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Reflections on McGirt v. Oklahoma: A Case Team Perspective

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REFLECTIONS ON *MCGIRT V. OKLAHOMA*: A CASE TEAM PERSPECTIVE

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I. INTRODUCTION

The Supreme Court's decisions in *McGirt v. Oklahoma* and *Sharp v. Murphy* constitute a resounding vindication of the bedrock principles of federal Indian law that trace their origin to Chief Justice Marshall's foundational trilogy: namely, that the sovereign rights of tribal governments remain intact unless and until Congress explicitly provides otherwise, notwithstanding the erosive forces of history or the "settled expectations" of non-Indian communities.[1] This essay does not attempt to locate the Court's decisions within the broader canon of federal Indian law or to comment on the

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1. 140 S. Ct. 2452 (2020); 140 S. Ct. 2412 (2020).

practical consequences of the Court's recognition that the Muscogee (Creek) Nation retains its treaty-protected rights to exercise sovereignty over its eastern Oklahoma Reservation. Those topics are well covered elsewhere in this Journal. This essay aspires to a more modest task, that of recounting some of the experiences of the Nation and the diverse coalition that supported its tireless efforts to protect its historic rights, efforts that culminated in Justice Gorsuch's opinion in *McGirt*.

II. LAYING THE GROUNDWORK

The story of the Creek Nation's victory dates back to the Nation's removal to what is now the State of Oklahoma from its historic homelands in the American southeast under the auspices of the Indian Removal Act of 1830.[2] It is the story of the Nation's effort to preserve the rights guaranteed to it under 1832 and 1833 removal treaties[3] against near-overwhelming historical forces operating in opposition to those rights; and of its fight to retain those rights through the trauma of removal, the waves of settlers and speculators that soon crashed over their new land, its eventual allotment, and of course the creation of the State of Oklahoma in the early 1900s. And it is the story of the Creeks thereafter struggling to preserve their government and the strength of their community throughout the twentieth century, the vast majority of which saw the federal and state governments and their non-Indian citizens acting as though those rights, and indeed the Nation itself, had been terminated.

This essay picks up the story's thread very late in the game. In the fall of 2010, a future member of the Nation's *Murphy* and *McGirt* case team was then a 2L at the University of Tulsa College of Law, and in need of a topic for a law review note to submit to this Journal. He stumbled upon a pair of then federal District Court cases that questioned the status of two tribal reservations in eastern Oklahoma, reservations which, according to all conventional wisdom at the time, had long since vanished.[4] One of these cases was brought by the Osage Nation as a test case, an affirmative bid to re-establish its long dormant Reservation rights. The other was brought by a member of the Muscogee (Creek) Nation seeking to avoid the death penalty for a gruesome murder committed within the boundaries of the historic Creek Reservation.

The resulting student note focused on the three-step *Solem* disestablishment test and concluded that the eastern Oklahoma reservations had never been abolished under it.[5] It was the first Quixotic step in its author's law school journey with the *Murphy* case. After the article was written but before its publication, the author attended his first Federal Indian Bar Association conference. There he encountered a number of like-minded law students from across Indian country who were equally confident that the eastern Oklahoma reservations had not been terminated by Congress under the *Solem* analysis. They were also equally and delightfully oblivious to the conventional wisdom that bad facts make

2. 4 Stat. 411 (1830).

3. Treaty with The Creeks, Mar. 24, 1832, 7 Stat. 366; Treaty with The Creeks, Feb. 14, 1833, 7 Stat 417.

4. *See* Osage Nation v. Okla. Tax Comm'n, 597 F. Supp. 2d 1250 (N.D. Okla. 2009); Murphy v. Sirmons, 497 F. Supp. 2d 1257 (E.D. Okla. 2007).

5. *See* Philip Tinker, *Is Oklahoma Still Indian Country? Reservation Disestablishment in* Murphy v. Sirmons *and* Osage Nation v. Irby, 9 DARTMOUTH L.J. 120 (2011).

bad law, and that the accumulated weight of "settled expectations" and assumptions regarding the consequences of Reservation status for entrenched non-Indian interests suggested that no prudent lawyer should waste their time tilting at this particular windmill.[6]

The student group made contact with federal public defender Patty Palmer Ghezzi, who represented Patrick Murphy in his federal habeas corpus action, and would continue to do so through the Supreme Court proceedings in Mr. Murphy's case. The students provided Ms. Ghezzi—an outstanding lawyer with substantial background in federal Indian law and its frequently contested application in Oklahoma—with (possibly over-enthusiastic and unsolicited) legal research and consultation regarding the issues implicated by Mr. Murphy's appeal. However, Mr. Murphy's case languished in procedural limbo for many years after these initial efforts, as the reservation issue took a back seat to other substantive and procedural criminal law issues also presented by the matter. The delay proved critical. For it meant that, although the Oklahoma Court of Criminal Appeals had rejected Mr. Murphy's Indian country arguments in 2005, and the Eastern District of Oklahoma had affirmed that decision in 2007, the issue would not reach the United States Court of Appeals for the Tenth Circuit before the Supreme Court decided *Nebraska v. Parker* nearly a decade later in 2016.[7]

