

## oklahoma

LINDSAY ROBERTSON: This is really fun. I love coming back here. I was a deliriously happy law student here, as you guys are. At least, that's how I choose to remember it. I'm sure there were times when that was not entirely true. But I did make my best friends for life as a law student here. And I hope that you guys are doing the same thing. I didn't take Indian law as a law student.

I didn't take any Indian law courses after law school. Some of you may have heard, I talked earlier today, about becoming an Indian lawyer. My story is ridiculous and embarrassing. I was drafted to be an Indian lawyer by a small firm in the District of Columbia, who had some clients they wanted to retain, understandably, after a former partner had left. And so, became an Indian lawyer sort of as a matter of necessity. And did some really interesting and exciting stuff.

I participated in the filing of a major land claim against much of the-- a number of the counties in upstate New York and the Power Authority of the State of New York, on behalf of the Akwesasne Mohawk tribe, back in the late 1980s. And represented tribal governments in all sorts of areas, including economic development. Returned to Charlottesville in 1990 to finish the PhD course in history that I had started as a law student in the joint degree program, that some of you may be in. And if you're not, you should look into it, because it's a great program.

And in the course of completing my PhD studies, was invited by the dean, at the time that I was a law student, Dick Merrill, to teach Indian law with him, since I had been practicing. He wanted to teach Indian law and didn't really have much background in it. And so, Dick and I taught Indian law together for seven years, which was fantastic, and inspirational, and decided me that loved practicing law, but I really loved being a law professor.

And so I hit the job market in 1997, and straight out landed my dream job, which was to run the Indian law program at the University of Oklahoma College of Law, which is the heartland, the native heartland in North America. 39 federally recognized tribes, including many that you all have heard of-- the Cherokee Nation, the Choctaw Nation, Chickasaw, Seminoles, and others, including the Cheyenne and Arapaho, for whom I've had the honor to serve for many years as a Supreme Court Justice.

But none of those are the things I'm going to talk about. I'm going to talk instead about the McGirt case. And the status of Muskogee Creek Nation reservation land in Oklahoma and what might come.

The McGirt case, it's the modern, sort of the latest version of the case that the Supreme Court heard oral argument in and decided to punt on a year ago, called Sharp vs Murphy. Who's heard of this? Anybody? Some of you. Oh, good, all of you. All right, well, then let's flip to part two. Any questions? No. OK, well I guess I'll tell you a little bit, things that you might not know.

Well, you'll know the removal story, most of you, but some of you may not. The Muskogee Creek Nation, the Cherokees, Chickasaws, Choctaws, and Seminoles were all what we used to call the five civilized tribes of the Southeast, now the five nations. There were all-- these were

the tribes principally targeted by the Andrew Jackson administration for expulsion, or more kindly, and I suppose legally correctly, for land swaps.

The Indian Removal Act of 1830 basically offered these tribes the opportunity to exchange their lands in the Southeastern United States for lands in what would become informally known as the Indian Territory, which is where we live, out west there, in sort of ghostly form. There's a long story behind that.

What the state of Georgia had done, in order to kind of start this process, and then Alabama and Mississippi followed, was to pass a law in 1829, saying from this date forward, June 1st, 1830 forward, you guys are welcome to stay here, you Cherokees, as long as you want, but you're going to be subject to Georgia law. Your government, and institutions, and laws are going to be invalidated. And we're going to attach you to four Georgia counties. And then you're welcome to hang out.

They did this on the basis of Georgia's claim that Georgia was the owner of the land underlying the Cherokee Nation's reservation. This was an application that Georgia was trying to make of an earlier Supreme Court decision, called *Johnson vs M'Intosh*, that some of you will remember from property law, in which Chief Justice Marshall, for all the wrong reasons, decided to create a doctrine we call the Discovery Doctrine, that said what Georgia was saying, that upon discovery of the New World, the discovering European sovereigns acquired instantaneously and magically ownership of the underlying fee title to all discovered lands. The tribes retaining an occupancy right, undefined, but an occupancy right, as it was called, which was alienable, could be sold or given away, but only to the same discovering sovereign.

And so, what Georgia decided in 1827 was, they had been trying to get the federal government to kick the Cherokees out for years. The feds had promised to in 1802, when they accepted Georgia's session of its bold English charter Western land claims, which became the state of Mississippi and the state of Alabama. And the feds just hadn't done it. And it was primarily because the Cherokees weren't really interested in leaving, or selling their lands, or anything.

