

Tribal Jurisdiction: Our History and Future

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I. Introduction

Two sovereigns may exercise authority over the same places, persons, and effects, at the same time; however, such authority usually concerns two different subject matters. The most obvious example of this legal principle is federalism or the contemporaneous exercise of jurisdiction by the United States' federal government and state government. In fact, a single action by an individual within the territory of the United States may be governed by Federal, State, Tribal, county, municipal, and community rules and regulation at the same time. But for the generally common sense guidance of law a person could decide to never leave their home for fear of violating one of the many potential mandates of the seeming unending jurisdictions with authority over one's conduct.

Concerning Indian tribe authority, the Continental Congress was silent with the exception of Article I, Section 8, Clause 3 and Article II, Section 2, Clause 2 of the United States Constitution. The first states, "The Congress shall have power... to regulate commerce with the Indian Tribes." The later creates Congressional treaty power. Over the last 150 years in the course of American jurisprudence and legislation, the powers of the United States government over the conduct of non-tribal members within Indian territory has become nearly absolute. Congress has spoken and the United States government has authority, not tribes over conduct of non-tribal members within Indian territory with the exception of narrowly construed exceptions. The development of Supreme Court and Circuit opinions and Congressional action concerning non-tribal members on Indian territory will be explored in the course of this article; beginning with the Settling of the West and ending with what the future holds.

II. History of Indian Jurisdiction/Sovereignty

The principle issue that Courts have wrestled with in this context is whether Congress has the constitutional authority to subject "[United States citizens], within our domestic borders, to a sovereignty outside the basic structure of the constitution."ⁱ The sovereignty at question is tribal sovereignty. The Supreme Court from very early in its analysis of this issue has held tribes are subordinate in jurisdictional respects to the United States government. The Court succinctly explained this point in *Oliphant*:

protection of territory within its external political boundaries is, of course, as central to the sovereign interest of the United States as it is to any sovereign nation. But from the formation of the Union and adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusion in their personal liberty. *By submitting to the overriding sovereignty of the United States, Indian tribes necessarily give up their power to try non-Indian citizens...*ⁱⁱ (emphasis added)

The *Oliphant* decision clarified the issue of 'inherent jurisdiction', i.e. jurisdiction derived from the Constitution, which is limitless, unless abrogated by treaty or legislation. Therefore,

leaving the question of divested jurisdiction. Can Congress grant tribes full criminal jurisdiction over non-tribal members. Some advocates say yes, in particular the Coeur d'Alene Tribe; however, the majority of Justices, past and present, the constitutional protections of due process and equal protection, and the republic form of government clause will likely hold this grant to tribes unconstitutional for the foreseeable future. Additionally, the one size fits all approach will never work for Indian law as exhibited by the simple contrast between the Navajo Nation, which is 27,000 square miles (larger than 10 states) and the Augustine Reservation in Riverside, California which is one square mile in size and has eight members.

III. Supreme Court and Circuits

The Marshall Doctrine articulated by Chief Justice Marshall between 1823 and 1832 in three bedrock decisions: *Johnson v. M'Intosh*ⁱⁱⁱ, *Cherokee Nation v. Georgia*^{iv} and *Worcester v. Georgia*^v, created concepts of Indian law, which are relevant and survive today. The Supreme Court defined sovereignty and the relationships between three key actors: Indian nations, the federal government, and individual states.

In 1823 the United States Supreme Court decided *Johnson v. M'Intosh*, the first of these key decisions. In *Johnson*, the descendants of Thomas Johnson^{vi}, one of the first United States Supreme Court justices, brought a cause of action against William M'Intosh for ejectment. Johnson had purchased land from the tribe prior to his death and subsequently M'Intosh obtained a land patent from the United States federal government. Interestingly, historian claim the disputed land did not even touch and further evidence indicates the parties were aware of the lack of an actual case or controversy and simply wanted the Court to decide the validity of private purchase from the tribes.^{vii}