III. *NEBRASKA V. PARKER*

Parker was a game-changer with respect to the *Solem* disestablishment analysis.[8] *Parker* affirmed the continued existence of a disputed portion of the Omaha Reservation despite that the Tribe's jurisdiction over that territory had long lain dormant and was assumed not to exist by State and federal officials and the area's non-Indian population.[9] In fact, in the Court's words, "the Tribe was almost entirely absent from the disputed territory for more than 120 years," and federal officials "treated the disputed land as Nebraska's."[10]

Parker's importance cannot be overstated. In the decades since *Solem*, federal courts, including the Supreme Court, had been drifting from *Solem*'s step-one emphasis on Congress's intent as evidenced in statutory text toward its step-three emphasis on the "justifiable expectations of the people living in the area."[11] The Court's 2005 decision in *City of Sherrill*, while not technically a disestablishment case, was appearing in disestablishment cases to justify giving "heavy weight" to such expectations at step-three.[12] *Parker*—authored by Justice Thomas for a unanimous Court—seemed intended to halt that drift (at least in the disestablishment context) and direct the analysis back

6. During the ensuing decade, far too many individuals contributed to the author's Quixotic quest to be able to list here. In the beginning, the core group came primarily from the University of Tulsa, University of Arizona, and Arizona State University and included Jasen Chadwick, Kevin Heade, Michael Corey Hinton, William Patrick Kincaid, Joe Keene, Brian Lewis, and Tonya Thurman.

7. 136 S. Ct. 1072 (2016).

8. *Id.*

9. *Id.*

10. *Id.*

11. Hagen v. Utah, 510 U.S. 399, 421 (1994).

12. *See, e.g.*, Osage Nation v. Irby, 597 F.3d 1117, 1128 (10th Cir. 2010) (citing *Sherrill*).

toward the textual emphasis of *Solem*'s step one.[13] The Court emphasized that Congress must act directly and speak clearly in order to disestablish a reservation, with several passages in the opinion sending a strong signal to the lower courts that, when it comes to determining the modern-day existence and scope of tribal rights, it is congressional intent, as discerned through the interpretive tools of textualism, that rules the day, and that an absence of clear language terminating tribal rights cannot be overcome by post-hoc analysis of the actions or settled expectations of governmental actors and non-Indian interest holders.[14]

Parker, in short, breathed new life into the previously fanciful notion that the federal courts might look past a century of conventional wisdom and hold that long dormant reservation borders like those of the Five Tribes can remain intact if no statute or treaty has explicitly terminated them, notwithstanding the effects that this renewed recognition might have on State and local governments or on non-Indian interests in the reservation territory. It was therefore of great moment that Patrick Murphy's case was not released from its decade of procedural limbo, and put back on track for briefing at the Tenth Circuit, until January of 2016, which meant that *Parker*, issued in May of that same year, would weigh heavily in the future of the case.

In light of *Parker*, the Creek Nation and other Five Tribes tribal governments began to focus attention on the *Murphy* case with a sense of cautious optimism. Shortly after the decision issued, the Creek Nation and the Seminole Nation of Oklahoma decided to submit an amicus brief in the Tenth Circuit arguing that the treaty rights that established and protected the Creek Reservation remained intact because Congress had not taken the legislative steps necessary to terminate those rights.[15]

At this point the first leg of the Quixotic journey was complete, and what started as a pie-in-the-sky argument in a 2L's law review note had become a credible bid to vindicate the continued existence of the Creek Reservation.

IV. THE TENTH CIRCUIT

Briefing the case for the Tenth Circuit presented a number of challenges. This essay highlights two of them, the first one strategic or doctrinal, and the second practical. These two challenges required the legal team to thread a delicate needle, making the most forceful case possible that the Creek Reservation had not been terminated, without stepping on the looming landmines, which may have provided justifications for a hesitant Court to conclude that the tribal position was either foreclosed by Circuit precedent, subject to a procedural bar, or simply incompatible with the weight of the historical expectations and assumptions that these lands had long ago been stripped of any vestiges of the former reservation boundaries.

A. Threading the Needle

A major strategic question was how to address *Parker* in terms of its impact on

13. *Parker*, 136 S. Ct. 1072.