So, Georgia, around the time Andrew Jackson got elected, figured we're going to have to do something on our own. And what they decided to do was to take this *Johnson M'Intosh* discovery rule, and say, wait a minute, we're the owners of the underlying fee title. We declared independence and won independence from England, so we inherited their interest in these lands. What do you call it, Governor Troop of Georgia presumably said to himself, when you own the land or a building and somebody else has the right to occupy it? Aha, we're their landlord, right? They're our tenants.

And none of you will have been in this position, but if you're ever a tenant who becomes an undesirable tenant, like your landlord's like, gees, can't we get rid of this guy? Not that I know what that's like, but I was a student, and so I can imagine. What do you do? Well, the answer for Georgia was, let's change the terms of the lease. And the way they changed the terms of the lease was, you can stay, we can't kick you out and won't, but from now on you're going to be subject to Georgia laws. Your laws are abolished and you're part of four Georgia counties.

The Cherokee Nation reacted, as might have been predicted. They said, no. Hired a lawyer, filed suit, went to the Supreme Court twice in the cases of Cherokee Nation vs Georgia in 1831 and Worcester vs Georgia in 1832. And won in the latter case a ruling from the court that said Georgia has no power to impose its laws on you under a couple theories. One is that that discovery doctrine from Johnson is wrong. We've changed our mind. That's a re-decision that won't stick.

But it ends up not mattering to Cherokee Nation, because the Jackson administration is determined to get these guys out. The Choctaws and Chickasaws had already signed removal agreements by the time they started really putting extra pressure on the Cherokees. The Seminoles, some signed, but they kind of held out for a long time. And there'll Seminole wars in Florida until 1842, resisting removal.

The Cherokees will finally go in 1838 as a result, I believe, of coming changes in Supreme Court composition. You know, Jackson was getting more and more appointments as people died and resigned. And I think the Cherokees saw the writing on the wall. And so a faction of Cherokees illegally signed a removal treaty and agreed to go west. But we're not talking about the Cherokees today. We're talking about the Creeks. And the Creeks by this time had already agreed to get out from under Alabama's thumb by signing a removal treaty too.

And then all of these groups marched west, some by boat, for parts of it. The Seminoles-- and you can see on this map, the various migration routes, forced migration routes, that we call the various Trails of Tears, which is a phrase that all of you will have heard. And you can see the Creeks sort of moved out over land. That's this little orange bits. And they all end up out west.

Now, the map that's now Oklahoma, that you see here, in removal, that's where they originally landed. Cherokees and lands running all the way to the western border. Chickasaws and Choctaws were actually initially combined into one giant reservation, but they didn't get along too well. So in the 1850s, they split apart, Choctaws on one side and Chickasaws on the other. The Chickasaws were outnumbered by the Choctaws, and that's part of the reason.

And then the Creeks and Seminoles, who were really closely attached to each other, had a lot of land in the middle, including the land where we live, and where the University of Oklahoma is, in Norman, on the north side of that river there, which is the Canadian River. And that's how things stood until the Civil War.

The Civil War comes and the tribes, all five of them, end up signing treaties of alliance with the Confederates, for a variety of reasons that we can talk about. One was, it was the only way they thought they could defend themselves against Texans. Any Texans in here? OK, all right, good. There we go. I'm supposed to say that as an Oklahoman. When you become a citizen and register, they make you say things like that.

So, what happened after the Civil War is, all of these treaties-- these were the most recent treaties with the tribes. The removal treaties get renegotiated in 1866. And we have a new family of treaties we call, collectively, the Treaties of Washington, Washington, DC, of 1866. And in those treaties, the thing of greatest consequence for our purposes today is the tribes lose the entire

western half of Oklahoma. It gets carved off. And other tribes from other parts of the country will be moved in.

So, the Apache are going to come up from Arizona. The Comanches are going to be removed. The Cheyennes and Arapahos come down from Colorado-- and they're the group that I work for now-- and loads of other tribes. I don't have a map to show you that, but trust me. And then there's a little bit in the middle. Eventually, I think the fed's just got exhausted moving Indians around. And so, there was a large bit in the middle, by 1889, that was called the unassigned lands. It hadn't yet been assigned to other tribes.

And the Congress decided what the heck, let's just give it to whoever wants it. And that's the Oklahoma land run, that some of you may have heard about, where they lined folks up on the north and south of the unassigned lands, fired a gun, everybody ran in and planted stakes and stuff. The movie *Far and Away* with Tom Cruise has a great representation of the land run at the end.

And what you may not know is that Ron Howard is an Okie. And his family were land runners. And his dad actually is in the scene. His son told him, do not do this. It's too dangerous. And apparently, Ron Howard's dad snuck out and actually is running. And you can sort of see him go, if you know where to look, I'm told. But in any event, that's the land run.