Justice Marshall gave a detailed chronology of the European "discovery" and conquest of the Americas extrapolating on every nation state's assertion the native people were current inhabitants, yet no longer sovereign after the occupation of the land. Justice Marshall authored the following words in *Johnson*, which for better or worse created the progeny of Indian law jurisprudence today:

All the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and recognized others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. Have the American States rejected or adopted this principle?^{viii}

Justice Marshall stated for the Court, Indian Nations did not have authority to convey complete ownership of their land to private individuals, as the ultimate title was acquired by discovery and subject to the "Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring."^{ix} The majority of the opinion is dicta; however, the "discovery doctrine" pronounced by the Court formed the precedent for aboriginal title, indigenous title, holding it is not alienable, with the exception of the federal government and extinguishable only by the federal government.

"Discovery doctrine" was further articulated in the second case of the Marshall trilogy, *Cherokee Nation v. Georgia*^x. In 1827 the Cherokee Nation proclaimed itself an "independent state" *arguendo* a response to multiple catalyzes including the Court's pronouncement in *Johnson*. Responsively the Georgia legislature enacted multiple statutes vesting state government with jurisdiction over all Indian territory, rescinded the Cherokee laws, and directed the *seizure of all Cherokee land*. The Cherokee Nation petitioned the United States Supreme Court under Article III, section 2 of the United States Constitution, which permits foreign nations to bring suit under

the Court's original jurisdiction, under the assertion they were an independent sovereign nation. However, the Supreme Court dismissed the petition concluding:

The nation or state...of the Cherokees... are not by its force or virtue a foreign state capable of calling into legitimate action the judicial power of this union, by the exercise of the original jurisdiction of this court against a sovereign state, a component part of this nation.^{xi}

Justice Marshall established the founding principle of Indian law in the United States tribes are "domestic dependent nations^{xii}" and their relationship to the United States resembles a ward of his guardian. This decision dictated the secondary result, tribes could not freely alienate land, nor enter treaties with foreign powers.

One year later, a case came before the United States Supreme Court, which raised a parallel issue as raised in *Cherokee Nation*. The case was *Worcester v. Georgia*^{xiii}, the third decision forming the Marshall trilogy. The cause of action in *Worcester* arose from a non-tribal missionary, working within the bounds of Cherokee territory, was arrested and convicted under Georgia law for failing to obtain a license from the governor of Georgia prior to residing within the Cherokee territory. The question before the Court was whether Georgia law applied to actions within Cherokee territory. Justice Marshall writing for the Court held:

Treaties and laws of the United States contemplate the Indian territory as completely separate from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union. *Id.* At 557

Justice Marshall's "completely separate from that of the states" language can be likened to the juxta positioning of the Vatican (Catholic state) to the Nation of Italy. Although, the Vatican as the Cherokee territory lies within a larger state, it was distinct and the state of Georgia had *no authority* over persons and actions within the boundaries of the Cherokee Nation.

Therefore, state laws did not extend to Indian Country absent a clear treaty cession or congressional act. *Id.* 558. This decision memorialized the essence of Tribal sovereignty, while not identical to nation states, tribes retained the right to self-govern and only the United States Congress has authority over Indian affairs, not individual states, such as Georgia.

Justice Marshall's trilogy memorialized three constitutional sources of Indian affair powers: the treaty clause, the war power clause, and the commerce clause. These limited powers and the acts in furtherance of them defined the parameters Congress and the Court operated in dealing with Indian tribes until the Civil War. In 1871, the United States ceased making treaties with Indian tribes and the federal-tribal relation moved towards unilateralism or one sided action by the United States' government towards Indian tribes.

In the late 1800s the Federal government stopped a policy of war and removal against indigenous peoples and began the painful transition towards assimilating Indian peoples into American society by the unjustified treatment of such as second class citizens. The Supreme Court in dealing with this new relationship between the federal government and indigenous people left the Marshall Trilogy of military protection from uniquely Indian peoples and their land and steered towards the dependency of indigenous people.