14. *Id.*

15. *See* Brief *Amicus Curiae* of the Muscogee (Creek) Nation and the Seminole Nation of Oklahoma, Murphy v. Royal, 866 F.3d 1164 (10th Cir. 2017) (No. 07-7068).

existing case-law. This was a critical issue on multiple levels. First, Mr. Murphy's federal habeas corpus challenge arose under the federal Antiterrorism and Effective Death Penalty Act of 1995.[16] This law generally precludes federal courts from overturning a State court conviction unless that conviction was "contrary to or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[17] If the Tribal Amici had taken the position that *Parker* dramatically revised the law of reservation diminishment and overturned prior precedent, this could have led the Court to find that regardless of whether the Creek Reservation would be considered intact under *Parker*'s analysis, there was no need to decide that question if the legal standards in place prior to *Parker* dictated a contrary conclusion.

To be sure, the Tribal Amici's paramount duty was not to ensure a favorable outcome for Mr. Murphy, but to preserve the treaty rights in issue.[18] But there was another reason the Tribal Amici were hesitant to embrace an interpretation of *Parker* as upending pre-*Parker* caselaw.

The Tenth Circuit had previously decided a case involving reservation rights in Eastern Oklahoma.[19] In a paradigmatic example of the "drift" by lower courts toward *Solem*'s step-three mentioned above, the Court, citing *City of Sherrill*, held that the Osage Reservation had been disestablished when it was allotted, and based this conclusion largely on historical assumptions about allotment and the "heavy weight" of "justifiable expectations" of present-day residents, rather than any specific statutory language thought to be sufficient to signal Congress's intent to disestablish the reservation.[20] Moreover, *Osage Nation* did not rely simply on historical assumptions and understandings specific to the Osage Nation, but instead commented in dicta that in preparation for Oklahoma's statehood, the United States "had already implemented an allotment process with the Five Civilized Tribes that extinguished national and tribal title to lands within the territory and disestablished the Creek and other Oklahoma reservations."[21]

Osage Nation, then, loomed as an inhospitable precedent for the argument that the Creek Reservation had not in fact been disestablished. If *Parker* had not intervened, it may not have been possible to convince the Circuit to hold that the Creek Reservation had indeed survived allotment. However, arguing that Circuit precedent was incorrect and had been repudiated by the more recent Supreme Court decision ran a significant risk. The Supreme Court in *Parker* did not profess to repudiate any pre-*Parker* caselaw and indeed described the basis of its analysis as "well settled."[22] Thus, the Tenth Circuit would have had credible grounds to find that *Osage Nation* was undisturbed by *Parker*, and accordingly remained controlling in *Murphy*. By telling the Court that it should reject *Osage Nation* as inconsistent with *Parker*, the Tribal Amici would have been signaling

16. *Murphy*, 866 F.3d at 1178.

17. 28 U.S.C. 2254 (d)(1).

18. *See* Brief *Amicus Curiae* of the Muscogee (Creek) Nation and the Seminole Nation of Oklahoma at n.2, *Murphy*, 866 F.3d 1164 (No. 07-7068) (Tribes took "no position" on the procedural issues in Mr. Murphy's case).

19. Osage Nation v. Irby, 597 F.3d 1117 (10th Cir. 2010).

20. *See id.* at 1124 ("the operative language of the statute does not unambiguously suggest diminishment or disestablishment of the Osage reservation.").

21. *Id.*

22. *Parker*, 136 S. Ct. at 1072.

that their arguments could not be squared with *Osage Nation*. This may have been fatal to the Reservation rights claims if the Circuit had elected to read *Parker* as simply a reaffirmation of settled law.

Still, *Parker* represented the then high-water mark for precedents recognizing the preservation of reservation boundaries despite the passage of time and widespread understanding that those boundaries had long since vanished. To have any chance of success at all, the Tribal Amici brief needed to embrace *Parker* to the fullest extent. However, it was equally necessary to frame *Parker* as being fully consistent with prior Supreme Court caselaw and the Circuit precedent developed in reliance on that caselaw. The brief accordingly described *Parker* as at once being a "watershed decision," but one that "reaffirmed and clarified" the disestablishment analysis.[23] This was no contradiction, because *Parker* in fact checked both these boxes. Its singular importance lay in the fact that it emphatically instructed the lower courts to return their primary focus to the textual factors that *Solem* and prior disestablishment decisions had emphasized, rather than hinging decisions on non-textual factors that were originally understood to be of secondary and tertiary importance.