So the central part of Oklahoma now is in that area. And I can show you a little bit, this is a slightly more modern map. You see where Oklahoma City is. And then the county, that looks like a triangle to the south of that, is where we live. That's Cleveland County where Norman and the University of Oklahoma are. OK, so that's the Civil War.

What happens after that, again, out west, is that by the late 1880s-- and this is laying the groundwork for the case that we're going to talk about-- the federal government decides, for a variety of reasons, including access to land for non-Indians, to help the tribes advance up the ladder of civilization by breaking up communally held reservations, which is what all of these were, and turning them into individual farms and ranches. And the name of this policy is the Allotment policy.

And the way it's supposed to work is this. 1887 Congress passes the General Allotment Act, which directs the executive, which is to say the Department of the Interior, Bureau of Indian Affairs, to go out and find some tribes and say, all right, you guys, you're up for allotment. And the way we're going to do that is this. You've got all this land out here that you own collectively. First, we're going to survey it and carve it up into squares. And there'll be either-- this was common-- 80 acre farms, or if the land's no good for farming, a 160 acre ranch where you can put cattle or whatever you want. So we'll have this big map at the end.

Then we're going to conduct a census. And you guys are all going to come down to the office here. And we're going to take your name down if you're a citizen of the tribe. And so, we'll compile a massive list of you guys. And then step three, we'll do first come, first serve. We'll have the giant map, and you all line up, and the first one comes in. Its per capita distribution, so

dad, you pick which square you want of 160 or 80 acres. Mom does the same thing. The kids each get-- grandma gets one. The baby gets a square.

So, everybody who's in the family, everybody who appears on that census, which is a roll of tribal citizens, gets to pick a share. And then, assuming, as was commonly the case, there's land left over, one of two things would happen. Either the federal government would buy it and give the tribe a fixed amount of money for it, or the federal government would sell it for the tribe. Then that's what commonly happened if they weren't sure the land was really all that valuable. It was valuable, they'd buy it. But if they weren't really sure, then they would say, well, we'll be your real estate agent, and we'll sell it for you. And then some of those lands will be sold and some will not be sold.

Now, the confusion that this created given that tribes did not then immediately disappear, which I think is what the feds expected would happen-- as they all became individual farmers, they'd give up on all this tribal stuff. They didn't do that. It didn't happen. So the confusion could have been predicted had they understood that the tribes weren't really interested in going anywhere.

You ended up with these former reservations. Everybody agreed they were reservations at the time Allotment began, where some land is owned by individual Indians, some land is owned by maybe the government, the federal government, some by non-Indians, who have come in eventually and bought it, once you could buy it. Some land is what we call trust land, or in the case of these tribes, restricted fee land, which means its land still subject to the Johnson vs Macintosh discovery rule. And it can't be sold. It can only be sold to the federal government. And some isn't. Some you can mortgage it, you can sell it, et cetera. We have what we call a checkerboard pattern of land. And that complicates jurisdictional issues today.

Well, what happened to the Creeks is that their lands were allotted in 1901. And the lands were distributed, and individuals got land-- sort of the process that we just described. But what wasn't made clear in the Creek Allotment Act was what happened to the reservation. And let me explain why that turns out to be important. In some of these-- in those cases where, for instance, the federal government said we're going to buy your land, OK, once that land is bought by the feds outright, it ceases to be a part of the tribe's reservation. It's gone. It's in the public domain.

And for lots of these allotment agreements, that's what happened. Individual lands were taken out of tribal reservation status, or entire reservations were disestablishment. In other instances, they didn't say one way or another what the impact of allotment on the status of the reservation would be. I think it's partly because they didn't think it mattered. Because again, Indian tribes are on the way out, we're modernizing and civilizing, so who really cares.

But when it turns out that tribes aren't going anywhere, when we get deep into the 20th century, suddenly people realize it does matter. And we had a series of cases, many of them involving criminal law, in the middle to latter years of the 20th century, where crimes would be committed. And often, they were committed on these lands that we'll call the surplus lands, the lands that weren't allotted, the lands that were either purchased by the US or sold to non-Indians by the US.

And a crime would be committed there. And it would be committed by a tribal citizen. And then the question suddenly became, well, who has jurisdiction over this crime? Because if the reservation's intact, and the crime is committed by an Indian, then it's either federal or tribal jurisdiction. But if the reservation no longer exists, then under the existing criminal jurisdiction rules, it's state jurisdiction. And we had a line of cases where the Supreme Court hammered out rules for determining whether reservations had been disestablished or not.