In 1886, the Supreme Court in *United States v. Kagama*^{xiv}, held Congress had the power to exercise criminal jurisdiction over Indian – Indian crimes on Indian land due to Indigenous people's dependency on the federal government, not based on a Constitutional authority. Tribes

exist “within the geographical limits of the United States and are wards of the nation”^{xv} The United States Supreme Court continued down the path begun in *Kagama* to abrogate authority of Indian tribes and people, thereby solidifying the federal government’s plenary power in Indian affairs.

In *Coyle v. Oklahoma*^{xvi}, a decision reached in 1911 by the Supreme Court dealt with the Enabling Act of 1906, which gave people residing in Indian territory and Oklahoma territory authority to frame state constitutions to form two states; however, the bill to form a state out of Indian territory was defeated in U.S. Congress in 1905 and the Oklahoma Enabling Act was signed by President Roosevelt on June 16, 1906 created the State of Oklahoma out of both territories. The Court stated, “Congress should embrace in an enactment introducing a new state into the Union legislation intended as a regulation of commerce among the states, or with *Indian tribes situated within the limits of such new state*... But in every such case such legislation would derive its force... because the power of Congress extended to the subject....”^{xvii}

Two years later, in 1913, the Supreme Court decided *United States v. Sandoval*^{xviii} and placed a nail in the coffin of Indian authority to regulate conduct within the four corners of Indian territory citing directly from *Kagama* and *Coyle v. Oklahoma*. The question considered by the Court was whether Pueblo land within the geographical bounds of New Mexico, which obtained statehood the preceding year, was subject to Federal prohibition of the introduction of liquor as a condition to the *Enabling Act of 1910*, which was enacted to authorize people of the New Mexico and Arizona territories to frame a state constitution in the process of admission to the Union. The Court held the following:

Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilize nation the power an the duty of exercising a fostering case and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state....”^{xix}

In 2004, in *Nevada v. Hicks*^{xx} the United States Supreme Court parsed the invisible boundary between reservations and state land and held the sovereignty of a State does not end at the reservation:

Though tribes are often referred to as sovereign entities, it was ‘long ago’ that the ‘court departed from Chief Justice Marshall’s view that the laws of [the states] can have no force’ within reservation boundaries... it is now clear, ‘an Indian reservation is considered part of the territory of the State.’^{xxi}

The road chosen by the Supreme Court in 1886 is alive today and plenary power doctrine has been affirmed time and time again by the Court throughout the twentieth century. In 2004 the Supreme Court decided *United States v. Lara*^{xxii}, stating Congress has enacted legislation with the Court’s approval to “both restrict and, in turn, relax those restrictions on tribal sovereign immunity.” *Ibid.* Further the need for “such legislative power ha[s] seemed obvious”^{xxiii} from the Nation’s inception. The specific application of the plenary powers doctrine within Indian Territorial bounds as it applies to civil and criminal cases will be discussed in the next sections.

IV. Civil Jurisdiction

In 1981, the United States Supreme Court decided *Montana v. United States*^{xxiv} holding Tribes have inherent sovereignty over some matters of civil jurisdiction concerning non-Indians and may regulate conduct of non-Indians upon tribal land through the exercise of taxation, licensing, and similar means who enter “consensual relationships” with a tribe or its members. held tribes generally lack authority over non-Indians on Indian reservations or within the boundaries of their property, except for two limited exceptions referred to as the *Montana exceptions*. The First “*Montana exception*” grants tribal jurisdiction over non-Indian civil matters related to consensual relationships through “commercial dealing, contracts, leases, or other arrangements.” *Ibid*. The Second “*Montana exception*” grants tribal jurisdiction over non-Indian civil matters “when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.”^{xxv}

