ICCA includes a limitation on federal jurisdiction that preserves tribal sovereignty. The Act further states that "[t]his section shall not extend to offenses committed by one Indian against the person or property of another Indian . . ."<sup>87</sup> The federal government does not have jurisdiction over offenses committed by an Indian who has already been punished by a tribe for the offense,<sup>88</sup> and it is undoubted that Indian tribes may enforce their criminal laws against tribe members.<sup>89</sup>

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81. 18 U.S.C. § 1153.

82. Act of Mar. 3, 1885, § 9, 23 Stat. at 385.

83. 18 U.S.C. § 1153.

84. *The Major Crimes Act — 18 U.S.C. § 1153*, U.S. DEP'T OF JUST. ARCHIVES, <https://www.justice.gov/archives/jm/criminal-resource-manual-679-major-crimes-act-18-usc-1153> (last updated Jan. 22, 2020).

85. *United States v. Kagama*, 118 U.S. 375, 377 (1886).

86. 18 U.S.C. § 1152.

87. *Id.*

88. *Id.*

89. *United States v. Wheeler*, 435 U.S. 313, 322 (1978).

Hence pursuant the ICCA, either the federal government or tribal governments may have jurisdiction over misdemeanor offenses and victimless crimes when committed in Indian Country, depending on the perpetrator and the nature of the crime.

### C. Tribal Jurisdiction

Indian tribes are sovereigns and entitled to self-governance.<sup>90</sup> The Court has said that under the Constitution, “tribes possess a nationhood status and retain inherent powers of self-government.”<sup>91</sup> Additionally, experts have emphasized that “the constitutional recognition of tribes as sovereigns in a government-to-government relationship with the United States has remained a constant in federal Indian law.”<sup>92</sup>

[Indian tribes] were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the state within whose limits they resided.<sup>93</sup>

According to experts, “[p]erhaps the most basic principle of all Indian law . . . is that those powers lawfully vested in an Indian nation are not, in general, delegated powers granted by express acts of Congress, but rather ‘inherent powers of a limited sovereignty which has never been extinguished.’”<sup>94</sup> Tribes have the right, which derives from a preexisting sovereignty, to govern their members and territories.<sup>95</sup>

To be clear, under the Constitution, federal laws and treaties are the “supreme law of the land” to which tribes are subject.<sup>96</sup> Congress has plenary power over Indian affairs, including the ability to end the federal government’s recognition of a tribe.<sup>97</sup> Congress’s broad authority also

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90. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 1 (1831).

91. *Id.*

92. COHEN’S, *supra* note 76, § 4.01(1)(a), at 209.

93. *United States v. Kagama*, 118 U.S. 375, 381–82 (1886).

94. COHEN’S, *supra* note 76, § 4.01(1)(a), at 207 (quoting *Wheeler*, 435 U.S. at 322–23).

95. *Id.*

96. U.S. CONST. art. VI, cl. 2.

97. U.S. CONST. art. I, § 8, cl. 3.

includes the authority to breach treaties.<sup>98</sup> But once a tribe is recognized, it retains its sovereignty unless Congress acts to end it.<sup>99</sup> Thus, tribes retain the aspects of sovereignty that are not abrogated by Congress through treaty, by law, or as the result of a tribe's dependent status.<sup>100</sup>

Like state and local governments, tribes may enact criminal and civil laws, unless Congress limits that power.<sup>101</sup> Tribal definitions of crimes and punishments apply in Indian country, coexisting with federal criminal statutes as well as with state laws, where Congress permits state criminal jurisdiction in Indian Country.<sup>102</sup> Tribal courts likewise enjoy broad authority to adjudicate matters arising in their jurisdictions, including criminal matters where Congress has not limited tribal authority.<sup>103</sup>

Although Congress never disestablished the tribe's reservation, it did abolish the Creeks' tribal courts in 1898.<sup>104</sup> After its admission as a state to the Union in 1907, the State of Oklahoma assumed that it had criminal jurisdiction over crimes committed by Indians anywhere within the state's borders.<sup>105</sup> But the forty-sixth state was mistaken. Oklahoma has never sought criminal jurisdiction from Congress, nor has Congress conferred it.<sup>106</sup>

Eventually, Congress permitted tribal courts to once again adjudicate minor criminal offenses that occur in Indian Country.<sup>107</sup> Congress also provided tribes the ability to consent to state criminal jurisdiction or—heavy handedly—expressly authorized state jurisdiction over offenses involving Indians.<sup>108</sup> Tribal governments may establish the institutions required to exercise criminal jurisdiction under the Indian Reorganization Act and the Oklahoma Indian Welfare Act.<sup>109</sup>

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98. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566–68 (1903); *see Solem v. Bartlett*, 465 U.S. 463, 470 (1984) (“[O]nly Congress can divest a reservation of its land and diminish its boundaries.”).

99. COHEN'S, *supra* note 76, § 4.01(1)(a), at 207.

100. *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (“Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.”).

101. COHEN'S, *supra* note 76, § 4.01(2)(c), at 216.

102. *Id.*

103. *Id.* § 4.01(2)(d), at 219.

104. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2465 (2020).

105. *Id.* at 2477.

106. *Id.* at 2479.

107. *Id.* at 2478.

108. *Id.*

109. *Muscogee Nation v. Hodel*, 851 F.2d 1439, 1446–47 (1988).

Congress passed the Oklahoma Indian Welfare Act (OIWA) in 1936, which authorized tribes to re-constitute their governments and authorized tribal courts to exercise jurisdiction over minor crimes.<sup>110</sup> The Muscogee (Creek) Nation did so in 1982, reestablishing its criminal (and civil) courts as authorized by the 1934 Act.<sup>111</sup> The Bureau of Indian Affairs challenged the tribe's authority to do so,<sup>112</sup> but the D.C. Circuit concluded that the tribe had the power to reestablish its courts under the OIWA.<sup>113</sup> The OIWA "conferred all powers associated with self-government" on Oklahoma's tribes.<sup>114</sup> Therefore, "the Muscogee (Creek) Nation has the power to establish Tribal Courts with civil and criminal jurisdiction, subject, of course, to the limitations imposed by statutes generally applicable to all tribes."<sup>115</sup>

#### *D. Recent Statutory Expansions of Tribal Jurisdiction*

Tribal governments may now also exercise additional limited criminal jurisdiction over some felony offenses. In recent years, the Tribal Law and Order Act (TLOA) of 2010 and the 2013 reauthorization of the Violence Against Women Act (VAWA) expanded tribal sentencing authority and increased the number of felony offenses over which tribal governments may exercise jurisdiction.<sup>116</sup> Both TLOA and VAWA 2013 were boons to tribal sovereignty because they expanded the role tribes may play in administering justice for and amongst tribal members. As Muscogee (Creek) Nation Principal Chief David Hill said, "[J]urisdiction is essential to sovereignty and self-determination."<sup>117</sup>

In 2010, Congress passed the TLOA in order to address persistently high levels of crime in Indian Country.<sup>118</sup> The Indian Civil Rights Act limits the

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110. *Id.* at 1442.

111. *Id.* at 1440.

112. *Id.* at 1442.

113. *Id.* at 1445–46.

114. *Id.* at 1445.

115. *Id.* at 1446–47.

116. TRIBAL L. & POL'Y INST., TRIBAL LEGAL CODE RESOURCE: TRIBAL LAWS IMPLEMENTING TLOA ENHANCED SENTENCING AND VAWA ENHANCED JURISDICTION 3 (2015), <http://www.tribal-institute.org/download/TLOA-VAWA-Guide.pdf>.

117. Allison Herrera, *Muscogee (Creek) Principal Chief Says Legislation in the Wake of McGirt v. Oklahoma Would Be Rushed*, KOSU (Aug. 24, 2020), <https://www.kosu.org/post/muscogee-creek-principal-chief-says-legislation-wake-mcgirt-v-oklahoma-would-be-rushed>.

118. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 211, 124 Stat. 2258, 2264 (codified as amended at 25 U.S.C. § 2802).

sentences tribal courts may impose to one-year confinement and a maximum fine of \$5,000 per offense.<sup>119</sup> The TLOA expanded felony sentencing for some tribes by allowing tribes that opt in to sentence defendants to terms of confinement longer than one year.<sup>120</sup> In order to impose the harsher felony sentences under TLOA, tribes must charge the defendant with an offense that would be considered felony-level under federal or state law or the defendant must have been convicted of the same or a comparable offense in another U.S. jurisdiction on a prior occasion.<sup>121</sup> Additionally, in order to impose a sentence longer than one year under TLOA, tribes must afford defendants certain constitutional protections in compliance with the Indian Civil Rights Act, including the right to effective assistance of counsel.<sup>122</sup>

Under TLOA, tribes may sentence a defendant to no more than three years imprisonment for a single offense.<sup>123</sup> Tribal courts may impose consecutive sentences up to nine years per criminal proceeding and may impose up to three \$15,000 fines per proceeding.<sup>124</sup> Notably, so long as tribes comply with the terms of the TLOA, their sentencing practices generally are not subject to federal oversight, “[n]or does the Department [of Justice] believe it would be appropriate for it to have oversight authority over the criminal justice system of a federally recognized tribe, given tribal nations’ sovereign status.”<sup>125</sup> The enhanced sentencing authority was the result of continued pressure on Congress from tribes.<sup>126</sup>

Congress further enhanced tribal authority over criminal cases with VAWA 2013.<sup>127</sup> Beginning in March 2015, tribal criminal jurisdiction was expanded to certain *non-Native* defendants.<sup>128</sup> VAWA 2013 allows tribes to investigate, prosecute, and sentence Indians and non-Indians for offenses

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119. 25 U.S.C. § 1302.

