THE RESERVATION AND THE RULE OF LAW

A Short Primer on Indian Country's Complexity

By Adam Crepelle

The rule of law is vital to social stability and economic development. The Supreme Court's 2020 decision in *McGirt v. Oklahoma* cast a cloud of uncertainty over which law to follow in eastern Oklahoma — tribal, state or federal.[1] *McGirt* arose because Oklahoma acted as though the Muscogee Nation's treaty guaranteed reservation had been disestablished for a century. Despite Oklahoma's behavior, a bedrock principle of federal Indian law is only Congress can diminish a reservation. Accordingly, Oklahoma's ignoring the Muscogee Nation's reservation was irrelevant because "[u]nlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law."[2]

McGirt is the greatest judicial affirmation of tribal sovereignty since 1832, the year the Supreme Court boldly decreed state law "can have no force" within the boundaries of an Indian nation.[3] Over time, this bright line rule has faded.[4] Consequently, Justice Roberts asserted chaos would result from the *McGirt* decision because no clear test exists to discern whether tribal, state or federal law governs a particular Indian country transaction.[5] The absence of clear jurisdictional rules is antithetical to the rule of law, yet it is the norm in Indian country, which now encompasses the eastern half of Oklahoma.

This article describes the legal framework governing varying areas of federal Indian law and their real-world impact. As a disclaimer, each of the 574 federally recognized tribes is unique. For example, the crime problems discussed later in this article are not particularly relevant to the four federally recognized tribes located within Louisiana due to the tribes' small land bases as well as their proximity to and good relationships with non-Indian law enforcement.

What is "Indian Country"?

Indian country is defined by 18 U.S.C. § 1151 as land within the exterior boundaries of a reservation and allotments that have not been extinguished. Reservations are lands set apart for Indians.[6] The reservation system arose because non-Indians wanted Indian lands. Although tribes were severely weakened by Old World diseases, tribes were still strong enough to pose a significant military threat for the United States.[7] Accordingly, treaties were in the best interest of the United States and tribes. In treaties, tribes exchanged their lands for smaller parcels on the guarantee they would be able govern themselves for all time as well as sundry other treaty promises. However, the United States violated each of those promises. On reservations, Indians were subject to each reservation superintendent's totalitarian control. Reservations warped into institutions designed to destroy tribal cultures and economies.[8]

In 1887, the United States passed the General Allotment Act (GAA). The Act broke reservations into 160-acre parcels for each Indian head of household. These parcels were placed in trust for 25 years. Indians were supposed to become self-supporting farmers at the end of the period. Lands remaining after Indians received their allotments were opened to white settlers. Nevertheless, legislative history reveals the GAA was designed as a pure land grab.[9]

Indians challenged allotment as a violation of their treaty rights. In a unanimous opinion authored by Louisiana's own E.D. White, the Supreme Court held Congress could violate Indian treaties at its whim and Indians had no legal recourse.[10] The opinion is regarded as "the Indians' Dred Scott decision."[11] Notwithstanding, it remains binding precedent.

Allotment robbed Indians of over 90 million acres of their best land and caused dire poverty.[12] Allotment ended in 1934 with the Indian Reorganization Act (IRA), which the Supreme Court stated was designed "to rehabilitate the Indian's economic life and give him a chance to develop the initiative destroyed by a century of oppression and paternalism."[13] The IRA locked lands remaining in Indian control in perpetual trust status. Trust land is owned by the United States while individual Indians or the tribe possess beneficial-use rights.

Due to allotment, the boundaries of Indian country are not always clear. Some reservations are contiguous and consist entirely of trust land. Other reservations are interspersed parcels of trust and fee-simple land. Some reservations have been entirely disestablished, but unextinguished allotments remain. On a single tract of land, some portions of land can qualify as Indian country while others do not.[14]

McGirt made the news for its reaffirmation of the Muscogee Reservation, but the question of whether a reservation exists is not uncommon. Indeed, all *McGirt* did was apply existing precedent on the issue, including a unanimous 2016 Supreme Court decision.[15] The jurisprudential inquiry into whether a reservation has been diminished hinges first and foremost on whether Congress clearly intended to diminish the reservation as evinced by the statutory text. Legislative history and the circumstances can be used to infer the existence of a reservation. Additionally, courts look to the settlement pattern following allotment — if "non-Indian settlers flooded into the opened portion," a reservation may have "lost its Indian character" and been diminished.[16] *McGirt* is notable for its emphasis on the first prong because "only Congress may disestablish a reservation."[17]