And the rules that finally came into being, and they're still the rules, unless they change them in the McGirt case, were that before Congress is going to be recognized as having disestablished a reservation, or taken lands out of reservation status, it had to make clear its intent to do so. And this is for a variety of reasons, one of which is Congress is the guardian for the tribes and is supposed to take care over tribal property, et cetera.

So, the court started looking at these cases and saying, well, what does the statute say? Is there an indication the statute that Congress intends to disestablish the reservation. And if there's not, then the reservation's intact. And the burden sort of falls on the people opposing reservation status to prove that that's what Congress intended.

OK, a word on criminal jurisdiction. The reason that the status of the land is reservation or not matters is that there are two major federal criminal jurisdictional statutes in the US code. One is called the Indian Country Crimes Act. And the other is the major Crimes Act. The Indian Country Crimes Act says that-- and both of these, by the way, share a definition of Indian country that includes all lands within the bounds of a reservation-- so, reservation, non-reservation.

The Indian Country Crimes Act says that if an Indian commits a crime against a non-Indian or vice versa, then jurisdiction lies in the federal courts. This is an old rule that we had from the colonial era. If one of our guys does something bad to one of your guys, then the national government will take care of it, or the colony will take care of it. If it's a crime by an Indian against an Indian, that's the tribe's business. And if it's a crime committed by a non-Indian against a non-Indian, that's the state's business.

OK, so those are the general rules of the Indian Country Crimes Act. And what that means is, if you're in Indian country, including on a reservation, and something bad goes down, the first thing you've got to do, if you're the first police to arrive on the scene, is to say, are you an Indian-- to the perpetrator. And to the victim, are you an Indian? Because if I'm a state police officer and neither of you is an Indian, I can arrest you. But if either of you is an Indian, then I can't. That's for the feds or the tribe, potentially. And if I make a mistake, I'm on the hook for wrongful arrest, and you can sue me. Does this sound chaotic? But this is how it works. This is how it works.

Now, that's the Indian Country Crimes Act. The second statute that Congress passed after, in the 1880s, after a scenario in which one of the Lakota guys, a guy named Crow Dog killed another tribal citizen named Spotted Tail within the bounds of the reservation. Spotted Tail apparently was a Bureau of Indian Affairs informant. And Crow Dog popped and said you shouldn't be doing that.

The tribe went ahead and punished Crow Dog. But then because this had been a federal informant, the federal government was concerned. They didn't think what Crow Dog got sentenced to by the tribe was restitution. And they thought, well that's not enough, we've got to hang him. This is the civilization letter. So, they arrested Crow Dog. And they prosecuted him in the federal territorial court.

And Crow Dog's defense was you guys have no jurisdiction over me. And they said, yeah, we do. And they pulled out the Indian Country Crimes Act, which, of course, says if it's a crime involving an Indian and a non-Indian, the feds have jurisdiction, but otherwise it's not. And so Crow Dog, the Supreme Court said, had to be set free. And he was.

So, immediately Congress passes the Major Crimes Act, which says, oh, yeah, well, from now on, if any Indian does any really bad stuff, and then there's an enumerated list of major crimes, and it's all awful stuff, like murder, and arson, and mayhem, and stuff like that. And so that list is there. If an Indian does any of those, it doesn't matter against whom, then the federal courts have jurisdiction.

OK, so what that means now is, for our reservation hypothetical, if an Indian, and they're defined basically as citizens of federally recognized tribes, commits any of those enumerated offenses, then there's federal jurisdiction, full stop. OK, that's all the background you need to understand the McGirt case and the Murphy case. And here's what happened.

So, that's the 1866 Muskogee Creek Nation Reservation. The Civil War is over. Muskogee Creek have lost all their western land. They've settled right here. And that's the reservation that's going to be allotted in 1901, carved up into parcels, census taken, and this sort of stuff. It had been the assumption, I think, of most folks, at least outside the nation, that that reservation had been disestablished, as a consequence of allotment, as part of the allotment process. Which means that it's not Indian country anymore. Isolated parcels might be, but it's not a reservation, so it doesn't fall as a reservation collectively, under the definition of Indian country.

And the state proceeded on that assumption forever. People committed crimes in there. Unless it was on an individual Indian parcel, the state would arrest you. They'd prosecute you, execute you, send you to jail, whatever. And that had been going on since 1901, or shortly after that, when the reservation was actually allotted. Murphy involved-- and this just this is a crime that occurred not too long ago in the span of history. Murphy was arrested by the state for committing a gruesome murder against another guy. And they were both Muskogee Creek Nation tribal citizens.

