

McGirt v. Oklahoma

by Skip Durocher

In series of Treaties with the Creek Nation in the 1830s, the United States established a Reservation for the Creeks, covering millions of acres in northeastern Oklahoma, including land on which the City of Tulsa is located. In the succeeding years, the United States chipped away at the Creeks' governmental authority and landholdings, and the Nation's continued existence was in peril on more than one occasion. The State of Oklahoma never acknowledged the Reservation, or the Creek Nation's criminal and regulatory jurisdiction in the area. That all changed on July 9, 2020, as the United States Supreme Court held that the Reservation established for the Creek Nation was never disestablished, and thus much of Northeastern Oklahoma is the Creek Nation Indian Reservation.

The dispute regarding the status of the Creek Reservation arose in post-conviction proceedings in the case of Jimcy McGirt, an enrolled member of the Seminole Nation of Oklahoma, who was convicted in Oklahoma state court of serious sexual offenses against a minor. McGirt argued that the state court did not have jurisdiction to convict him of those crimes because the alleged offense occurred within the boundaries of the Creek Reservation. The Major Crimes Act requires that any major crime committed by an Indian in Indian country is "within the exclusive jurisdiction of the United States,"¹ and as a result, McGirt argued, federal law required that his case be tried in federal court, not state court.

The Court of Criminal Appeals of Oklahoma rejected McGirt's argument and concluded that there was no Creek Reservation in Oklahoma. The United States Supreme Court granted McGirt's petition for certiorari to answer two questions: did Congress establish a Creek Reservation in Oklahoma, and if so, does that reservation remain in place today?

Writing for the majority, Justice Gorsuch began the Court's analysis by answering the first question. Congress clearly established a reservation for the Creek Nation in the 1832 and 1833 "Treaty with the Creeks" in which the United States "solemnly guarantied"

Related People

- Skip Durocher

Related Capabilities

- Indian & Alaska Native

to the Creek Nation a “permanent home” in Oklahoma.

To answer the second question and determine whether Congress subsequently disestablished the Creek Reservation, the Court considered its analysis in a prior reservation disestablishment case, *Solem v. Bartlett*.² According to *Solem*, only Congress, armed with plenary power, can disestablish a reservation. Most often, Congress demonstrates its intent to disestablish a reservation by drafting clear statutory language to that effect. However, *Solem* also suggested that congressional intent could be shown by circumstantial evidence, such as recorded congressional commentary or even geographic or demographic evidence.

The State of Oklahoma relied upon statutory language and circumstantial evidence in arguing that Congress intended to disestablish the Creek Reservation. With respect to statutory language, Oklahoma argued that Congress intended to terminate the Creek Reservation when it passed legislation which divided the Creek Reservation into individual parcels of land, referred to as allotments. This congressional action, Oklahoma argued, was Congress’s “first step in a plan ultimately aimed at disestablishment.” However, while Congress may have wished for the allotment to end the Creek Reservation, the Court found no statutory language in the allotment act “that could plausibly be read as an Act of disestablishment.” As such, the Court concluded that Congress did not intend to disestablish the Creek Reservation with the allotment act.

With respect to circumstantial evidence, Oklahoma argued that, under *Solem*, the Court was required to examine “contemporary events at the second [step], and even later events and demographics at the third [step].” According to Oklahoma, *Solem* permitted circumstantial evidence of Congress’s intent to disestablish the Creek Reservation to overcome the lack of statutory evidence. Oklahoma’s array of circumstantial evidence spanned a century of congressional action from the allotment era to modern day. Oklahoma raised circumstantial evidence from the allotment era, including Congress’s efforts to abolish Creek tribal courts and its requirement that the Creeks “turn over all ‘tribal properties’ to the Secretary of the Interior.” Moving forward in time, Oklahoma also presented modern demographic evidence showing that Indians only constituted 10 to 15% of the population of northeastern Oklahoma. In presenting these examples, Oklahoma sought to prove that northeastern Oklahoma had “long since lost its Indian character” (citing *Solem*).

The Court rejected Oklahoma’s interpretation of *Solem*, “restat[ing] the point” that “[t]here is no need to consult extratextual sources when the meaning of a statute’s terms is clear. Nor may extratextual sources overcome those terms.” Rather, the Court held, “[i]f Congress wishes to withdraw its promises, it must say so.” Finding no such clear statement in the statute, the Court reversed the judgment of the Court of Criminal Appeals of Oklahoma.

McGirt v. Oklahoma is significant for confirming, and clarifying, the *Solem* factors as the appropriate analysis for determining whether a reservation has been disestablished. The Court made clear that the first *Solem* factor, statutory language clearly evidencing Congress’s intent to disestablish the reservation, bears the most weight and is necessary

in order to conclude in favor of disestablishment. Further, when Congress clearly and unambiguously intends to preserve, and not disestablish, a reservation, a court may not combine circumstantial evidence by “[s]prinkl[ing] in a few predictions here, some contestable commentary there,” in order to cast doubt on language that would be otherwise unambiguous. Indeed, the Court held that it may not “favor contemporaneous or later practices *instead* of the laws Congress passed” (emphasis in original).

The decision is also significant in the larger context of federal Indian law. The Creek Nation has an opportunity to enhance its civil regulatory jurisdiction and the scope of its governmental services. The holding likely also applies to several other Oklahoma tribes, whose reservations the State has not acknowledged. The holding—especially considered along with the Court’s recent decisions in *Cougar Den*³ and *Herrera*⁴—confirms that courts—and state governments—must respect tribal treaty rights. Furthermore, there can be no doubt now that Justice Gorsuch’s reputation for understanding the nuances and equities of federal Indian law and in particular federal treaty rights is well-deserved, and his presence on the Court is an effective counter to those justices who would undermine or eliminate the fundamental rights of American Indian tribes.

¹ 18 U.S.C. § 1153(a).

² *Solem v. Bartlett*, 465 U.S. 463 (1984).

³ *Wash. State Dep’t of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000 (2019).

⁴ *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019).