The United States Supreme Court decided *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*^{xxvi} on February 26, 1991, which stemmed from the Tax Commission’s 1987 demand that the Tribe pay \$2.7 million for back taxes on cigarettes. The Tribe sued in the Western District of Oklahoma, where Judge Lee R. West Jr. denied the Tribe’s motion for summary judgment and following trial held: sales to tribal members immune from state tax, but sales to non-tribal members *were taxable*. The Tribe appealed to the Tenth Circuit, which reversed holding the Potawatomis have absolute immunity from suit and the State of Oklahoma lacked authority to tax any sales on a reservation.^{xxvii} In the State of Oklahoma’s brief to the Supreme Court the State asserted, among other things, the sale of cigarettes did not occur on a formal reservation, but on land held in trust for the Tribe, thereby falling outside the bounds of the Tribe’s sovereignty immunity. The Supreme Court rejected this argument citing *United States v. John, Ibid*. where the Court defined the test for determining Indian country as land “validly set apart for the use of the Indians as such, under the superintendence of the Government.”^{xxviii} The Court affirmed in part and reversed in part holding, individual officers/agents of a Tribe are not immune from damages brought by the State, States may collect taxes by seizure or assessing the wholesaler directly, a State may enter into a consensual agreement with a Tribe, or seek legislation to affect the interest desired.^{xxix}

In 2008, the Court addressed the issue of tribal jurisdiction over non-Indians on tribal land in *Plains Commerce Bank v. Long Family Land and Cattle Co.*^{xxx}. In *Plains Commerce Bank* a non-Indian bank in South Dakota sought declaratory relief in federal court to void a jury verdict against the bank in favor of a tribal claimant, the Longs and Long company in tribal court. In the original case the Longs, an Indian couple sued the bank claiming the bank, who sold fee simple property to non-Indians had provided more favorable terms than had been offered to the Longs. The bank contested jurisdiction, the Indian Tribal court decided it had jurisdiction and eventually ruled against the bank and awarded damages to the Longs. The bank appealed to the Cheyenne River Sioux Tribal Court of Appeals, which affirmed the Tribal court and the bank filed in federal court.

The United States District Court for the District of South Dakota granted summary judgment to the Longs, a Tribal couple due to the “consensual relationship” between the bank and the Longs^{xxxi}. The District Court found the relationship fell within the first category of tribal jurisdiction over non-Indians outlined in *Montana v. U.S.*^{xxxii} The Court of Appeals for the Eighth Circuit affirmed^{xxxiii}, holding the Long’s relationship “arose directly from their preexisting commercial relationship with the bank.”^{xxxiv} In summary, the Circuit court held the Tribe has authority to regulate Non-Indian commercial conduct when they “voluntarily deal with tribal

members.” *Ibid.* United Supreme Court reversed all lower courts and held the Bank had Article III standing to contest the injury in Tribal Court.^{xxxv}

The Supreme Court in reaching its decision in *Plains Commerce Bank* to deny the Tribal Court’s jurisdiction offered the following background on the “unique and limited character”^{xxxvi} of Tribal Sovereignty. Tribes retain authority to self-govern their members and territory subject to the limitations of Congress.^{xxxvii} Tribes have residual sovereignty to legislate and tax on the reservation including some activities on nonmembers.^{xxxviii} Tribes possess the power to exclude nonmembers from entering tribal land.^{xxxix} However, “the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”^{xl} Finally, Tribes lost, by incorporation in the United States, although involuntary in many instances, “the right of governing... person[s] within their limits expect themselves.”^{xli}

With the analytical framework listed above, Justice Roberts focused on the fact the land in question as fee simple removes the Tribe’s plenary jurisdiction pursuant to the Indian General Allotment Act of 1887^{xlii} and the precedent of *County of Yakima*^{xliii}. Additionally, Tribal authority over actions upon fee simple land is “presumptively invalid” *Ibid.* and the burden rests on the Tribe to establish a *Montana exception* applies, which cannot be construed to “swallow the rule.”^{xliv} Therefore, the Tribal Court does not have jurisdiction to hear the Longs’, Indian couple’s, discrimination claim as the Tribe lacks jurisdiction to regulate the Bank’s land. Justice Roberts surmised the status of Tribal civil jurisdiction as follows:

[C]ertain forms of nonmember behavior, even on non-Indian fee land may sufficiently affect the tribe as to justify tribal oversight. While tribes generally have no interest in regulating the conduct of nonmembers, then, they may regulate nonmembers behavior that implicates tribal governance and internal relations.^{xlv}

The Supreme Court has granted certiorari in a limited number of cases dealing with Indian jurisdiction since the decision in *Plains Commerce Bank*. Interestingly, the Court did not grant certiorari; rather affirmed *per curiam* by an equally divided court, on June 23, 2016, the Fifth Circuit’s decision upholding tribal court civil jurisdiction in a civil tort action brought by an Indian Tribe member *against* a non-Indian corporation, which allegedly occurred on tribal land in *Dolgencorp*^{xlvi}.