Happily, the Tenth Circuit saw the world in the same way. In his thoroughly considered, 126-page opinion for a unanimous panel, Judge Matheson explained that, "[i]n *Nebraska v. Parker*, the Supreme Court unanimously recommitted to the 'well-settled' *Solem* framework."[24] And throughout his opinion, he cited *Solem* and *Osage Nation* as controlling, but consistently did so through the lens of, and with parallel citation to, *Parker*.[25]

B. Supplementing the Record

Another major challenge that the legal team faced related to the record, and more specifically the lack thereof. Due in no small part to procedural complications in the State court proceedings, the case reached the Tenth Circuit with virtually no development of the historical or contemporary evidence bearing on the questions of reservation disestablishment. While disestablishment is a question of statutory or treaty interpretation, under *Parker*, historical context remained significant in determining the meaning of the relevant text, particularly with respect to the negotiation records of the allotment agreements and statutes that severed the reservation land base from communal tribal ownership and documents reflecting how Tribal, federal, and State actors interpreted and enforced those statutes and agreements in the critical years immediately following allotment.

Under ideal circumstances, a tribe whose Reservation rights are in issue would be involved in the case from an early stage and could submit an expert witness report providing the critical historical evidence and context necessary for the Court to fully evaluate the meaning the parties to an agreement would have attributed to it at the time. Unfortunately, reservation boundaries claims are frequently brought by criminal

23. *See* Brief *Amicus Curiae* of the Muscogee (Creek) Nation and the Seminole Nation of Oklahoma, *Murphy*, 866 F.3d 1164 (No. 07-7068).

24. *Murphy*, 875 F.3d at 930.

25. *See generally id.*

defendants, who will ordinarily lack the tribal government's unique perspective into the relevant historical context and may not possess the resources to ensure that this evidence comes into the record. Such was the case in *Murphy*, where the Nation had not been involved in those early stages and accordingly submitted no such materials.

Given that the case was already up on appeal, there was no ability to submit a comprehensive historical report. Accordingly, the legal team in *Murphy* had to fill in the gaps with available primary sources. Based on the arguments below and the district court's decision, it was understood that the State would be arguing that the purpose of the federal government's pursuit of an allotment agreement with the Five Tribes was to set the table for terminating their sovereign rights and reservation land base. Under *Parker* and *Solem*, though, it was the State's burden to support this argument with "unequivocal evidence"[26] showing that everyone involved—tribal, federal, and affected non-Indian citizens—understood this to be the case. Fortunately, the historical record was not unequivocal, and significant evidence existed supporting a contrary historical narrative, one that showed a Creek Nation (like others of the Five Tribes) unwavering in its commitment to preserving its sovereignty and treaty rights against immense pressure to relinquish both.

Key sources the team was able to draw on included the accounts from the Dawes Commission—the negotiation team dispatched by Congress to negotiate with the Five Tribes for the allotment of their lands in anticipation of Oklahoma Statehood. At first glance, there was cause for concern that these records could be viewed as supporting the State's narrative. The Dawes Commission was established by Congress

> for the purpose of the extinguishment of the national or tribal title to any lands within [the Indian] Territory . . . either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations.[27]

Taken in isolation and stripped of its historical context, this language could be read to suggest the very thing that Courts can rely on to find diminishment—an explicit desire on the part of the federal government to effectuate an "extinguishment" of the tribal territorial rights that inhere in reservation status. This is in fact how the State construed this language in its brief, citing it as one of many Congressional acts demonstrating "clear and unequivocal expressions of legislative intent" to disestablish the Creek Reservation.[28]

However, a deeper exploration into the historical record revealed that the history of the Dawes Commission's negotiations with the Five Tribes told a far different story. In its first Annual Report to the Commissioner of Indian Affairs in 1894, the Dawes Commission reported that:

> Early interviews . . . satisfied us that the Indians would not, under any circumstances, agree to cede any portion of their lands to the Government, but would insist that if any agreements were made for allotment of their lands it should all be divided equally among them . . . . Finding this unanimity among the people against the cession of any of their lands to the United States, we abandoned all idea of purchasing any of it and determined to offer them an equal division of their lands.[29]

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26. *Parker*, 136 S. Ct. 1072.
27. Act of March 3, 1893, ch. 209, § 16, 27 Stat. 612.
28. Brief of Respondent-Appellee at 57–58, *Murphy*, 866 F.3d 1164 (No. 07-7068).
29. COMMISSION TO THE FIVE CIVILIZED TRIBES, ANNUAL REPORTS OF 1894, 1895, AND 1896, at 14 (1897).