120. Tribal Law and Order Act of 2010, § 234, 124 Stat. at 2279–80. *See generally* U.S. DEP’T OF JUST., TRIBAL LAW AND ORDER ACT REPORT ON ENHANCED TRIBAL-COURT SENTENCING AUTHORITY 1 (n.d.), <https://www.justice.gov/tribal/file/796981/download> [hereinafter TRIBAL LAW AND ORDER ACT REPORT].

121. Tribal Law and Order Act of 2010, § 234, 124 Stat. at 2280.

122. 25 U.S.C. § 1302(c).

123. Tribal Law and Order Act of 2010, § 234, 124 Stat. at 2280.

124. TRIBAL LAW AND ORDER ACT REPORT, *supra* note 120, at 1.

125. Tribal Law and Order Act of 2010, § 214, 124 Stat. at 2271 (codified as amended at 25 U.S.C. § 3665); TRIBAL LAW AND ORDER ACT REPORT, *supra* note 120, at 2.

126. *See* TRIBAL LAW AND ORDER ACT REPORT, *supra* note 120.

127. *VAWA 2013 and Tribal Jurisdiction over Crimes of Domestic Violence*, *supra* note 77.

128. *Id.*

related to violence committed against a spouse or partner as well as for violations of protective orders.<sup>129</sup> In order to try a non-Indian defendant in a tribal court, the tribe must ensure that the defendant's constitutional rights to due process are protected by complying with the Indian Civil Rights Act and TLOA; tribal courts must also include non-Indians in jury pools and inform defendants of their right to file a federal habeas corpus petition.<sup>130</sup> Tribes across the United States are using the Special Domestic Violence Criminal Jurisdiction (SDVCJ).<sup>131</sup> A tribal government does not need to seek approval before exercising SDVCJ, but the tribe must comply with VAWA 2013's requirements to protect defendants' rights.<sup>132</sup>

The authority of tribal courts is limited by the requirements in VAWA 2013. In order to exercise SDVCJ over a non-Indian defendant, the victim must be an Indian, the crime must have occurred in Indian Country within the jurisdiction of the prosecuting tribe, and the defendant must have sufficient ties to the tribe.<sup>133</sup> Sufficient ties to a tribe include: residing in Indian Country under the tribe's authority; being employed by the tribe; or being a spouse or intimate partner of a tribal member, or an Indian who resides in Indian Country under the participating tribe's authority.<sup>134</sup>

The criminal jurisdiction maze on the Muscogee (Creek) Nation's reservation now has some new twists. State jurisdiction over most crimes committed by non-Indians against non-Indians in violation of state law is unaltered.<sup>135</sup> Serious felonies committed by Indian or non-Indian defendants—those included in the Major Crimes Act—will now be prosecuted by the U.S. Attorney for the Northern District of Oklahoma.<sup>136</sup> Muscogee (Creek) Nation prosecutors and federal prosecutors will both be able to prosecute crimes committed by Indian defendants on the

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129. *Id.*

130. *Id.*

131. *VAWA 2013 Special Domestic Violence Criminal Jurisdiction: Tribal Criminal Jurisdiction over Non-Indians*, NAT'L CONG. OF AM. INDIANS, <https://www.ncai.org/tribal-vawa> (last visited Nov. 5, 2021).

132. *Special Domestic Violence Criminal Jurisdiction: FAQ*, NAT'L CONG. OF AM. INDIANS, <https://www.ncai.org/tribal-vawa/sdvcj-overview/faqs> (last visited Nov. 5, 2021).

133. *VAWA 2013's Special Domestic Violence Criminal Jurisdiction (SDVCJ): Overview*, NAT'L CONG. OF AM. INDIANS, [https://www.ncai.org/tribal-vawa/overview/VAWA\\_Information\\_-\\_Technical\\_Assistance\\_Resources\\_Guide\\_Updated\\_November\\_11\\_2018.pdf](https://www.ncai.org/tribal-vawa/overview/VAWA_Information_-_Technical_Assistance_Resources_Guide_Updated_November_11_2018.pdf) (last visited Nov. 5, 2021).

134. *Id.*

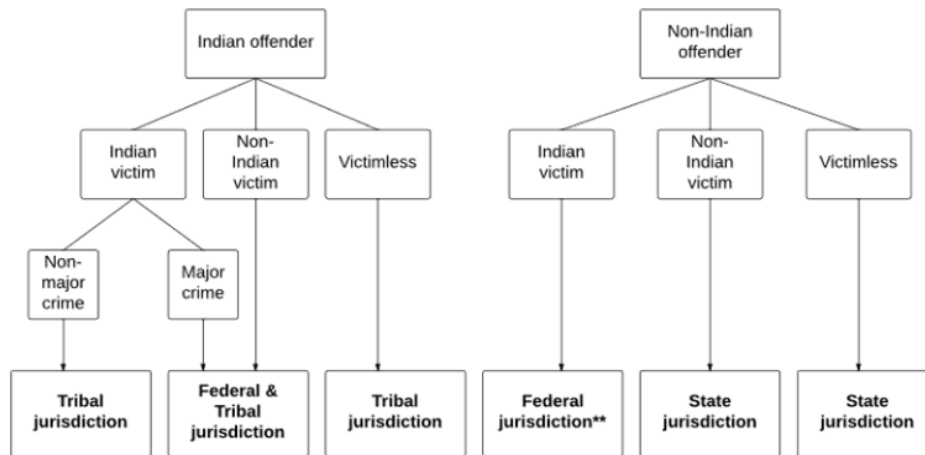
135. Mikkanen, *supra* note 70.

136. *Id.*



reservation.<sup>137</sup> Tribal prosecutors will exercise jurisdiction over Native-Native property crimes and victimless offenses.<sup>138</sup> Tribal prosecutors will also prosecute non-MCA offenses referred to them by the U.S. Attorney's Office.<sup>139</sup> Muscogee (Creek) Nation prosecutors will continue to prosecute domestic and intimate partner violence crimes under their enhanced VAWA 2013 jurisdiction.<sup>140</sup>

Figure 1



\*\*Under VAWA 2013, tribes may exercise Special Domestic Violence Jurisdiction with the federal government in certain cases.

Source: Indian Law Order Commission at the UCLA American Indian Studies Center

#### IV. Oklahoma Post-McGirt

The State of Oklahoma suggested to the Supreme Court that holding that the Muskogee Nation had and continues to have a reservation could—if not would—result in a significant negative impact on public safety.<sup>141</sup> The State suggested that convictions would be thrown into question, prosecutions

137. *See id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2479–81 (2020).

frustrated, and even civil and regulatory laws might be upended.<sup>142</sup> The majority was not persuaded by the State's—or the dissent's—predictions and fears.<sup>143</sup>

To date, the *McGirt* decision has not resulted in the State of Oklahoma setting free thousands of dangerous criminals or spelled total jurisdictional disarray, although there have been some challenges.<sup>144</sup> The U.S. Attorney for the Northern District of Oklahoma is now responsible for prosecuting a large number of cases involving a variety of crimes the office rarely handled prior to *McGirt*.<sup>145</sup> Law enforcement agencies within the Muscogee (Creek) Nation reservation now must take the additional step of determining whether a suspect or a victim is a tribal citizen.<sup>146</sup> Nonetheless, leaders in Oklahoma have indicated that they will work through these challenges together. As Trent Shores, a Choctaw Nation citizen and U.S. Attorney for the Northern District said, “I want people to remember that . . . when they call 911, somebody’s gonna show up.”<sup>147</sup>

#### A. *Avalanche of Appeals Absent*

In the same way that thousands of criminals were not set loose upon issuance of the *McGirt* opinion, courts are not likely to be inundated with petitions for writs of habeas corpus and appeals for post-conviction relief.

In late 2017, the Tenth Circuit held in *Murphy v. Royal* that Congress never disestablished the Muscogee (Creek) Nation’s reservation.<sup>148</sup> The Supreme Court granted certiorari.<sup>149</sup> While *Murphy* worked its way to the Supreme Court, inmates in Oklahoma had begun to appeal their convictions

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142. *Id.* at 2479–80. The definition of Indian Country for criminal jurisdiction purposes contained in 18 U.S.C. § 1151 is referenced by several civil and regulatory statutes. *Id.* at 2480.

143. *Id.* at 2482.

144. Cary Aspinwall & Graham Lee Brewer, *Half of Oklahoma Is Now Indian Country. What Does That Mean for Criminal Justice There?*, MARSHALL PROJECT (Aug. 4, 2020), <https://www.themarshallproject.org/2020/08/04/half-of-oklahoma-is-now-indian-territory-what-does-that-mean-for-criminal-justice-there>.

145. Gustavo Olguin, *U.S. Attorney’s Office Seeing ‘Absolute Tsunami’ of Cases Stemming from McGirt Decision*, KTUL (Sept. 22, 2020), <https://ktul.com/news/local/us-attorneys-office-seeing-absolute-tsunami-of-cases-stemming-from-mcgirt-decision>.

