

Resolving the Jurisdictional Issues between the State of Oklahoma and the “Five Civilized Tribes” Through A State/Sovereign Nation Compact

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Abstract

*The decision of the United States Supreme Court in *McGirt v. Oklahoma* (2020) raises several important questions relating to determining jurisdiction required to try certain criminal offenses for crimes committed on Indian lands by both Native Americans and non-Native Americans. This article considers these questions and proposes a possible solution through the creation of a State and Sovereign Nation Compact to resolve jurisdiction questions.*

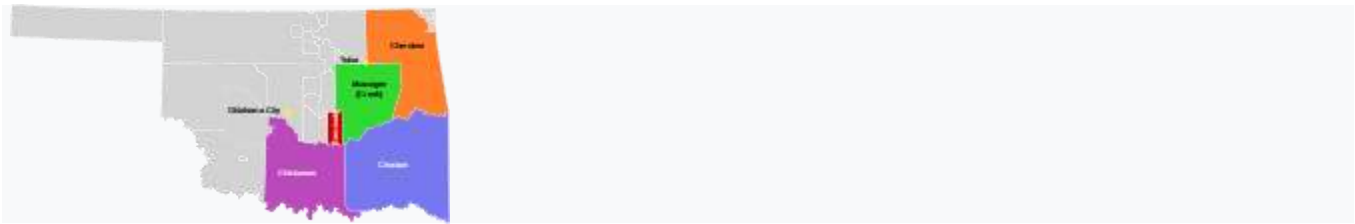
Key Words: Native Americans, jurisdiction, “Five Civilized Tribes,” compacting, *McGirt v. Oklahoma*

1. Introduction

Section 1153 of Title 18 of the *Major Crimes Act* (United States Department of Justice, 2021) grants jurisdiction to federal courts, exclusive of the states, over Native Americans who commit any of the listed offenses, regardless of whether the victim is a Native American or non-Native American (see *United States v. John*, 1978). *McGirt v. Oklahoma* (2020) is a decision of the United States Supreme Court in which the Court ruled that in relation to the *Major Crimes Act*, much of the eastern part of Oklahoma remains as Native American lands of the prior Indian reservations of the Five Civilized Tribes (Foreman, 1989), which were never disestablished by Congress as part of the *Oklahoma Enabling Act of 1906*.

Since the Department of Justice notes that “It remains an open question whether federal jurisdiction is exclusive of tribal jurisdiction” (*Duro v. Reina*, 1990), as a result, prosecution of crimes allegedly committed by Native Americans on these lands falls under the jurisdiction of the Indian tribal courts and the federal judiciary, rather than the state courts of Oklahoma. Miller and Dolan (2021, p. 2) posit that “*McGirt* is probably the most significant Indian law case in well over one hundred years, and it will have serious repercussions for the Muscogee (Creek) Nation, Oklahoma, the United States, and other Indian nations located in that state and nationwide.”

The decision in *McGirt* was related to another U.S. Supreme Court case, *Sharp v. Murphy* (2020), heard in the Court’s 2018–19 term, essentially raising the same jurisdictional question, but which was believed to be deadlocked on a 4 to 4 vote due to Justice Neil Gorsuch’s earlier recusal (see Faz, 2020). Justice Gorsuch had recused himself because he had exercised prior judicial oversight in *Sharp*, having been a member of the Tenth Circuit Court of Appeals that heard the case. *Sharp* was decided *per curiam* alongside *McGirt* in 2020.



“The Five Civilized Tribes”

1.1. Background

Prior to attaining statehood in 1907, about half of the land in the eastern part of Oklahoma, including the Tulsa metro area today, belonged to the Five Civilized Tribes, comprised of the Cherokee, Choctaw, Chickasaw, Creek, and Seminole tribal nations (see Dippel, Frye, & Leonard, 2020). Several decades of warfare and conflict during the 19th century over these lands had taken place between Native Americans and the United States. Much of the tension which led to the protracted conflicts was caused by the efforts of “White Americans to civilize Native Americans,” unfortunately termed by many as “savages” (Ross, 1998). Recurring conflicts led to what is now known as the “Trail of Tears,” more formally known as the “Southern Removal,” a migration of over 1,000 miles between 1830-1850 by approximately 60,000 Native Americans that the U.S. government forced the Native Americans to undertake (see Nelson, 2018). [See Table 1]

