



Carpenter v. Murphy: A Death Row Inmate's Appeal Depends on Whether an Oklahoma Indian Reservation Still Exists

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*UPDATE: On June 27, 2019, the Supreme Court [ordered](#) *Carpenter v. Murphy* restored to the calendar to be re-argued in the October 2019 Term. The original post from November 16, 2018, is below.*

This term, the Supreme Court in *Carpenter v. Murphy* will review a decision by the U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit) concerning whether Oklahoma had jurisdiction to charge and convict Patrick Murphy, a member of the Muscogee (Creek) Nation who [killed](#) a fellow tribe member. The validity of Murphy's murder conviction turns on whether his crime was committed within the boundaries of the Creek Nation reservation—a reservation that Oklahoma says ceased to exist in the early 1900s. Although the Oklahoma state courts rejected Murphy's efforts to overturn his conviction, the Tenth Circuit concluded that the crime did occur on reservation land, so Oklahoma lacked authority to prosecute Murphy. Whether the Supreme Court will agree with the Tenth Circuit's decision is uncertain, but if it does, the decision could have significant consequences beyond Murphy's case. The land where the crime occurred would be "Indian country" under federal law, narrowing Oklahoma's criminal jurisdiction over offenses committed by Indians on such land. Such a decision might also prompt litigation concerning the status of other tribal lands within Oklahoma. This Sidebar briefly discusses how federal law may circumscribe state criminal jurisdiction over Indian country, examines the Tenth Circuit's decision, previews arguments being raised at the Supreme Court, and describes options for congressional action.

The Major Crimes Act and "Indian Country"

The legal question in *Murphy* turns on whether Creek land constitutes "Indian country" over which Oklahoma's criminal jurisdiction is limited. The federal government (particularly Congress) has long been recognized as having [plenary authority](#) over Indian affairs, and states cannot exercise jurisdiction over "Indian country" without federal approval. A [federal statute](#) defines "Indian country" to mean (1) all land within an Indian reservation, (2) all dependent Indian communities, and (3) all Indian allotments that still have Indian titles. An area qualifies as Indian country if it fits within [any](#) of these three categories, meaning a formal designation of Indian lands as a "reservation" is [not required](#) for those lands to be considered Indian country.

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Federal law generally limits when states may prosecute certain crimes committed within Indian country. Most relevant to this case, the [Major Crimes Act](#) confers the federal government with jurisdiction over certain serious crimes, like murder and kidnapping, committed by an Indian within Indian country. ([Exceptions allow](#) some states, though not Oklahoma, to exercise jurisdiction over such conduct.)

The Tenth Circuit Decision

The Supreme Court has [explained](#) that Congress alone has the power to change or erase reservation boundaries. Once land is designated as a reservation, it generally stays that way until Congress eliminates (“disestablishes”) or reduces (“diminishes”) it. Appealing his state murder conviction to the Tenth Circuit, Murphy contended that the Creek reservation had never been disestablished and therefore constituted “Indian country,” precluding state jurisdiction over his offense. The Tenth Circuit agreed.

In its decision, the Tenth Circuit briefly [explained](#) the history of the Creek reservation. In the 1820s, the federal government forcibly relocated the Creeks and several other tribes to what is now present-day Oklahoma. As part of that relocation, the government signed a [series of treaties](#) with the Creek tribe, ultimately giving the Creek Nation a [vast area of land](#) roughly equivalent to present-day Oklahoma.

That tract of land was [reduced](#) by later treaties. The final reduction occurred after the Civil War, when the Treaty of 1866 required the Creek Nation to [transfer the western half of its land](#) back to the United States.

Though the Creek Nation later experienced many changes in its relationship with the federal government—most notably related to [tribal governance and a push for individual ownership](#) of the land—the boundaries of the Creek land remained generally unchanged until at least the early 1900s. At that point, the “[unique history](#)” of Oklahoma began to transition toward statehood, effectively merging eastern Indian lands and western non-Indian lands into a single geographic entity.

To determine whether Congress intended to disestablish the Creek reservation land, the Tenth Circuit [applied](#) a three-step analysis developed by the Supreme Court in [Solem v. Bartlett](#) in 1984. Under this framework, courts examine: (1) the language of the governing federal statute; (2) the historical circumstances of the statute’s enactment; and (3) subsequent events, such as Congress’s later treatment of an affected area. Importantly, the *Solem* framework instructs courts to resolve any uncertainty in favor of the tribes: if the evidence is not clear, the reservation continues to exist.

