Case No. F-2018-138

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TRAVIS HOGNER

Appellant,

VS.

THE STATE OF OKLAHOMA

Appellee.

TENDERED AMICUS BRIEF OF CHEROKEE NATION

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INTRODUCTION

Cherokee Nation is a federally recognized Indian tribe. It is one of five tribes that are often treated as a group for purposes of federal legislation (Cherokee, Muscogee (Creek), Choctaw, Chickasaw, and Seminole Nations, historically referred to as the "Five Civilized Tribes" or "Five Tribes"). The Cherokee Reservation boundaries encompass lands in a fourteen-county area, including all of Adair, Cherokee, Craig, Nowata, and Washington Counties and portions of Delaware, Mayes, McIntosh, Muskogee, Ottawa, Rogers, Sequoyah, Tulsa, and Wagoner Counties, within the borders of the State of Oklahoma.[1] The Nation's government, headquartered in Tahlequah, consists of executive, legislative, and judicial branches, including an active district and appellate court.[2] The Cherokee Nation has a continuing interest in maintaining law and order and the safety of all citizens within its boundaries. It provides law enforcement through its Marshal Service, and maintains cross-deputation agreements with state, county, and city law enforcement agencies to ensure protection of citizens and non-citizens.[3]

Cherokee Nation maintains a significant and continuous presence in the Cherokee Reservation. There are approximately 139,000 Cherokee citizens residing there. The Nation provides extensive services to communities throughout the reservation, including, among others, health and medical centers, veteran's center, employment, housing, bus transit, waterlines, sewers,

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[1] The following interactive link can be used to determine if a specific address is located on the Cherokee Reservation: http://geodata.cherokee.org/CherokeeNation/

[2] *See* "*Rising Together, 2018 Annual Report to the Cherokee People*" (FY 2018 Rep.) and "*Popular Annual Financial Report for FY 2019, Cherokee Nation*" (FY 2019 Rep.). These reports are available at https://www.cherokee.org/media/lufhr5rp/fy2018-annual-report-_final-online.pdf; https://www.cherokee.org/media/gaahnswb/pafr-fy19-final-v-2.pdf.

[3] *See* Appendix ("App."). at 1, Attachment ("Att.") 1 (Cherokee Nation Cross-Deputization Agreements (1992-2019)).

water treatment, bridge and road construction, parks, food distribution, child support services, child welfare, youth shelter, victim services, donations to public schools and local fire departments, and charitable contributions. The Nation's activities, including its business operations, resulted in a statewide $2.17 billion favorable economic impact in 2019.[4]

ARGUMENTS AND AUTHORITIES

I. BASIC PRINCIPLES APPLY TO FEDERAL JURISDICTION OVER CRIMES COMMITTED ON INDIAN COUNTRY WITHIN OKLAHOMA.

A. The Supreme Court's Recent Decision in *McGirt v. Oklahoma* Is Controlling as to Reservation Status and Federal Criminal Jurisdiction.

As recognized by this Court more than thirty years ago, Oklahoma failed to assume criminal and civil jurisdiction under Public Law 280 before it was amended to require tribal consent, 25 U.S.C. § 1321; and Oklahoma "does not have jurisdiction over crimes committed by or against an Indian in Indian Country;" *See Cravatt v. State*, 1992 OK. CR. 6, 825 P.2d 277, 279 (citing *State v. Klindt*, 1989 OK CR 75, 782 P.2d 401, 403 (Okla. Crim. App. 1989).[5] This Court determined in *Klindt* that trust allotments within the boundaries of Cherokee Nation constitute Indian country as defined by 18 U.S.C. § 1151(c), but it has not addressed whether all lands within the boundaries of the Cherokee Nation constitute Indian country as defined by § 1151(a) (Indian reservation).

[4] *See* FY 2018 Rep. and FY 2019 Rep., supra n. 1; *see also* App. at 4, Att. 2 (Cherokee Nation Service Area Maps).

[5] In *Klindt*, this Court overruled *Ex parte Nowabbi*, 1936 OK CR 123, 61 P.2d 1139, 1154, which had found that Oklahoma courts had criminal jurisdiction over crimes on restricted Choctaw allotments., *Klindt*, 782 P.2d at 404. *see also Cravatt*, 825 P.2d at 279 (stating the United States "has continuously urged different judicial treatment for incidents involving members of the five civilized tribes notwithstanding the fact that there is no foundation for this position in the statutes and that the idea has been previously rejected by the courts of this State."

The United States Supreme Court likewise had not addressed reservation status as to any of the Five Tribes, until July 9, 2020, when it decided *McGirt v Oklahoma*, 2020 WL 3848063, 591 U.S. __, 140 S.Ct. 2452 (2020). In *McGirt*, the Court ruled that: the Muscogee (Creek) Reservation was established by treaty; Congress never disestablished the reservation; all land, including fee land, within the reservation is Indian country under 18 U.S.C. § 1151(a); federal statutes concerning the Five Tribes near the time of statehood did not grant jurisdiction to Oklahoma over crimes committed by Indians on the reservation; the Major Crimes Act, 18 U.S.C. § 1153 (MCA), applies to certain listed crimes committed by Indians on the reservation; and Oklahoma had no jurisdiction to prosecute a Seminole citizen for crimes committed on fee lands within the reservation under the MCA. *Id*.

On the same date that the Supreme Court issued the *McGirt* decision, it affirmed the Tenth Circuit's ruling in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *aff'd, Sharp v. Murphy*, 591 U.S. __, 140 S.Ct. 2412 (2020) (*Murphy*), determining that Oklahoma had no jurisdiction over the murder of an Indian by another Indian on the Creek Reservation under the MCA. On July 9, 2020, the Supreme Court also remanded four cases pending certiorari in the Supreme Court involving other reservations in Oklahoma, in light of *McGirt*.[6] There are at least nine direct appeals, briefed and asserting Cherokee Reservation status, presently before this Court.[7]

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[6] *See Bentley v. Oklahoma*, OCCA No. C-2016-699, U.S. Sup. Ct No. 19-5417, Judgment Vacated and Case Remanded, July 9, 2020 (Citizen Band Potawatomi reservation); *Johnson v. Oklahoma*, OCCA No. PC-2018-343, U.S. Sup. Ct. No. 18-6098, Judgment Vacated and Case Remanded, July 9, 2020 (Seminole Reservation); *Terry v. Oklahoma*, OCCA No. PC-2018-1076, U.S. Sup. Ct. No. 18-8801, Judgment Vacated and Case Remanded, July 9, 2020 (Quapaw/Modoc/Ottawa Reservations); and *Davis v. Oklahoma*, OCCA No. PC-2019-451, U.S. Sup. Ct. No. 19-6428 Judgment Vacated and Case Remanded, July 9, 2020 (Choctaw Reservation).