And the state arrested him, prosecuted him, sentenced him. And while he was in jail, it occurred to him that maybe the Muskogee Creek reservation was not disestablished by the Allotment Act of 1901. Maybe it still existed. And so he filed for relief. Now mind, if he wins, it doesn't mean he's free. It just means the state had no jurisdiction over him. Because if it's a reservation, it's Indian country. That means that we apply those federal criminal jurisdiction statutes.

And they say that if it's a crime committed by an Indian against an Indian, there's no federal jurisdiction under the Indian Country Crimes Act. But there is federal jurisdiction under the

Major Crimes Act, because murders a really bad thing, it turns out, and it's on the enumerated list. And there might have been-- there would have been tribal jurisdiction, because tribes have jurisdiction over all Indians who do bad things in their Indian country. So he's making a jurisdictional argument. You know, it's not that I'm free, it's that I have to be retried by a different sovereign. And that's the relief that he requested.

That thing got filed. And people were just absolutely flabbergasted. It went up through the court systems, ended up in the Tenth Circuit. And the Tenth Circuit decided that Murphy was right, that the Muskogee Creek Nation reservation had not been disestablished. And, in fact, the state had no jurisdiction to prosecute him. And they were poised to let him go. The state, of course, appealed to the Supreme Court. And they held oral argument a year ago. I went. A bunch of us went.

We sort of sat on the edges of our seat, because everybody, by the time the case got before the Supreme Court, understood the consequences. And the consequences were these. If Muskogee Creek Nation hasn't been disestablished-- or here's set of consequences one. All of this is Indian country. And what all of this is-- and here's a sort of more detailed view. That's a Muskogee Creek Nation government building. It looks like a mound. That was done to commemorate the tribe's Alabama homeland.

But here's that old reservation. This is Okmulgee. That's the capital Muskogee Creek Nation. But that big, patch at the top, that's the city of Tulsa. So, like the lower two thirds of the city of Tulsa would be Indian country and subject to Muskogee Creek Nation jurisdiction. And we're talking about on the criminal side now, but also on the civil side. And not just for lawsuits, but for regulations, like taxes, and licenses, and zoning, potentially, and all of that. That's what caused people to flip out.

The state started launching this massive-- you know, the world will end campaign if tribal jurisdiction is found. The Supreme Court has to rule that this is not Indian country anymore, because they'll be chaos in Tulsa, and property values will fall, and kind of the standard parade of horrors that you get. And we'll discuss the level to which those concerns are valid momentarily.

The tribe was sort of like, this would be great. And mind, they didn't bring this suit. This is Murphy's suit. He's just some guy in jail, right? And the tribe was like, holy cow, it's Christmas. But they were a little concerned too. It's a bit like-- friends of mine analogized this is like the dog that caught the car, only the car is bigger than any car you've ever seen.

There's one-- I have a good friend who's the trial court judge for Muskogee Creek Nation. He's one guy. And he's fairly busy as it is. But if you throw onto his plate every civil and criminal case that arises in all of these counties, including the southern two thirds of the county of Tulsa, he's going to be a crazy busy guy. And by the way, if this comes down this way, and Judge Bigler is alone on this court, judicial clerkship possibilities galore. So, just call me. Follow this, April 21st, and call me, and you can get first in line. All of you will have jobs.



Now-- well, I guess I should give that to my students first, shouldn't I? But anyway, you're UVA students and I'm loyal. OK, so, this is-- so that was kind of the situation that we had when Murphy came up. I think I've just mentioned-- maybe I didn't-- I went to the-- I did. I went to the Supreme Court argument, a whole bunch of people. And it was packed with people who do this sort of thing, especially folks from Oklahoma.

There was a wrinkle on the court, because Justice Gorsuch was on the Tenth Circuit when they decided the Murphy case in favor of the Nation's position. So he recused himself. So we had eight justices. And it wasn't really clear where they were going. I had a theory. And I learned yesterday The New York Times had the same theory. And I think a bunch of other people did as well, that it was a 4-4 split. And I can tell you afterwards who I thought was going to go in each direction.

But some justices are more into-- they get Indian law and have more experience than other justices. So, their questions were-- some of them were a little unusual. But in any event, if it had been a 4-4 split, and they had issued a decision, that means the Tenth Circuit opinion is upheld and Muskogee Creek Nation is back with a vengeance, and then other consequences that I'll share with you in a minute.

They closed oral argument. We all went home. And then time passed. The last day of the term came, when they release opinions. And we were waiting. I mean, there were people like hanging over their computer screens waiting for the judgment in the Murphy case. Because it's all anybody was talking about. And they reached the end of the line. And what we got was, Murphy scheduled to re-argument next term. And we thought, about what?