146. *See id.*

147. Aspinwall & Brewer, *supra* note 144.

148. 875 F.3d 896, 937 (10th Cir. 2017).

149. *Royal v. Murphy*, 138 S. Ct. 2026 (2018).

consistent with the Tenth Circuit's *Murphy* decision.<sup>150</sup> Indeed, Jimcy McGirt appealed his conviction to the Oklahoma Court of Criminal Appeals—as did some 140 other Oklahoma inmates—while Oklahoma appealed *Murphy* to the U.S. Supreme Court.<sup>151</sup> The Court heard arguments in *Murphy* the term before *McGirt* but declined to issue a decision because Justice Gorsuch participated in the case when he was a judge on the Tenth Circuit.<sup>152</sup> *Murphy* was affirmed in a per curiam opinion the same day *McGirt* was issued.<sup>153</sup> But procedural barriers<sup>154</sup> and practical considerations will limit inmates' success in relying on *McGirt* to seek release from state custody.

The Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 placed a one-year limitation on the time a person in custody may pursue a writ of habeas corpus that relates to a judgment from a state court.<sup>155</sup> A federal district judge in the Eastern District of Oklahoma ruled recently that nothing in *Murphy* provides an exception to the AEDPA one-year statute of limitation.<sup>156</sup> Therefore, state prisoners who exhausted their state appeals prior to summer 2019 are unlikely to file successful habeas petitions relying on *McGirt*.<sup>157</sup>

The Oklahoma Court of Criminal Appeals (OCCA) (the highest criminal court in Oklahoma) also dismissed a substantial number of appeals filed in the wake of *Murphy* and *McGirt*.<sup>158</sup> Although the State of Oklahoma has no statute of limitations on using jurisdiction as a basis for challenging a conviction, the OCCA dismissed appeals because the jurisdiction issue

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150. Rebecca Nagle, *Oklahoma's Suspect Argument in Front of the Supreme Court*, ATLANTIC (May 8, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/oklahomas-suspect-argument-front-supreme-court/611284/>.

151. *Id.*

152. *SCOTUS Rules in Favor of Creek Nation Petitioner in Historic Tribal Lands Case*, PROJECT PRESS (A.B.A. Death Penalty Representation Project), Summer 2020, [https://www.americanbar.org/groups/committees/death\\_penalty\\_representation/project\\_press/2020/summer/supreme-court-favors-petitioner-in-tribal-lands-case/](https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/summer/supreme-court-favors-petitioner-in-tribal-lands-case/).

153. *See Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam).

154. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2479 (2020).

155. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 101, 110 Stat. 1214, 1217 (codified at 28 U.S.C. §2244(d)) (“A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.”).

156. *Barbre v. Whitten*, No. CIV 18-259-RAW-KEW, 2019 U.S. Dist. LEXIS 142802, at \*7 (E.D. Okla. Aug. 22, 2019).

157. *See* AEDPA, § 101, 110 Stat. at 1216.

158. Nagle, *supra* note 150.

could have been raised in prior appeals.<sup>159</sup> According the OCCA: “If the reservations in eastern Oklahoma have always been reservations, it’s not a new area of law.”<sup>160</sup> In fact, the 140 appeals launched after the Tenth Circuit held in *Murphy* that the Muscogee (Creek) Nation has a reservation have resulted in “slew of denials and dismissals.”<sup>161</sup>

Journalist Rebecca Nagle, a citizen of the Muscogee (Creek) Nation, conducted an analysis of inmates incarcerated in Oklahoma who might be eligible for relief post-*McGirt*.<sup>162</sup> Nagle identified 1,887 people in the custody of Oklahoma Department of Corrections who were convicted of crimes that occurred within the historical reservation boundaries of the Five Tribes.<sup>163</sup> Nagle’s research showed that, contrary to the State of Oklahoma’s arguments, fewer than ten percent of the cases would qualify for a new trial.<sup>164</sup> In particular, of those convicted of murder, Nagle notes, “less than 10 percent are eligible for federal habeas relief.”<sup>165</sup> Of those convicted of first-degree rape, approximately five percent might be eligible.<sup>166</sup>

In addition to procedural barriers, practical considerations may dissuade inmates from attempting to disturb their convictions. For a number of crimes covered by the MCA, federal sentences may be harsher than state-level penalties, and there is no parole in the federal system.<sup>167</sup> For some—if not many—inmates, the risk of conviction at another trial in federal court and the possibility of a lengthier sentence may weigh in favor of not disturbing a conviction. In addition, it can take many months or even years to obtain federal habeas relief.<sup>168</sup> For inmates whose release date is on the horizon, the habeas process and the prospect of a new trial in federal court may prove too time-consuming.<sup>169</sup>

Rather than a mass release of dangerous criminals, *McGirt* has produced administrative work and court filings.<sup>170</sup> In fact, Nagle’s analysis identified

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159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. See Timothy J. Droske, *Correcting Native American Sentencing Disparity Post-Booker*, 91 MARQ. L. REV. 723, 724, 747 (2008).

168. Nagle, *supra* note 150.

169. *Id.*

170. *Id.*

that between 2017 and early 2020, Oklahoma courts were holding the final disposition in fewer than forty cases until the Supreme Court issued an opinion in *McGirt*.<sup>171</sup> The inmates in those approximately forty cases raised the tribal land claim in their appeal and were also within the one-year federal habeas limitation window, meaning it is unlikely more than a few dozen new trials are possible in light of *McGirt*.<sup>172</sup>

### *B. Growing Pains*

A significant portion—over nine percent—of self-identifying Native Americans live in Oklahoma.<sup>173</sup> With such a large portion of the state's population identifying as Native, federal and tribal criminal justice mechanisms could be strained by expanded jurisdictional landscape. But there is no reason to believe that criminal landscape will shift drastically post-*McGirt*. In October 2020, the Muscogee (Creek) Nation's ambassador, Jonodev Chaudhuri, summed up why: "What has changed is that for the very small category of crimes that *McGirt* addresses, where there was one jurisdiction who could prosecute . . . now there are two . . . in this case, Muscogee (Creek) Nation and the United States."<sup>174</sup>

To be sure, there have been changes to the way criminal cases proceed within the Muscogee reservation, but the changes appear to be shifts rather than wholesale transformations of the criminal justice system. In the first two months after the *McGirt* ruling, the U.S. Attorney for the Northern District of Oklahoma indicted 115 cases.<sup>175</sup> In a typical year, that office handles approximately 250 cases in total.<sup>176</sup> The U.S. Attorney for the Northern District estimated the office dealt with about twenty homicide cases in the six weeks after the *McGirt* decision, compared to about three homicides in the previous twenty years.<sup>177</sup>

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171. *Id.*

172. *Id.*

173. *Quick Facts: Oklahoma*, U.S. CENSUS BUREAU, at headnote a, <https://www.census.gov/quickfacts/OK#qf-headnote-a> (last visited Jan. 30, 2022); TINA NORRIS, PAULA L. VINES & ELIZABETH M. HOFFEL, U.S. CENSUS BUREAU, C2010BR-10, 2010 CENSUS BRIEFS: THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, at 8 fig.3 (2012), <https://www.census.gov/history/pdf/c2010br-10.pdf> [hereinafter 2010 CENSUS BRIEF: INDIAN POPULATION].

174. Allison Herrera, *U.S. Attorney General Visits Oklahoma to Discuss Effects of SCOTUS Ruling*, KOSU (Oct. 2, 2020, 5:00 AM), <https://www.kosu.org/post/us-attorney-general-visits-oklahoma-discuss-effects-scotus-ruling>.

175. Olguin, *supra* note 145.

176. *Id.*

177. *Id.*

Yet, federal prosecutors appear to be navigating the challenges, convening additional grand juries and redeploying federal prosecutors from other parts of the country to assist with the increased caseload in Oklahoma.<sup>178</sup> The Department of Justice put out a call for prosecutors to temporarily relocate to Tulsa in order to help with the caseload<sup>179</sup> and committed to funding thirty additional permanent assistant United States Attorneys for the Eastern and Northern Districts of Oklahoma.<sup>180</sup> Most of the additional AUSAs will be assigned to the Eastern and Northern Districts because they are the U.S. Attorney's Offices that encompass the bulk of the Five Tribes' territory.<sup>181</sup> Similarly, federal law enforcement agencies have continued to enhance their investigations within the Muscogee (Creek) Nation reservation boundaries.<sup>182</sup>

#### *V. Muscogee (Creek) Nation Assumes Jurisdiction*

In *McGirt*, the Supreme Court was clear that the MCA applies to Indian Country in Oklahoma, including the Muscogee (Creek) Nation.<sup>183</sup> And by concluding that the Muscogee (Creek) Nation has a reservation, the Court determined by implication that the Indian Country Crimes Act also applies to the tribe's reservation.<sup>184</sup> Because the Muscogee (Creek) Nation has the authority to exercise criminal jurisdiction<sup>185</sup> and because the Indian Country Crimes Act limits the federal government's general Indian Country criminal jurisdiction,<sup>186</sup> the Muscogee (Creek) Nation now has the responsibility for

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178. Press Release, U.S. Att'y's Off.: N.D. of Okla., Federal Grand Jury A Indictments Announced (Oct. 8, 2020), <https://www.justice.gov/usao-ndok/pr/federal-grand-jury-indictments-announced-5>; Amy Slanchik, *US Attorney Office Prosecutors, Staff Volunteer to Move to Tulsa After McGirt Ruling*, NEWS ON 6 (Aug. 11, 2020), <https://www.newson6.com/story/5f331c06e9d97622933f4667/us-attorney-office-prosecutors-staff-volunteer-to-move-to-tulsa-after-mcgirt-ruling->.