[7] *Perales v. State*, OCCA No. F-2018-383 (Delaware Co.)*; Castro-Huerta v. State*, OCCA No. F-2017-1203 (Tulsa Co.); *Bragg v. State*, OCCA F-2017-1028 (Tulsa Co.); *Cottingham v. State*, OCCA No. F-2017-1294 (Washington Co.); *Hogner v. State*, OCCA No. F-2018-138 (Craig Co.);

B. Certain Crimes in Indian Country in Oklahoma Are Subject to Federal Jurisdiction Under the Major Crimes Act and the General Crimes Act**.**

Although the applicability of federal and state criminal laws in the exercise of federal or state court jurisdiction in Indian country nationwide is fairly complex, the jurisdictional parameters are clearly defined by federal law as amended from time to time.[8] First, under the MCA,[9] federal courts have exclusive jurisdiction, as to Oklahoma, over prosecutions for certain listed qualifying crimes, including murder, committed by Indians against Indians or non-Indians in Indian country. *See McGir*t, 2020 WL 3848063 at *12, 13, 17-18. Second, Oklahoma lacks jurisdiction over prosecutions of crimes defined by federal law committed by or against Indians in Indian country within Oklahoma under the General Crimes Act (also known as Indian Country Crimes Act), 18 U.S.C. § 1152 (GCA); [10] such crimes are subject to federal or tribal jurisdiction. *McGirt, Id*. at *19. Third, Oklahoma has criminal jurisdiction over all offenses committed by non-Indians against non-Indians in Indian country. *Id.*, citing *United States v. McBratney*, 104 U.S. 621, 624 (1881);

McDaniel v. State, OCCA No. F-2017-357 (Muskogee Co.); *Shriver, Gage v. State*, OCCA No. F-2017-1276 (Rogers Co.); *Shriver, Dakota v. State*, OCCA No. F-2017-1279 (Rogers Co.); and *Vaught v. State*, OCCA No. F-2017-869 (Tulsa Co.).

[8] *See* App. at 11, Att. 3 (Indian Country Criminal Jurisdictional Chart).

[9] The MCA provides in pertinent part: "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter . . . [and] robbery . . . within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a).

[10] The GCA provides: "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." 18 U.S.C. § 1152.

see also United States v. Langford, 641 F. 3d 1195 (10th Cir. 2011) (holding state possesses exclusive criminal jurisdiction over non-Indians who commit victimless crimes in Indian country).

The *McGirt* decision laid to rest Oklahoma's position that the MCA and the GCA do not apply in Oklahoma. The Court noted that even the dissent declined "to join Oklahoma in its latest twist." *See McGir*t, 2020 WL 3848063 at *17. The Court found no validity to Oklahoma's argument that the MCA was rendered inapplicable by three statutes: the Act of June 7, 1897, ch. 3, 30 Stat. 62, 83 (granting federal courts in Indian Territory[11] "exclusive jurisdiction" to try "all criminal causes for the punishment of any offense"); the Act of June 28, 1898, ch. 517, § 28, 30 Stat. 495, 504-505 (Curtis Act) (abolishing Creek Nation courts and transferring pending criminal cases to federal courts in Indian Territory); and the Oklahoma Enabling Act, Act of June 16, 1906, ch.3335, 34 Stat. 267, as amended by the Act of Mar. 4, 1907, ch. 2911, 34 Stat. 1286) (concerning transfer of cases upon statehood).[12] *McGirt,* 2020 WL 3848063 at *17-18. The Court noted that Oklahoma was formed from Oklahoma Territory in the west and Indian Territory in the east,[13] and

[11] Federal courts in the bordering states of Arkansas and Texas, and later in Muskogee, Indian Territory, were originally authorized to exercise federal jurisdiction in Indian Territory, subject to changes over time. *See* Act of Jan. 31, 1877, ch. 41, 19 Stat. 230 (Arkansas); Act of Jan. 6, 1883, ch. 13, § 3, 22 Stat. 400 (Texas); Act of Mar. 1, 1889, ch. 333, §§ 1, 5, 25 Stat. 783 (Muskogee, Indian Territory); Act of May 2, 1890 ch. 182 §§ 29-44, 26 Stat. 81 (Indian Territory); Act of Mar. 1, 1895, ch. 145, §§ 9, 13, 28 Stat. 693 (repealing laws conferring jurisdiction on the federal courts in Arkansas, Kansas, and Texas over offenses committed in Indian Territory, and authorizing the federal court in Indian Territory to exercise such jurisdiction, including jurisdiction over "all offenses against the laws of the United States."

[12] The Enabling Act required transfer to the new federal courts of prosecutions of "all crimes and offenses" committed within Indian Territory "which, had they been committed within a State, would have been cognizable in the Federal courts." § 16, 34 Stat. 267, 276, as amended by § 1, 34 Stat. 1286. It required transfer of prosecutions of crimes not arising under federal law to the new state courts. §20, 34 Stat. 267, 277, as amended by §3, 34 Stat. 1286.

[13]No territorial government was ever created in the reduced Indian Territory, and it remained directly subject to tribal and federal governance until statehood. *See* App. at 17, Att. 5 (Map of Indian Territory); and App. at 19, Att. 6 (Map of Oklahoma and Indian Territories).

that criminal prosecutions in Indian Territory were split between tribal and federal courts, citing Act of May 2, 1890, ch. 182, § 30, 26 Stat. 81, 94.[14] *McGirt*, 2020 WL 3848063 at *17**.** The Court held that Congress "abolished that [Creek tribal/federal court split] scheme" with the 1897 act, but "[w]hen Oklahoma won statehood in 1907, the MCA applied immediately according to its plain terms." *Id*. The Enabling Act sent federal-law cases to federal court in Oklahoma, and crimes arising under the federal MCA "belonged in federal court from day one, wherever they arose within the new state." *Id*. at *18. Crimes arising under the federal GCA, which "applies to a broader range of crimes by or against Indians in Indian country," *McGir*t, *Id.* at *19, likewise applied immediately upon statehood, and are not subject to state jurisdiction.

C. Indian Country Includes Restricted and Trust Allotments, Tribal Trust Lands, and All Fee Lands Within Cherokee Reservation Boundaries.

The Cherokee Reservation includes individual restricted and trust Cherokee allotments[15] that constitute Indian country under 18 U.S.C. § 1151(c) for purposes of application of the MCA and GCA ("all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same"). *See United States v. Ramsey*, 271 U.S. 467, 469, 472 (1926) (GCA applies to murder of Indian by non-Indian on restricted Osage allotment); *United States v. Sands*, 968 F.2d 1058, 1061-62 (10th Cir. 1992) *cert. denied*, 506 U.S. 1056 (1993) (MCA applies to murder of Indian by Indian on restricted Creek allotment, and allotment era statutes "did

[14] *See Talton v. Mayes*, 163 U.S. 376, 381 (1896) (finding that Cherokee Nation had exclusive jurisdiction over an 1892 Cherokee murder in Cherokee Nation under its treaties and the 1890 Act). The 1897 act "broadened the jurisdiction of the federal courts, thus divesting the Creek tribal courts of their *exclusive* jurisdiction over cases involving only Creeks." *See Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Commission*, 829 F.2d 967, 978 (10th Cir. 1987) *cert. denied*, 487 U.S. 1218 (1988) (emphasis added).

