
REFLECTION ON *MCGIRT V. OKLAHOMA*

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My Mvskoke family lives in a world of stories. My mother immersed me in these stories. Until her untimely death, Mom did all that she could to keep my brother, my cousin, and me connected to our traditions and instill in us a sense of what it means to be Muscogee. The fact that we lived out of state made no difference. Some of her efforts were overt; she would often round us up and sit us down for formal Muscogee language lessons. As a nine-year-old, I did not always fully appreciate the value of these lessons, and I found creative ways to hide and avoid learning my own language — including hiding under the bathroom sink (my favorite), in remote boxes, or behind the bushes my dad had planted, much to my mom’s consternation.

But she never gave up. And while my brother, my cousin, and I balked at formal instruction, we always loved the stories. Little did we understand what was being taught.

More than thirty years before the Supreme Court reminded Oklahoma that the Muscogee (Creek) Nation (MCN) still has a Reservation, my mom repeatedly took us to it. We would pile into the car and drive the thousand miles from our family home in Arizona to our Nation’s Reservation in what is today also known as the State of Oklahoma. When funds were short, we would take the bus. And when we would complain about the length of the drive (a trauma that is considerably less than what our ancestors endured on the Trail of Tears, but nonetheless difficult for a nine-year-old to endure), Mom would tell Creek stories. Her stories were timeless and seemed to transport us, not just to an understanding of our past, but ultimately to our destination.

One of her favorites was Corn Woman, the story of a mother/grandmother working to feed her son/grandson, whom she always fed corn and beans. When he asked where she acquired all of this food, she would deflect his inquiries and state that she would inform him at an appropriate time. One day, curiosity got the better of him, and while his grandmother was out retrieving the food to feed him, he set off to look for her. Instead of locating his grandmother, he found a beautiful young woman, shimmering in an aura of light, dressed in a transparent gown made from corn husk materials. While one of her hands remained held high up in the air, the other poured corn that she seemingly stripped from her body and her hair. The Earth trembled at the young man’s discovery, and the beautiful woman transformed into his grandmother.

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She then instructed him that he had let his curiosity get the better of him, and now that he had this knowledge, he would have to learn and find his own way to provide. She told him to cut her hair and put it in one basket, and in another, her body. The young man was told to scatter her hair and flesh in the field and remain there for four days and nights. He did. There was rain, lightning, and wind. And at the end of four days and nights, he awoke to the spreading fragrance of the field blooming with the beautiful abundance of an incredible crop of corn all around him.

What does this have to do with the Supreme Court's decision in *McGirt v. Oklahoma*?¹ Everything.

When I read Justice Gorsuch's statement that "[o]n the far end of the Trail of Tears was a promise,"² I thought of my mother, whose ashes are spread at the far end of the Trail of Tears, on our family land in Okemah.

My mother spent her life combatting the consequences of false stories.

The falsehoods she fought, however, were not created by accident. These falsehoods have been carefully designed, and then repeated and replicated, to justify the perpetuation of an American legal regime that strips Tribal Nations of land, resources, and sovereignty.

Take, for example, *Johnson v. M'Intosh*.³ In 1823, the Supreme Court considered the legal question of whether Tribal Nations could claim legal title to their own lands and decided we could not. To reach this conclusion, the Court employed a fictional story. As Chief Justice Marshall explained, Tribal Nations could not be left "in possession of their country" because Indians were "fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest."⁴ As a result, "[t]o leave [us] in possession of [our] country, was to leave the country a wilderness."⁵

This story, of course, was false. As the story of Corn Woman demonstrates, corn was a central crop to the Muscogee that we cultivated for millennia across the southeastern quadrant of this continent, long before European immigrants showed up. Today, Americans, and billions of people worldwide, rely on corn to create and consume tacos, chewing gum, Coca-Cola, and even fireworks and batteries. And yet somehow, the Supreme Court, in 1823, ruled that our Nations could not claim legal title to our lands because we do not cultivate them.

In 1830, the Indian Removal Act⁶ was passed by Congress to secure the forced removal of the MCN from our homelands in Alabama, Georgia, and Florida — as well as the removal of the Cherokee,

¹ 140 S. Ct. 2452 (2020).

² *Id.* at 2459.

³ 21 U.S. (8 Wheat.) 543 (1823).

⁴ *Id.* at 590.

⁵ *Id.*

⁶ Ch. 148, 4 Stat. 411 (1830).

Seminole, Choctaw, and Chickasaw Nations from their homelands in the Southeast. Although President Jackson insisted his Removal Act was undertaken to protect us from our own racial “inferiority,”⁷ the truth is that the Indian Removal Act was passed to secure additional resources for the cotton and chattel slavery industries, who wanted to expand and viewed Tribal Nations as obstacles.⁸

Next, we turn to the harmful allotment acts, passed at the turn of the twentieth century, pursuant to which millions of acres of tribal lands were distributed to white settlers, under the pretext that without individual ownership of land, Indians — my mother’s own parents — did not know how to cultivate or farm land.⁹ The corrupt Curtis Act¹⁰ not only contributed to opening up millions of acres of tribal lands for white settlement,¹¹ but also opened up access to billions of dollars’ worth of resources to non-Indian coal, timber, oil, gas, and agricultural industries.