And they had, by the way-- I failed to mentioned this-- already requested supplemental briefing. It seemed clear to me, anyway, that what the big concern was, I don't think there was a whole lot of question about the way the law tended. I think the tribe's position is dead clear here. I think what the justices, who weren't prepared to uphold the Tenth Circuit, were concerned about is, what happens then to all of those currently incarcerated state prisoners, who should not have been prosecuted by the state, because the state lacked jurisdiction over them?

Which is to say, every-- not just every Indian defendant who had been sent to state prison from this area since 1901, but all of the non-Indians who were in state prison, who had committed crimes against Indians, because they shouldn't have been subject to a state jurisdiction either. They're subject to exclusively federal jurisdiction under the Indian Country Crimes Act. Do we let them out? I mean, they can still be prosecuted by the correct sovereign, but do we have the capacity to do that?

I have a good friend, a former student, who's the US attorney in Tulsa. He's a good soldier. And it would've been his problem. He said, we'll do whatever we have to do. He happens to be Choctaw and took loads of Indian law classes in law school. So, he said, if we have to, we will. We're going to need a little help. We're going to need resources. So assistant US attorney jobs, when you get out, in the Northern District of Oklahoma, plenty of those too, possibly, out there.

But I think that was the correct attitude-- he could do it. The tribe was a little bit concerned about this too, as I mentioned. But then there were some, I think, some valid, sort of real world practical concerns. Some of these guys who had been imprisoned had been in there for a long time, so that while theoretically we could re-prosecute them, could we do that as a practical matter? Witnesses disappear. So does this mean that we're going to be releasing people?

And nobody really knew. And there was a real paucity of-- there were lots of allegations made by both sides during the oral argument. The state's position was they'll be like zombies. It was this sort of horrible, a million rapists will be roaming the streets. And people were like, a million? Like that seems like a lot. In any event, that was kind of how that shook out. And there wasn't a whole lot of detail. And I think that sort of concerned the court, the idea that there might be some major crime problem and we didn't really have a whole lot of accurate information. And Justice Gorsuch wasn't participating.

So, here's what happened at the end of the day. We're still waiting for-- we're waiting for a scheduling of the re-argument. The new term has begun, and the argument schedule's come out, and we're all waiting, when is Murphy being re-argued. And then, without any announcement, they sent the file back. And people thought, what does that mean? I have friends at the solicitor's-- US Solicitor General's Office, who do Indian law stuff. I asked my one friend, how often does this happen? That they say they're going to schedule something, and then just bag it, and send the file back? And he said never in my career have I seen this, and I really have no idea, clear idea what's going on.

But then, same time, file's going back, they took a petition from a currently incarcerated tribal citizen in the same area named McGirt, Jim C. McGirt, and said we'll do this one instead. And just last week, they scheduled this for oral argument on April 21st. And I'll probably go, and you guys can go, if you want to, and stand in the long line and stuff. But it'll be really interesting.

Now McGirt, slightly different fact situation. And I think you choose these things strategically. The Murphy case was a murder case. McGirt is a sexual abuse of a child case, which I think-- and I suspect there was a little bit, on the part of some justices, let's take this one, because it's more repulsive even than the murder was in the last one, and it will dispose people against the tribe's position. I don't know that, but I do know that some strategizing goes into some of these decisions.

McGirt, who protested his innocence, and said this is a family dispute, and false allegation, this sort of thing, had been arrested and sentenced by the state court. He requested relief on the grounds of Murphy. Because Murphy, Tenth Circuit said Indian Country, that means I couldn't have been prosecuted by the state. I should have been prosecuted under the Major Crimes Act by the federal government. So my relief requested is a re-prosecution, another crack at defending myself, but in a federal court, as opposed to a state court, because I don't believe I got a fair shake in the state court, because this, that, and the other.

And so, that case went up. And as I say, got scheduled for oral argument April 21st. We think that the reason is that Justice Gorsuch doesn't have to recuse himself from this one. He did from the last, but he doesn't from this. And that gives them a full complement of nine justices. And it

may well be that I'm right, and whoever thought this was right, that it was a 4-4 split, and that they were uncomfortable simply announcing a 4-4 split.

What happens, and you may know this, is if it's a tie decision, then they just say, it's a tie, but they don't issue an opinion. And so, it's only binding on the parties, and that sort of thing, or there's no precedential effect in any areas beyond this, because there's no opinion. And so, it could be that they were solidly 4-4, but they wanted to issue an opinion. I mean, they wanted to have a resolution of this for fear that it might come up. And that's kind of my suspicion.