[15] Restricted Cherokee allotments are subject to federal statutory requirements for conveyances and encumbrances. *See* infra, n. 26.

not abrogate the federal government's authority and responsibility, nor allow jurisdiction by the State of Oklahoma" over those allotments); *Klindt*, 782 P.2d at 403 (no state jurisdiction over assault with dangerous weapon by or against Indian on Cherokee trust allotment).

The Cherokee Reservation also includes tribal lands held in trust by the United States and unallotted tribal lands that constitute Indian country under 18 U.S.C. § 1151(a) for jurisdictional purposes ("all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation"). *See United States v. John*, 437 U.S. 634, 649 (1978) (Mississippi Choctaw tribal trust land); *Ross v. Neff*, 905 F.2d 1349 (10th Cir. 1990) (Cherokee tribal trust land); *Indian Country, U.S.A.*, 829 F.2d 967 (10th Cir. 1987) (unallotted Creek land).

Oklahoma has no jurisdiction over crimes covered by the MCA or the GCA, even when committed on individual fee land within the Cherokee Reservation, rather than on restricted, trust or tribal fee land. Reservations include lands within reservations boundaries owned in fee by non-Indians. "[W]hen Congress has once established a reservation, *all tracts included within it* remain a part of the reservation until separated therefrom by Congress." *United States v. Celestine*, 215 U.S. 278, 285 (1909). (emphasis added). "[T]his Court long ago rejected the notion that the purchase of lands by non-Indians is inconsistent with reservation status." *McGirt*, 2020 WL 3848063 at *7, n. 3, citing *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 357-358 (1962). "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *McGirt*, 2020 WL 3848063 at *10, citing *Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

II. THE CHEROKEE RESERVATION WAS ESTABLISHED BY TREATY, AND ITS BOUNDARIES HAVE BEEN ALTERED ONLY BY EXPRESS CESSIONS IN 1866 AND 1891.

A. The Creek Nation Reservation Was Established by Treaty.

In *McGirt,* the Court discussed Creek treaties in detail, before concluding that they established the Creek Reservation. The Court noted that the 1832 and 1833 Creek removal treaties "solemnly guarantied" the land; established boundary lines to secure "a country and permanent home;" stated the United States' desire for Creek removal west of the Mississippi River; included Creek Nation's express cession of their lands in the East; confirmed the treaty obligation of the parties upon ratification; required issuance of a patent, in fee simple, to Creek Nation for the new land, which was formally issued in 1852; and guaranteed Creek rights "so long as they shall exist as a nation, and continue to occupy the country hereby assigned to them." *McGirt*, 2020 WL 3848063 at *4, 6, citing Treaty with the Creeks, arts. I, XII, XIV, XV, Mar. 24, 1832, 7 Stat. 366-366-368, and Treaty with the Creeks, preamble, arts. III, IV, IX, Feb. 14, 1833, 7 Stat. 417, 419.

The Court further noted that the 1856 Creek treaty promised that no portion of the reservation "shall ever be embraced or included within, or annexed to, any Territory or State;" and secured to the Creeks "the unrestricted right of self-government," with "full jurisdiction" over enrolled citizens and their property. *McGirt*, 2020 WL 3848063 at *5, citing Treaty with Creeks and Seminoles, arts. IV, XV, Aug. 7, 1856, 11 Stat. 699, 700, 704.

The Court recognized that although the 1866 post-civil war Creek treaty reduced the size of the Creek Reservation, it restated a commitment that the remaining land would "be forever set apart as a home for said Creek Nation," referred to as the "reduced Creek reservation." *McGirt*, 2020 WL 3848063 at *4, citing Treaty Between the United States and the Creek Indians, arts. III and IX, June 14, 1866, 14 Stat. 785, 786, 788.

In sum, the Court stressed in *McGirt* that the Creek treaties promised a "permanent home" that would be "forever set apart," and assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state. The Court concluded that "[u]nder any definition, this was a reservation." *McGirt*, 2020 WL 3848063 at *5.

B. The Cherokee Reservation Was Established by Cherokee Treaties Containing the Same or Similar Provisions as Creek Treaties.

"Each tribe's treaties must be considered on their own terms," in determining reservation status. *McGirt*, 2020 WL 3848063 at *19. The approval of Creek and Cherokee treaties during the same period of time, and the similarity of Creek treaties described in *McGirt* and Cherokee treaties, conclusively demonstrate that the Cherokee Reservation was established by treaty.

Cherokee Nation was originally located in what are now the states of Georgia, Alabama, Tennessee, South Carolina, North Carolina, and Kentucky. Wilkins, Thurman, *Cherokee Tragedy: The Ridge Family and the Decimation of a People* 22, 91, 209, 254 (rev. 2d ed. 1986) (*Cherokee Tragedy*). Like the Creeks, the Cherokees exchanged lands in the Southeast for new lands in Indian Territory in the 1830s under pressure of the national removal policy. The Indian Removal Act of 1830, Act of May 28, 1830, ch. 148, 4 Stat. 411, which implemented this policy, authorized the President to divide public domain lands into defined "districts" for tribes removing west of the Mississippi River. *Id*. at § 1. It also provided that the United States would "forever secure and guaranty" such lands to the removed tribes, "and if they prefer it . . . the United States will cause a patent . . . to be made and executed to them for the same[.]" *Id.* at § 3.

In 1831 and 1832, the Supreme Court issued two seminal decisions in cases involving Cherokee Nation resistance to Georgia citizens' trespasses on Cherokee lands. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), the Supreme Court held that Cherokee Nation was a

"domestic dependent nation." The following year, the Supreme Court held that Indian tribes were "'distinct political communities, having territorial boundaries, within which their authority is exclusive . . . which is not only acknowledged, but guarantied by the United States,' a power dependent on and subject to no state authority." *McGirt*, 2020 WL 3848063 at *17, citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). Despite these decisions, President Jackson persisted in efforts to remove Cherokee citizens from Georgia.

The Cherokee Reservation in Indian Territory was finally established by 1833 and 1835 treaties. The 1833 Cherokee treaty "solemnly pledged" a "guarantee" of seven million acres to the Cherokees on new lands in the West "forever." Treaty with the Western Cherokee, Preamble, Feb. 14, 1833, 7 Stat. 414. The 1833 Cherokee treaty used precise geographic terms to describe the boundaries of those lands, and provided that "a patent" would issue as soon as reasonably practical. *Id*. at art. 1. It confirmed the treaty obligation of the parties upon ratification. *Id*. at art. 7.