179. Slanchik, *supra* note 178.

180. Max Bryan, *DOJ Funds Special Attorneys in Cherokee Territory*, TIMES REC. (Fort Smith, Ark.) (Oct. 1, 2020), <https://www.swtimes.com/news/20201001/doj-funds-special-attorneys-in-chokeee-territory>.

181. *Id.*

182. Press Release, FBI Okla. City, Federal Bureau of Investigation Oklahoma City Field Office's Statement Regarding Cases Affected by the Supreme Court's Ruling in *McGirt v. Oklahoma* (July 27, 2020), <https://www.fbi.gov/contact-us/field-offices/oklahomacity/news/press-releases/federal-bureau-of-investigation-oklahomacity-field-offices-statement-regarding-cases-affected-by-the-supreme-courts-ruling-in-mcgirt-v-oklahoma>.

183. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2478 (2020).

184. *Id.* at 2479.

185. *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1446 (D.C. Cir. 1988).

186. 18 U.S.C. § 1152.

law enforcement and prosecutions of crimes involving Native Americans on its reservation—responsibilities previously assumed by the State of Oklahoma.<sup>187</sup>

The Muscogee (Creek) Nation is well-positioned to share criminal jurisdiction over its reservation with the federal government. The tribe has a sophisticated law enforcement agency and a modern judicial branch. Although the majority of people may not realize that tribal governments employ police and prosecutors and have court systems,<sup>188</sup> the Muscogee (Creek) Nation has a criminal code, police force, and court system.<sup>189</sup> The tribe's court system has a bar association, and its judges must meet educational, professional, and experiential requirements.<sup>190</sup> Since 1994, Oklahoma has recognized judgments and orders of tribal courts.<sup>191</sup> That is, the State has given full faith and credit to tribal court judgments. In fact, the Muscogee (Creek) Nation was the first tribe in Oklahoma to seek full faith and credit and to reciprocate with the state court system.<sup>192</sup> Despite Oklahoma's suggestions to the contrary, after the initial kinks are worked out, the Muscogee (Creek) Nation in all likelihood will be able to administer justice effectively within its reservation boundaries.

In light of the *McGirt* decision, the Bureau of Indian Affairs Office of Tribal Justice Support awarded Muscogee (Creek) Nation a \$547,980 grant for the tribe's attorney general to hire four additional prosecutors.<sup>193</sup> The tribe said, "The new prosecutors would take on cases specifically in the areas of Violence Against Women Act, domestic violence and protective orders, and Indian Child Welfare Act and child dependency."<sup>194</sup> The grant will also fund technology upgrades and an update to the tribal code.<sup>195</sup>

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187. *U.S. Supreme Court Ruling Supports Tribal Sovereignty*, CHICKASAW TIMES (Sept. 2020), <http://www.chickasawtimes.net/Online-Articles/U-S-Supreme-Court-ruling-supports-tribal-sovereignty.aspx>.

188. Aspinwall & Brewer, *supra* note 144.

189. Crimes and Punishments, MUSCOGEE (CREEK) NATION CODE ANN. tit. 14, §§ 1-101 to 2-1006 (2010).

190. Judicial Branch/Courts, MUSCOGEE (CREEK) NATION CODE ANN. tit. 26, §§ 1-101 to 4-205; *Muscogee (Creek) Nation Bar Association*, SUPREME COURT: MUSCOGEE (CREEK) NATION, <http://www.creeksupremecourt.com/bar-assoc/> (last visited Nov. 7, 2021).

191. OKLA. DIST. CT. R. 30.

192. Shelly Grunsted, *Full Faith and Credit: Are Oklahoma Tribal Courts Finally Getting the Respect They Deserve?*, 36 TULSA L.J. 381, 391–92 n.91 (2000).

193. Press Release, Muscogee (Creek) Nation News Room, Muscogee Nation Awarded Grant to Improve Court System (Sept. 17, 2020), <https://muscogee-creek-nation.prowly.com/108900-muscogee-creek-nation-awarded-grant-to-improve-court-system>.

194. *Id.*

195. *Id.*

The Muscogee (Creek) Nation Lighthorse Police Department employs nearly sixty people.<sup>196</sup> The department bears all of the hallmarks of a modern police department. According to the Muscogee (Creek) Nation Attorney General: “Our police force operates like any other police force in the county.”<sup>197</sup> The department employs four officers who partner with canines and has a criminal investigations division, which investigates property crimes, white collar crimes, and child abuse.<sup>198</sup>

The tribe’s police force also has cross-deputization agreements with other law enforcement agencies.<sup>199</sup> For example, every officer in the City of Tulsa Police Department and the Tulsa County Sheriff’s Office is cross-deputized as a Muscogee (Creek) Nation Lighthorse officer.<sup>200</sup> In total, the tribe has cross-deputization agreements with sixty other law enforcement agencies within the reservation’s eleven counties.<sup>201</sup>

Within the Muscogee (Creek) Nation reservation, non-tribal police departments are adjusting their procedures in light of the *McGirt* decision. For example, the City of Muskogee’s police department policy now requires officers to inquire as to the Indian status of suspects and victims.<sup>202</sup>

The cross-deputization agreements and cooperation between tribal and non-tribal law enforcement are embraced by the tribe and other

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196. *Lighthorse Tribal Police*, MUSCOGEE NATION, <https://www.muscogeenation.com/services/lighthorse-police/> (last visited Jan. 30, 2021).

197. Aspinwall & Brewer, *supra* note 144.

198. *K9 Unit*, MUSCOGEE NATION, <https://www.muscogeenation.com/services/lighthorse-police/k9-unit/> (last visited Nov. 5, 2021); *Criminal Investigations Division*, MUSCOGEE NATION, <https://www.muscogeenation.com/services/lighthorse-police/criminal-investigations-division/> (last visited Nov. 5, 2021).

199. Matt Trotter, *County Finalizes Deputization Agreement Between Muscogee (Creek) Nation, Tulsa Sheriff*, KWGS: PUB. RADIO TULSA (Jul. 27, 2020), <https://www.publicradiotulsa.org/local-regional/2020-07-27/county-finalizes-deputization-agreement-between-muscogee-creek-nation-tulsa-sheriff>.

200. *Tribal Police Expand Reach After Supreme Court Ruling*, KJRH: 2 NEWS OKLA. (Oct. 30, 2020) <https://www.kjrh.com/news/local-news/investigates-tribal-police-expand-reach-after-supreme-court-ruling>.

201. Kristen Weaver, *Muscogee (Creek) Nation Receives Grant to Aid Influx of New Criminal Cases*, NEWS ON 6 (Sept. 17, 2020), <https://www.newson6.com/story/5f641f670811e473c77fa812/muscogee-creek-nation-receives-grant-to-aid-influx-of-new-criminal-cases->; Press Release, Muscogee Nation, Muscogee Nation Proclaims Sovereignty Day on 1-Year Anniversary of Historic U.S. Supreme Court McGirt Decision (Jul. 9, 2021), <https://muscogee-creek-nation.prowly.com/147645-sovereignty-day-press-release>.

202. Press Release, Lynn Hamlin, Public Information Officer, Muskogee Police Dep’t, Muskogee Police Department Working with Muscogee Creek Nation (n.d.), [http://cityofmuskogee.com/news\\_detail\\_T2\\_R325.php](http://cityofmuskogee.com/news_detail_T2_R325.php).



governments, and such arrangements appear to be functioning well. The U.S. Attorney for the Northern District, the Tulsa County District Attorney's Office, and the Muscogee (Creek) Nation are working together to ensure justice continues to be served after the jurisdictional shift.<sup>203</sup> A Tulsa County prosecutor said: "The partnership between this office and our sister sovereigns with the federal and tribal government has been exemplary . . . . It has been a collaborative effort."<sup>204</sup> In total, there are 158 cross-deputization agreements between tribal law enforcement agencies and state, local, and federal agencies across the state.<sup>205</sup> These agreements are in and of themselves victories for sovereignty as "intergovernmental agreements are the hallmark of respect among sovereigns."<sup>206</sup>

The Muscogee (Creek) Nation is proving that the Oklahoma tribes have the ability to administer justice effectively within their reservation boundaries. Intergovernmental agreements demonstrate that officers from various law enforcement agencies can effect arrests without incident, and the tribe's criminal code and court system evidence that defendants have access to the judicial process. Challenges have presented themselves. For example, Muscogee (Creek) Nation defendants may be arrested in a county far from the tribe's courthouse in Okmulgee;<sup>207</sup> however, as noted, improvements are being funded across the tribe's justice system.<sup>208</sup> For example, the tribe will implement technology to allow for remote hearings that will make processes more efficient.<sup>209</sup> In addition, the Muscogee (Creek) Nation has proved it can overcome challenges by navigating successfully enhanced sentencing authority and expanded jurisdiction in recent years under the TLOA and VAWA 2013.<sup>210</sup>

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203. Allison Herrera, "My Office Will Work Until We Drop": Agencies Vow to Work Together on McGirt Cases, KOSU (Aug. 12, 2020), <https://www.kosu.org/post/my-office-will-work-until-we-drop-agencies-vow-work-together-mcgirt-cases>.