Six years later, in its final Report, the Commission confirmed that it had made no further progress in its efforts to negotiate for the cession of tribal lands and extinguishment of their rights to those lands:

> Had it been possible to secure from the Five Tribes a cession to the United States of the entire territory at a given price, . . . the duties of the commission would have been immeasurably simplified . . . When an understanding is had, however, of the great difficulties which have been experienced in inducing the tribes to accept allotment in severalty . . . it will be seen how impossible it would have been to have adopted a more radical scheme of tribal extinguishment, no matter how simple its evolutions.[30]

These are but a few examples of how the historical record worked to undermine the conventional historical narrative and demonstrate that the actual experiences of the Tribal and federal actors living through the historical period in question were quite different than many unexamined modern assumptions would hold. To be sure, as noted, there was some historical evidence supporting Oklahoma's disestablishment narrative. But evidence of diminishment had to be unequivocal to hold any sway in the analysis, and it was far from that here. As the Tenth Circuit concluded in *Murphy*,

> Even if the State's evidence offers some suggestion of a contemporary understanding that the Creek Reservation was disestablished, Mr. Murphy and the Creek Nation have marshalled evidence showing an understanding that the Reservation's borders continued. The step-two evidence is at most debatable, and we need not parse it further because ambiguous evidence cannot overcome the missing statutory text at step one. *See Hagen*, 510 U.S. at 411. ("Throughout the inquiry, we resolve any ambiguities in favor of the Indians . . . .").[31]

B. En Banc Review

The Creek Nation, alas, would not leave the Tenth Circuit with its reservation status totally unquestioned or unscathed. For while the Circuit denied en banc review, Chief Judge Tymkovich (who concurred in that denial and was indeed a member of the original panel) encouraged Supreme Court review, and in decidedly ominous terms.[32] He first questioned the appropriateness, under the circumstances, of insisting on "unequivocal" historical evidence at step two of the *Solem* framework: "Supreme Court precedent . . . requires that evidence of intent to disestablish be 'unequivocal[].' . . . History, however, is not always well suited to provide the unequivocal evidence of disestablishment that *Solem* requires. Sometimes history is ambiguous, making it impossible to decide between competing narratives."[33]

The Chief Judge then turned to step three: "This case may present the high-water mark of *de facto* disestablishment: the boundaries of the Creek Reservation . . . encompass a substantial non-Indian population, including much of the city of Tulsa; and Oklahoma claims the decision will have dramatic consequences for taxation, regulation, and law

30. SEVENTH ANNUAL REPORT OF THE COMMISSION TO THE FIVE CIVILIZED TRIBES 9, *reprinted in* H. Doc. No. 5, 56th Cong., 2d Sess. (1901) (1900 Commission Report).

31. *Murphy*, 875 F.3d at 959–60.

32. *See id.* (Tymkovich, J., concurring).

33. *Id.* at 967.

enforcement."[34]

Thus, where *Parker* had appeared to stem the drift among courts away from the step-one emphasis on text toward the atextual considerations at steps two and three, the Chief Judge was urging that, at least in the singular context of Oklahoma, steps two and three should predominate:

> [T]his may be the rare case where the Supreme Court wishes to enhance Steps Two and Three of Solem if it can be persuaded that the square peg of Solem is ill suited for the round hole of Oklahoma statehood . . . . In sum, this challenging and interesting case makes a good candidate for Supreme Court review.[35]

The Supreme Court accepted that invitation, with the United States taking the rare step of lending its support to the State's petition for certiorari even before the Court requested its views.

V. ROUND ONE AT THE SUPREME COURT: *MURPHY*

A. Merits Briefing

The State of Oklahoma, represented by specialist, highly experienced counsel in the Supreme Court, would press Chief Judge Tymkovich's view of the case with all guns blazing. Its petition for certiorari and its opening brief on the merits placed heavy and forceful emphasis on the historical evidence that Congress anticipated the demise of the Creek Nation and its Reservation; and equal or perhaps even greater emphasis on the later demographic transformation of the area, and the resulting "massive disruption" to "settled expectations" an affirmance would bring.[36] Indeed, Oklahoma's petition for certiorari warned that affirming the Tenth Circuit's decision would "render Oklahoma a fractured, second-class state," and its merits brief opened with a half-page color photograph of downtown Tulsa, Oklahoma, and a declaration that acknowledging the Creek Reservation would be "revolutionary" and "would shock the 1.8 million residents of eastern Oklahoma who have universally understood that they reside on land regulated by state government, not by tribes."[37] In what the Nation's team viewed as a tacit concession that its step one textual argument was its least compelling, Oklahoma placed decidedly less emphasis on that prong of the *Solem* framework, and barely mentioned *Parker*.

The Nation's preferred ground, of course, was the law. There simply was no statutory text disestablishing the Creek Reservation. But Oklahoma's emphasis on steps two and three of the *Solem* analysis—and the quality and force with which its narrative was written—meant that the team could not over-rely on *Parker* and had to account for the possibility that the Court would share Chief Judge Tymkovich's (and Oklahoma's) view that this case marked "the high-water mark of *de facto* disestablishment" and that *Parker* was beside the point.[38] This meant that, although *Parker* permeated the Nation's

34. *Id.* at 967–68.

35. *Id.* at 967.