However, there were internal disputes within Cherokee Nation, and the 1833 treaty failed to achieve removal of the majority of Cherokee citizens. Two Cherokee groups represented divisive viewpoints of what was best for the Cherokee people. The group led by John Ross, who represented a majority of Cherokee citizens, opposed removal. The other group, led by John Ridge, supported removal, fearing that tribal citizens would quickly lose their lands if conveyed to them individually in the southeastern states. *Cherokee Tragedy* at 266-68.

Almost three years after the 1833 treaty, members of the Ridge group signed the treaty at New Echota. Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478. Containing language similar to wording in the 1832 and 1833 Creek treaties, the 1835 Cherokee treaty was ratified "with a view to re-unite their people in one body and to secure to them a *permanent home* for themselves and their posterity," in what became known as Indian Territory, "*without the territorial limits of*

the state sovereignties," and "*where they could establish and enjoy a government of their* choice, and perpetuate such a state of society as might be consonant with their views, habits and condition." *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 237-38 (1872) (emphasis added).

Like Creek treaty promises, the United States' treaty promises to Cherokee Nation "weren't made gratuitously." *McGirt*, 2020 WL 3848063 at *4. Under the 1835 treaty, Cherokee Nation "cede[d], relinquish[ed], and convey[ed]" all its aboriginal lands east of the Mississippi River to the United States. Arts. 1, 7 Stat. 478. In return, the United States agreed to convey to Cherokee Nation, by fee patent, seven million acres in Indian Territory within the same boundaries as described in the 1833 treaty, plus "a perpetual outlet west." *Id*. at art. 2. Like Creek treaties the 1835 Cherokee treaty described the United States' conveyance to the Cherokee Nation as a cession; required Cherokee removal to the new lands; covenanted that none of the new lands would be "included within the territorial limits or jurisdiction of any State or Territory" without tribal consent; and secured "to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government . . . within their own country," so long as consistent with the Constitution and laws enacted by Congress regulating trade with Indians; and provided that it would be "obligatory on the contracting parties" after ratification by the Senate and the President. *Id*. at arts. 1, 5, 8; art. 19, 7 Stat. 478.

As of January 1838, approximately 2,200 Cherokees had removed to Indian Territory, and around 14,757 remained in the east. *See The Western Cherokee Indians v. United States*, 27 Ct. Cl. 1, 3, 1800 WL 1779 (1891). That spring, the army rounded up most of the remaining Cherokees who had refused to remove within the time allotted. "They were seized as they worked in their farms and fields . . . They remained in captivity for months while hundreds died from inadequate and unaccustomed rations. The debilitation of others contributed to deaths during the removal

march." Rogin, Michael Paul, *Fathers & Children: Andrew Jackson and the Subjugation of the American Indian* 241 (1991).

After removal, on December 31, 1838, President Van Buren executed a fee patent to the Cherokee Nation for the new reservation in Indian Territory. *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 297 (1902). The patent recited the United States' treaty commitments to convey the land to the Nation. *Id*. at 307. The title was held by Cherokee Nation "for the common use and equal benefit of all the members." *Id*. at 307; *see also Cherokee Nation v. Journeycake*, 155 U.S. 196, 207 (1894). A few years later, an 1846 treaty between Cherokee Nation and the United States also required federal issuance of a deed to the Nation for lands it occupied, including the "purchased" 800,000-acre tract in Kansas (known as the Neutral Lands") and the "outlet west." Treaty with the Cherokee, Aug. 6, 1846, art. 1, 9 Stat. 871.

Like Creek Nation, Cherokee Nation negotiated a treaty with the United States after the Civil War. Treaty with the Cherokee, July 19, 1866, art. 4, 14 Stat. 799. The 1866 treaty authorized settlement of other tribes in a portion of the Nation's land west of its current western boundary (within the area known as the Cherokee Outlet), Treaty with the Cherokee, *id*. at art. 16, and required payment for those lands, stating that the Cherokee Nation would "retain the right of possession of and jurisdiction over all of said country . . . until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied." It also expressly ceded the Nation's patented lands in Kansas, consisting of a two-and-one-half mile-wide tract known as the Cherokee Strip and the 800,000-acre Neutral Lands, to the United States. ("The Cherokee Nation hereby cedes . . . to the United States, the tract of land in the State of Kansas which was sold to the Cherokees. . . and also that strip of the land ceded to the nation . . . which is included in the State of Kansas, and the Cherokees consent that said lands

may be included in the limits and jurisdiction of the said State"). *Id*. at art. 17. None of the other provisions of the 1866 treaty affected Cherokee Nation's remaining reservation lands. Instead, the treaty required the United States, at its own expense, to cause the Cherokee boundaries to be marked "by permanent and conspicuous monuments, by two commissioners, one of whom shall be designated by the Cherokee national council." *Id*. at art. 21.

The 1866 treaty recognized the Nation's control of its reservation, by expressly providing: "*Whenever the Cherokee national council shall request it*, the Secretary of the Interior shall cause the country reserved for the Cherokees to be surveyed and allotted among them, at the expense of the United States." *Id*. at art. 20 (emphasis added). It also guaranteed "to the people of the Cherokee Nation the quiet and peaceable possession of their country," and promised federal protection against "intrusion from all unauthorized citizens of the United States" and removal of persons not "lawfully residing or sojourning" in Cherokee Nation. *Id*. at arts. 26, 27. It "*re-affirmed and declared to be in full force*" all previous treaty provisions "not inconsistent with the provisions of" the 1866 treaty, and provided that nothing in the 1866 treaty "shall be construed as an acknowledgment by the United States, or as a relinquishment by Cherokee Nation of any claims or demands under the guarantees of former treaties," except as expressly provided in the 1866 treaty. *Id.* at art. 31 (emphasis added).

Like Creek treaties, Cherokee treaties involved exchange of tribal homelands in the East for a new homeland in Indian Territory deeded to the Nation, and included the promise of a permanent home and the assurance of the right to self-government outside the jurisdiction of a state. These treaties established the Cherokee Reservation.

C. Special Terminology Is Not Required to Establish a Reservation, and Tribal Fee Ownership Is Not Inconsistent with Reservation Status.

In *McGirt*, the Court rejected Oklahoma's argument that Creek treaties did not establish a reservation and instead created a dependent Indian community, as defined by 18 U.S.C. § 1151(b) ("all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state"). *McGir*t, 2020 WL 3848063 at *****15-16. The "entire point" of this reclassification attempt was "to avoid *Solem's* rule that only Congress may disestablish a reservation."[16] *Id*. at *15. The Court was not persuaded by Oklahoma's argument that a reservation was not created due to tribal fee ownership of the lands, and the absence of the words "reserved from sale" in the Creek treaties. *Id*. at *15. The Creek land was reserved from sale in the "very real sense" that the United States could not give the tribal lands to others or appropriate them to its own purposes, without engaging in "an act of confiscation." *Id.* at *15, citing *United States v. Creek Nation*, 295 U.S. 103, 110 (1935). Additionally, fee title is not inherently incompatible with reservation status, and establishment of a reservation does not require a "particular form of words." *McGir*t, 2020 WL 3848063 at *16, citing *Maxey v. Wright*, 54 S.W. 807, 810 (Indian Terr. 1900) and *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902).