In the *Dolgencorp*^{xlvii}, petitioner urged the Supreme Court to abide by the court’s precedent in *Oliphant*, which held tribal courts lacked power or jurisdiction over non-Indians in criminal matters, which occur on Indian territory. The Choctaw tribe took the opposite position in their response stating, the full inherent sovereignty of the tribe exists and is available in all matters, not specifically diminished through express action of Congress. The tribe further asserted Tribal civil jurisdiction over torts involving non-Indians exist in parallel to the holding in *Montana*.

The Solicitor General of the United States in an *amicus curie* brief supported the tribes point of view. The following factors should give Tribal sovereignty advocates cause for relief: the significant contacts between the Choctaw Tribe, all conducting giving rise to the cause of action occurred on tribal trust land, and the resulting strong nexus between Dollar General and the Choctaw tribe are indicative of the Court granting Tribal Sovereignty and the resulting jurisdiction over torts matters occurring on tribal land, which involves Non-Indians. All this points to the potential for a logical continuation of an *International Shoe*^{xlviii} “nexus of contacts approach” to civil cases judging consent of non-Indian parties. This case is perfectly positioned to insulate Tribal jurisdiction in civil cases as the Choctaw nation has a legal code, administrative departments, a

multi-level judicial system, and experienced judicial officers, all of which may serve as a basis to apply the nexus argument to substantiate the Tribes' jurisdiction.

V. Criminal Jurisdiction

The settlement of the West first gave rise to the issue of tribal criminal jurisdiction over non-Indians. In 1834, Congress passed the Western Territory Bill^{xlx}, which granted Tribes by confederation broad governing powers; however, did not authorize criminal jurisdiction over American citizens.

The Major Crimes Act was passed in 1885 and placed specified crimes under federal jurisdiction, if committed by an Indian upon Indian territory. The Supreme Court held the Act constitutional one year later in *United States v. Kagama* and stated Indian tribes are no longer "possessed of the full attributes of sovereignty."^l

The first explicit declaration by the Supreme Court that tribes lacked criminal jurisdiction over non-Indians occurred in the 1891 pronouncement of *In re Mayfield*^{li}, which was decided only six years after the Major Crimes Act. There the Court emphasized Congress' authorization of "self-governance" to Indian tribes with the reservation of criminal matters involving United States citizens.

Historically, the power of a tribe to exercise criminal jurisdiction over non-members has been precipitously denied by Congressional action and the Colonial approach of the Supreme Court in deeming Indian tribes as subordinate sovereigns to the United States. On March 6, 1978 in *Oliphant*, The Supreme Court held tribal courts do not possess inherent criminal jurisdiction to prosecute non-Indians. Justice Rehnquist delivered the opinion of the Court, which concluded with the following:

We recognize that some Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts. We also acknowledge that with the passage of the Indian Civil Rights Act of 1968, which extends certain basic procedural rights to *anyone* tried in Indian tribal court, many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indian only a few decades ago have disappeared. Finally, we are not unaware of the prevalence of non-Indians crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians. But these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians.^{lii}

In 1978, the Supreme Court decided *United States v. Wheeler*, *Ibid.* holding tribes have inherent authority to prosecute tribal members; however, the Tribes incorporation into the United States "necessary divested them of some aspects of the sovereignty which they had previously exercised."^{liii}

In 1990, the United States Supreme Court had to address the issue of whether an Indian tribe has criminal jurisdiction over an Indian, who is not a member of the tribe in *Duro v. Reina*^{liv}. The Court cited civil jurisdictional cases including, *Oliphant* and *Montana*, and the United States citizenship of non-member Indians as a basis to deny a tribe criminal jurisdiction over nonmember Indians. However, the Court in *Duro* did grant the following authority to tribes:

Tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them. Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities.^{lv}

Congress reacted within the same year *Duro* was decided and amended the Indian Civil Rights Act^{lvi} superseding the Court's pronouncement in *Duro*, granting Indian tribes the authority to try non-member Indians from crimes committed within the tribe's land. Congress bestowed the additional power to investigate crimes alleged committed by non-tribal members as the power of tribal authorities would be meaningless, if tribal police were not empowered to investigate such violations.^{lvii} However, tribal officers must avoid effecting unconstitutional searches and seizures in this realm as specifically stated in 25 U.S.C. §1302(2).

In 1998, the Eight Circuit was confronted in *United States v. Weaselhead*^{lviii} with the task of deciding the conflict between the historical analysis of the Supreme Court stemming from *Oliphant and Duro* and Congress' amendments to the Indian Civil Rights Act superseding *Duro*. There a non-member Indian, Weaselhead was charged in tribal court with crimes constituting sexual misconduct and child abuse. He eventually pled and was sentenced to 280 days in jail. The same day, Weaselhead was indicted by a federal grand jury and moved to dismiss the charged on double jeopardy grounds. The district court denied his motion, finding separate sovereigns were the basis of his two prosecutions. A divided panel on the Eight Circuit reversed and held the Tribe's power to punish was derived from congressional delegation only; therefore, his federal prosecution is barred as a result of his prior tribal prosecution pursuant to double jeopardy. The Eight Circuit heard the case *en banc* and by an equally divided panel reversed and affirmed the District Court's ruling denying Weaselhead's double jeopardy claim^{lix}.

In 2001, the Ninth Circuit in an *en banc* decision overruled an Arizona District Court's determination that a prosecution subsequent to a tribal court conviction violated Double Jeopardy in *United States v. Enas*^{lx}. The Ninth Circuit court held the Tribe proceeded under its inherent authority in prosecuting a non-member Indian; therefore, federal government's subsequent prosecution for the same crime did not violate Double Jeopardy Clause.

Three years after *Enas* the United Supreme Court granted *certiorari* based on the conflict between the Eight and Ninth Circuits and heard the case of *United States v. Lara*^{lxi}. The case, like *Enas*, caused much trepidation in the Circuit Court. Billy Lara pled guilty in tribal court to violence to a policeman and was subsequently charged in federal court for assaulting a federal officer. Lara claimed he could not be prosecuted in federal court under the Double Jeopardy Clause. The District Court accepted the Government's arguments based on the *Wheeler* and *Duro* decisions and rejected the double jeopardy claim. A panel of the Eight Circuit affirmed with the District Court^{lxii}; however, the Eight Circuit, who was confronted with a similar issue in the 1998 case of *Weaselhead* heard the case *en banc* and reversed the District Court^{lxiii}.

The Supreme Court in *Lara* journeyed through an analysis of the above-mentioned precedent with consideration of their specific historical context, stating, "Indeed *Duro* itself anticipated change by inviting interested parties to 'address the problem [to] Congress.'" *Ibid*. The Court went on to state, "we do not read any of these cases as holding that the Constitution forbids Congress to change 'judicially made' federal Indian law through this kind of legislation."^{lxiv} The Court held the Constitution *authorizes* Congress to allow tribes by their inherent authority to

prosecute nonmember Indians. As a result, Billy Lara could be prosecuted in federal and tribal court under separate sovereigns and henceforth Congress has the authority, according to the Supreme Court, to legislate tribal sovereignty in criminal and civil matters within the confines of *Lara*.