204. Clifton Adcock, *After SCOTUS Decision, Some Jailed American Indians Wait Weeks Without Access to Attorneys*, NORMAN TRANSCRIPT (Aug. 30, 2020) [https://www.normantranscript.com/news/after-scotus-decision-some-jailed-american-indians-wait-weeks-without-access-to-attorneys/article\\_c2d4d45e-eaef-11ea-bd0e-03aa02a10b69.html](https://www.normantranscript.com/news/after-scotus-decision-some-jailed-american-indians-wait-weeks-without-access-to-attorneys/article_c2d4d45e-eaef-11ea-bd0e-03aa02a10b69.html).

205. Nicole Marshall, *Common Ground Found by Officers*, TULSA WORLD (Dec. 12, 2020), [https://tulsaworld.com/news/local/common-ground-found-by-officers/article\\_72938327-38e9-580f-9ebc-84aaa5a6782e.html](https://tulsaworld.com/news/local/common-ground-found-by-officers/article_72938327-38e9-580f-9ebc-84aaa5a6782e.html).

206. Letter from Fawn Sharp et al. to Jim Inhofe, *supra* note 1, at 1.

207. Adcock, *supra* note 204.

208. Weaver, *supra* note 201.

209. Adcock, *supra* note 204.

210. *Tribal Law & Order Act*, NAT'L CONG. OF AM. INDIANS, <https://www.ncai.org/tribal-vaawa/resources/tribal-law-order-act> (last visited Nov. 5, 2021); *Currently Implementing*

### VI. The Other Four of the Five Tribes

The treaties and agreements between the other four of the “Five Civilized Tribes”—the Cherokee, Chickasaw, Choctaw, and Seminole—and the U.S. government are similar to those between the Muscogee (Creek) Nation and the federal government.<sup>211</sup> Accordingly, there is a strong likelihood that the other four tribes, like the Muscogee (Creek) Nation, have reservations that have never been disestablished by Congress. In light of *McGirt*, the State of Oklahoma will no longer have criminal jurisdiction over those tribes’ historic reservation lands, which comprise nearly half of Oklahoma.

#### A. Five Similar Treaties

The Cherokee, Chickasaw, Choctaw, and Seminole nations, as well as other supporters of tribal sovereignty, followed *McGirt* closely because the tribes’ similar, shared legal histories indicate that the other four tribes are also likely to have reservations that Congress never disestablished.<sup>212</sup> The language in the other tribes’ treaties tracks closely with the language in the Muscogee (Creek) Nation’s 1832 treaty with the U.S. government that the Supreme Court determined created a reservation.<sup>213</sup>

The removal agreement between the U.S. government and Choctaw Nation—the 1830 Treaty of Dancing Rabbit Creek—uses similar language to that in the Muscogee (Creek) Nation’s 1832 treaty.<sup>214</sup> In the majority opinion, Justice Gorsuch pointed to language in the Muscogee (Creek) Nation’s 1832 treaty with the United States, in which Congress guaranteed

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*Tribes*, NAT’L CONG. OF AM. INDIANS, <https://www.ncai.org/tribal-vawa/get-started/currently-implementing-tribes> (last visited Nov. 5, 2021).

211. Fred S. Clinton, *Oklahoma Indian History*, 16 INDIAN SCHOOL J. 175, 175-87 (1915), <https://catalog.archives.gov/id/2745554>. The Five Civilized Tribes were tribal nations in the southeast of the United States. *Id.* The Five Civilized Tribes moniker derived from the fact that the tribes seemed to have adopted certain Anglo-American practices and norms like practicing Christianity as well as having written constitutions and formal government structures, including courts. *Id.* at 176. Ironically, these “civilized” tribes nonetheless were removed from their ancestral homelands to what was then Indian Territory (present day eastern Oklahoma) during the mid-nineteenth century. *Id.* at 177. The removal process includes multiple Trails of Tears at the end of which the tribes were promised new permanent, sovereign homelands, free from encroachment by white settlers. *Id.*

212. See Letter from Fawn Sharp et al. to Jim Inhofe, *supra* note 1.

213. Susan Work, *The “Terminated” Five Tribes of Oklahoma: The Effect of Federal Legislation and Administrative Treatment on the Government of the Seminole Nation*, 6 AM. INDIAN L. REV. 81, 83-84 (1978).

214. Treaty with the Choctaw, art. II, III, IX, XVI, Sept. 27, 1830, 7 Stat. 333; 1832 Treaty with the Creeks, *supra* note 30, at art. XIV.

the tribe a permanent reservation.<sup>215</sup> The Choctaw removal treaty includes six references to the Choctaws' "new homes"<sup>216</sup> and "conveyed to the Choctaw Nation a tract of country . . . in fee simple to them and their descendants, to inure to them while they shall exist as a nation."<sup>217</sup> In a later agreement, the Choctaw Nation allowed the Chickasaw Nation to establish a homeland within the Choctaw Nation with the same rights that the Choctaw had (except the right of dispossession).<sup>218</sup>

The Cherokee Nation's removal treaty, like the Choctaws' treaty, included multiple references to "new homes."<sup>219</sup> Similar to the Creeks' treaty, the Cherokees' treaty also indicated congressional intent to create a permanent homeland for the tribe.<sup>220</sup> Congress drafted the treaty with

[a] view to reuniting their people in one body and securing a *permanent* home for themselves and their posterity in the country selected by their forefathers *without the territorial limits of the State sovereignties*, and where they can establish and enjoy a government of their choice and perpetuate such a state of society as may be most consonant with their views, habits and condition; and as may tend to their individual comfort and their advancement in civilization.<sup>221</sup>

The Seminoles' agreement relates explicitly to the Creeks' treaty.<sup>222</sup> In fact, once removed to west of the Mississippi River, the Seminole would reside on the land alongside the Creeks.<sup>223</sup> The treaty provided that the Creek-Seminole "country" would be expanded "proportioned to their numbers . . . and [] the Seminoles [would] be received as a constituent part of the Creek nation."<sup>224</sup> Like the U.S. government's treaties with the other tribes, the treaty with the Seminoles included references to the tribe's "new homes."<sup>225</sup>

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215. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2460 (2020) (quoting 1832 Treaty with the Creeks, *supra* note 30, at art. XIV; 1833 Treaty with the Creeks, *supra* note 30, at pmb.).

216. Treaty with the Choctaw, *supra* note 214, at art. III, XVI, XIX.

217. *Id.* at art. II.

218. Treaty with the Choctaw and Chickasaw, art. 1, Mar. 24 1837, 11 Stat. 573.

219. Treaty with the Cherokee, art. 8, 9, May 23, 1835, 7 Stat. 478.

220. *Id.* at pmb.

221. *Id.* (emphasis added).

222. Treaty with the Seminole, proclamation, Apr. 12, 1832, 7 Stat. 368.

223. *Id.* at art. I.

224. *Id.*

225. *Id.* at art. III, V, VI.

In *McGirt*, which relied in part on *Menominee Tribe of Indians v. United States*, the Court was clear: Congress need not use the specific term “reservation” in order to create one.<sup>226</sup> Parallel language in the other four of the Five Tribes’ removal treaties leads to the conclusion that Congress created reservations for those tribes. To borrow from Justice Gorsuch, “[u]nder any definition,” these were reservations.<sup>227</sup>

Like the removal treaties, the Allotment Era agreements between the Five Tribes and the U.S. government are also quite similar. There are differences tailored to each tribe’s particular circumstances, but none of the allotment agreements include language explicitly disestablishing a tribe’s reservation nor do they include any language similar to that which the Court has determined indicates disestablishment.<sup>228</sup>

Allotment, absent additional congressional action, was not sufficient to terminate the Creeks’ reservation.<sup>229</sup> The other Five Tribes’ allotment agreements, like their removal treaties, parallel the Creeks’. Likewise, there is no language in those agreements that disestablishes the Cherokee, Chickasaw, Choctaw, or Seminole reservations, nor are there any congressional statutes that indicate disestablishment. To borrow again from Justice Gorsuch, “because there exists no equivalent law terminating what remained,” the reservations survived allotment.<sup>230</sup>

Because of the Five Tribes’ shared legal history, it is generally accepted within the State of Oklahoma that the Cherokee, Chickasaw, Choctaw, and Seminole reservations must also continue to exist for criminal jurisdiction purposes.<sup>231</sup> Shortly after the *McGirt* decision was issued, the Oklahoma attorney general said that while the decision “directly relates” to the Muscogee (Creek) Nation, “[w]e think it applies to the other four tribes.”<sup>232</sup>

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226. See sources cited *supra* note 31.

227. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020).

