

THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

FOREWORD

APPELLATE ISSUES IN AND AROUND INDIAN COUNTRY

The October 2019 Supreme Court Term was, like most other Supreme Court terms, packed with high-profile cases involving topics as wide-ranging as religious liberty, abortion, the Second Amendment, discrimination based on sexual orientation, and presidential immunity. Like the rest of the world, the Court's usual business was interrupted by the COVID-19 pandemic. After canceling several weeks of arguments in March and April 2020, the Supreme Court commenced telephonic oral arguments in May.¹

On May 9, 2020, the Court heard oral argument in *McGirt v. Oklahoma*.² The key issue in *McGirt* was whether a large portion of Eastern Oklahoma constituted the Muscogee (Creek) Reservation for purposes of federal criminal jurisdiction.³ Interestingly, the Court had heard oral argument on the same issue in November 2018 in *Sharp v. Murphy*. But instead of issuing a decision during the 2018 Term, the Court

1. SUPREME CT. OF THE U.S. OFF. OF THE CLERK, GUIDANCE CONCERNING CLERK'S OFFICE OPERATIONS, at 3 (Apr. 17, 2020), https://www.supremecourt.gov/announcements/COVID-19_Guidance_April_17.pdf.

2. 140 S. Ct. 2452 (2020).

3. *Id.* at 2459–60.

returned the case to the calendar for reargument.⁴ Justice Gorsuch, who participated in the *Murphy* case when he was on the Tenth Circuit, recused himself from the case.⁵

The Court's decision in *McGirt* was issued on the last day of the term. While most Court watchers were waiting to hear how the Court would resolve *Trump v. Vance*, I had my eyes on *McGirt*. And while my interest in the Court's decisions is usually academic, the *McGirt* case was personal. I am Muscogee (Creek).

In 1925, my grandmother was born in Bristow, Oklahoma, which is now properly recognized as part of the Muscogee (Creek) reservation. My Creek ancestors left our ancestral lands for the "Western Creek lands" of now-Oklahoma in the late 1820s, a few years before Trail of Tears. Nearly 100 years later, during the Dust Bowl, my grandmother's family left Oklahoma for California.

My interest in publishing a special issue on appellate issues in Indian country stems not just from my Native heritage. I was surprised by some of the reaction to the opinion. The Oklahoma Governor, Kevin Stitt, launched a "sky is falling" attack on the Court's ruling,⁶ as did the *Wall Street Journal*.⁷ Some of the criticism I heard was wildly uninformed. I recall hearing one person complain that tribal judges might be biased because they are elected. My response was to point to the numerous elected state judiciaries that somehow manage to operate without bias.

There are over five million Native Americans and Alaska Natives in the United States and 566 federally

4. Sharp v. Murphy, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/sharp-v-murphy/> (last visited Feb. 20, 2023).

5. Amy Howe, *Justices Grant Four New Cases*, SCOTUSBLOG (May 21, 2018, 11:55 AM), (<https://www.scotusblog.com/2018/05/justices-grant-four-new-cases/>).

6. See, e.g., D. Sean Rowley, *Stitt Knocks McGirt Ruling in State of State Address*, CHEROKEE PHOENIX (Feb. 8, 2022), https://www.cherokeephoenix.org/news/stitt-knocks-mcgirt-ruling-in-state-of-state-address/article_10a48ed4-88f3-11ec-93f3-7b1a41897ecc.html.

7. Derrick Beetso et al., *Oklahoma v. Castro-Huerta—Rebalancing Federal–State–Tribal Power*, *infra* p.53 n.26.

recognized tribes.⁸ Within these communities are approximately 400 tribal court systems.⁹ My hope is that this issue will demystify some of the legal issues facing Indian country and the operation of tribal court systems.

In the first article, Chief Justice Todd R. Matha of the Ho-Chunk Nation Supreme Court looks at the often-sporadic development of tribal precedent. He explains that given the limited appellate caseload of most tribal courts, it is important for courts to (1) review issues carefully and (2) not bypass opportunities to review past decisions.

The second article is the transcript of a panel discussion on the Supreme Court's recent ruling in *Oklahoma v. Castro-Huerta*.¹⁰ The panelists, all Native law professors, two of whom are now deans of law schools,¹¹ discuss the impact of *Castro-Huerta* on the field of Indian law generally and tribal sovereignty specifically.

Next, my colleague Professor Barbara Ann Atwood examines the challenges to the Indian Child Welfare Act (ICWA) that are currently pending before the Supreme Court. Professor Atwood carefully sets out the history of the challenges and urges the Court to look carefully at the justiciability issues in the case.

The last several terms have been banner years for religious liberties claims at the Supreme Court. But in the federal circuit courts Native claimants have not had as much success. Adèle Auxier Keim, senior counsel at the Becket Fund for Religious Liberty, uses the example

8. *American Indians and Alaska Natives—By the Numbers*, U.S. DEP'T OF HEALTH & HUM. SERVS., <https://www.acf.hhs.gov/ana/fact-sheet/american-indians-and-alaska-natives-numbers> (last visited Feb. 20, 2023).

9. *Tribal Court Systems*, BUREAU OF INDIAN AFFS., [https://www.bia.gov/CFRCourts/tribal-justice-support-directorate#:~:text=CFR%20Courts%20Menu%20List&text=There%20are%20approximately%20400%20Tribal,Tribal%20Priority%20Allocations%20\(TPA\)](https://www.bia.gov/CFRCourts/tribal-justice-support-directorate#:~:text=CFR%20Courts%20Menu%20List&text=There%20are%20approximately%20400%20Tribal,Tribal%20Priority%20Allocations%20(TPA)) (last visited Feb. 20, 2023).

10. 142 S. Ct. 2486 (2022).

11. While this issue was being finalized, Stacy Leeds was announced as the next dean of the Sandra Day O'Connor College of Law at Arizona State University. *Stacy Leeds Named as New Dean of ASU Law*, ARIZ. STATE UNIV. (Nov. 10, 2022), <https://news.asu.edu/20221110-university-news-stacy-leeds-named-new-dean-asu-law>.

of federal regulation of eagle feathers to explain how the recent Supreme Court cases have strengthened the Religious Freedom and Restoration Act's ability to protect Native religious freedom.

Professor Victoria Sutton's essay also examines Native religious freedom and the protection of sacred sites. She urges courts to adopt a new test, like the Supreme Court did to protect commercial speech, that better reflects the unique nature of Native religious freedom claims.

Finally, Professor Neoshia R. Roemer reviews *Reading American Indian Law: Foundational Principles*. This text, edited by Professors Grant Christensen and Melissa L. Tatum, highlights some of the most influential pieces of Native law scholarship over the past 50 years.

I hope that you enjoy this window into appellate issues in and around Indian country.

Mvto.¹²

TLD

Tucson, Arizona

February 1, 2023

P.S. It is fitting for this issue to share the land acknowledgment of the University of Arizona:

We respectfully acknowledge the University of Arizona is on the land and territories of Indigenous peoples. Today, Arizona is home to 22 federally recognized tribes, with Tucson being home to the O'odham and the Yaqui. Committed to diversity and inclusion, the University strives to build sustainable relationships with sovereign Native Nations and Indigenous communities through education offerings, partnerships, and community service.¹³

12. Thank you.

13. *University Land Acknowledgement Statement*, UNIV. OF ARIZ., <https://www.as.arizona.edu/university-land-acknowledgement-statement> (last visited Feb. 20, 2023).