The "most authoritative evidence of [a tribe's] relationship to the land" does not lie in scattered references to "stray language from a statute that does not control here, a piece of congressional testimony there, and the scattered opinions of agency officials everywhere in between." *McGirt*, 2020 WL 3848063 at *16. "[I]t lies in the treaties and statutes that promised

[16] The United States and the dissent did not make any arguments supporting Oklahoma's novel dependent Indian community theory. *McGir*t, 2020 WL 3848063 at *15.

the land to the Tribe in the first place." *Id*. As previously noted, the 1830 Indian Removal Act promised issuance of fee patents upon removal of tribes affected by its implementation, which were granted to Creek Nation and Cherokee Nation. The treaties for both tribes contain extensive evidence of their relationships with their respective lands in Indian Territory. The Cherokee Reservation was established by treaty, just as Creek treaties established the Creek Reservation. As with Creek Nation, *McGirt*, 2020 WL 3848063 at *4, later federal statutes also recognized the existence of the Cherokee Reservation as a distinct geographic area.[17]

D. The Cherokee Reservation Has Been Diminished Only by Express Cessions of Portions of the Reservation in Its 1866 Treaty and Its 1891 Agreement.

The current boundaries of Cherokee Nation are as established in Indian Territory in the 1833 and 1835 treaties, diminished only by the express cessions in the 1866 treaty described in part II.B of this brief, and by an 1891 agreement ratified by Congress in 1893 (1891 Agreement). Act of Mar. 3, 1893, ch. 209, § 10, 27 Stat. 612, 640-43. The 1891 Agreement provided that Cherokee Nation "shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the Indian Territory" encompassing a strip of land bounded by

[17] *See* Act of June 21, 1906, ch. 3504, 34 Stat. 325, 342-43 (drawing recording districts in the Indian Territory, including district 27, with boundaries along the northern and western "boundary line[s] of the Cherokee Nation," and district 28, described as "lying within the boundaries of the Cherokee Nation"); § 6, 34 Stat. 277 (the third district for the House of Representatives must "(with the exception of that part of recording district numbered twelve, which is in the Cherokee and Creek nations) comprise all the territory now constituting the Cherokee, Creek, and Seminole nations and the Indian reservations lying northeast of the Cherokee Nation, within said State"); Act of June 30, 1913, ch. 4, § 18, 38 Stat. 77, 95 ("common schools in the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Nations"); Act of May 25, 1918, ch. 86, 40 Stat. 561, 581 ("common schools in the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Nations"); and the Oklahoma Indian Welfare Act, Act of June 26, 1936, ch. 831, 49 Stat. 1967, codified at 25 U.S.C. §§ 5201-5210 (authorizing Secretary of the Interior to acquire land "within or without existing Indian reservations" in Oklahoma).

Kansas on the North and Creek Nation on the south, and located between the ninety-sixth degree west longitude and the one hundredth degree west longitude (i.e., the Cherokee Outlet). *See United States v. Cherokee Nation*, 202 U.S. 101, 105-06 (1906).[18] The 1893 ratification statute required payment of a sum certain to the Nation and provided that, upon payment, the ceded lands would "become and be taken to be, and treated as, a part of the public domain," except for such lands allotted under the Agreement to certain described Cherokees farming the lands. *Id*. at 112. Cherokee Nation did not cede or restore any other portion of the Cherokee Reservation to the public domain in the 1891 Agreement, and no other cession has occurred since that time.

The original 1839 Cherokee Constitution established the boundaries as described in its 1833 treaty, and the Constitution as amended in 1866 recognized those same boundaries, "subject to such modification as may be made necessary" by the 1866 treaty.[19] Cherokee Nation's most recent Constitution, a 1999 revision of its 1975 Constitution, was ratified by Cherokee citizens in 2003, and provides: "The boundaries of the Cherokee Nation territory shall be those described by the patents of 1838 and 1846 diminished only by the Treaty of July 19, 1866, and the Act of Mar. 3, 1893." 1999 Cherokee Constitution, art. 2.

[18] *See* App. at 14, Att. 4 (Goins, Charles Robert, and Goble, Danney, "*Historical Atlas of Oklahoma*" (4th Ed. 2006) at 61), showing the Cherokee Outlet ceded by the 1891 Agreement, as well as the Kansas lands, known as the Neutral Lands, and the Cherokee Strip ceded by the 1866 Treaty.

[19] 1839 Cherokee Constitution, art. I, § 1, and Nov. 26, 1866 amendment to art. I, § 1, *reprinted in* Volume I of West's Cherokee Nation Code Annotated (1993 ed.).

III. CONGRESS HAS NOT DISESTABLISHED THE CHEROKEE RESERVATION.

A. Only Congress Can Disestablish a Reservation by Explicit Language for the Present and Total Surrender of All Tribal Interests in the Affected Lands.

Congress has not disestablished the Cherokee Reservation as it existed following the last express Cherokee cession in the 1891 Agreement ratified in 1893, and all land within reservation boundaries, including fee land, remains Indian country under 18 U.S.C. § 1151(a). Courts do not lightly infer that Congress has exercised its power to disestablish a reservation. *McGirt*, 2020 WL 3848063 at *5, citing *Solem*, 465 U.S. at 470. Once a reservation is established, it retains that status "until Congress explicitly indicates otherwise." *McGirt*, 2020 WL 3848063 at *11, citing *Solem*, 465 U.S.at 470. Congressional intent to disestablish a reservation "must be clear and plain." *Id*., citing *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). Congress must clearly express its intent to disestablish, commonly by "'[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests.'" *McGirt*, 2020 WL 3848063 at *5, citing *Nebraska v. Parker*, 577 U.S. 481, __, 136 S.Ct. 1072, 1079 (2016).

A reservation disestablishment analysis focuses on the statutory text that allegedly resulted in reservation disestablishment. The only "step" proper for a court of law is "to ascertain and follow the original meaning of the law" before it. *McGirt*, 2020 WL 3848063 at *10. Disestablishment has never required any particular form of words. *McGirt*, 2020 WL 3848063 at *5, citing *Hagen v. Utah*, 510 U.S 399, 411 (1994). A statute disestablishing a reservation may provide an "[e]xplicit reference to cession" or an "unconditional commitment . . . to compensate the Indian tribe for its opened land." *McGirt*, 2020 WL 3848063 at *5, citing *Solem*, 465 U.S. at 470. It may direct that tribal lands be "'restored to the public domain,'" *McGirt*, 2020 WL 3848063 at *5, citing *Hagen*, 510 U.S. at 412, or state that a reservation is "'discontinued,'" "'abolished,'"

or "'vacated.'" *McGirt*, 2020 WL 3848063 at *5, citing *Mattz v. Arnett*, 412 U.S. 481, 504, n. 22 (1973); *see also DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 439–440, n. 22 (1975).

