

Impact of *McGirt*

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

McGirt was about Indian Country more than criminal jurisdiction:

- I.C. includes lands within a reservation.
- Criminal jurisdictional rules are clear for crimes occurring in I.C.
- Held: the Creek reservation was never legally disestablished and continues to exist to this day.
- Result: No State Criminal Jurisdiction over crime perpetrated by one Indian against another.

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

McGirt led to the same holding as to the Cherokee, Chickasaw, Choctaw and Seminole reservations.

Criminal Jurisdiction in I.C.: State jurisdiction in I.C. does not extend to crimes *by or against* Indians.

Civil Jurisdiction in I.C.: State has jurisdiction unless 1) Congress has preempted State jurisdiction or 2) State jurisdiction would infringe on Tribal sovereignty.

Indian: Some Indian blood + recognition as a member of a Federally recognized Tribe.

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

On vs Off Reservation: Tribal authority largely limited to on reservation activities by Tribal member Indians except for criminal jurisdiction, which extends to all Indians, including non-member Indians.

Tribal regulation of non-members: Tribal civil jurisdiction and regulatory authority only trumps State/local authority if 1) the non-member has entered into a consensual relationship with the Tribe or 2) where the exercise of authority is necessary to protect tribal self-government or to control internal relations. *Montana v. U.S.*, 450 U.S. 544 (1981).

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

Taxation: State and local taxes do not apply to on-reservation activities by Tribal member Indians. Basic rules:

- **Who owes the tax (e.g. Sales Tax):** Purchaser owes the tax even though the vendor collects and remits it.
- **Incidence of tax (e.g. Income Tax):** Where you earned the income controls, not where you receive or deposit the money/check.
- **Land is different (e.g. Property Tax):** State and local property taxes apply unless the land is held in trust.

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Zoning and Land Use: *Montana* applies. State and local regulations will control except in unique and rare situation where the Tribe owns all surrounding land and has restricted public access to the non-member owned land. *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989).

Regulation of Businesses: State and local regulations apply unless *Montana* can be successfully invoked to allow for Tribal authority to supersede State and local authority.

History and the Future

States Rights, Threats of Cession and the Marshall Trilogy:

- Founding Tensions:
 - Federalists vs. Republicans; Republicans vs. Democrats
 - Role of the Federal government vs. States rights.
 - North vs. South & Slavery: moral and economic interests.
 - Southern States, Tribes and Westward Expansion

History and the Future

States Rights, Threats of Cession and the Marshall Trilogy:

- Chief Justice John Marshall (1801-1835): Known for his ability to unite his colleagues in opinions established the power of the Court while avoiding direct political conflicts.
- In his final years, Marshall established the foundation for Federal Indian Law in 3 opinions which almost provoked Southern cession. *Johnson v. M'Intosh*, 21 U.S. 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) & *Worcester v. Georgia*, 31 U.S. 515 (1832)

History and the Future

States Rights, Threats of Cession and the Marshall Trilogy:

- Domestic Dependent Nations: Tribes submitted to the authority and protection of the Federal government. Federal government, not States, has the authority to regulate Tribes.
- Dependent status and Federal duty to protect extends to Indians. Protection duty includes protecting Indians from what the Court viewed as their most deadly enemy: white people and the State governments they control. Limitation on State authority over Tribes extended to Indians as well.

History and the Future

States Rights, Threats of Cession and the Marshall Trilogy:

- Express statement: Congress' Art. I to regulate commerce with Tribes interpreted as granting Congress exclusive control over Indians and Tribes. Congress may limit Tribal authority or grant States authority and jurisdiction, but it must do so expressly.
- *U.S. v McBratney*, 104 U.S. 621 (1881): States have inherent jurisdiction over all citizens and only lacks jurisdiction over crimes by/against Indians occurring in I.C.

History and the Future

States Rights, Threats of Cession and the Marshall Trilogy:

- Indians granted citizenship by legislation, not the 14th Amendment. Court viewed that the grant of citizenship was not an express grant of State authority over Indians.
- Congress has expressly granted jurisdiction over Indians to certain States, but Oklahoma never asked for jurisdiction.
- Federal jurisdiction: Indian Country Crimes Act and Major Crimes Act.