228. Act for the Protection of the People of the Indian Territory, ch. 517, 30 Stat. 495 (1898) (allotting Chickasaw and Choctaw lands); Act to Ratify and Confirm an Agreement with the Cherokee Tribe of Indians, ch. 675, 34 Stat. 848 (1901) (allotting Cherokee lands); Act to Ratify the Agreement Between the Dawes Commission and the Seminole Nation of Indians, ch. 542, 30 Stat. 567 (1898) (allotting Seminole lands and using the term “Seminole Reservation”).

229. *McGirt*, 140 S. Ct. at 2466.

230. *Id.* at 2464.

231. Mike W. Ray, *Judges Contend McGirt Applies to All 5 Tribes*, SW. LEDGER (Lawton, Okla.) (Oct. 28, 2020), <https://www.southwestledger.news/news/judges-contend-mcgirt-applies-all-5-tribes-0>.

232. *Id.*

Indeed, since the *McGirt* decision was issued, the Oklahoma Court of Criminal Appeals has remanded several inmates' appeals to trial courts with the instruction that the trial courts determine whether the underlying crimes were committed on reservations.<sup>233</sup> By the end of October 2020, state district courts had dismissed criminal cases against Indian defendants for crimes alleged to have been committed within the nineteenth century reservation boundaries of the Cherokee, Chickasaw, Choctaw, and Seminole nations.<sup>234</sup>

*B. Half of Oklahoma Is Indian Country*

At present, only the Muscogee (Creek) Nation's reservation is recognized for criminal jurisdictional purposes by Oklahoma's highest court.<sup>235</sup> This means that there are currently eleven counties in which the Muscogee (Creek) Nation and federal government share responsibility for enforcing laws and prosecuting offenses.<sup>236</sup> That shared responsibility applies to the 55,991 Muscogee (Creek) Nation citizens who live within the reservation's boundaries, as well as Native Americans who are enrolled members of other tribes and reside within Muscogee (Creek) Nation reservation boundaries.<sup>237</sup> Enrolled tribal members make up fourteen percent of the total population living within the boundaries of the tribe's reservation.<sup>238</sup>

However, because of the similar legal histories, which now include dismissals of charges for crimes occurring within the traditional reservation boundaries of all of the Five Tribes, it is likely that about half of Oklahoma will be Indian Country for the purposes of criminal jurisdiction.<sup>239</sup> In total, about 1.8 million people would be living within the boundaries of the Five Tribes' reservations, including the 400,000 people who reside in Tulsa, the state's second-largest city.<sup>240</sup>

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233. *Id.*

234. *Id.*

235. Ray, *supra* note 231.

236. Aspinwall & Brewer, *supra* note 144.

237. *The Muscogee (Creek) Nation in Oklahoma*, NAT'L CONG. OF AM. INDIANS, <https://www.ncai.org/tribal-vawa/sdvcj-today/the-muscogee-creek-nation-in-oklahoma> (last visited Nov. 5, 2021).

238. *Id.*

239. See Ray, *supra* note 232.

240. Hurley, *supra* note 8.

Figure 2



Source: Petition for a Writ of Certiorari at 17, *Royal v. Murphy*, 2018 WL 776368 (U.S.), 17 (No. 17-1107).

Tribal populations within the Five Tribes' historic reservation boundaries vary in size and proportion. For example, about 5,300 citizens of the Seminole Nation reside within tribal boundaries and about a quarter of the more than 23,000 people residing within its boundaries are Native.<sup>241</sup> About 26,000 citizens of the Cherokee Nation reside within tribal boundaries.<sup>242</sup> The Choctaw Nation's tribal area has a total population of over 230,000.<sup>243</sup> About twenty percent of the population within the Choctaw Nation's tribal area is Native, including approximately 85,000 registered Choctaw tribal members.<sup>244</sup>

The *McGirt* decision means that once the reservations of these other four tribes are recognized again, tribal governments in conjunction with federal authorities, will be able to administer justice within their own communities,

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241. *The Seminole Nation in Oklahoma*, NAT'L CONG. OF AM. INDIANS, <https://www.ncai.org/tribal-vawa/sdvcj-today/the-seminole-nation-in-oklahoma> (last visited Nov. 5, 2021).

242. *Cherokee Nation of Oklahoma*, NAT'L CONG. OF AM. INDIANS, <https://www.ncai.org/tribal-vawa/sdvcj-today/chokeee-nation-of-oklahoma> (last visited Nov. 5, 2021).

243. *The Choctaw Nation in Oklahoma*, NAT'L CONG. OF AM. INDIANS, <https://www.ncai.org/tribal-vawa/sdvcj-today/the-choctaw-nation-in-oklahoma> (last visited Nov. 5, 2021).

244. *Id.*

in accordance with tribal values and traditions.<sup>245</sup> For example, Cherokee Nation marshals employ a concept called “Gadugi,” which means working together or collaboratively with the community, in policing.<sup>246</sup> The Muscogee (Creek) Nation also administered federally funded, family-based substance-abuse treatment programs and alternatives to incarceration programs.<sup>247</sup> Indeed, tribal officials believe tribal courtrooms are the best forums for Natives to get a fair hearing and justice because “[w]e understand these people are going back into *our* community.”<sup>248</sup>

### C. Five Similarly Capable Sovereigns

Like the Muscogee (Creek) Nation, the other Five Tribes are well-positioned to assume both law enforcement and prosecutorial responsibilities for crimes committed by Native Americans within tribal boundaries. Indian tribes have the right to adopt constitutions and bylaws.<sup>249</sup> All of the Five Tribes have adopted constitutions and enacted criminal codes.<sup>250</sup>

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245. *See About the Choctaw Nation District Court*, CHOCTAW NATION JUD. BRANCH, <https://www.choctawnationcourt.com/courts/district-court/> (last visited Nov. 5, 2021); *Tribal Courts*, TRIBAL CTS. CLEARINGHOUSE, <https://www.tribal-institute.org/lists/justice.htm> (last visited Nov. 5, 2021) (“Today, tribal justice systems are diverse in concept and character. While some are extensively elaborate, others are just beginning to develop a ‘Western’ judicial system within the context of their individual nations. Some tribes prefer the adversarial process, while others emphasize traditional dispute resolution. Many courts apply large bodies of written or positive law and others apply custom and tradition to address controversy and settle disputes.”).

246. Faye Elkins, *The Cherokee Nation Marshal Service: Policing a Community They Call Family*, CMTY. POLICING DISPATCH (Cmty. Oriented Policing Servs., U.S. Dep’t of Justice), Nov. 2020, [https://cops.usdoj.gov/html/dispatch/11-2020/photo\\_contest\\_winner.html](https://cops.usdoj.gov/html/dispatch/11-2020/photo_contest_winner.html) (stating that, on one occasion, Cherokee marshals were able to secure the peaceful surrender to the FBI of a young Cherokee man suspected of homicide).

247. *Awards [for Muscogee Nation]*, U.S. DEP’T OF JUST.: BUREAU OF JUST. ASSISTANCE, <https://bja.ojp.gov/funding/awards/list?awardee=Muscogee%20%28Creek%29%20Nation> (last visited Nov. 5, 2021).

248. Jack Healy, *A Historic Supreme Court Ruling Opens Courts in Oklahoma*, N.Y. TIMES (Aug. 4, 2020), <https://www.nytimes.com/2020/08/03/us/Supreme-court-Oklahoma-tribal-land-ruling.html> (quoting Muscogee Nation Judge Gregory Bigler) (emphasis added).

249. 25 U.S.C. § 5123 (regarding organization of Indian tribes).

250. SEMINOLE NATION CONST. tit. 6, § 105-311 (Criminal Offenses and Traffic Offenses); SEMINOLE NATION CONST. tit. 6A, §§ 101-721 (Domestic Violence Code); SEMINOLE NATION CONST. tit. 6B, §§ 101-605 (Meth & CDS Code); SEMINOLE NATION CONST. tit. 6C, §§ 1.01-8.01 (Tribal Sex Offender Registration Code); CHOCTAW NATION CRIM. CODE §§ 1-1993 (2018); CHEROKEE NATION CONST., tit. 21, §§ 1-1344; CHICKASAW NATION CODE tit. 17, §§ 17.201-201.23 (2013) (Offenses and Penalties).

The tribes will prosecute violations of the tribal codes,<sup>251</sup> and they will continue to have enhanced criminal jurisdiction under the Tribal Law and Order Act of 2010 and the 2013 renewal of the Violence Against Women Act, which the Cherokee, Choctaw, and Seminole nations (and Muscogee (Creek) Nation) have exercised over non-Natives for years.<sup>252</sup>

There is also reason for supporters of tribal sovereignty to welcome the shift of responsibility from the state to the federal government. Although Oklahoma's federal prosecutors are now responsible for more cases, "the Department [of Justice] recognizes that in many cases tribal governments are best positioned to effectively investigate and prosecute crime occurring in their own communities."<sup>253</sup> Furthermore, the Tribal Law and Order Act (TLOA) of 2010 placed direct and indirect mandates on U.S. Attorneys' Offices.<sup>254</sup> The TLOA requires U.S. Attorneys in Indian Country to appoint at least one assistant U.S. Attorney to serve as a tribal liaison.<sup>255</sup> U.S. Attorneys are also authorized and encouraged to appoint special assistant U.S. Attorneys to assist with the prosecution of crimes occurring in Indian Country.<sup>256</sup> Perhaps most significantly, a U.S. Attorney's Office that declines to prosecute a crime or terminates a prosecution is *required* to consult with the affected tribe about the investigation and evidence, which may be admissible in a tribal court.<sup>257</sup>

The Five Tribes have taken steps to expand their law enforcement, prosecutorial, and judicial capabilities in light of *McGirt*. For example, the Choctaw Nation employed sixty police officers at the time the *McGirt* decision was announced.<sup>258</sup> Within weeks of the decision, the Choctaw

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251. Mikkanen, *supra* note 70.