B. The Allotment of Cherokee Land Did Not Disestablish the Cherokee Reservation.

The General Allotment Act, which authorized allotment of the lands of most tribes nationwide, was expressly inapplicable to the Five Tribes. Act of Feb. 8, 1887, ch. 119, § 8, 24 Stat. 38. In 1893, in the same statute ratifying the 1891 Agreement, Congress established the Dawes Commission to negotiate agreements with the Five Tribes for "the extinguishment of the national or tribal title to any lands" in Indian Territory "either by cession," by allotment or by such other method as agreed upon. § 16, 27 Stat. 612, 645–646.[20] The Commission reported in 1894 that the Creek Nation "would not, under any circumstances, agree to cede any portion of their lands." *McGirt*, 2020 WL 3848063 at *6.[21] The Cherokee Nation resisted allotment for almost a decade longer, but finally ratified an agreement in 1902. Act of July 1, 1902, ch. 1375, 32 Stat. 716 (Cherokee Agreement). Like the Creek Agreement, Act of Mar. 1, 1901, ch. 676, 31 Stat. 861 (Creek Agreement) the Cherokee Agreement contained no cessions of land to the United States,

[20] As previously noted, Congress clearly knew how to diminish reservations when it enacted the 1893 Act, which also ratified the 1891 Agreement, in which Cherokee Nation agreed to "cede" Cherokee Outlet lands to the United States in exchange for payment.

[21] Although the Court in *McGirt* referenced only Creek Nation in this statement, the 1894 report reflects that each of the Five Tribes refused to cede tribal lands to the United States. App. at 21, Att. 7 (Ann. Rept. of the Comm. Five Civ. Tribes of 1894, 1895, and 1896 (1897) at 14). This refusal is also reflected in the Commission's 1900 annual report: "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." App. at 32, Att. 9 (Seventh Ann. Rept. of the Comm. Five Civ. Tribes (1900) at 9). (emphasis added).

and did not disestablish the Cherokee Reservation, which also "survived allotment." *See McGirt*, 2020 WL 3848063 at *6.[22] Where Congress contemplates, but fails to enact, legislation containing express disestablishment language, the statute represents "a clear retreat from previous congressional attempts to vacate the . . . Reservation in express terms[.]" *DeCoteau*, 420 U.S. at 448.

The central purpose of the 1902 Cherokee Agreement, like that of the Creek Agreement, was to facilitate transfer of title from the Nation of "allottable lands" (defined in § 5, 32 Stat. 716, as "all the lands of the Cherokee tribe" not reserved from allotment)[23] to tribal citizens individually. With exceptions for certain pre-existing town sites and other special matters, the Cherokee Agreement established procedures for conveying allotments to individual citizens who could not sell, transfer, or otherwise encumber their allotments for a number of years. (5 years for any portion, 21 years for the designated "homestead" portion). §§ 9-17, 32 Stat. at 717; *see also McGirt*, 2020 WL 3848063 at *6, citing Creek Agreement, §§ 3, 7, 31 Stat. 861, 862-864.

The restricted status of the allotments reflects the Nation's understanding that allotments would not be acquired by non-Indians, would remain in the ownership of tribal citizens, and would be subject to federal protection. Tribal citizens were given deeds that conveyed to them "all the right, title, and interest" of the Cherokee Nation. § 58, 32 Stat. at 725; *see also McGirt*, 2020 WL 3848063 at *6, citing Creek Agreement, § 23, 31 Stat. at 867-868. As of 1910, 98.3% of the lands

[22] Even the dissent did not "purport to find any of the hallmarks of diminishment in the Creek Allotment Agreement." *McGirt*, 2020 WL 3848063 at *7, n. 5.

[23] Lands reserved from allotment included schools, colleges, and town sites "in Cherokee Nation," cemeteries, church grounds, an orphan home, the Nation's capital grounds, its national jail site, and its newspaper office site. §§ 24, 49, 32 Stat. at 719-20, 724; *see also* Creek Agreement, § 24, 31 Stat. at 868-869.

of Cherokee Nation (4,348,766 acres out of 4,420,068 acres) had been allotted to tribal citizens, and an additional 21,000 acres were reserved for town sites, schools, churches, and other uses.[24] Only 50,301 acres scattered throughout the nation remained unallotted in 1910 − approximately one percent of the nation's reservation area. *Id.* Later federal statutes, which generally continued restrictions on disposition of allotments, contributed to the loss of individual Indian ownership of allotments over time, based on a variety of factors.[25]

"Missing in all this, however, is a statute evincing anything like the "'present and total surrender of all tribal interests' in the affected lands" required for disestablishment. *McGirt*, 2020 WL 3848063 at *6. Allotment alone does not disestablish a reservation. *Id*., citing *Mattz*, 412 U.S. at 496-97 (explaining that Congress's expressed policy during the allotment era "was to continue the reservation system," and that allotment can be "completely consistent with continued reservation status"); and *Seymour*, 364 U.S. at 356-58 (allotment act "did no more than open the way for non-Indian settlers to own land on the reservation").

C. Allotment Era Statutes Intruding on Cherokee Nation's Right to Self-Governance Did Not Disestablish the Reservation.

Statutory intrusion during the allotment era were "serious blows" to the promised right to Creek self-governance, but did not prove disestablishment. *McGirt*, 2020 WL 3848063 at *8. This

[24] App. at 43, Att. 11 (Ann. Rept. of the Comm. Five Civ. Tribes (1910) at 169, 176).

[25] *See McGirt*, 2020 WL 3848063 at *6, citing Act of May 27, 1908, ch. 199, § 1, 35 Stat. 312; s*ee also* Act of Apr. 26, 1906, ch. 1876, §§ 19, 20, 34 Stat. 137 (Five Tribes Act); Act of Aug. 4, 1947, ch. 458, 61 Stat. 731; Act of Aug. 11, 1955, ch. 786, 69 Stat. 666; Act of Dec. 31, 2018, Pub. L. No. 115-399, 132 Stat. 5331; *see* "*Fatally Flawed*:" *State Court Approval of Conveyances by Indians of the Five Civilized Tribes—Time for Legislative Reform*," Vollmann, Tim, and Blackwell, M. Sharon, 25 Tulsa Law Journal 1 (1989). Congress has also recognized Cherokee Nation's reversionary interest in restricted lands. *See* Act of May 7, 1970, Pub. L. No. 91-240, 84 Stat. 203 (requiring escheat to Cherokee Nation, as the tribe from which title to the restricted interest derived, to be held in trust for the Nation).

conclusion is mandated with respect to the Cherokee Reservation as well, in light of the applicability of relevant statutes to both the Creek and Cherokee Nations, and the similarities in the Cherokee and Creek Agreements.