36. *See* Petition for Writ of Certiorari, *Murphy*, 866 F.3d 1164 (No. 07-7068); Brief for Petitioner, *Murphy*, 866 F.3d 1164 (No. 07-7068).

37. *See* sources cited *supra* note 36.

38. *See Murphy*, 875 F.3d at 967 (Tymkovich, J., concurring).

brief, the Nation nevertheless had to devote a significant portion of its sharply limited word count—much more than it would have had it been confident that *Parker* was the governing framework—to countering the State's step two, and especially its step three, arguments.

The Nation could do so with greater comfort given that Mr. Murphy's Supreme Court team, consisting of Ms. Ghezzi and the excellent Jenner & Block firm (with a group headed by former Acting Solicitor General Ian Gershengorn), would devote considerable attention to textual analysis in its briefing.

With respect to the arguments about modern-day consequences, the Nation's team quickly concluded that it was important not simply to play defense on the issue (the sky will not fall if the Nation wins) but to tell an affirmative story about the tremendous governmental contributions the Nation makes throughout its Reservation area, contributions that benefit both Nation citizens and non-citizens alike and that would be jeopardized were the Nation's governmental authority to be undermined by a disestablishment holding. The material for this story was well in hand. For while the State wanted to focus on Tulsa, in the northeastern corner of the Reservation, the vast majority of the Reservation is rural and, in low-tax Oklahoma, far from amply served by the State and local governments. The Creek Nation's robust governmental activities are hence critical: in areas ranging from public safety (with its highly sophisticated Lighthorse police force) to infrastructure to the running of hospitals and health care clinics to family violence prevention and counseling, the Nation acts to enhance the safety and welfare of all within the Reservation borders.[39] These facts, the Nation's team knew, were not ones that would be within the normal cognizance of the Court, and they were well worth educating the Court about.

The Nation was aided immeasurably in countering Oklahoma's counterfactual narrative about the consequences of reservation affirmation by stellar amicus briefs filed by others. The National Congress of American Indians, in a brief authored by Colette Routel and Bethany Berger, detailed how sizeable non-Indian population centers thrive on reservations across the country, with reservation status often (as in the case of the Creek Nation) resulting in considerable benefits for non-Indians as well as tribal members.[40] Troy Eid and Jennifer Weddle authored a brief on behalf of former United States Attorneys (of whom Troy is one) explaining with great authority that Congress is well capable of addressing any criminal justice issues arising out of continued reservation status, and that it has done so successfully in other instances.[41] The guest editor of this volume, Mary Kathryn Nagle, joined with Professor Sarah Deer to write a brief for the National Indigenous Women's Resource Center fleshing out for the Court the grave problems with domestic violence that have arisen across the country where tribal governmental powers have been handicapped, a point with particular pertinence given the nationally-recognized efficacy of the Nation's family violence prevention programs.[42] Susan Work and Stacy

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39. *See* Brief *Amici Curiae* Muscogee (Creek) Nation in Support of Respondent, Carpenter v. Murphy, 139 S. Ct. 626 (2020) (No. 17-1107).

40. *See* Brief for National Congress of American Indians as *Amicus Curiae* in Support of Respondent, *Sharp*, 140 S. Ct. 2412 (No. 17-1107).

41. *See* Brief *Amici Curiae* of Former United States Attorneys Troy A. Eid, Barry R. Grissom et al. in Support of Respondent, *Sharp*, 140 S. Ct. 2412 (No. 17-1107).

42. *See* Brief of *Amici Curiae* National Indigenous Women's Resource Center and Additional Advocacy

Leeds authored a brief on behalf of Indian law scholars and historians complementing nicely the Nation's historical discussion, including with a broader discussion of the relevant histories of the other Five Tribes.[43]

And in what was a truly unique submission, Robert Henry (former Chief Judge of the Tenth Circuit), Michael Burrage, Steve Greetham, Brad Mallett, and the Sonosky firm wrote a brief on behalf of the Chickasaw Nation, the Choctaw Nation, and current and former State of Oklahoma elected officials, including high-ranking officials in State government and Congressman Tom Cole, a senior member of the House Republican leadership and co-chair of the Congressional Native Caucus.[44] Yes, you read all that right—a collaborative brief between Indian nations and State officials, which touted the collaboration between the Five Tribes and the State and local units of government throughout eastern Oklahoma on a wide variety of issues. It is hard to think of a more effective counter to the State's litigation rhetoric about dire consequences than a brief like this (and sure enough, it, like several of the other amicus briefs, was cited by Justice Gorsuch in his eventual opinion for the Court in *McGirt*).[45]

