

THE HISTORICAL SOCIETY OF THE TENTH JUDICIAL CIRCUIT

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The Curious Case of *McGirt v. Oklahoma*

By Andy Lester and A.J. Ferate

Lawyers love to debate which Supreme Court case is the most important one in American history. Some say *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), in which Chief Justice John Marshall firmly established the judiciary's right to declare a Congressional enactment unconstitutional. Others claim *Brown v. Board of Education*, 347 U.S. 483 (1954), where the Court finally outlawed segregation in public schooling, holds the top spot.

For Oklahomans, however, there is little doubt. Surprisingly, it is not *U.S. v. Texas*, 162 U.S. 1 (1896), where the Court awarded Oklahoma the several counties comprising its southwest corner (some Texans still say they are upset over that loss). Instead, the case that has had the greatest impact on Oklahoma is *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

The *McGirt* Ruling

The last ruling handed down during the Court's 2020 term, *McGirt* had an immediate



impact in Oklahoma, and has affected other parts of the country as well. *See, e.g., Oneida Nation v. Village of Hobart*, 968 F.3d 664 (7th Cir. 2020) (noting the Court's shift from the disestablishment analysis under *Solem v. Bartlett*, 465 U.S. 463 (1984), to the more rigid *McGirt* rule that requires "a greater focus on statutory text" to find disestablishment). Of special significance to the Tenth Circuit Historical Society, the majority opinion in the 5-4 decision was penned by Neil Gorsuch, the first Tenth Circuit judge ever to serve on the Supreme Court.

At first blush, *McGirt's* holding does not appear to be of great significance. Under the Major Crimes Act, 18 U.S.C. § 1153, federal courts have exclusive jurisdiction to prosecute Indians or those charged with crimes against Indians occurring within Indian country. "Major crimes" include charges such as murder, kidnapping, arson, burglary, robbery, and the like. The Court held that the Muscogee (Creek) reservation in Oklahoma constitutes Indian country, because Congress never explicitly and affirmatively disestablished it.

McGirt had been convicted in Oklahoma state court of rape and other sex crimes against his wife's 4-year-old granddaughter. The Court ruled his conviction could not stand. He was subsequently convicted again and remains incarcerated.

The majority and dissenting opinions are well-written, well-reasoned, and compelling. Both use a great amount of toner giving the historical background. Yet, while history plays a central role in both the majority ruling and in Chief Justice John Roberts's dissent, the histories are quite different. One focuses primarily on the wrongs committed against Native Americans. The other focuses on the establishment of Oklahoma and Indian Territories and, ultimately, of the State of Oklahoma.

What makes the ruling so significant has little to do with McGirt's personal fate. Instead, it is the finding that the Muscogee (Creek) reservation still exists. To understand why this matters, it is important to know Oklahoma's unique history.

Oklahoma's Unusual History

Most states beyond the original 13 went through a pre-statehood territorial period. But Oklahoma is the only state formed out of two separate territories – Oklahoma Territory (roughly the western half of the state) and Indian Territory. Indian Territory was the portion of the country to which the government forced Native American tribes to move. It was the end of the Trail of Tears.

Many who think of the settlement of Oklahoma think of the various land runs, the biggest of which occurred in 1889 and 1893. But the land runs happened in Oklahoma Territory. Indian Territory was already divided into several parts, based on the location of the lands held by or for the various tribes. The vast bulk of Indian Territory was occupied by the so-called Five Civilized Tribes, namely, the Cherokee, Chickasaw, Choctaw, Creek, and Seminole Nations.