History and the Future

Municipal jurisdiction under Section 14 of the 1898 Curtis Act:

- The 1890 Organic Act created a set of local, territorial laws in Indian Territory, including laws authorizing municipalities to incorporate.
- Territorial laws did not apply to Indians until 1897. Question remained whether local ordinances applied to Indians.
- Sec. 14 expressly provided that municipalities could enforce their ordinances and apply their taxes to Indians.

History and the Future

Municipal jurisdiction under Section 14 of the 1898 Curtis Act:

- 1898-1906: Cherokee, Chickasaw, Choctaw and Creek Tribes all entered allotment agreements with the United States which retained Sec. 14 in full force and effect.
- Seminole Tribe ratified their allotment agreement prior to the adoption of the Curtis Act. Express statement only needed for agreements ratified by Tribes after the Curtis Act was adopted.
- Does Sec. 14 of the Curtis Act still apply?

History and the Future

Municipal jurisdiction under Section 14 of the 1898 Curtis Act:

- The only 2 Judges who have ruled on that question both concluded that Sec. 14 continues to apply and grants Municipal jurisdiction over Indians within the 5 reservations. *Nicholson et al. v. Stitt et al.*, Okmulgee County Case CJ-20-94 (11/24/2020) & *Hooper v. City of Tulsa*, US Dist. Crt. For the Northern Dist. of Oklahoma Case 21-CV-165 (4/13/2022).
- Textualism vs. Pragmatism: the Sec. 14 argument should appeal to *McGirt's* author and the 4 dissenting justices.
- Time will tell...

History and the Future

Municipal jurisdiction under Section 14 of the 1898 Curtis Act:

- *Not an either / or:* Tribal jurisdiction is unaffected by Municipal (or State or Federal) jurisdiction. Prohibition on double jeopardy only applies to governments constrained by the U.S. Constitution.
- Tribes generally opposed to the Sec. 14 argument, but have not vocalized their opposition in any Court filings in cases where Sec. 14 is at issue...

History and the Future

***Oklahoma v. Castro-Huerta*, U.S. Supreme Court Case 21-429:**

- Court refused to reconsider *McGirt* but did agree to decide whether States have jurisdiction over non-Indians who victimize Indians within a reservation.
- Oklahoma's argument: State has inherent jurisdiction over citizens unless Congress expressly says *otherwise*. MCA grants the Federal government exclusive jurisdiction over 13 Indian-on-Indian crimes. ICCA is worded differently and does not grant exclusive jurisdiction to the Feds. So States have concurrent jurisdiction with the Feds.

History and the Future

***Oklahoma v. Castro-Huerta*, U.S. Supreme Court Case 21-429:**

- ***Widely Understood yet Technical Unanswered***: For the same reason that States lack jurisdiction over Indians who victimize non-Indians in I.C. (*Kagama*), the Court has stated that States must also lack jurisdiction over non-Indians who victimize Indians in I.C. *Donnelly v. U.S.*, 228 U.S. 243 (1913).
- Because that legal issue has never been presented to the Court, these prior statements are not binding precedent.

History and the Future

***Oklahoma v. Castro-Huerta*, U.S. Supreme Court Case 21-429:**

- ***Unless Congress says so or says otherwise?*** State's argument turns our understanding of I.C. jurisdiction on its head and runs contrary to Congressional enactments (e.g. Public Law 280).
- Court could grant jurisdiction over all non-Indians without opening the door to jurisdiction over Indians.
- Court could also revisit the foundations of Federal Indian Law, leading to significant changes in the coming years.

History and the Future

***Oklahoma v. Castro-Huerta*, U.S. Supreme Court Case 21-429:**

- **Why take this case on this issue:** Due to turnover on the Court, some argue that Oklahoma would have won if *McGirt* was decided in 2022 instead of 2020. Is the Court open to reducing the negative impact of *McGirt* without stripping Tribes of their reservations?
- Oral Argument: April 27, 2022
Audio livestream: www.supremecourt.gov
- Decision: June/July, 2022