Table 1- Statistics

Southern removals							
Nation	Population before removal	Treaty and year	Major emigration	Total removed	Number remaining	Deaths during removal	Deaths from warfare
Choctaw	19,554 + white citizens of the Choctaw Nation + 500 Black slaves	Dancing Rabbit Creek (1830)	1831–1836	15,000	5,000–6,000	2,000–4,000+ (cholera)	None
Creek (Muscogee)	22,700 + 900 Black slaves	Cusseta (1832)	1834–1837	19,600	Several hundred	3,500 (disease after removal)	Unknown (Creek War of 1836)
Chickasaw	4,914 + 1,156 Black slaves	Pontotoc Creek (1832)	1837–1847	over 4,000	Several hundred	500–800	None
Cherokee	16,542 + 201 married white + 1,592 Black slaves	New Echota (1835)	1836–1838	16,000 ¹	1,500	2,000–4,000	None
Seminole	3,700–5,000 + fugitive slaves	Payne's Landing (1832)	1832–1842	2,833–4,000	250 ¹ –500		700 (Second Seminole War)

The Oklahoma Historical Society (2021) reported that “The Dawes Severalty Act (the General Allotment Act) of 1887 ushered in the allotment era. Drafted by U.S. Sen. Henry L. Dawes of Massachusetts, the act did not pertain to the Five Tribes.” On November 1, 1893, retired Senator Henry Dawes was appointed to head a three-member commission to the Five Tribes to negotiate agreements with the leaders of the Cherokee, Choctaw, Chickasaw, Creek, and Seminole (see Carter, 1999). The purpose of the Commission was to end tribal land ownership and give each of the Five Tribes individual possession of a portion of the tribal lands.

From 1894 to 1896, the Commission had no success convincing tribal leaders to accept the federal government's allotment policy. By 1896, this inaction led to passage of the first in a series of laws that increased the commission's powers and "changed its character from a diplomatic mission to a judicial tribunal that decided who was eligible for tribal membership and what land they received" (Oklahoma Historical Society, 2021).

Under powers granted to it by the *Curtis Act of 1898*, the commission processed enrollment applications from more than 250,000 individuals and approved the applications for tribal membership of more than 101,000 whose names were placed on the "final rolls of the Five Civilized Tribes" (see Spruhan, 2018). In 1906, the United States Congress enacted the *Oklahoma Enabling Act*, which had been passed in order to disestablish the reservations, providing the pathway for Oklahoma's statehood (see Campbell, 1984). The former reservation lands, comprising those of the Five Civilized Tribes, as well as the other tribes in the state, were allocated into areas by tribe that were then given governing rights to adjudicate internal matters for Native Americans within their geographical boundaries. In other cases, the state of Oklahoma retained jurisdiction over non-Native Americans for all other purposes, including civil matters.

The enrollment process was officially closed as of March 4, 1907, and the final rolls have remained the definitive source on eligibility for each tribe's membership (see *United States v. Prentiss*, 2001).

In terms of allotment of lands, the commission surveyed and appraised the *19,525,966 acres of tribal land*. The individuals enrolled in the "final rolls of the Civilized Tribes" were allotted *15,794,000 acres*, with individual allotment sizes based on the appraised value. Some of the individuals eligible for land allotment received cash rather than land. Interestingly, the rules governing both the enrollment and allotment processes were unique to each of the five tribes and were memorialized in agreements negotiated between 1897 and 1902. These agreements were subsequently ratified by both Congress and the tribes. Many of the enrollees laid claim to the same lands, and the commission was required to rule on 10,952 contested allotments (see *United States v. Prentiss*, 2001).

2. A Prelude

In *Sharp v. Murphy* (2020), Patrick Murphy, a citizen of the Muscogee-Creek Nation, was charged with committing murder. Murphy was subsequently tried by the state courts and found guilty (see Crawford, 2019). Murphy argued that the language of the *Oklahoma Enabling Act* did not specify that the Native American reservations were disestablished, and because he had committed the murder within the Muscogee reservation territory, that his crime was subject to tribal and federal jurisdiction and not that of the state under the *Major Crimes Act*.