The individual lands now owned by MCN citizens were quickly swindled away through corruption, fraud, subterfuge, unlawful Oklahoma state court proceedings, and alcohol. That is how our family lost our land; by the time my mother came along, her family had lost everything. As a child, she worked with her parents and siblings as a pecan picker — a migrant farmer working for pennies on her own Reservation.

Since the inception of the United States, the false story that we are uncivilized and do not know how to cultivate our own lands has been repeatedly used to justify taking them from us. This story is false, but before July 9, 2020, that did not matter.

Until now. In *McGirt*, the State of Oklahoma asked the Supreme Court to judicially disestablish our Reservation, despite the fact that the governing precedent, *Solem v. Bartlett*,¹² made clear that the Court was without the authority to do what Congress has not.¹³ In an attempt to circumvent this clear precedent, Oklahoma told the Court a false story.

According to Oklahoma, confirming the continued existence of MCN’s Reservation would “reopen[] thousands of state convictions” and

⁷ President Andrew Jackson, Fifth Annual Message (Dec. 3, 1833), in AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/node/200846> [<https://perma.cc/9FTJ-P29U>].

⁸ See ADAM ROTHMAN, SLAVE COUNTRY: AMERICAN EXPANSION AND THE ORIGINS OF THE DEEP SOUTH 221–22 (2005).

⁹ See D.S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS 11 (1973) (quoting Senator Henry Dawes’s statement that “[t]ill this people will consent to give up their lands, and divide them among their citizens so that each can own the land he cultivates, they will not make much more progress”).

¹⁰ Ch. 517, 30 Stat. 495 (1898).

¹¹ See Addison W. Bennett, Comment, *Partially Tribal Land: The Case for Limiting State Eminent Domain Power Under 25 USC § 357*, 86 U. CHI. L. REV. 945, 955–56 (2019).

¹² 465 U.S. 463 (1984).

¹³ *Id.* at 470 (“[O]nly Congress can divest a reservation of its land and diminish its boundaries.”).

potentially put thousands of criminals on the streets.¹⁴ Oklahoma has never offered any support or evidence to back up this bold claim, and it has since been thoroughly refuted.¹⁵ Since *McGirt*, tribal citizens who were wrongfully prosecuted in Oklahoma state courts have been charged in either federal or MCN courts.¹⁶

Of course, this was never about public safety. It was, as it always has been, about private profits. When the continued existence of the MCN Reservation was squarely before the Supreme Court, in the fall of 2019, “Oklahoma farmers, ranchers, oil and gas developers, and business owners”¹⁷ filed an amicus brief asserting that judicial recognition that the MCN Reservation had not been disestablished would be “economically destructive” for non-Indian businesses.¹⁸

That was the argument underlying *M’Intosh*, the Indian Removal Act, and the Curtis Act — a law that stripped my family of the lands on which we had built our home. But it did not strip us of our Reservation. 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.”¹⁹

For the first time in my life, and my mother’s, and her mother’s and her mother’s — for pretty much the first time that anyone can remember, the law was not bent or altered or discarded through the crafting of a false story about my people and my Nation. The law was applied as is, because it is *the law*.

Stories matter. Corn Woman gave her very body to provide my people with sustenance and the knowledge of corn planting — a food that now sustains all of humanity, in one way or another, on this planet. But most importantly, her story — and my mom’s telling of it — provide both a moral framework for our daily life and a tie to our roots as cultivators of our homelands.

My mother’s life story was one of extreme loss: loss of land, loss of family, loss of language, loss of her leg due to diabetes, loss of her life before her time. But the story of the Supreme Court’s decision in *McGirt* constitutes a new chapter, a chance to maintain what we have. Instead of losing it to yet another falsehood.

¹⁴ Brief for Respondent at 43, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526).

¹⁵ See Rebecca Nagle, *Oklahoma’s Suspect Argument in Front of the Supreme Court*, THE ATLANTIC (May 8, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/oklahomas-suspect-argument-front-supreme-court/611284> [<https://perma.cc/5ZNP-2KQA>].

¹⁶ See Max Bryan, *McGirt Indicted; Feds, Tribes Prepare for Cases*, SW. TIMES REC. (Sept. 22, 2020, 4:53 PM), <https://www.swtimes.com/news/20200922/mcgirt-indicted-feds-tribes-prepare-for-cases> [<https://perma.cc/6PGY-729H>].

¹⁷ Brief of *Amici Curiae* Environmental Federation of Oklahoma, Inc. et al. in Support of Respondent State of Oklahoma at 3, *McGirt*, 140 S. Ct. 2452 (No. 18-9526).

¹⁸ *Id.* at 2.

¹⁹ *McGirt*, 140 S. Ct. at 2459.