The question the Supreme Court will decide in McGirt v. Oklahoma may sound familiar: “whether the prosecution of an enrolled member of the Creek Tribe for crimes committed within the historical Creek boundaries is subject to exclusive federal jurisdiction.” The Supreme Court agreed to decide this very same question last term in Sharp v. Murphy. But the Court didn’t decide that case, presumably because it was deadlocked 4-4; Justice Gorsuch didn’t participate.

Justice Gorsuch will participate in McGirt v. Oklahoma. Interestingly, last term he joined his more liberal colleagues twice to rule in favor of Indian tribes.

This case has significant implications for Oklahoma. If the Supreme Court sides with McGirt, many Oklahomans, including most Tulsa residents, will find they are living on an Indian reservation.

Per the Major Crimes Act states lacks jurisdiction to prosecute Native Americans who commit particular crimes in “Indian country.” Oklahoma prosecuted Jimcy McGirt, a member of the Seminole/Creek nation, for a number of sex crimes. He claims Oklahoma lacked jurisdiction to prosecute him because he committed his crimes in Indian country. The Oklahoma Court of Criminal Appeals ruled against him noting that this is the same argument being made to, but not yet adopted by, the Supreme Court in the Sharp v. Murphy.

In Solem v. Barlett (1984) the Supreme Court established a three-part test to determine when Congress has diminished a reservation. First courts “must examine the text of the statute purportedly disestablishing or diminishing the reservation.”

In Sharp v. Murphy, Murphy argued that Congress never diminished the 1866 territorial boundaries of the Creek Nation where he committed his crimes. The Fifth Circuit agreed. It reviewed eight statutes allotting Creek land and creating the State of Oklahoma. The court concluded that the statutory text “fails to reveal disestablishment.” “Instead, the relevant statutes contain language affirmatively recognizing the Creek Nation’s borders.”

Following Sharp v. Murphy, for the purposes of the Major Crimes Act, the Creek Nation reservation encompasses over 4,600 square miles of land. Oklahoma argued that the decision could to apply to half of Oklahoma, which the Five Tribes (Creek, Cherokee, Choctaw, Chickasaw, and Seminole Nations) formerly occupied.

While the definition of “Indian country” in the Major Crimes Act only relates to federal criminal jurisdiction, in its certiorari petition in Sharp v. Murphy, Oklahoma pointed out that the Supreme Court has recognized “that it also generally applies to questions of civil jurisdiction.”
In oral argument in *Sharp v. Murphy* Justice Breyer asked explicitly about the impact on local governments and their residents if the Supreme Court rules the reservations in Oklahoma weren’t diminished: “There are 1.8 million people living in this area. They have built their lives not necessarily on criminal law but on municipal regulations, property law, dog-related law, thousands of details. And now, if we say really this land … belongs to the tribe, what happens to all those people? What happens to all those laws?”

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