The most intriguing case, concerning Indian territory and criminal jurisdiction, in recent history, *Murphy v. Royal*^{lxv}, was pronounced by the Tenth Circuit in November 2017. It concerned a murder case in the territorial bounds of the Muscogee (Creek) Nation reservation, established by a 1866 treaty, in Oklahoma in which the defendant Patrick D. Murphy, a Muscogee (Creek) Nation citizen was tried in McIntosh County, Oklahoma state court and convicted of murder and sentenced to death. Judge MC writing for the 10th Circuit panel began his legal background of the case with the following conclusion, “the crime occurred on the Creek Reservation and therefore the Oklahoma courts lacked jurisdiction.”^{lxvi}

The Court in *Murphy* determined the crime occurred in Indian country and that Oklahoma lacked jurisdiction by analyzing jurisdiction through the following factors: 1) the Major Crimes Act, 2) Indian country definitions, 3) diminishing or disestablishing reservations, and 4) reservations generally. Subsequently, the Court’s analysis concerned three issues:

A) Whether there was clearly established federal law as determined by the Supreme Court when the OCCA addressed Mr. Murphy’s jurisdictional claim. We conclude the *Solem* framework constituted clearly established law. (B) Whether the OCCA rendered a decision contrary to this clearly established law when it resolved Mr. Murphy’s jurisdictional claim. We conclude that it did because the OCCA failed to apply the *Solem* framework and took an approach incompatible with it. (C) **Whether the federal government has exclusive jurisdiction over Mr. Murphy’s case. We conclude that it does because, under the *Solem* framework, Congress has not disestablished the Creek Reservation.**^{lxvii}

Circuit Judge Matheson’s one-hundred-twenty-six page opinion in *Murphy* is an artful historical analysis of Indian country jurisdiction jurisprudence, which perhaps was an intentional summation to set the stage for Supreme Court review. Judge Matheson concluded the opinion in *Murphy* with a succinct recitation of the basis for the Court’s decision:

Apply *Solem*, we conclude Congress has not disestablished the Creek Reservation. Consequently, the crime in this case occurred in Indian country as defined in 18 U.S.C. § 1151(a). Because Mr. Murphy is an Indian and because the crime occurred in Indian country, the federal court has exclusive jurisdiction. Oklahoma lacked jurisdiction. *See* 18 U.S.C. §1153(a)... The decision whether to prosecute Mr. Murphy in federal court rests with the United States. Decisions about the borders of the Creek Reservation remain with Congress.^{lxviii}

Although Mr. Murphy was successful before the 10th Circuit, his fight is far from over. The State of Oklahoma is seeking an appeal from the United States Supreme Court, which has already draw *amici curiae* briefs from a variety of interested parties in Supreme Court docket number 17-1107. The perspectives on criminal jurisdiction concerning Indian country are far from settled in the United States and this term in the United States Supreme Court may determine the future of this complex issue for generations to come.

VI. Conclusion

The only certainty for the future of jurisdiction on Indian territory is uncertainty. In the civil context, the Court's split four to four last year in upholding the Fifth Circuit's determination in *Dolgencorp.*, indicates the future of jurisdiction on Indian land may rest in the hands of the newly minted Justice Gorsuch. A review of his jurisprudence in this area may forecast the future for the nation as a whole. Some may argue the first Justice from the Midwest in decades is the perfect jurist to determine the future course of jurisdiction upon Indian territory others may disagree.

In the criminal context, the Court's current holding prohibit a non-Indian from being prosecuted in tribal courts; however, as discussed above with the increased sophistication of tribal courts and Congress' authority to legislate tribal jurisdiction as delineated in *Lara*. Additionally, and potentially most important the *Murphy* decision originating in Oklahoma may determine the future of this two-hundred-year-old area of jurisprudence, making for an exciting term in the United States Supreme Court, if the Court grants certiorari.

ⁱ *U.S. v. Lara*, 541 U.S. 193 (2004)

ⁱⁱ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 at 209 (1978)

ⁱⁱⁱ *Johnson v. M'Intosh*, 21 U.S. 543 (1823)

^{iv} *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831)

^v *Worcester v. Georgia*, 31 U.S. 515 (1832)

^{vi} Thomas Johnson was appointed to the United States Supreme Court by President George Washington on October 31, 1791 and served until resignation in 1793.

^{vii} Kades, 148 U. Pa. L. Rev. at 1098, ("M'Intosh did not contest a single fact alleged in the complaint, jurisdictional or otherwise... Neither the district court nor the Supreme Court questioned any of these facts. Everyone involved, it seems, wanted a decision on the legal question of the validity of private purchase from the Native Americans.")