The Act of June 28, 1898, ch. 517, 30 Stat. 495 (Curtis Act), provided "for forced allotment and termination of tribal land ownership without tribal consent unless the tribe agreed to allotment." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441 (D.C. Cir. 1988). "[P]erhaps in an effort to pressure the Tribe to the negotiating table," the Curtis Act included provisions for termination of tribal courts. *McGirt*, 2020 WL 3848063 at *8, citing § 28, 30 Stat. 495, 504–505. A few years later, the 1901 Creek Allotment Act expressly recognized the continued applicability of the Curtis Act abolishment of Creek courts, by providing that it did not "revive" Creek courts.[26] Nevertheless, the Curtis Act's abolishment of Creek courts did not result in reservation disestablishment. *McGirt*, 2020 WL 3848063 at *17. Although *McGirt* eliminates a need to determine whether Cherokee courts were abolished (and Cherokee Nation requests no determination on that question),[27] there are ample grounds for the conclusion that the Cherokee Agreement, unlike the Creek Agreement, superseded the Curtis Act's abolishment of Cherokee courts. While earlier unratified versions of the Cherokee Agreement contained provisions like those in the Creek Agreement expressly validating the Curtis Act's abolishment of tribal courts,

[26] The Creek Agreement provided that nothing in that agreement "shall be construed to revive or reestablish the Creek courts which have been abolished" by former laws. 31 Stat. at 873, ¶ 47. The 1936 OIWA, 25 U.S.C. § 5209, impliedly repealed this limitation on Creek courts. *Muscogee (Creek) Nation v. Hodel*, 851 F.2d at 1446-47.

[27] The Cherokee Nation and Creek Nation operated their court systems years before the Department of the Interior's 1992 establishment of Courts of Indian Offenses in eastern Oklahoma for those tribes that had not yet developed tribal courts. "Law and Order on Indian Reservations," 57 Fed. Reg. 3270-01 (Jan. 28, 1992), and continue to do so.

the final version, ratified in 1902, did not.[28] Instead, section 73 of the Cherokee Agreement recognized that treaty provisions not inconsistent with the Agreement remained in force.[29] § 73, 32 Stat. at 727. Treaty protections included the 1866 Treaty's provision that Cherokee courts would "retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee Nation, except as otherwise provided in this treaty." Art. 13, 14 Stat. 799. It is also noteworthy in considering the effects of the Curtis Act that it recognized continuation of Cherokee Reservation boundaries, by referencing a "permanent settlement in the Cherokee Nation" and "lands in the Cherokee Nation." §§ 21, 25, 30 Stat. at 502, 504.

Another "serious blow" to Creek governmental authority was a provision in the Creek Agreement that conditioned the validity of Creek ordinances "affecting the lands of the Tribe, or

[28]Unratified agreements that predate the Cherokee Agreement demonstrate that Cherokees ensured that tribal court abolishment was not included in the final Agreement. The unratified January 14, 1899 version stated that the Cherokee "consents" to "extinguishment of Cherokee courts, as provided in section 28 of the [1898 Curtis Act]." App. at 26, Att. 8 (Sixth Ann. Rept. of the Comm. Five Civ. Tribes (1899), Appendix No. 2, § 71 at 49, 57). The unratified April 9, 1900 version provided that nothing in the agreement "shall be construed to revive or reestablish the Cherokee courts abolished by said last mentioned act of Congress [the 1898 Curtis Act]." App. at 32, Att. 9 (Seventh Ann. Rept. of the Comm. Five Civ. Tribes (1900) at 13, Appendix No. 1, § 80 at 37,45); *see also* Act of Mar. 1, 1901, ch. 675, pmbl. and § 72, 31 Stat. 848, 859 (version of Cherokee allotment agreement approved by Congress but rejected by Cherokee voters). The Five Tribes Commission's early efforts to conclude an agreement with Cherokee Nation were futile, "owing to the disinclination of the Cherokee commissioners to accede to such propositions as the Government had to offer." App. at 26, Att. 8 (Sixth Ann. Rept. of the Comm. Five Civ. Tribes (1899 at 9-10). The tribal court provisions in the unratified agreements were eliminated from the Cherokee Agreement as finally ratified. The Commission's discussion of the final agreement, before tribal citizen ratification, reflects that allotment was the "paramount aim" of the agreement, App. at 40, Att. 10 (Ninth Ann. Rept. of the Comm. Five Civ. Tribes (1902) at 11), - not erosion of Cherokee government.

[29] Treaty protections also included the Nation's 1835 treaty entitlement "to a Delegate in the House of Representatives when Congress may provide for the same." Art. 7, 7 Stat. 478.

of individuals after allotments, or the moneys or other property of the Tribe, or of the citizens" thereof, on approval by the President. *McGirt*, 2020 WL 3848063 at *8, citing § 42, 31 Stat. at 872. There is no similar limitation on Cherokee legislative authority in the Cherokee Agreement. Even if there had been, such provision did not result in reservation disestablishment, in light of the absence of any of the hallmarks for disestablishment in the Cherokee Agreement, such as cession and compensation. *See McGirt*, 2020 WL 3848063 at *7, n. 5.

Like the Creek Agreement, § 46, 31 Stat. 872, the Cherokee Agreement provided that tribal government would not continue beyond March 4, 1906. § 63, 32 Stat. at 725. Before that date, Congress approved a Joint Resolution continuing Five Tribes governments "in full force and effect" until distribution of tribal property or proceeds thereof to tribal citizens. Act of Mar. 2, 1906, 34 Stat. 822. The following month, Congress enacted the Five Tribes Act, which expressly continued the governments of all of the Five Tribes "in full force and effect for all purposes authorized by law, until otherwise provided by law." *McGirt,* 2020 WL 3848063 at *8, citing § 28, 34 Stat. at 148. The Five Tribes Act included a few incursions on Five Tribes' autonomy. *McGirt,* 2020 WL 3848063 at *8. It authorized the President to remove and replace their principal chiefs, instructed the Secretary of the Interior to assume control of tribal schools, and limited the number of tribal council meetings to no more than 30 days annually. *McGirt,* 2020 WL 3848063 at *8, citing §§ 6, 10, 28, 34 Stat. 139–140, 148. The Five Tribes Act also addressed the handling of the Five Tribes' funds, land, and legal liabilities in the event of dissolution. *McGirt,* 2020 WL 3848063 at *8, citing §§ 11, 27, 34 Stat. at 141, 148.