By the end of briefing, the case had taken on a binary feel. On one side, the Creek Reservation would stand if the case were decided with a step-one emphasis on text and *Parker*. On the other, the State was pounding the points about "disruption" and "settled expectations" that had ruled the day in cases like *Sherrill*, with the Nation pushing back vigorously while trying to keep the focus, as was Mr. Murphy, on the text. And oral argument reflected that divide. Justice Gorsuch, who had sat on a Tenth Circuit panel that had addressed a procedural issue pertaining to Mr. Murphy's habeas proceedings, recused himself when the case reached the Court, leaving eight Justices to decide it. Three of them focused their questions on the intent of Congress as reflected in statutory text—*i.e.*, step one: (Kagan, J.: "did Congress, in fact" terminate the reservation?); (Sotamayor, J.: "Exactly when did [Congress] do this?"); (Breyer, J.: text of 1906 statute "does not sound like an abrogation" of sovereignty).[46] And three of them, through a *Sherrill*-esque lens, focused on practical consequences and the disruption of settled expectations: (Alito, J.: "Could you say something about the practical effects of the Tenth Circuit's decision on . . . eastern Oklahoma?"); (Roberts, C.J.: "Would this expand the reach of [gaming] in the area?"); (Kavanaugh, J.: "even if it were ambiguous on the text, . . . we would be . . . creating a great deal of turmoil. And so why shouldn't . . . all the practical implications say leave well enough alone here?").[47] Meanwhile, Justice Ginsburg asked a single,

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Organizations for Survivors of Domestic Violence and Assault in Support of Respondent, *Sharp*, 140 S. Ct. 2412 (No. 17-1107).

43. *See* Brief of *Amici Curiae* Historians, Legal Scholars, and Cherokee Nation in Support of Respondent, *Sharp*, 140 S. Ct. 2412 (No. 17-1107).

44. *See* Brief of *Amici Curiae* David Boren, Brad Henry et al. in Support of Respondent, *Sharp*, 140 S. Ct. 2412 (No. 17-1107).

45. *McGirt*, 140 S. Ct. at 2499.

46. Transcript of Oral Argument at 4 lns.24–25, *Sharp*, 140 S. Ct. 2412 (No. 17-1107); Transcript of Oral Argument at 20 lns.17–18, *Sharp*, 140 S. Ct. 2412 (No. 17-1107); Transcript of Oral Argument at 32 ln.4, *Sharp*, 140 S. Ct. 2412 (No. 17-1107).

47. Transcript of Oral Argument at 28 lns.18–22, *Sharp*, 140 S. Ct. 2412 (No. 17-1107); Transcript of Oral Argument at 55 lns.20–25; Transcript of Oral Argument at 56 lns.1–4, *Sharp*, 140 S. Ct. 2412 (No. 17-1107); Transcript of Oral Argument at 72 lns.8–10, *Sharp*, 140 S. Ct. 2412 (No. 17-1107).

largely unrevealing, question;[48] and Justice Thomas asked none. It was not lost on the team that these two reticent Justices were the authors, respectively, of *Sherrill* and *Parker*.[49]

B. Supplemental Briefing

Given the strong cross-currents at argument, it would have been even more foolish than usual to have made predictions about outcome, and the Nation's team settled in for what presumably would be a several-month wait until a decision. But word from the Court came much sooner than that. Oral argument in *Murphy* took place on November 27, 2018. One week later the Court ordered supplemental briefing on two issues:

> (1) Whether any statute grants the state of Oklahoma jurisdiction over the prosecution of crimes committed by Indians in the area within the 1866 territorial boundaries of the Creek Nation, irrespective of the area's reservation status. (2) Whether there are circumstances in which land qualifies as an Indian reservation but nonetheless does not meet the definition of Indian country as set forth in 18 U. S. C. §1151(a).[50]

While somewhat dismayed at a personal level by a briefing order that promised to wreak havoc on the holidays, the Nation's team was pleased by the questions. Their predicate was continued reservation status. Which meant that the Nation was still very much alive and in the game.

In the weeks that followed, a few observers raised the question whether it would be strategically prudent to simply concede that the State has criminal jurisdiction, and in so doing preserve the broader suite of tribal authority inherent in reservation status. There were two significant problems with this approach. First, jurisdiction and sovereignty are not matters of expedience, and the Nation was not willing to engage in horse-trading to preserve a reservation that, with enough concessions of the sort suggested, would end up being one in name only. Second, the law provided no credible basis to offer up the proposed concession. The Nation's team scoured the historical record and found no statute expressly transferring criminal jurisdiction to the State—an express transfer being the accepted standard for such a fundamental shift in governmental authority. The Nation laid out its findings for the Court, and this time settled in for a wait that turned out to be much longer than expected. For when the last day of the Term arrived, the Court announced that it was holding *Murphy* over for re-argument.[51] With this news the Nation's team received calls and notes expressing condolences at the lack of a decision. But there was no cause for consolation. The Nation was still alive. The Court had rung the bell for another round, and the Nation and all others involved in this epic fight would answer it.

