



Written by [Steve Byas](#) on March 30, 2021

McGirt Decision Could Lead to Legal, Economic Problems in Oklahoma

In a stunning decision made last year, the U.S. Supreme Court vacated the state conviction of Jimcy McGirt of three serious sexual offenses, arguing that for the purposes of the Major Crimes Act, land throughout much of eastern Oklahoma is still reserved for the Muscogee (Creek) Nation. For the 5-4 ruling in *McGirt v. Oklahoma*, Justice Neil Gorsuch wrote an opinion that the state could not prosecute McGirt because of his membership in the Muscogee (Creek) tribe, and that McGirt could only be prosecuted by tribal courts or in federal court.



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While the decision only directly affected McGirt, the precedent set has created a cloud of uncertainty on the status of criminal law, taxation, and other issues. Its application is expected to eventually include the land of four other tribes covering most of eastern Oklahoma, including the Choctaw, Chickasaw, Cherokee, and Seminole tribes, as well as the Muscogee (Creek) Nation.

The decision of the Supreme Court reversed a decision by the Oklahoma Court of Criminal Appeals (the state's supreme court for criminal cases), which had rejected McGirt's argument. The Oklahoma Court had held that the Enabling Act of 1906 had created the State of Oklahoma (which entered the Union as the 46th state on November 16, 1907) and extinguished all criminal-court jurisdiction over the five tribes often dubbed "The Five Civilized Tribes."

Clearly, the tribal governments lack the capacity to retry all the criminal convictions of the past few decades, which would probably send the cases to federal court. Federal prosecutors also are not equipped to deal with all of the backlog of cases, as well as future cases that would come under their jurisdiction, if the McGirt decision is fully implemented.

And some cases may prove impossible to prosecute. After all, with convictions going back into the previous century, witnesses have often died, or can no longer be located. Physical evidence may no longer exist. In other words, the McGirt decision can be expected to simply lead to the release of thousands of convicted criminals prematurely.

The Oklahoma Farm Bureau has asked Oklahoma's congressional delegation to step in. Bureau President Rodd Moesel wrote, "We recommend Congress enact legislation clarifying that the McGirt decision be limited to criminal jurisdiction under the Major Crimes Act and that it shall not affect the authority and jurisdiction of Oklahoma, its agencies, counties and municipalities, to regulate civil conduct or civil transactions, to tax, to exercise judicial authority over civil matters, nor shall it enlarge the civil jurisdiction of the Five Tribes, and such authority and jurisdiction shall remain as it existed prior to the decision."

The Farm Bureau had warned the Supreme Court in a brief filed before the McGirt decision was



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announced last July that if the court sided with McGirt it would “impact our members by authorizing tribal taxation or overturning State, county, and municipal taxation of activities and properties; investing tribal courts with broader jurisdiction or divesting State courts of long-accepted authority; and authorizing greater, and potentially exclusive, tribal and federal regulation over lands, businesses and energy resource development.”

Moesel also warned that the tribes could “claim senior water rights” or “try to limit certain types of agricultural operations which they find objectionable” and “limit locations of certain types of agricultural operations by utilizing zoning,” as well as restricting hunting and fishing on privately owned property within a tribal reservation area.

Other concerns have been expressed by the Oklahoma Tax Commission, which has estimated that the decision could lead to a drastic reduction in state tax collections to the tune of hundreds of millions of dollars should the tribal governments assert immunity from state taxation for tribal citizens.

Oklahoma Attorney General Mike Hunter also has expressed concern over the ramifications of the McGirt decision. “Federal prosecutors are doing all they can to keep up with the cases that are being handed to them, but their resources are being stretched. All the while, the state’s courts, prosecutors and corrections systems are ready and willing to help. However, Congress must act to give the state and the tribes the authority to enter into these agreements.”

While often cast as a protection of tribal sovereignty, this and other decisions like it concerning Indian tribes are actually more about transfers of power and authority away from a state, in this case Oklahoma, to the federal government.

Supreme Court Justice Clarence Thomas vigorously dissented in the McGirt case, and continues to criticize it, saying that the decision had essentially “transformed half of Oklahoma into tribal land.” This destabilization of the governance of much of Oklahoma has created great uncertainties.

“The least we can do now,” Thomas wrote, “is mitigate some of that uncertainty.”



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