Now, they've got nine justices, they will get a majority, because none is recusing. And we'll see how it goes. Justice Gorsuch is believed to be, widely believed and known to be pretty good on Indian issues, in terms of understanding how Indian law works, and tribes, and that sort of thing. The Tenth Circuit justices are really good on Indian law cases, relative to the area, because we got so many tribes within the Tenth Circuit. And so, we're sort of waiting to see what happens when that oral argument comes.

If there are five in favor of McGirt's position, then McGirt will be retried by the Northern District of Oklahoma, and my former student friend, Trent Shores, who's a fantastic attorney. And then all of the other consequences will flow as well. Now, let me say a word about those.

Criminal jurisdiction, we talked about. So, we'd have a massive shift. The state would sort of back out of exercising criminal jurisdiction in this whole area, of these counties, except for cases just involving non-Indians. And there, the state would have exclusive jurisdiction. So, there'd still be things for the state to do. By the way, another thing we do in Oklahoma-- and we started this a number of years ago, when I was working for the governor's office, as special counsel in Indian Affairs-- we put together a document called a cross deputization agreement.

And we're not unique in this, but Oklahoma was sort of in the forefront. And what the document does is, it allows-- it includes three parties, the feds, the state, and the tribe, to cross deputize each other's police officers. So, in that hypothetical I raised a minute ago, if I arrive on a crime scene, and I don't know if people are tribal citizens or not, and I'm a state police, I can arrest folks. And they say, ah, I'm Cherokee, you don't have jurisdiction, state police. I can say, ha, well good news, I'm also deputized federal law, or tribal, or you whatever card you need me to produce, I can. And so, that would definitely come into play in this scenario. We have massive cross deputization in order to insulate law enforcement from potential tort liability.

So, that's on the criminal side. And the dockets would really change. The Muskogee Creek docket would go through the roof, because they'd get jurisdiction over every case where there was an Indian defendant. And it doesn't matter what tribe, they would have jurisdiction to prosecute. And the federal docket would really increase, because they would get every case where you had a non-Indian defendant who committed a crime against an Indian, and all the serious crimes, where you had an Indian defendant. So, that shuffling, prospective shuffling would happen.

It's workable on the criminal side, except for we're uncertain now as to what happens to the people currently incarcerated who can't be re-prosecuted because of witness death and stuff like

that. So, that's still a bit of an unknown. On the civil side, it's more complicated. And frankly, it's the civil side that's causing more heartache, I think, especially among non-Indians in the city of Tulsa.

The way the civil side works is, you've got two types of civil jurisdiction. You've got civil regulatory jurisdiction and civil adjudicator jurisdiction. Civil adjudicator jurisdiction is what sovereign has jurisdiction to adjudicate your lawsuit. And so, if you have Indians suing a non-Indian, or a non-Indian suing an Indian, or a non-Indian and suing each other, there's a bunch of scenarios you can imagine occurring in Indian country-- breach of contract, or divorce actions, or child custody, or really anything you can think of.

And then, there are civil regulatory cases, where the tribe exercises-- civil regulatory jurisdiction says, OK, income tax, OK, real property tax, you need a fishing license, all those sorts of things that governments do. Happily, this is the only happy part of this, the rules are the same now for civil adjudicator and civil regulatory.

And the rule is that if you're in Indian country-- I'm going to simplify this a bit-- but if you're in Indian country, but you're on non-Indian owned fee land-- so, I'm non-native-- if I happen to own my house, I'm within the bounds of the reservation, so I'm in Indian country, but it's land that I own. So, that's what we call non-Indian owned fee land. If that's where the conduct occurs, either that gives rise to the litigation, or that is subject to the regulation, and we're talking about regulating non-Indians, then the rule is, the default rule is, that the tribe does not have jurisdiction unless-- unless one of two exceptions applies.

And these are derived from a case called *Montana vs United States*. We call these the Montana Exceptions. The first is that there is a consensual commercial relationship between the non-Indian actor and the tribe or a tribal member. So, if I come into Indian country, and I'm a landscaper, and I'm engaged in some sort of commercial deal with the tribe, but it's on land that is not trust land, maybe it's non-Indian owned fee land, but the tribe wants me to fix it up or something, and so I'm performing conduct-- or maybe the contract has been entered into or something, on non-Indian own fee land, but I'm in a consensual commercial relationship with the tribe, I have subjected myself to their regulatory and adjudicator jurisdiction.

And that's kind of easy. You can sort of imagine that. You want to do business with us, you're subject to our jurisdiction. That's the first Montana Exception. That one's pretty easy. The second one is the one that's caused a lot of confusion. And I'm going to quote it to you. "Conduct on non-Indian owned fee land is subject to tribal regulation"-- regulatory jurisdiction or adjudicator jurisdiction-- "if the conduct threatens or has a direct effect on the tribe's political integrity, economic security, or health or welfare."