"Grave though they were, these congressional intrusions on pre-existing treaty rights fell short of eliminating all tribal interests in the land." *McGirt*, 2020 WL 3848063 at *8. Instead, Congress left the Five Tribes "with significant sovereign functions over the lands in question." *See*

McGirt 2020 WL 3848063 at *8. For example, Creek Nation retained the power to collect taxes; to operate schools; and to legislate through tribal ordinances (subject to Presidential approval of certain ordinances as required by the Creek Agreement, § 42, 31 Stat. 872). *Id.*, citing §§ 39, 40, 42, 31 Stat. at 871–872. Like the Creek Agreement, the Cherokee Agreement also recognized continuing tribal government authority. As previously noted, it did not require Presidential approval of any ordinance, did not abolish tribal courts, and confirmed treaty rights. § 73, 32 Stat. at 727. It also required that the Secretary operate schools under rules "in accordance with Cherokee laws;" required that funds for operating tribal schools be appropriated by the Cherokee National Council; and required the Secretary's collection of a grazing tax for the benefit of Cherokee Nation. §§ 32, 34, 72, 32 Stat. at 721. "Congress never withdrew its recognition of the tribal government, and none of its [later] adjustments[30] would have made any sense if Congress thought it had already completed that job." *McGirt*, 2020 WL 3848063 at *8.

Instead, Congress changed course in a shift in policy from assimilation to tribal self-governance. *See McGirt*, 2020 WL 3848063 at *9. The 1934 Indian Reorganization Act (IRA) officially ended the allotment era for all tribes. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 5101, *et seq*.)[31] The 1936 OIWA included a section recognizing tribal authority to

[30] "Adjustments" included the 1908 requirement that Five Tribes officials turn over all "tribal properties" to the Secretary of the Interior, § 13, 35 Stat. 316; a law seeking Creek National Council's release of certain money claims against the United States, Act of Mar. 3, 1909, ch. 263, 35 Stat. 781, 805; and a law authorizing Creek Nation to file suit in the federal Court of Claims for "any and all legal and equitable claims arising under or growing out of any [Creek] treaty or agreement.." Act of May 24, 1924, ch. 181, 43 Stat. 139. *See McGirt*, 2020 WL 3848063, at *8. The Act of Mar. 19, 1924, ch. 70, 43 Stat. 27, similarly authorized Cherokee Nation to file suit in the federal Court of Claims for the same type of claims against the United States.

[31] The IRA excluded Oklahoma tribes from applicability of five IRA sections, 25 U.S.C. §5118, but all other IRA sections applied to Oklahoma tribes, including provisions ending allotment.

adopt constitutions and corporate charters, and repealed all acts or parts of acts inconsistent with the OIWA. 25 U.S.C. §§ 5203, 5209. Cherokee Nation's government, like those of other tribes, was strengthened later by the Indian Self-Determination and Education Assistance Act (ISDEAA) of 1975. Act of Jan. 4, 1975, Pub. L. No. 93-638, 88 Stat. 2203 *(codified* at 25 U.S.C. §§ 5301, *et seq*.). The ISDEAA enables Cherokee Nation to utilize federal funds in accordance with multi-year funding agreements after government-to-government negotiations with the Department of the Interior. Congress, for the most part, has treated the Five Tribes in a manner consistent with its treatment of tribes across the country.

Notwithstanding the shift in federal policy, the Five Tribes spent the better part of the twentieth century battling the consequences of the "bureaucratic imperialism" of the Bureau of Indian Affairs (BIA), which promoted the erroneous belief that the Five Tribes possessed only limited governmental authority. *Harjo v. Kleppe,* 420 F. Supp. 1110, 1130 (D.D.C.1976), *aff'd sub nom. Harjo v. Andrus,* 581 F.2d 949 (D.C. Cir. 1978) (finding that the evidence "clearly reveals a pattern of action on the part of" the BIA "designed to prevent any tribal resistance to the Department's methods of administering those Indian affairs delegated to it by Congress," as manifested in "deliberate attempts to frustrate, debilitate, and generally prevent from functioning the tribal governments expressly preserved by § 28 of the [Five Tribes] Act."). This treatment, which impeded the Tribes' ability to fully function as governments for decades, cannot overcome lack of statutory text demonstrating disestablishment. *See Parker,* 136 S. Ct. at 1082.

D. <u>The Events Surrounding the Enactment of Cherokee Allotment Legislation and Later Demographic Evidence Cannot, and Did Not, Result in Reservation Disestablishment</u>.

There is no ambiguous language in any of the relevant allotment-era statutes applicable to Creek Nation and Cherokee Nation, including their separate allotment agreements, "that could

plausibly be read as an Act of disestablishment." *McGirt*, 2020 WL 3848063 at *10. Events contemporaneous with the enactment of relevant statutes, and even later events and demographics, are not alone enough to prove disestablishment. *Id*. A court may not favor contemporaneous or later practices *instead of* the laws Congress passed. *Id.* at *11. There is "no need to consult extratextual sources when the meaning of a statute's terms is clear," and extratextual sources may not overcome those terms. *Id*. The only role that extratextual sources can properly play is to help "clear up ... not create" ambiguity about a statute's original meaning. *Id*.

The "perils of substituting stories for statutes" were demonstrated by the "stories" that Oklahoma claimed resulted in disestablishment in *McGirt*. *McGirt,* 2020 WL 3848063 at *11. Oklahoma's long historical practice of asserting jurisdiction over Indians in state court, even for serious crimes on reservations, is "a meaningless guide for determining what counted as Indian country." *Id.* at *12. Historical statements by tribal officials and others supporting an idea that "everyone" in the late nineteenth and twentieth centuries believed the reservation system and Creek Nation would be disbanded, without reference to any ambiguous statutory direction, were merely prophesies that were not self-fulfilling. *Id*. at *13**.** Finally, the "speedy and persistent movement of white settlers" onto Five Tribes land throughout the late nineteenth and early twentieth centuries is not helpful in discerning statutory meaning. *Id*. at *14. It is possible that some settlers had a good faith belief that Five Tribes lands no longer constituted a reservation, but others may not have cared whether the reservations still existed or even paused to think about the question. *Id*. at *14. Others may have been motivated by the discovery of oil in the region during the allotment period, as reflected by Oklahoma court "sham competency and guardianship proceedings that divested" tribal citizens of oil rich allotments. *Id.* Reliance on the "practical advantages of ignoring the written law" would be "the rule of the strong, not the rule of law." *Id*.

CONCLUSION

Congress had no difficulties using clear language to diminish reservation boundaries in the 1866 treaty and the 1891 Agreement provisions for the Cherokee Nation's cessions of land in Indian Territory in exchange for money and promises. There are no other statutes containing any hallmark language altering the Cherokee Reservation boundaries as they existed after the 1891 Agreement's cession of the Cherokee Outlet. Clear language of disestablishment was available to Congress when it enacted laws specifically applicable to the Five Tribes as a group and to Cherokee Nation individually, but it did not use it. The Cherokee Reservation boundaries as established by treaty and as defined in the Cherokee Constitution have not been disestablished. Oklahoma has no jurisdiction over crimes covered by the MCA and GCA when committed on the Reservation.