After a series of appeals, the Tenth Circuit Court of Appeals in 2017 found in favor of Murphy and held that indeed the *Enabling Act* had fail to disestablish the Indian territories, and thus Murphy should have been prosecuted by a federal or tribal court and not by the state courts of Oklahoma. Judge Neil Gorsuch was a member of the Tenth Circuit panel at the time that had considered Murphy's appeal. Oklahoma petitioned to the Supreme Court in 2018, which agreed to grant *certiorari* and hear the case. However, by that time Judge Gorsuch had become Justice Gorsuch and had been elevated to the United States Supreme Court (Keen, 2017). As a result, he recused himself from further consideration of the case. Because only eight out of nine Justices on the Supreme Court heard the case, it remained unresolved at the end of the 2018–2019 term. The Court announced plans to hold another hearing on the case in the 2019–20 term, but had not set a firm date for the hearing. Court observers surmised that the Supreme Court had been deadlocked 4-4 in its determination.

3. Facts of the McGirt Case

Jimcy McGirt was an enrolled member of the Seminole Indian tribe. In 1991, McGirt was discharged from prison. McGirt married another member of the tribe at Broken Arrow, who was 10 years his senior. McGirt's wife had a granddaughter, whom McGirt allegedly would sexually abuse and sodomize on a regular basis when she was just four years old. Evidence indicated that McGirt had threatened the girl in order to keep her silent. Nonetheless, McGirt was arrested on November 4, 1996 after turning himself in on an outstanding warrant. The trial court set bail at \$25,000, and McGirt was released from jail in January of 1997 after posting bond. McGirt was subsequently returned to jail in May of 1997 after violating the conditions of his release, and new bail was set at \$50,000. In June of 1997, McGirt was tried and found guilty in a state court in Oklahoma and was sentenced to life in prison without the possibility of parole, plus two consecutive 500-year sentences.

The case reached the United States Supreme Court on appeal. *McGirt* claimed that the state lacked jurisdiction to prosecute him because he was an American Indian and the crime with which he was charged occurred within the Muscogee Nation reservation.

Procedurally, *McGirt* was unique in that the Supreme Court had opted to use teleconferencing for oral arguments for the first time in the court's history due to the COVID-19 pandemic. The oral arguments for *McGirt* were heard on May 11, 2020. The record indicated that several of the justices had raised concerns how a ruling in favor of *McGirt* would impact not only on prisoners within the state penal system who had been convicted in state prosecutions, but also how the federal courts would be required to adjudicate approximately the 8,000 felonies that occur annually on tribal lands. Concerns were also voiced relating to the potential impact on civil matters that would fall under tribal regulation rather than the laws of Oklahoma. During the oral arguments, attention was naturally focused on the views of Justice Gorsuch, who appeared to cast doubt on Oklahoma's argument that the lands had been disestablished. Justice Sonia Sotomayor, while agreeing that the reservations were never formally disestablished, also noted however that Congress would be able to remedy the situation with legislation in order to settle the jurisdictional question.

4. The Decision

The Court issued its decision on *McGirt* as well as the *per curiam* decision on *Sharp* on July 9, 2020. Not unsurprisingly, the 5–4 majority opinion was authored by Justice Neil Gorsuch, who was joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan—generally considered to be part of the Court's liberal wing. In its majority opinion, the Court held that for purposes of the *Major Crimes Act*, Congress had indeed failed to disestablish the Indian reservations. Justice Gorsuch wrote, "Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word." Gorsuch further stated that disestablishment was a power only Congress could exercise, as the Court had previously affirmed in the landmark case of *Lone Wolf v. Hitchcock* (1903) (see Singer, 2002; Cobb, 2021).

Chief Justice John Roberts wrote a dissenting opinion, in which he was joined by Justices Samuel Alito and Brett Kavanaugh, as well as in part by Clarence Thomas. Roberts wrote that the majority decision "creates significant uncertainty for the State's continuing authority over any area that touches Indian affairs, ranging from zoning and taxation to family and environmental law." Justice Roberts emphasized that the Dawes Commission had in fact established these lands for natives with the intention to eliminate the reservations. However, the Creek refused to give up their land at the time these attempts were made.

The United States Supreme Court reversed *McGirt*'s criminal conviction that had been obtained in the Oklahoma criminal court and ordered a retrial by a federal court. The retrial was scheduled for October 6th, 2020 in Muskogee federal court. *McGirt* remained in jail until his federal trial, which did not occur until November 5, 2020. In the retrial, *McGirt*'s alleged victim was able to offer her account of the incidents. Now 28 years old, she admitted that while she had some difficulty recalling the events when she was merely four years old, she could now testify about the parts she could remember. *McGirt* was found guilty on three counts of aggravated sexual abuse and sexual contact in November 2020. On August 25, 2021, *McGirt* was sentenced to life in prison without the possibility of parole, though he may be eligible for "compassionate release" on June 1, 2027, under provisions of federal law.