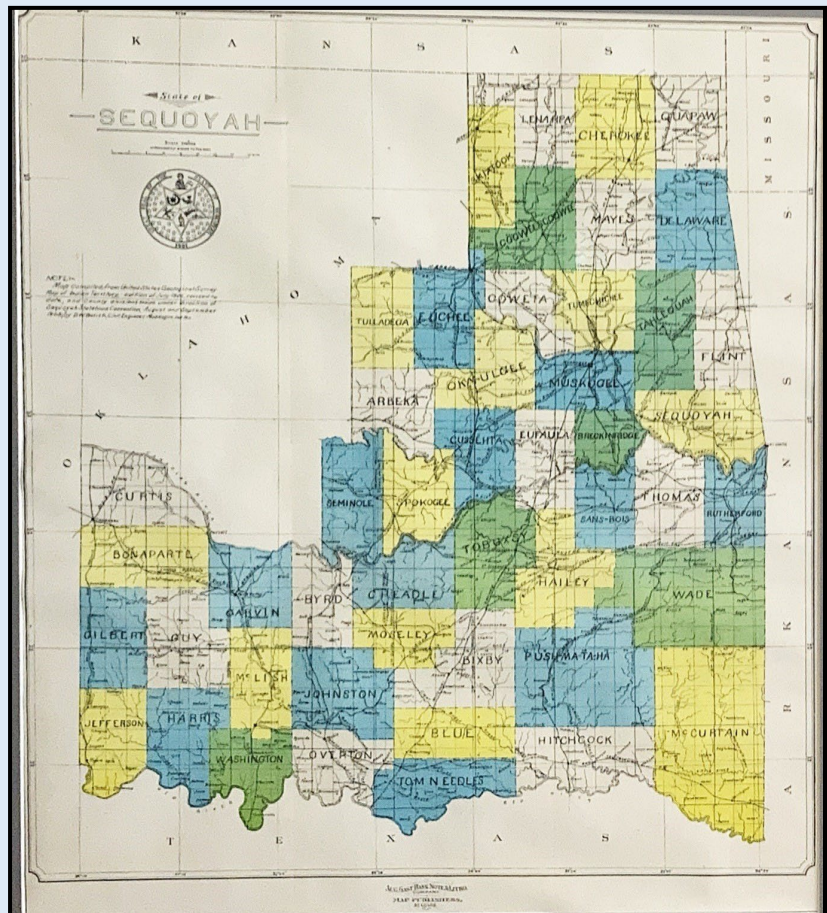
In 1907, Oklahoma became the 46th American state. Two years earlier, though, before the territories held a joint constitutional convention, Indian Territory sought entry into the Union as the new State of Sequoyah. Sequoyah fully qualified for statehood. But Sequoyah statehood did not happen. It is not clear why, though many believe that the Republican Senate would not agree to create four new Democratic seats. In any event, the petition did not receive a vote.

The federal direction was clear. The two territories should combine into one proposed state. On November 16, 1907, a “marriage” ceremony occurred between the two territories and President Theodore Roosevelt proclaimed Oklahoma, in the words of the eponymous state song, “a brand new state!”

Criminal Law Effects

The Court in *McGirt* effectively found that virtually all of eastern Oklahoma constitutes Indian country. That means, for example, that most of the city of Tulsa is located within the Creek and Cherokee reservations. Since the High Court ruling, courts have ruled none of the Five Nations’ reservations has been disestablished. One court has also ruled the Quapaw reservation, in the far northeastern corner of the state, has not been disestablished. And while the Supreme Court only ruled as to one federal statute and as to one tribe’s reservation, the effect in Oklahoma has been of tectonic proportions.

Among the most immediate and obvious effects was the sudden flood of federal felony cases. Oklahoma is divided into three federal districts, and the Northern and Eastern Districts mostly encompass old Indian Territory, while the Western District mostly covers the former Oklahoma Territory. In any event, federal prosecutors have been overwhelmed with cases that hitherto had been brought in state court. This has had several consequences.



Proposed State of Sequoyah, 1905

It has necessitated an infusion of prosecutors from federal districts around the country to help out with the sudden increase in work. It has brought about an arrangement among the judges of the three Oklahoma districts, whereby the Western District judges are spending time helping out their colleagues in the Northern and Eastern Districts. And it has meant that less heinous “major crimes” go unprosecuted.

It has also created confusion for various policing agencies. A police officer, for example, responds to a call for a burglary in progress. May the officer effect an arrest? While it may be clear whether the crime scene is within one of the covered reservations, it is not always easy to tell whether the alleged perpetrator or victim is an Indian.

Civil Law Impact

Although *McGirt* was a criminal case, criminal law is not the only area *McGirt* affects. Western District of Oklahoma Judge Stephen Friot's December 22, 2021 order in *Oklahoma v. U.S. Dep't. of the Interior*, Case No. CIV-21-719-F, illustrates the point. The court denied Oklahoma's request for a preliminary injunction. Nevertheless, Judge Friot declared that the case was "a prime example of the havoc flowing from the *McGirt* decision." *McGirt*, he wrote, calls into question "[c]ore functions of state government" in the parts of Oklahoma covered by "newly recognized reservation[s]."

The case involved whether Oklahoma could continue to "operate its state regulatory program on the (newly confirmed) Creek Reservation because it qualifies as 'Indian land' under [the Surface Mining Control and Reclamation Act]." The Department of the Interior determined Oklahoma could not, and the State sought the injunction.