252. *See id.*

253. TRIBAL LAW AND ORDER ACT REPORT, *supra* note 120, at 5.

254. *Tribal Law and Order Act*, U.S. DEP'T OF JUST., <https://www.justice.gov/tribal/tribal-law-and-order-act> (last updated July 19, 2021); *Duties Imposed on United States Attorneys by the Tribal Law and Order Act of 2010*, U.S. DEP'T OF JUST., <https://www.justice.gov/sites/default/files/usao-az/legacy/2010/10/14/Tribal%20Law%20and%20Order%20Act%20of%202010%20Summary.pdf> (last visited Nov. 5, 2021).

255. *Duties Imposed on United States Attorneys by the Tribal Law and Order Act of 2010*, *supra* note 254.

256. *Id.*

257. *Id.* (emphasis added).

258. Derrick James, *Cross-Deputization Important to Local Law Enforcement*, MCALESTER NEWS-CAPITAL (Aug. 28, 2020), [https://www.mcalesternews.com/news/cross-deputization-important-to-local-law-enforcement/article\\_7ad36266-e8b4-11ea-848a-8bb54644d932.html](https://www.mcalesternews.com/news/cross-deputization-important-to-local-law-enforcement/article_7ad36266-e8b4-11ea-848a-8bb54644d932.html).



Nation moved to hire ten new patrol officers.<sup>259</sup> Expansion is not a new concept for the Choctaw Nation, as the tribe's police force has grown substantially over the past several decades.<sup>260</sup> The Choctaw Nation reconstituted its police force in 1992 with four officers who had the authority to make misdemeanor and felony arrests on tribal land.<sup>261</sup>

While the Choctaw Nation's reservation boundaries have not yet been recognized officially by the State of Oklahoma or the federal government, the tribe has stated that it is prepared for an influx of criminal cases.<sup>262</sup> The Choctaw Nation says it is taking steps "to hire seven new social workers as well as assistant prosecutors, public defenders and a court clerk to augment existing tribal judicial and legal capabilities."<sup>263</sup> In the summer of 2020, under its jurisdiction under the Tribal Law and Order Act, the Choctaw Nation's court system conducted its first criminal jury trial.<sup>264</sup>

Like the Choctaw Nation, the Cherokee Nation is also taking steps to prepare for expanded criminal jurisdiction. In August 2020, the Cherokee Nation Council passed its \$1.52 billion budget for the 2021 fiscal year, titled the Cherokee Nation Reservation, Judicial Expansion and Sovereignty Protection Act, which provided significant funding to expand law enforcement, prosecutorial, and judicial capacity.<sup>265</sup> Specifically, the Cherokee Nation's budget provided an additional \$15.6 million for the tribal court system to expand from one district court to a maximum of

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259. Derrick James, *Choctaw Nation Forms McGirt Task Force*, MCALESTER NEWS-CAPITAL (Aug. 28, 2020), [https://www.mcalesternews.com/news/choctaw-nation-forms-mcgirt-task-force/article\\_1a6cde7a-1dd6-5cb4-a8a8-7a483ab99781.html](https://www.mcalesternews.com/news/choctaw-nation-forms-mcgirt-task-force/article_1a6cde7a-1dd6-5cb4-a8a8-7a483ab99781.html).

260. *Choctaws Start Own Police Unit*, OKLAHOMAN (Feb. 14, 1992), <https://oklahoman.com/article/2384953/choctaws-start-own-police-unit>.

261. *Id.*

262. Adrian O'Hanlon, III, *Choctaw Nation Chief Addresses McGirt Case, Gaming, COVID-19 in Annual Address*, MCALESTER NEWS-CAPITAL (Sept. 7, 2020), [https://www.mcalesternews.com/news/choctaw-nation-chief-addresses-mcgirt-case-gaming-covid-19-in-annual-address/article\\_fd1ada28-f11b-11ea-b0ca-5fb3ac7f1e2a.html](https://www.mcalesternews.com/news/choctaw-nation-chief-addresses-mcgirt-case-gaming-covid-19-in-annual-address/article_fd1ada28-f11b-11ea-b0ca-5fb3ac7f1e2a.html).

263. *Choctaw Nation Chief Announces Formation of Sovereignty Committee*, HERALD DEMOCRAT (Sherman, Tex.) (Sept. 2, 2020), <https://www.heralddemocrat.com/story/news/2020/09/02/choctaw-nation-chief-announces-formation-of-sovereignty-committee/113839216/>.

264. O'Hanlon, *supra* note 262.

265. *Tribal Council Approves Historic Budget, Passes 'Cherokee Nation Reservation, Judicial Expansion and Sovereignty Protection Act'*, ANADISGOI (Aug. 27, 2020), <https://anadisgoi.com/index.php/government-stories/399-tribal-council-approves-historic-budget-passes-chokeee-nation-reservation-judicial-expansion-and-sovereignty-protection-act>.

ten.<sup>266</sup> The tribe increased the tribal attorney general's budget by \$3.5 million in order to hire more staff to handle prosecutions.<sup>267</sup>

The Cherokee Nation Reservation, Judicial Expansion and Sovereignty Protection Act also provided funding to hire an additional twelve marshals, funding for victims' services programs, and funding for reentry programs, as well as funding to align the tribe's criminal code more closely with the Oklahoma Criminal Code.<sup>268</sup> Changes to the tribe's criminal code include refining the penalties for misdemeanors and felonies committed within the Cherokee Nation's boundaries and updating the tribe's Controlled Substances Act.<sup>269</sup>

Less information is immediately available about the Chickasaw Nation's specific law enforcement capabilities and judicial capacity. The Chickasaw Nation Lighthorse Police Department (LPD) serves thirteen counties and employs seventy-seven full-time officers.<sup>270</sup> The Chickasaw Nation LPD has a canine division, special weapons and tactics team, a dive team, professional standards division, and criminal investigations division.<sup>271</sup> "There is probably no police agency in the State of Oklahoma, bar none, that is better run than this group of Lighthorse policemen,' [Oklahoma Bureau of Narcotics] Director R. Darrell Weaver said."<sup>272</sup> The Chickasaw

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266. *Id.*; *Commission for Protection of Cherokee Nation Sovereignty Makes Initial Recommendations for judicial, Criminal Justice Expansion*, CLAREMORE DAILY PROGRESS (Oct. 9, 2020), [https://www.claremoreprogress.com/news/commission-for-protection-of-chokeee-nation-sovereignty-makes-initial-recommendations-for-judicial-criminal-justice-expansion/article\\_6b913da2-0a5e-11eb-9f86-5b5b05ce71e9.html](https://www.claremoreprogress.com/news/commission-for-protection-of-chokeee-nation-sovereignty-makes-initial-recommendations-for-judicial-criminal-justice-expansion/article_6b913da2-0a5e-11eb-9f86-5b5b05ce71e9.html).

267. *Commission for Protection of Cherokee Nation Sovereignty Makes Initial Recommendations for judicial, Criminal Justice Expansion*, *supra* note 266.

268. *Id.*

269. *Cherokee Nation Upgrades Criminal Codes, Redirects \$10M for Law Enforcement, Courts, Prosecutors After McGirt Decision*, ANADISGOI (Dec. 15, 2020), <https://anadisgoi.com/index.php/government-stories/477-chokeee-nation-upgrades-criminal-codes-redirects-10m-for-law-enforcement-courts-prosecutors-after-mcgirt-decision>.

270. *About*, CHICKASAW NATION, <https://chickasaw.net/Our-Nation/Government/Lighthorse-Police/About.aspx> (last visited Nov. 5, 2021).

271. *Divisions and Special Teams*, CHICKASAW NATION, <https://chickasaw.net/Our-Nation/Government/Lighthorse-Police/Divisions-and-Special-Teams.aspx> (last visited Nov. 5, 2021).

272. Press Release, Dana Lance, Chickasaw Nation, Chickasaw Nation Lighthorse Police Chief Named Police Chief of the Year, (Oct. 16, 2008), <https://www.chickasaw.net/News/Press-Releases/Release/Chickasaw-Nation-Lighthorse-Police-Chief-Named-Pol-768.aspx>.

Nation LPD has cross-deputization agreements with forty-eight law enforcement agencies, including federal agencies.<sup>273</sup>

The Five Tribes' ability to carry out day-to-day law enforcement activities and prosecutions represents a victory for tribal sovereignty. *McGirt* will likely lead to the tribes assuming and carrying out a basic function of government: administering justice. But there are three additional ways in which the Five Tribes will be able to exercise more powers of a sovereign. First, because a significant portion of Oklahoma's population is Native American, the Five Tribes will be able to exercise criminal jurisdiction over people residing within their reservations in addition to their own tribal citizens. Second, well-resourced tribes with access to federal programs will be able to serve as important partners to cash-strapped local and state law enforcement agencies. Third, and perhaps most significantly, tribal prosecutors and courts will be filling a role for which federal prosecutors are not traditionally suited.