5. Impact

The decision by the Supreme Court was seen as significant for Native American rights (see. e.g., Crawford, 2019; Merreffield, 2021; Farrell, 2021; Landau, 2021). Quoting District Court Judge Stacy Leeds, Merreffield (2021) notes: "When *McGirt* was decided there was shock among all the state actors, and of course relief and celebration for the tribes impacted. That of course was tempered with shock in the Indian law community that the plain language of the law had finally been applied to get the result for the Five Tribes in Oklahoma." Farrell (2021, p. 737) stated: "The Supreme Court's decision in *McGirt v. Oklahoma* could lead nearly half of the state of Oklahoma to be classified as indigenous land and change the way federal jurisdiction operates in the United States."

Justice Gorsuch's opinion acknowledged that many of the promises that Congress had made to Native Americans had gone unfulfilled. Gorsuch summarized these promises as: "Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye."

The decision of the United States Supreme directly impacts Native American tribal members who had been convicted in state courts for crimes committed on reservation lands, as well as for any future descendants of Native American tribal members who may henceforth be arrested for similar crimes under the Major Crimes Acts. Their prosecution would become a matter for adjudication by federal or tribal courts and not those of the state of Oklahoma. At the time of the Supreme Court's decision, about 1,900 prisoners in the Oklahoma penal system met these conditions; however, only around 10% would qualify for rehearings to transfer their cases to the federal system, as the alleged crimes still fell within the statute of limitations.

The majority opinion, however, raised concerns relating to territorial rights that may arise in the future, which the Court interestingly assigned to the state and the tribes to resolve "amicably" should any conflicts occur. Chief Justice Roberts had cautioned in his dissenting opinion that this decision could potentially extend to such issues as taxation, adoption, and environmental regulations ordinarily reserved for adjudication in state courts. Lawyers for the tribal groups countered that the decision was narrow and affected only Native American descendants within the tribal lands. The state and the five tribes appeared to be more conciliatory and issued a joint statement after the decision was handed down, stating: "The nations and the state are committed to implementing a framework of shared jurisdiction that will preserve sovereign interests and rights to self-government while affirming jurisdictional understandings, procedures, laws, and regulations that support public safety, our economy, and private property rights. We will continue our work, confident that we can accomplish more together than any of us could alone" (see Wolf & Johnson, 2020).

The next steps in the saga would soon follow!

6. Reaction

Following the McGirt decision, convictions of several tribal members who had been tried in Oklahoma state courts were vacated and new trials were held in the federal court system. A further complication arose with the March 2021 decision of the Oklahoma Supreme Court in the case of Shaun Bosse, a non-tribal member who had been charged with the murder of a Chickasaw family member on tribal lands (see *Bosse v. State*, 2021). The Oklahoma Supreme Court ruled that under McGirt, Bosse must now be tried under federal law, since the victims were Native Americans (Andone, 2021). The Court concluded: "Absent any law, compact, or treaty allowing for jurisdiction in state, federal or tribal courts, federal and tribal governments have jurisdiction over crimes committed by or against Indians in Indian Country, and state jurisdiction over those crimes is preempted by federal law. The State of Oklahoma does not have concurrent jurisdiction to prosecute Petitioner."

Reaction by state authorities was swift and pointed. Oklahoma governor Kevin Stitt stated in April 2021 that he considered the U.S. Supreme Court's decision to have created a threat to public safety, since thousands of convicted criminals may now have their convictions vacated due to the Bosse and McGirt cases. Native American tribes countered that the governor was overestimating the impact of McGirt and urged the state to cooperate with the tribes to manage these cases, performing initial prosecution in their own tribal courts, before pursuing any federal options.

Oklahoma's Attorney General Michael J. Hunter filed an emergency appeal with the U.S. Supreme Court in Bosse, requesting the Court to intervene and reconsider their earlier decision in McGirt. Some observers posit that because the composition of the Court had changed with the addition of Justice Coney Barret to the Court upon the death of Justice Ginsberg, the Supreme Court now granted the state's appeal on May 26, 2021, allowing the state to retain custody of Bosse pending review of the state's petition.