May the State regulate environmental concerns? Does the Oklahoma Corporation Commission, which since statehood has regulated oil and gas exploration, continue to have that power in the former Indian Territory? Does *McGirt* affect the ability of the State and its political subdivisions to collect taxes? Who has the power to issue hunting and fishing licenses? Does the Indian reservation status of most of eastern Oklahoma impact titles to property? Will the State continue to build and improve roads in eastern Oklahoma?

Conclusion

To be sure, the effects of *McGirt* are hotly debated. Some claim it is limited to cases brought under the Major Crimes Act. Others assert it has split Oklahoma into several competing parts. Perhaps the answer is somewhere in the middle. Certainly both Oklahoma's Governor and the leadership of most Oklahoma-based Tribes, who have consistently clashed over Indian sovereignty issues, appear to agree that *McGirt* significantly changed the relationship between the State and the various Indian Nations.

Two final notes of interest bear telling. First, in one of the last rulings of its recently concluded term, the Supreme Court held that "the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian county." *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2491 (2022). Like *McGirt*, the Court again split 5-4. But this time, Justice Gorsuch wrote the dissenting opinion. The difference? Justice Amy Coney Barrett, who succeeded Justice Ruth Bader Ginsburg, voted with the *Castro-Huerta* majority. While *Castro-Huerta* constitutes a small step away from *McGirt*, the Court flatly refused to consider overruling it.

Of special interest to Tenth Circuit Historical Society members is a curious footnote at the end of the penultimate sentence of *McGirt*. There, Justice Gorsuch showed he has not forgotten his former colleagues in Denver. He gave a special shout-out to the amicus "brief authored by Robert H. Henry, also a former State Attorney General and Chief Judge of the Tenth Circuit[.]" *McGirt*, 140 S.Ct. at 2482, n.16. A fitting end to a fascinating case.

Andy Lester is a partner in the Oklahoma City office of Spencer Fane, LLP, where he practices trial and appellate litigation. He serves on the Board of the Historical Society for the Tenth Circuit, and previously served as its President and Board Chair.

A.J. Ferate is Of Counsel in the Oklahoma City office of Spencer Fane, LLP, where he practices appellate litigation, tribal law and energy law.

Tales from the 10th: New podcast series adds new episodes

By Eric Turner, Newsletter Editor

Tales from the 10th, the official podcast of the Tenth Circuit Historical Society, now has eight episodes available after launching in October 2021.

Available on Apple Podcasts, Spotify, Google Podcasts and other distributors, Tales from the 10th is a podcast about the rich history, culture and contributions of the Tenth Circuit courts. Tenth Circuit Historical Society volunteers—including host Leah Schwartz and Stacy Guillon—have partnered with Tina Howell of the Tenth Circuit’s library staff to produce the series. The goal is to educate the community about the federal courts and civics generally, while connecting the Historical Society with its members and a broader base of listeners from all six states within our circuit. There have been more than 600 downloads so far.

The eight episodes currently available are:

- 1) Introducing: Tales from the 10th
- 2) How the Court Enlisted Congress to Secure Its Home in the Byron White Courthouse (with Honorable Judge Bobby R. Baldock)
- 3) How the Tenth Circuit Got Ruth Bader Ginsburg Her “Good Job” (Part 1)
- 4) How the Tenth Circuit Got Ruth Bader Ginsburg Her “Good Job” (Part 2)
- 5) A Reluctant Mentor: Byron White the Man (with Judge David M. Ebel)
- 6) Judge David Ebel Q&A
- 7) Excerpts from the Oral History of Hal Haddon (Part 1)
- 8) Excerpts from the Oral History of Hal Haddon (Part 2)



There are about two and a half hours of content with more to come. The most recent episodes feature the oral history of Hal Haddon, who served on seven nominating commissions to identify candidates for federal judicial appointments. An upcoming episode is planned to feature stories from Judge Bruce S. Jenkins of the District of Utah about the Downwinders case.

In each episode of approximately 30 minutes, Schwartz—the Historical Society’s state vice president from Wyoming—interviews a judge, lawyer, litigant, court staff member, or anyone else with a story to tell from the Tenth Circuit’s history. Howell, the Court’s Emerging Technologies Librarian, and Guillon—the Historical Society’s state vice president from Colorado co-produce the series.

We welcome your ideas for other episodes. Please forward them to the Historical Society’s email address: 10thcircuithistory@gmail.com

Chair's Note

By James D. Oliver, Chair of the Tenth Circuit Historical Society, Overland Park, Kan.

We have news and it's good!