Under the Indian Civil Rights Act, tribes may exercise criminal jurisdiction over anyone enrolled in a federally-recognized tribe who commits a crime within reservation boundaries.<sup>274</sup> There are thirty-eight federally-recognized tribes in the state, including the Five Tribes.<sup>275</sup> According to the U.S. Census, 482,760 Native Americans lived in Oklahoma in 2010.<sup>276</sup> Thus, the Five Tribes' jurisdictional reach will extend well beyond their own citizens.

The Five Tribes' law enforcement capabilities also stand to supplement state and local agency capabilities. In addition to the cross-deputization agreements, tribal police forces sometimes have resources and capabilities other agencies do not. For example, in 2016, due to budget constraints, the Oklahoma Highway Patrol limited its troopers' travel to one hundred miles per day.<sup>277</sup> The travel restriction was in addition to a hiring freeze.<sup>278</sup> In

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273. Tony Choate, *Lighthorse Police Department Celebrates 15 Years Working Together with Area Law Enforcement*, ADA NEWS (Oct. 24, 2019), [https://www.theadanews.com/news/local\\_news/lighthorse-police-department-celebrates-15-years-working-together-with-area-law-enforcement/article\\_bc8f70f8-a7ed-50c4-b9e6-ed1bb73686f8.html](https://www.theadanews.com/news/local_news/lighthorse-police-department-celebrates-15-years-working-together-with-area-law-enforcement/article_bc8f70f8-a7ed-50c4-b9e6-ed1bb73686f8.html).

274. 25 U.S.C. § 1301(2).

275. *Tribal Jurisdiction in Oklahoma*, OKLA. DEP'T OF TRANSP., [https://www.ok.gov/health2/documents/map\\_tribal\\_jurisdictions.pdf](https://www.ok.gov/health2/documents/map_tribal_jurisdictions.pdf) (last visited Nov. 5, 2021).

276. 2010 CENSUS BRIEF: INDIAN POPULATION, *supra* note 173, at 7.

277. Barbara Hoberock, *OHP Troopers Given 100-Mile Daily Driving Limit Due to State Budget Woes*, TULSA WORLD (Nov. 30, 2016), [https://tulsa-world.com/news/ohp-troopers-given-100-mile-daily-driving-limit-due-to-state-budget-woes/article\\_2244c2ac-5f60-5e6e-be02-aa3b9e9eab03.html](https://tulsa-world.com/news/ohp-troopers-given-100-mile-daily-driving-limit-due-to-state-budget-woes/article_2244c2ac-5f60-5e6e-be02-aa3b9e9eab03.html).

278. *Id.*

addition to contributing to the number of patrol officers on the streets, the Five Tribes have provided equipment to non-tribal law enforcement agencies. For example, the Choctaw Nation helped fund bulletproof vests for Southeastern Oklahoma State University police officers.<sup>279</sup> Because tribes have access to federal funding and grants, Oklahoma tribes also have supplied other agencies with surplus gear such as bulletproof vests.<sup>280</sup>

Tribal law enforcement agencies, prosecutors, and courts may also support and compliment federal capabilities and capacities. Generally, the federal government directs prosecutorial attention to human trafficking, multimillion-dollar white collar crimes, and disrupting narcotics enterprises.<sup>281</sup> In addition to potential inexperience, the Justice Department has a checkered history, which includes documents lapses, with respect to its handling of crimes committed in Indian Country.<sup>282</sup> While the federal government has exclusive jurisdiction over serious felonies committed in Indian Country, enhanced sentencing authority under TLOA, extension of jurisdiction to non-Natives under VAWA 2013, referrals from federal prosecutors, and designation of tribal prosecutors as special United States Attorneys who have the authority to bring cases in tribal and federal court, tribal governments will have the ability to play a larger role in prosecuting crimes occurring on their reservations.

### VII. Conclusion

The Muscogee (Creek) Nation, the Five Tribes, and other Native American organizations and allies celebrated the Supreme Court's decision in *McGirt v. Oklahoma*, believing it to be a positive decision for tribal sovereignty.<sup>283</sup> Although the decision itself is narrow, holding that the Muscogee (Creek) Nation has a reservation for criminal jurisdictional purposes, its implications for tribal sovereignty are significant for two reasons. First, because of the similar legal histories of the Five Tribes, it is likely that the Cherokee, Chickasaw, Choctaw, and Seminole nations also have reservations. Second, because of Oklahoma's significant Native population and the large geographic territory comprising the Five Tribes' historic reservations, the tribes may soon exercise criminal jurisdiction over

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279. Press Release, Se. Okla. State Univ., Federal Grant, Contributions from Choctaw Nation and Southeastern Foundation Assist Southeastern Police Officers (Jun. 11, 2019), <https://www.se.edu/2019/06/federal-grant-police-officers/>.

280. Marshall, *supra* note 205.

281. Aspinwall & Brewer, *supra* note 144.

282. *Id.*

283. Letter from Fawn Sharp et al. to Jim Inhofe, *supra* note 1, at 2.

a nearly half of the land in Oklahoma and a significant portion of the state's population.

The Five Tribes appear well-positioned to meet the moment. All five have criminal codes, sophisticated law enforcement agencies, and modern court systems. Challenges are inevitable, but as Muscogee (Creek) Nation District Court Judge Greg Bigler said, "We have been around a very long time . . . . We handled justice in the 1850's, 60's and 70's, and we can do it again."<sup>284</sup>

#### *Addendum*

It has been over a year since I wrote this article in December 2020. In that time, several predictions have come to fruition. Most significantly, the Oklahoma Court of Criminal Appeals recognized all Five Tribes' historic reservation boundaries.<sup>285</sup>

Notably, Eastern Oklahoma has not plunged into *McGirt*-inspired lawlessness. Indeed, tribal, federal, and state and local officials are working together to enforce criminal laws.<sup>286</sup> Moreover, the federal government is moving to supplement the federal resources that it surged to Eastern Oklahoma in the wake of *McGirt* with tens of millions of dollars in funding and recommendations for permanent expansions of federal judicial infrastructure, including additional federal district judgeships.<sup>287</sup> Finally, the OCCA held that *McGirt*-based claims do not apply retroactively,<sup>288</sup> thus the vast majority of state convictions will remain undisturbed.

Nonetheless, the State of Oklahoma remains opposed to expanded tribal authority.<sup>289</sup> The state asked the Supreme Court to reverse its decision in

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284. Angel Ellis, *Expansions Needed for Tribal Courts*, MVSOKKE MEDIA (Oct. 29, 2020), <https://www.mvskokkedia.com/?p=3221>.

285. Chris Casteel, *Choctaw, Seminole Reservations Recognized by Oklahoma Appeals Court*, OKLAHOMAN (Apr. 1, 2021), <https://www.oklahoman.com/story/news/2021/04/01/choctaw-seminole-reservations-oklahoma-appeals-court-recognizes/4835019001/>.

286. See Brief for Amicus Curiae Muscogee (Creek) Nation in Support of Respondent at 6–17, *Oklahoma v. Castro-Huerta*, No. 21-429 (U.S. Nov. 16, 2021), 2021 WL 5405623, at \*6–17.

287. *Id.* at 13–16, 2021 WL 5405623, at \*13–16.

288. *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶ 41, 497 P.3d 686, 694.

289. Adam Liptak, *Supreme Court to Consider Limits of Ruling for Native Americans in Oklahoma*, N.Y. TIMES (Jan. 21, 2022), <https://www.nytimes.com/2022/01/21/us/politics/supreme-court-native-americans-oklahoma.html>; see Brief of Amicus Curiae the Chickasaw Nation and Choctaw Nation of Oklahoma in Support of Respondent at 2–3, *Castro-Huerta*, No. 21-429 (U.S. Nov. 18, 2021), 2021 WL 5474978, at \*2–3.

*McGirt*.<sup>290</sup> The Court denied Oklahoma's request to overturn its decision, which it rendered only during its immediate prior term.<sup>291</sup> However, the Court agreed in January 2022 to take up a narrower question: whether non-Indians who commit crimes against Indians in Oklahoma's new Indian Country must be tried in federal court.<sup>292</sup>

A prediction as to the success of the State of Oklahoma's latest legal gambit to undermine *McGirt* is beyond the scope of this Addendum. However, it is worth noting that the Court's ideological composition has shifted with Justice Amy Coney Barrett joining as Judge Ruth Bader Ginsburg's replacement, something the State of Oklahoma believes may aid its cause.<sup>293</sup>

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290. Liptak *supra* note 5.

291. *Id.*

292. *Id.*

293. Janelle Stecklein, *Experts: Supreme Court Could Clarify McGirt Ruling, Won't Overturn It*, ENID NEWS & EAGLE (Aug. 19, 2021), [https://www.enidnews.com/news/politics/experts-supreme-court-could-clarify-mcgirt-ruling-wont-overturn-it/article\\_9b06385c-0130-11ec-90e3-0786aebb5a34.html](https://www.enidnews.com/news/politics/experts-supreme-court-could-clarify-mcgirt-ruling-wont-overturn-it/article_9b06385c-0130-11ec-90e3-0786aebb5a34.html).