In October of 2021, partially in reaction to a criminal case involving Victor Manuel Castro-Huerta, a non-Indian who victimized a five-year old Indian child who has cerebral palsy and is legally blind (Carter, 2021), the cities of Tulsa and Owasso Oklahoma joined in the suit filed by the state, claiming that the decision in McGirt actually damaged the position of the Native American Tribes, asserting that McGirt had "reduced American Indian crime victims to 'second-class status'" (quoted in Killman, 2021, p. 3). The states of Texas, Kansas, Louisiana, and Nebraska also filed amicus briefs in the matter "seeking to grant Oklahoma criminal jurisdiction over non-American Indians who commit crimes in Indian Country" (Killman, 2021, p. A3).

The amicus curiae or “friend of the court” brief noted:

“McGirt has had – and continues to have—harmful consequences. [No other decision by the Supreme Court has had a] more immediate and destabilizing effect on life in an American State than *McGirt v. Oklahoma*.... The tragic consequences is that some crimes are going unprosecuted, with a significant share committed by non-Indians against Indians.”

Are cases going actually without prosecution? State and federal prosecutors differ sharply in their assessments. As a matter of fact, the city of Tulsa alone claimed that it had referred 1,156 cases for prosecution to the Muscogee and Cherokee nations; “Yet these tribes have not issued a single subpoena asking a Tulsa police officer to testify in a single criminal case” (see Killman, 2021, p. 3).

The U.S. Attorney’s Office, however, offered a different view, noting that federal prosecutors reviewed almost 3,000 cases, opened 900 cases, and have filed 450 indictments in relation to the Supreme Court’s ruling in *McGirt*. In addition, U.S. prosecutors referred 1,900 cases to the Cherokee or Muscogee Nations for their adjudication.

Interestingly, Principal Chief Chuck Hoskin, Jr., of the Cherokee Nation, also rejected claims that *McGirt* had “upended criminal jurisprudence in Oklahoma.” Hoskins noted: “Since the Supreme Court’s decision, the Cherokee Nation and other tribes have worked hard to expand our justice systems and to closely coordinate with all partners to ensure we are supporting victims and prosecuting crimes” (reported in Killman, 2021, p. 3).

Is there a possible solution? Did Justice Sotomayor provide an insight into a pathway forward?

7. Federal-state Compacting Relating to Criminal Jurisdiction

Hedden-Nicely and Leads (2021, p. 304) provide a proper context to the discussion. In quoting from Cohen’s *Handbook of Federal Indian Law* (Cohen, 2012) they note “From its inception, the “whole course of judicial decision on the nature of Indian tribal power is marked by adherence to three underlying fundamental principles.” Those foundation principles provide that:

“(1) [A]n Indian tribe possesses, in the first instance, all the inherent powers of any sovereign state; (2) a tribe’s presence within the territorial boundaries of the United States subjects the tribe to federal legislative power and precludes the exercise of external powers of sovereignty of the tribe . . . but does not by itself affect the internal sovereignty of the tribe; and (3) inherent tribal powers are subject to qualification by treaties and by express legislation of Congress, but except as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.” (Cohen, 2012).

An interstate compact may be viewed as a mechanism for states and the federal government to work cooperatively to avoid an exclusively federally mandated solution to an issue such as jurisdiction (see Blumstein & Cheeseman, 2019). Under certain circumstances, the federal government has encouraged states to pursue an interstate compact in order to address a specific issue such as that presented in *McGirt*. Applying this principle in the context of the “Five Civilized Tribes,” acting as sovereign nations analogous to the states, would allow for the formation of a compact, while simultaneously ensuring that Congress has significant influence over the process (see generally Litwak & Mayer, 2020).

deGolian (2014) cites a generalized model that may suggest a way forward. By creating a compact to deal with jurisdictional issues, representatives from the “Five Civilized Tribes” would serve on the compact’s commission and would be responsible for passing rules, appointing committees, electing commission leadership and passing bylaws. A representative from the Department of Justice would “serve on the commission, attend commission meetings, serve on committees, assist with training and outreach, and generally serve as a resource for the compact commission and its staff” (deGolian, 2014). DeGolian (2014) cites an example of a possible path forward in the participation of the District of Columbia in interstate compacts. With congressional approval, the District of Columbia is a member of 17 different interstate compacts, including several 50-state compacts employed for various purposes.