Criminal Law

According to the Supreme Court, "[c]riminal jurisdiction over offenses committed in 'Indian country' is governed by a complex patchwork of federal, state, and tribal law."[18] Determining which government has authority to prosecute a crime depends on whether the victim and offender are Indians, the nature of the crime and the status of the land where the crime was committed. The federal government has jurisdiction over Indian country crimes involving both an Indian and a non-Indian, and over Indians who commit "major crimes" against another Indian. The tribe has criminal jurisdiction over Indians for all offenses in Indian country. States have exclusive jurisdiction if an Indian country crime involves only non-Indians. In June 2022, the Supreme Court granted Oklahoma, and possibly other states, jurisdiction over reservation crimes involving a non-Indian perpetrator and an Indian victim.[19]

This scheme developed over time. The federal government has claimed jurisdiction over non-Indian criminals in Indian country since the nation's founding. The federal government did this in hopes of preventing a tribal war. In 1882, the Supreme Court held the equal-footing doctrine subjected non-Indians who harm other non-Indians on reservations to state jurisdiction.[20] Nearly a century later, the Supreme Court held tribes cannot prosecute non-Indians in *Oliphant v. Suquamish Indian Tribe*.[21]

While every crime is technically covered by one jurisdiction, law enforcement and prosecutors do not want to deal with

Indian country crime. The transaction costs are much higher than outside Indian country. For example, Indian identity is pivotal to determining which government can arrest and prosecute a crime. But no one knows who is an Indian. Federal law provides over two dozen definitions of "Indian." Federal courts use different tests to discern whether a person is an Indian, so a person could be an Indian in one circuit but not another. Get it wrong and the perpetrator walks due to lack of subject matter jurisdiction. Moreover, if a non-Indian shoots an Indian and a non-Indian in the same transaction, the cases must be prosecuted in separate court systems: non-Indian on Indian in federal court and non-Indian on non-Indian in state court.[22]

This convoluted jurisdictional regime has subjected Indians to extremely high rates of violent crime. In fact, Indians experience violence at twice the rate of any other racial group.[23] In 2010, Congress found 34% of Indian women will be raped and 39% will experience domestic violence during their lifetime.[24] Most people familiar with Indian country believe these figures are a vast understatement as Indians simply do not report crimes due to the long history of law enforcement neglect and abuse.

In addition to the staggering rate of crime, violence against Indians is unique because of the relationship between the victim and offender. Crime in the United States is overwhelmingly intraracial; nonetheless, over 90% of violence committed against Indians is perpetrated by non-Indians.[25] Non-Indians know they are functionally above the law on reservations and have been known to call the police on themselves after beating their Indian wife or girlfriend simply to flaunt their immunity. For this reason, reservation rape rates soar during hunting season, oil booms and other surges of non-Indians onto reservations.

The alarming rates of violence against Indian women led Congress to authorize tribes to prosecute non-Indians who commit dating violence or domestic violence or who violate a protective order in the Violence Against Women Reauthorization Act of 2013 (VAWA). However, in order to prosecute non-Indians, tribes must satisfy procedural safeguards that are more stringent than any state's or the federal government's. These expensive procedural safeguards have prevented all but 27 of the 574 federally recognized tribes from implementing VAWA. Approximately 200 non-Indians have faced tribal criminal jurisdiction under VAWA, and not one has alleged unfair treatment. Thus, Congress expanded tribal jurisdiction over non-Indians in the most recent VAWA reauthorization.

Civil Adjudicatory Jurisdiction

Indian country civil jurisdiction is even more ambiguous than criminal jurisdiction. Although the limits of tribal civil jurisdiction are now unclear, tribes long asserted civil jurisdiction over non-Indians. The Supreme Court and lower courts affirmed tribal civil jurisdiction over non-Indians during the late 1800s and early 1900s. In 1959, the Supreme Court held tribal courts have exclusive civil jurisdiction over suits against Indians for incidents arising in Indian country.[26] Following *Oliphant*'s reasoning, tribal civil jurisdiction over non-Indians was circumscribed in 1981. The Supreme Court in *Montana v. United States*[27] held tribes have civil jurisdiction over non-Indians who engage in consensual relationships with a tribe or its citizens and also over non-Indians engaged in activities that jeopardize the health and welfare of the tribe.