VI. ROUND TWO AT THE SUPREME COURT: *MCGIRT*

A case that had witnessed its share of unusual developments had one more major

48. Transcript of Oral Argument at 35 lns.11–18, *Sharp*, 140 S. Ct. 2412 (No. 17-1107).

49. *Sherrill*, 544 U.S. 197; *Nebraska*, 136 S. Ct. 1072.

50. Order for Supplemental Briefs, *Murphy*, 139 S. Ct. 626 (No. 17-1107).

51. *Supreme Court Schedules Tribal Lands Case for Reargument Next Term,* ABA (July 1, 2019), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2019/summer/supreme-court-schedules-tribal-lands-case-for-reargument-next-te/.

one in store. When the Court released its argument calendars for the early months of the next Term, *Murphy* was nowhere to be seen.[52] The Nation and *Murphy* teams fairly quickly surmised that the Court had a new plan in mind: the Court had a number of other cases in the pipeline in which criminal defendants were challenging their convictions on the same reservation basis as Mr. Murphy. Some of those cases came out of the State court system, meaning that they would not raise a recusal issue for Justice Gorsuch. Sure enough, in December of 2019 the Court granted certiorari in the State court case of *Jimcy McGirt v. State of Oklahoma*.[53] A nine-justice Court would decide the fate of the Creek Reservation.

It was natural to think that, in the new proceedings, Justice Gorsuch might act to break what could have been a 4-4 logjam in *Murphy* (and that an equally divided Court had not simply wanted to affirm without an opinion in *Murphy* due to the historic and practical significance of the case). That was not necessarily true. The complexities introduced by the supplemental questions suggested the possibility of other approaches and coalitions on the Court. But, leaving those nuances aside, it is not surprising that the new briefs filed by the State, the United States, Mr. McGirt, and the Nation all sought to draw strength from Justice Gorsuch's jurisprudence.

Fortunately, this was a much easier fit for the Nation and Mr. McGirt than for the other side. Within days of the new grant of certiorari, the Nation's team was devouring not only Justice Gorsuch's key decisions on the Court and the Tenth Circuit, but also his book, *A Republic, If You Can Keep It*.[54] It was happy reading. Several core features of Justice Gorsuch's approach to the law that were of critical relevance to the reservation dispute became crystal clear, and they were fully consistent with the core theme of the Nation's case: that only Congress could have disestablished the Nation's reservation, that it had nowhere made clear an intent to do so, and that subsequent events (including a brazen disregard for the Nation's rights) and predictions of dire consequences could not substitute for Congressional action.[55] Perhaps most importantly, the extent to which Justice Gorsuch is a fervent believer in the separation of powers and its critical role in sustaining our republic infused his book and opinions. His commitment to maintaining a proper respect for the coordinate branches of government applies forcefully to the field of Indian affairs, where he has made it clear that the Court should respect Congress's primacy. Relatedly, Justice Gorsuch is of course a strict textualist, hewing faithfully to the language of treaties and statutes, and has made plain his view that the courts should not depart from textual conclusions favoring the tribes because of dire predictions about the consequences of doing so. His writings also demonstrated that he is a keen student of history, and that, perhaps in part because of his western roots, he has an understanding that Tribes, States, and local governments can work well together, and that inter-governmental cooperation rather than domination is in the best interests of all citizens.

All these features of Justice Gorsuch's approach to the law are evident in the opinion

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52. *Calendars and Lists: Session Beginning October 7, 2019*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/oral_arguments/calendarsandlists.aspx (last visited Feb. 28, 2021).

53. Order Granting Petition for a Writ of Certiorari, *McGirt*, 140 S. Ct. 2452 (No. 18-9526).

54. NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT (Crown Forum ed., 2019).

55. *See generally id*.

that he ultimately penned for the Court.[56] Many of the infringements on tribal sovereignty over the last few decades have resulted from courts imposing their views as to what the limitations on tribal sovereignty should be, rather than respecting the will of Congress. Justice Gorsuch refused to travel that road, and along with others on the Court, including especially Justices Sotomayor and Kagan, his deep interest in and fidelity to fundamental principles of federal Indian law is affecting an important shift in the Court's approach to Indian law cases.

VII. CONCLUSION

As members of the Nation's litigation team, we feel blessed to have played a small role in vindicating the creation and continued existence of the Nation's Reservation. We are deeply appreciative of the contributions of so many to the legal effort, and above all else remain in awe of the sheer determination and force of will that have enabled the Muscogee (Creek) Nation and its people not only to endure but to flourish anew.

56. *McGirt*, 140 S. Ct. at 2499.