Congressional consent is the most direct way the federal government can influence the compacting process (see Finkel, 2019).

Article 1, Clause 10, Section 3 of the Constitution, which is often referred to as the Compact Clause, reads as follows: “No state shall, without the consent of Congress ... enter into any agreement or compact with another state.” The Compact Clause is said to have been included in the Constitution to protect the “dual-sovereignty nature” of our system, while simultaneously granting states [or, in this case, the “Five Civilized Tribes”] the ability to cooperatively resolve problems so as not to “alter the balance of power between the states and the federal government” (deGolian, 2014).

In *Virginia v. Tennessee* (1983), the United States Supreme Court ruled that two types of compacts require Congressional consent:

- Compacts that alter the balance of power between the states and the federal governments; and
- Compacts that intrude on a power traditionally reserved for Congress (see Broun, Buenger, McCabe, & Masters (2006).

If a proposed compact does not touch on either of these two areas, the federal government does not have a direct interest in the compact and, therefore, congressional consent is not required. In modifying the terms of the Major Crimes Act, however, congressional consent would be required in seeking such a cooperative arrangement. Congressional consent may be granted in one of three ways (de Golian, 2014):

7.1. Explicit

In these instances a compact is submitted for congressional consent only after it has been signed into law by the minimum number of states (in this case, representatives of the “Five Civilized Tribes”) required to make the compact effective. Congress would then review, amend, and potentially revise the agreement if necessary. In this way, Congress retains the right to make a clear determination about the validity and legality of a specific compact.

7.2. Pre-emptive

From time to time, Congress may be called upon to provide advanced consent to any compact. In these instances, states (the “Five Civilized Tribes”) would be encouraged by Congress to enter into a compact that addresses a very specific purpose in order to resolve the jurisdictional question. Pre-emption would normally be accomplished through the exercise of the legislative process.

7.3. By Implication

In the case of implication, consent is simply inferred by Congress demonstrating acquiescence with the terms of a given compact entered into by the “Five Civilized Tribes.” Acquiescence is most often inferred when Congress adopts subsequent legislation in relation to the Major Crimes Act that is consistent with the new compact.

Should Congress consider a compact, it has the authority to either withhold consent or amend the agreement. If Congress fails to give its consent, the compact would not come into effect. Should Congress choose to modify the terms of the agreement, the compact would be returned to the member states for additional consideration or clarification (see Litwak & Mayer, 2021).

In the event where Congress provides consent under one of the theories discussed above, the new compact would now be “elevated” to the status of federal law, “transform[ing] the States’ agreement into federal law under the Compact Clause” (see *Cuyler v. Adams*, 1981).

8. Analogizing to the Compact Model

A possible solution and potential compromise might lie in a thoughtful use of the compact model where as a first step, the “Five Civilized Tribes” would create an agreement or compact relating to aspects of the controversy. For example, an agreement could be reached to:

- Permit federal courts to exercise jurisdiction in cases where a non-tribal member is the defendant or where the non-tribal member is the alleged victim of crime committed on tribal lands;
- However, clarifying the position of the United States Department of Justice, limit federal jurisdiction to serious felonies only—such as murder, arson, etc.;
- Permit state prosecutions where the victim or the defendant is a non-tribal member in all other felony matters;

- Continue to recognize tribal jurisdiction in all cases where the defendant or the alleged victim is a tribal member or for actions involving non-felony, misdemeanor actions;
- Monitor referral actions by the tribal courts to assure reasonably swift adjudication of crimes and misdemeanors;
- Should there not be a referral or other appropriate action by tribal courts within a 180 day period, prosecution would automatically revert to federal courts (serious felonies) and state courts (non-serious felony misdemeanor cases);
- Seek Congressional authorization for approval of the compact;
- Entertain exceptions in extenuating circumstances.

The compact model is just one possible pathway to resolving the thorny jurisdictional questions and would, at the same time, preserve the unique positions of federal, state, and tribal courts to resolve core matters of concern to them. Of course, the United States Supreme Court will have the opportunity to once again weigh in on the controversy when it decides whether or not to uphold or to overrule its decision in *McGirt v. Oklahoma* in the not-too-distant future. Justice Coney Barrett may prove central in this process just as Justice Gorsuch filled this role in *McGirt*.

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