The *Montana* jurisdictional predicates have not been construed consistently. First, it is not clear when it applies. *Montana* itself was explicitly limited to non-Indian fee lands within an Indian reservation. Some precedent holds tribes have inherent authority over all persons on trust land within a reservation.[28] Other courts apply *Montana* to all assertions of tribal civil jurisdiction over non-Indians.[29] Though one may quibble over when consent is needed, consent itself seems like a straightforward term. This has not been the case. For example, the Supreme Court split four-to-four over whether the Mississippi Band of Choctaw Indians could assert civil jurisdiction over Dollar General despite the retailer explicitly consenting to tribal court jurisdiction and tribal law in a lease agreement.[30] Health and welfare seem like capacious exceptions; nevertheless, the Supreme Court has only twice affirmed tribal jurisdiction on these grounds. The Supreme Court most recently did so in 2021, when it held gun-toting, non-Indian meth-heads are sufficiently dangerous to authorize tribal civil detention until state or federal police arrive at the scene.[31]

The uncertain scope of tribal civil jurisdiction is costly in both time and money with no clear cure. Non-Indians have a federal common law right to contest tribal jurisdiction in federal court, but they must exhaust their tribal court remedies first. Tribal courts often have tiered judiciaries, so parties can easily spend a few years in tribal court prior to entering federal court. Federal litigation can take years, too. All of this simply to determine where to litigate. Forum-selection clauses are not a foolproof remedy, as some federal courts require tribal exhaustion even if a forum-selection clause exists.[32] Furthermore, tribal court jurisdiction over non-Indians is a question of subject matter jurisdiction. Subject matter jurisdiction cannot be eluded by consent. Assuming a forum-selection clause is enforced sans exhaustion, the lingering question of subject matter jurisdiction could undermine the judgment *ex post facto*.[33]

What's Legal?

Determining which activities are legal in Indian country has long been a source of conflict between tribes and states. Gaming is the best-known example. Tribes began gaming in the 1970s to generate revenue. States immediately pushed back, resulting in a litany of federal cases culminating in the Supreme Court's 1987 decision in *California v. Cabazon Band of Mission Indians*.[34] California argued tribal gaming operations offering larger prizes than the state limit were illegal. The Court said the issue hinged on whether gaming was criminally prohibited in California or civilly regulated in the state. The Court ruled gaming was civilly regulated in California because the state itself operated gaming enterprises and encouraged its citizens to gamble.

States responded to the tribal victory by immediately having Congress enact the Indian Gaming Regulatory Act,[35] which greatly curtailed tribal sovereignty in the gaming sphere. Although *Cabazon* has been legislatively superseded, the general principle remains: Tribes can engage in activities the surrounding state regulates but does not categorically prohibit. For example, tribes located in Utah cannot operate casinos because the state prohibits gaming. The line has proven to be less clear in other areas. Cannabis highlights the confusion.

When states started loosening their marijuana laws, many tribes became interested in cannabis. After all, medical marijuana means cannabis is no longer prohibited. Tribes and states clashed over cannabis. Tribes lost most of the battles; however, the federal prohibition was a major determinate in the conflicts.[36] The conflicts are fading because marijuana is becoming widely legalized. Nevertheless, the feds recently raided Picuris Pueblo in New Mexico despite the user having a valid license from both the state and tribe. The feds have yet to explain the basis for the raid.[37]

Tribes get into industries like gaming and cannabis because federal law stifles reservation economic development. State law sets limits on what is legal in Indian country, but regardless of the activity, a dense layer of federal bureaucracy undermines most hopes of private enterprise. To begin with, tribal trust land is owned by the United States. This prevents trust land from being used as collateral without federal approval — which often takes over a year. Obtaining a lease also requires completing historical and environmental reports.[38] Due to these regulations, it takes hopping through 49 bureaucratic hoops to engage energy production in Indian country. The same energy production can occur in four steps outside Indian country.[39] The complications of bureaucracy are exacerbated by the jurisdictional uncertainty mentioned above. Consequently, private enterprise is nonexistent in most of Indian country. This explains why Indian country's unemployment rate was 50% prior to the pandemic, and Indians have the highest poverty rate in the United States.

