

Supreme Court to Rule on Whether Much of Oklahoma Is an Indian Reservation

The court was poised to decide the question in its last term but appeared to have deadlocked.



By Adam Liptak | December 13, 2019

The Supreme Court agreed on Friday to decide whether much of eastern Oklahoma is an Indian reservation, a question that could have enormous consequences for the area's 1.8 million residents in matters of criminal justice and commerce.

The court **tried to resolve the question** in a different case in its last term, but it appeared to have deadlocked 4 to 4. Justice Neil M. Gorsuch had recused himself from the case, which was an appeal from **a decision** of the court on which he once sat, the United States Court of Appeals for the 10th Circuit, in Denver.

On the last day of the Supreme Court's earlier term, on June 27, the court said it would hear another set of arguments in that case, *Sharp v. Murphy*, No. 17-1107, in its new term, which started in October.

But that has not happened, and it was not clear that another argument would break the deadlock so long as the court remained short-handed.

The court appears to have decided to hear the new case, *McGirt v. Oklahoma*, No. 18-9526, an appeal from a state court's decision, to ensure that the issue could be decided by a nine-member court.

The new case concerns Jimcy McGirt, a member of the Muscogee (Creek) Nation who was convicted of sex crimes against a child by state authorities in the Nation's historic boundaries.

Drawing on the 10th Circuit's decision in Patrick Murphy's case, Mr. McGirt argued that only the federal government could prosecute him.

At the argument of Mr. Murphy's case last year, Lisa S. Blatt, a lawyer for the state, said Congress had long ago destroyed the Creek Nation's authority over the land in question, meaning that state prosecutions are proper. She said the Creek Nation's authority had been severely curtailed by the federal government around the time Oklahoma became a state in 1907, incorporating lands that previously had been officially designated as Indian Territory.

Justice Samuel A. Alito Jr. said that it was a little late to raise the idea that half of Oklahoma is an Indian reservation.

"There's a fundamental principle of law that derives from Sherlock Holmes, which is the dog that didn't bark," he said. "And how can it be that none of this was recognized by anybody or asserted by the Creek Nation, as far as I'm aware, for 100 years?"

But Ian H. Gershengorn, a lawyer for Mr. Murphy, said the tribe had continued to exercise sovereignty after Oklahoma became a state.

The justices scrutinized the consequences of a ruling in Mr. Murphy's favor. Edwin S. Kneedler, a lawyer for the federal government, arguing in favor of Oklahoma, said they would be vast.

"Any crime involving an Indian as a victim or a perpetrator would be subject to federal jurisdiction, not state jurisdiction," he said. That would, he said, strain the resources of the F.B.I. and federal prosecutors.

The state also would not be able to impose taxes on Native Americans, he added, and many other ordinary laws could be affected.

"This would be a dramatic change from the way everyone has understood it for the past 100 years," Mr. Kneedler said.



Supreme Court to decide Native American land dispute in Oklahoma

Richard Wolf | Dec 13, 2019



WASHINGTON – The Supreme Court agreed for the second time Friday to decide whether much of Oklahoma remains Native American territory, a ruling that could plunge the state into what it has called "civil, criminal and regulatory turmoil."

The justices will hear an appeal from Jimcy McGirt, a member of the Muscogee (Creek) Nation, who claims his state **rape conviction** from 1997 should be overturned because of the jurisdictional dispute.

His case is similar to one the high court heard last term but failed to decide – presumably because the justices were **deadlocked, 4-4**, without **Associate Justice Neil Gorsuch's** participation. Gorsuch came from the U.S. Court of Appeals for the 10th Circuit and likely was involved with the earlier case there.

When the first case was heard, the justices reached back to 1907 to determine whether Congress, using imprecise language, failed to disestablish the 1866 boundaries of the Indian reservation. If so, virtually half of Oklahoma – home to 1.8 million residents and including Tulsa, its second-largest city – would remain Native American territory and subject to federal, not state, laws.

The 10th Circuit had ruled the state lacked jurisdiction to prosecute the gruesome murder because it happened within 3 million acres belonging to the Muscogee (Creek) Nation. In all, that threatened more than 19 million acres in eastern Oklahoma once inhabited by five Indian tribes.

Oklahoma told the court "that cannot be right," since it "would plunge eastern Oklahoma into civil, criminal and regulatory turmoil and overturn 111 years of Oklahoma history."

The Trump administration took the state's side, telling the justices that Congress long ago broke up the Creek Nation's lands, abolished its courts and set a timetable for the tribe's dissolution.

Ten states, from Maine to Texas to Montana, warned that the boundaries of tribal lands have jurisdictional consequences there as well. They said a decision in the tribe's favor "would be confusing and costly at best, and disastrous at worst," affecting health and energy policy, environmental regulation, economic development and taxes.