The Bench Bar Conference is back after four years, September 8-10, 2022, at the Broadmoor. The Historical Society is especially honored to help host the Fireside Chat, this year with Chief Justice John Roberts. You won't want to miss this event.

A dramatic and beautiful new history exhibit in the Byron White Courthouse, funded by the Historical Society, was completed during the COVID hiatus. The formal opening ceremony was held in May 2022. This exhibit is a must-see, whether you are in Denver for court, for other business, or on vacation.

In forward-looking news, the inaugural episodes of a new podcast, Tales from the 10th, are available at <http://www.10thcircuithistory.org/podcast>. Hosted by Leah Schwartz and produced by Tina Howell and Stacy Guillon, Tales from the 10th brings significant events and historical figures to life in a format that is popular and accessible to a wide audience. In 2020, over 155 million people listened to a podcast every week. Thanks to Leah and Tina for getting this started. The board anticipates it will grow and afford the opportunity for contributions of content from across the circuit. Try it out!

In other news, it's time to congratulate and thank Juliette White of Salt Lake City on completion of her two-year term as Board Chair in January. Juliette is a marvelous lawyer and has been generous and skilled in service to the Historical Society.

This opening note as Chair of the Board caused me to reflect on teaching history, which I did as a profession for one year before starting law school.

I knew those kids needed to know history but did not want to, so I had to make it interesting and relevant. They needed to know that history is relevant to every subject and academic discipline (even though it isn't labeled as history).

For example, the history of mathematics, chemistry, and physics (and the people who pioneered them) is essential to understanding the subject and to human progress. As Sir Isaac Newton observed, "if I have seen further than others, it is by standing upon the shoulders of giants."

This is true of other academic disciplines and especially law. What happened before provides the context necessary to see where we are now. Understanding events of the past, along with the experiences and wisdom of great lawyers and judges of each generation, helps us to find a better way forward. And, as Newton observed, knowing our history will humble us.

This is the mission of the Historical Society: "To preserve and promote knowledge of the history of the development of the law in the Tenth Circuit and the judges and notable lawyers who have served in the Circuit."

Thank you for supporting it.

Remembering Judge Dee Benson

The Deseret News, Salt Lake City

Judge Dee Benson, the longtime federal district court judge who cut a wide swath through the legal world in Utah, died at his home in Sandy, Utah, on Nov. 30, 2020, at age 72.

Judge Benson had a brilliant, far-reaching legal career. He was appointed as a federal judge in 1991 by President George H.W. Bush and took senior status in 2014. Before that he was the U.S. attorney for Utah, chief of staff for Sen. Orrin Hatch, and associate deputy attorney general in the Attorney General's Office in Washington, D.C., the No. 3 position in main justice.



Judge Dee Benson

While serving as a federal judge, Judge Benson was appointed by Chief Justice William Rehnquist to the FISA court, and Chief Justice John Roberts appointed him to

serve on the Judicial Conference of the United States. Not bad for a PE major from BYU.

“He had an amazing legal career, just remarkable,” said longtime friend Judge Paul Warner, the chief magistrate judge for the U.S. District Court in Utah, whose office was next door. “These days you hear about so-called Democratic or Republican judges. The media is quick to report a judge was appointed by Obama or Trump, indicating that’s what swayed their rulings. Dee loved the law, and he was enormously talented—clearly the quickest legal study I’ve seen in the 45 years I’ve been in law. And because he loved the law and knew it, he let the law dictate the outcome.

“He never had an agenda, other than to get it right, and he did his best to get it right—not according to personal beliefs or feelings, but according to the law as he understood it.”

Besides a keen legal mind, Judge Benson possessed a deep streak of wit, humor and kindness, which engendered friendship and affection everywhere he went.

“I don’t know if I’ve ever met a more genuine person,” said Utah Sen. Mike Lee, who clerked for Judge Benson. “A person without guile in the position of prominence that he had is a true treasure to his fellow beings. All he wanted was to do the right thing. And he was genuinely concerned about the happiness of everyone around him, including those who worked for him. And he was fun. There’s not another person like him anywhere.”

Judge Benson grew up on a small farm, enrolled at BYU, then took two years off to serve a mission in Sweden for The Church of Jesus Christ of Latter-Day Saints. After graduating from BYU in 1973 with a degree in physical education, he was a student teacher and high school soccer coach. He changed his career plans after that experience and applied for law school.

“He only went to law school because he didn’t want to be a schoolteacher,” said Lee Benson, Judge Benson’s identical twin brother who is a newspaper columnist.

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