Conclusion

When people assert Indian country is lawless, they are wrong. The problem is there are too many laws in Indian country. Returning to the original principle — state authority ends where Indian country begins — is the answer. In addition to being simple, respecting tribes' right to govern *their* land is a United States obligation pursuant to hundreds of treaties. As Justice Hugo Black wrote over 60 years ago, "Great nations, like great men, should keep their word."[40] Or as Justice Neil Gorsuch put it in 2019, honoring treaties with tribes "is the least we can do."[41]

FOOTNOTES

1. McGirt v. Oklahoma, 140 S.Ct. 2452, 2459 (2020).
2. *Id.* at 2482.
3. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1831).
4. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 (1973).
5. McGirt, 140 S.Ct. at 2501 (Roberts, J., dissenting).
6. United States v. Pelican, 232 U.S. 442, 449 (1914).
7. *E.g.*, Letter from Henry Knox, Sec'y of War, to George Washington, U.S. President (February 15, 1790), *https://founders.archives.gov/documents/Washington/05-05-02-0085#GEWN-05-05-02-0085-fn-0001-ptr* [https://perma.cc/85NK-5BL3].
8. *Acknowledgment and Apology: Hearing on S.J. Res. 15 Before the S. Comm. on Indian Aff.,* 109th Cong. 25 (2005) (statement of Kevin Gover at the Ceremony Acknowledging the 175th Anniversary of the BIA Sept. 8, 2000) ("After the devastation of tribal economies and the deliberate creation of tribal dependence on the services provided by this agency, this agency set out to destroy all things Indian.").
9. H.R. Rep. No. 46-1576, at 10 (1880).
10. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).
11. Sioux Nation of Indians v. United States, 601 F.2d 1157, 1173 (Ct. Cl. 1979) (Nichols, J., concurring).
12. S. Rep. No. 112-66, at 4 (2012).
13. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973).
14. Adam Crepelle, *Shooting Down* Oliphant: *Self-Defense as an Answer to Crime in Indian Country*, 22 Lewis & Clark L. Rev. 1284, 1317 (2018).
15. Nebraska v. Parker, 577 U.S. 481 (2016).
16. Solem v. Bartlett, 465 U.S. 463, 471 (1984).
17. McGirt v. Oklahoma, 140 S.Ct. 2452, 2474 (2020).
18. Negonsott v. Samuels, 507 U.S. 99, 102 (1993).
19. Oklahoma v. Castro-Huerta, 142 S.Ct. 2486, 2526, n.10 (2022) (Gorsuch, J., dissenting) (The truth is, in this case involving one Tribe in one State, the Court does not purport to evaluate the (many) treaties, federal statutes, precedents, and state laws that may preclude state jurisdiction on specific tribal lands around the country.)
20. United States v. McBratney, 104 U.S. 621, 624 (1882).
21. 435 U.S. 191 (1978).
22. Adam Crepelle, *The Law and Economics of Crime in Indian Country,* 110 Geo. L.J. 569, 571-73 (2022).
23. Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, Div. W, Title VIII, § 801(a)(1)(A).
24. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(5)(A–C), 124 Stat. 2261, 2262.
25. VAWA Reauthorization Act of 2022, *supra* note 23, at § 801(a)(3).
26. Williams v. Lee, 358 U.S. 217 (1959).
27. 450 U.S. 544 (1981).
28. *See, e.g.,* Wheel Camp Recreational Area, Inc. v. Larance, 642 F.3d 802 (9th Cir. 2011).
29. *See, e.g.,* Nevada v. Hicks, 533 U.S. 353 (2001).
30. Dollar General v. Mississippi Band of Choctaw Indians, 579 U.S. 545 (2016).
31. United States v. Cooley, 141 S.Ct. 1638 (2021).
32. Adam Crepelle, *How Federal Indian Law Prevents Business Development in Indian Country*, 23 U. Pa. J. Bus. L. 683, 713 (2021).
33. Elliott v. Peirsol's Lessee, 26 U.S. 328, 340 (1828).
34. 480 U.S. 202 (1987).
35. Indian Gaming Regulatory Act of 1988, Pub. L. No. 100-497, § 2, 102 Stat. 2467 (codified as amended at 25 U.S.C. §§ 2701-2721 (2018)).
36. Menominee Indian Tribe of Wis. v Drug Enforcement Admin., 190 F.Supp.3d 843 (E.D. Wis. 2016).
37. Shaun Griswold, *Picuris Pueblo Works to Preserve Its Independence Through N.M. Recreational Cannabis Industry*, Indianz (Apr. 11, 2022), *https://www.indianz.com/News/2022/04/11/source-new-mexico-tribe-clashes-with-federal-authorities-over-cannabis/* [https://perma.cc/RR5J-YTE5].
38. 25 C.F.R. § 162.438(g) (2022).
39. Crepelle, *supra* note 32 at 688, n. 27.
40. Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting).
41. Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S.Ct. 1000, 1021 (2019) (Gorsuch, J., concurring).

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