

Opinion of the Court

SUPREME COURT OF THE UNITED STATES

JIMCY MCGIRT, PETITIONER v. OKLAHOMA

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

[July 9, 2020]

JUSTICE GORSUCH delivered the opinion of the Court.

On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received [promises] that their new lands in the West would be secure forever... Both parties settled on boundary lines for a new and “permanent home to the whole Creek nation,” located in what is now Oklahoma. ***Treaty With the Creeks, preamble, Feb. 14, 1833, 7 Stat. 418 (1833 Treaty)***. The government further promised that “[no] State or Territory [shall] ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves.” ***1832 Treaty, Art. XIV, 7 Stat. 368***. 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...

... While there can be no question that Congress established a reservation for the Creek Nation, it’s equally clear that Congress has since broken more than a few of its promises to the Tribe. Not least, the land described in the Creek’s treaties, once undivided and held by the Tribe, is now fractured into pieces. While these pieces were initially distributed to Tribe members, many were sold and now belong to persons unaffiliated with the Nation. So in what sense, if any, can we say that the Creek Reservation [still exists] today?

To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress... If Congress wishes to break the promise of a reservation, it must say so.

History shows that Congress knows how to withdraw a reservation when it can [summon] the will... Disestablishment [of reservations] has “never required any particular form of words,” ***Hagen, 510 U. S., at 411***. But it does require that Congress clearly express its intent to do so, “[c]ommon[ly with an] ‘[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests.’ ” ***Nebraska v. Parker, 577 U. S. 481, ___–___ (2016)***.

In an effort to show Congress has done just that with the Creek Reservation, Oklahoma points to events during the so-called “allotment era.” Starting in the 1880s, Congress sought to pressure many tribes to [give up] their communal lifestyles and [divide] their lands into smaller

lots owned by individual tribe members. *See 1 F. Cohen, Handbook of Federal Indian Law §1.04 (2012) (Cohen), discussing General Allotment Act of 1887, ch. 119, 24 Stat. 388...*

The Creek were hardly exempt from the pressures of the allotment era. In 1893, Congress charged the Dawes Commission with negotiating changes to the Creek Reservation. Congress identified two goals: Either persuade the Creek to cede territory to the United States, as it had before, or agree to allot its lands to Tribe members. ***Act of Mar. 3, 1893, ch. 209, §16, 27 Stat. 645–646.*** A year later, the Commission reported back that the Tribe “would not, under any circumstances, agree to cede any portion of their lands.” ***S. Misc. Doc. No. 24, 53d Cong., 3d Sess., 7 (1894)***... the Commission and Congress took this report seriously and turned their attention to allotment rather than cession.

The Commission’s work [ended] in an allotment agreement with the Tribe in 1901. ***Creek Allotment Agreement, ch. 676, 31 Stat. 861.*** ... the Agreement established procedures for allotting 160-acre parcels to individual Tribe members... [Over time] individual Tribe members were eventually free to sell their land to Indians and non-Indians alike.

Missing in all this, however, is a [law saying] anything like the “present and total surrender of all tribal interests” in the affected lands. Without doubt, in 1832 the Creek “cede[d]” their original homelands east of the Mississippi for a reservation promised in what is now Oklahoma. ***1832 Treaty, Art. I, 7 Stat. 366.*** And in 1866, they “cede[d] and convey[ed]” a portion of that reservation to the United States. ***Treaty With the Creek, Art. III, 14 Stat. 786.*** But because there exists no equivalent law terminating what remained, the Creek Reservation survived allotment.

In saying this we say nothing new. For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument...

... Oklahoma reminds us that allotment was often the first step in a plan ultimately aimed at disestablishment... This plan was set in motion nationally in the General Allotment Act of 1887, and for the Creek specifically in 1901... Still, just as wishes are not laws, future plans aren’t either. Congress may have passed allotment laws to create the conditions for disestablishment. But to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination...

If allotment by itself won’t work, Oklahoma seeks to prove disestablishment by pointing to other ways Congress intruded on the Creek’s promised right to self-governance during the allotment era...

... the 1901 allotment agreement ended by announcing that the Creek tribal government “shall not continue” past 1906, although the agreement quickly qualified that statement, adding [the phrase] “subject to such further legislation as Congress may deem proper.” ***§46, 31 Stat. 872.*** Thus, while suggesting that the tribal government might end in 1906, Congress also necessarily understood it had not ended in 1901. All of which was consistent with the

Legislature's general practice of taking allotment as a first, not final, step toward disestablishment and dissolution [of reservations]...

In the years that followed, Congress continued to adjust its arrangements with the Tribe... But Congress never withdrew its recognition of the tribal government...

... in all this history there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation.

... The federal government promised the Creek a reservation in perpetuity. Over time, Congress has diminished that reservation. It has sometimes restricted and other times expanded the Tribe's authority. But Congress has never withdrawn the promised reservation. As a result, many of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to [change] the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right. The judgment of the Court of Criminal Appeals of Oklahoma is Reversed.

Source: Supreme Court of the United States. (2020, July 9). *18-9526 McGirt v. Oklahoma* (07/09/2020).
https://www.supremecourt.gov/opinions/19pdf/18-9526_9okb.pdf