^{viii} *Johnson*, at 583

^{ix} *Johnson*, at 592

^x *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831)

^{xi} *Id.* At 39

^{xii} *Id.* at 10

^{xiii} *Worcester v. Georgia*, 31 U.S. 515 (1832)

^{xiv} *United States v. Kagama*, 118 U.S. 375 (1886)

^{xv} *Id.* At 460

^{xvi} *Coyle v. Oklahoma*, 221 U.S. 559 (1911)

^{xvii} *Id.* at 574

^{xviii} *United States v. Sandoval*, 231 U.S. 28 (1913)

^{xix} *Id.* at 46

^{xx} *Nevada v. Hicks*, 533 U.S. 353 (2001)

^{xxi} *Id.* at 361

^{xxii} *United States v. Lara*, 541 U.S. 193 (2004)

^{xxiii} *Id.* at 202

^{xxiv} *Montana v. United States*, 450 U.S. 544 (1981)

^{xxv} *Id.* at 556

^{xxvi} *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991)

^{xxvii} *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 888 F.2d 1303 (10th Cir. 1989)

^{xxviii} *United States v. John*, 437 U.S. 634, 648-649 (1978)

^{xxix} *Oklahoma Tax Com'n* at 512

^{xxx} *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008)

^{xxxi} *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 440 F. Supp. 2d 1070 (D.S.D. 2006)

^{xxxii} *Id.* at 1077-1078

^{xxxiii} *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 491 F.3d 878 (8th Cir. 2007)

^{xxxiv} *Id.* at 887

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- xxxv *Plains Comm. Bank*, 554 U.S. 316, 327 (2008)
- xxxvi *United States v. Wheeler*, 435 U.S. 313, 322 (1978)
- xxxvii *Hicks* at 392
- xxxviii *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 201 (1985)
- xxxix *Duro v. Reina*, 495 U.S. 676, 696-697 (1990)
- xl *Montana* at 565
- xli *Oliphant* at 209
- xlii 25 U.S.C. § 331 *et seq.* (as amended)
- xliii *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992)
- xliv *Atkinson Trading Company v. Joe Shirley, Jr.*, 532 U.S. 645, 655 (2001)
- xlvi *Plains Comm. Bank* at 335
- xlvi *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016)
- xlvi *Dolgencorp, Inc. and Dollar General Corp. v. The Mississippi Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014)
- xlvi *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)
- xlvi H.R.Rep. No. 474, 23d Cong., 1st Sess. 36 (1834)
- l *Kagama* at 381
- li *In re Mayfield*, 141 U.S. 107, 115-116 (1891)
- lii *Oliphant* at 212
- liii *United States v. Wheeler*, U.S. v. Wheeler, 435 U.S. 313, 322 (1978)
- liv *Duro v. Reina*, 495 U.S. 676, 679 (1990)
- lv *Duro* at 696
- lvi 25 U.S.C. §1301(2) *et seq.*
- lvii *United States v. Terry*, 400 F.3d 575, 579 (8th Cir. 2005)
- lviii *United States v. Weaselhead*, 156 F.3d 818 (8th Cir. 1998)
- lix *United States v. Weaselhead*, 165 F.3d 1209 (8th Cir. 1999)
- lx U.S. v. Enas, 204 F.3d 915 (9th Cir. 2000)
- lxi *United States v. Lara*, 541 U.S. 193 (2004)
- lxii *United States v. Lara*, 294 F.3d 1004 (8th Cir. 2002)
- lxiii *United States v. Lara*, 324 F.3d 635 (8th Cir. 2003)
- lxiv *Lara* at 207 (2004)
- lxv *Patrick Murphy v. Terry Royal Warden, Oklahoma State Penitentiary*, 866 F.3d 1164 (10th Cir. 2017)
- lxvi *Id.* at 1181
- lxvii *Murphy* at 1188 (emphasis added)
- lxviii *Id.* at 1233