Using this framework, the Tenth Circuit [agreed](#) with Murphy that his criminal conduct occurred in Indian country, and Oklahoma therefore lacked jurisdiction over it. Although Oklahoma referenced eight separate federal acts that it viewed as collectively disestablishing the Creek reservation, the Tenth Circuit [ruled](#) that none of those statutes clearly referred to disestablishment, and in some instances reflected Congress’s continued recognition of the reservation’s borders. Oklahoma’s evidence that Congress intended to change its governance over the Creek reservation [did not convince](#) the Tenth Circuit that Congress also intended to erase the reservation boundaries. Similarly, the Tenth Circuit found that events following legislation cited by Oklahoma insufficiently supported the argument that Congress intended the Creek reservation to be disestablished. In sum, the Tenth Circuit did not find that Congress clearly intended to disestablish the Creek reservation, so it concluded that Oklahoma lacked jurisdiction to convict Murphy for a killing occurring on those lands.

Oklahoma appealed that decision to the Supreme Court.

Challenges Raised on Appeal

In its brief to the Supreme Court, Oklahoma [claims](#) that no one has treated the relevant land like a reservation since Oklahoma became a state in 1906. It also [argues](#) that because Congress broke certain promises in the treaties that had established the reservation, Congress must have intended to disestablish

it. Oklahoma [maintains](#) that it “is inconceivable that Congress created a new State by combining two territories while simultaneously dividing the jurisdiction of that new State straight down the middle by leaving the former Indian Territory as Indian country”—in other words, Congress [could not have intended](#) Oklahoma to have criminal jurisdiction in only half its land mass. Finally, Oklahoma [contends](#) that the *Solem* framework should be inapplicable in the unique context of Oklahoma statehood.

The federal government filed a [brief](#) in support of Oklahoma that makes [similar arguments](#). However, the federal government [additionally](#) claims that Congress elsewhere granted Oklahoma broad criminal jurisdiction over Indian country, which it says should enable prosecution of cases like Murphy’s, regardless of whether or not his crime was committed in Indian country.

Implications of the Supreme Court’s Decision in *Murphy*

The Supreme Court is scheduled to hear oral arguments in this case on [November 27, 2018](#). Justice Neil Gorsuch [recused](#) himself from considering whether the Supreme Court should hear this case. This likely means he also won’t participate in deciding the case—[presumably](#) because he participated in earlier discussions about this case while he was [still a judge](#) on the Tenth Circuit.

In addition to the Creek Nation, [several other tribes](#) were forcibly relocated to Oklahoma under similar circumstances and under the same or similar treaties. The parties in *Murphy* filed a [joint appendix](#) containing several historical maps depicting reservation boundaries in Oklahoma in the early 1900s.

If the Supreme Court agrees with the Tenth Circuit that Congress never disestablished reservations like the Creek’s, Oklahoma argues that its ability to prosecute many crimes in the eastern part of the state would be significantly narrowed. [According to Oklahoma](#) and some amici, the Tenth Circuit’s decision “would create the largest Indian reservation in America today That revolutionary result would shock the 1.8 million residents of eastern Oklahoma who have universally understood that they reside on land regulated by state government, not by tribes.” If a significant part of Oklahoma is Indian country, then the burden would shift to the federal and tribal [governments](#) to prosecute many offenses involving Indian offenders or victims—at least, absent other federal statutory authority allowing the state to prosecute.

If the Supreme Court reverses the Tenth Circuit and finds that the Creek reservation was disestablished, Murphy’s conviction and death sentence would be reinstated, and Oklahoma would (presumably) continue to prosecute cases like Murphy’s.

However, other amici have joined *Murphy* in arguing that the Tenth Circuit’s decision should be upheld. Some, including the Creek Nation, [contend](#) that recognition of the Creek reservation’s continued existence would leave intact most state and local functions on those lands. For example, the Creek Nation argues that even on reservation land, state and local governments would retain most civil jurisdiction, including taxing and zoning authority.

The Supreme Court could also avoid the question of whether the Creek reservation still exists. For instance, it could adopt the federal government’s argument that Oklahoma had jurisdiction to prosecute *Murphy* because of a different statute, regardless of whether the Major Crimes Act applies. The Supreme Court could also reassess the approach it endorsed in *Solem*, or—as [suggested by](#) Tenth Circuit Chief Judge Tim Tymkovich—conclude that the *Solem* framework is ill-suited to the unique circumstances surrounding Oklahoma’s statehood.

Options for Congressional Action

In any event, the decision whether to disestablish a reservation still lies solely with Congress. If the Supreme Court agrees that the Creek reservation still exists, a statute clearly disestablishing it would limit

this case's applicability in the future. Congress [could also pass a law](#) expressly giving Oklahoma state jurisdiction to prosecute crimes that overlap with those named in the Major Crimes Act.

If the Supreme Court disagrees with the Tenth Circuit and holds that the Creek reservation no longer exists, Congress could—depending on the exact grounds of the ruling—countermand that decision by re-establishing or clarifying the continued existence of the Creek reservation.

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