OK, you listen and you think, what? Right? Because, I mean, kind of? What does that mean? And the truth is, we don't really know. We have very few cases where the second Montana Exception is invoked. But we do know that there has to be some conduct that does one of those things. So, here's one where the Supreme Court dodged definitively resolving it. Zoning, so say I own non-Indian land in the middle of a tribe's reservation and I want to build a really hideous

house. Do I have to get permission from the tribal zoning office? Or do I go to the county zoning office? We don't know.

The tribe argues the house is probably ugly, and for anybody to develop land within our reservation threatens our political integrity. You can make that argument. But the court said, well, maybe not. Maybe it's the individual project, how ugly is it? And so, the answer, we don't really know. And I think that's the likeliest source of confusion in a post McGirt world, if the Muskogee Creek Nation wins this case, that we just won't know exactly what the limits are of the tribe's regulatory jurisdiction.

We know some things it won't be able to touch. I suspect there's no chance that they'll be-- the tribe would be able to levy real property taxes on homes in South Tulsa, which is what everybody's going crazy about. I just don't see that as falling within the second Montana Exception. It certainly doesn't fall within first Montana. But there are people who would argue otherwise, and so there could well be litigation.

Now, what does that mean real world? Well, here's the answer. And this is really the answer to all of the parade of horrors. Folks in Oklahoma aren't stupid and they have loads of experience dealing with just these sorts of complicated scenarios. And so, two things will happen if the case comes down in McGirt's favor and Muskogee Creek Nation's re-recognized.

One is that the state and the tribes will sit down, and the tribe, and start cutting deals. And when I worked for the governors, we did this all the time. Where you've got some jurisdictional gray zone, you just decide who's going to do it. And then you write it down, and then you sign it, and that's how you share out jurisdiction. So, we have lots of practice doing this, lots of incentive to do this, because nobody benefits from jurisdictional confusion. And so, that will definitely happen.

The other thing that will happen, I believe, is that Congress will step in. Congress has the power to legislate changes to this situation. And I think Congress will pass legislation. We've already heard from certain members that they will, as long as the tribe and the state agree on the terms. But Congress will pass legislation, I believe, conferring upon the state criminal jurisdiction, which is their big concern, over a lot of the offenses over which they currently exercise criminal jurisdiction.

As I say, Congress has the power to do that. The state would want that. And frankly, I think the tribe would want them to have it. Because my friend Judge Bigler doesn't want to have a 9,000-person long criminal docket to deal with every week. And so, I think that there will be negotiated solutions to this.

We're still left with that one unresolved question I keep referring to, which is, well, what happens to the people currently incarcerated who can't be retried? But I think, candidly, that's the only unanswered question in this case. And it may well be that it has to remain unanswered, and the Supreme Court simply has to do what I believe is the right thing, which is to follow the law, and say, well, Oklahoma you shouldn't have prosecuted these people, and you did, and you don't have any jurisdiction to hold them under existing federal law. That's really clear, so just work it

out. I mean, something will happen. But we can't do the wrong thing to avoid your having a short-term problem. But we'll see, we'll see if it works out that way.

The other large wrinkle here, and this is the last thing I'll say something about, has to do with, well, what about those other tribes that were removed from the Southeast? And we've got two sort of families of cases. In that we've got the Creeks, who are subject to the McGirt decision, and whatever the court says will be what happens. But then we've got the Seminoles, Chickasaws, Choctaws, and Cherokees, who aren't parties to the McGirt case, weren't parties to that Sharp vs Murphy case, but who have Allotment Agreements, that may-- or Allotment Acts, that may be materially identical to the Creek Allotment Act, same legislative history, same language in the text of the Act.

If that's true, then all four of those tribes would have a really strong argument that their reservations are still intact too. Because why not? What's the difference? And what that would mean is we'd be reopening the Muskogee Creek problem all throughout the rest of Eastern Oklahoma, other major cities in this part of the state, and the same unresolved questions about releasing currently incarcerated people, and who would have regulatory jurisdiction, et cetera.

Everybody knows this. This wouldn't be a surprise. And so, the federal legislation that's in process of negotiation would cover them too, I'm quite confident. I know that's under discussion. And so that might eliminate prospective problems, if not retrospective problems. But this would be the scenario. Muskogee Creek wins and the language is identical that would result in effectively the Eastern half of Oklahoma becoming once again Indian country. And as I may have said at the outset, I don't remember, this would be, in my judgment, the biggest thing to happen in Oklahoma since statehood. And that's a really, really big deal. That's all I have. Thank you very much.

[APPLAUSE]