

Automated voice 1:

Mr. Chief Justice, may it please the court. It's an old joke but when a man argues against two beautiful ladies like this, they're going to have the last word.

Automated voice 2:

She spoke not elegantly but with unmistakable clarity. She said, "I ask no favor for my sex. All I ask of our brethren, is that they take their feet off our necks."

Leah Litman:

Hello, and welcome back to Strict Scrutiny, your podcast about the Supreme Court and the legal culture that surrounds it. I'm Leah Litman, one of the hosts, and today we have our much awaited and long promised deep dive episode on McGirt versus Oklahoma. One of the benefits of the summer recess is that it gives us the opportunity to do deeper dives on cases that got lumped together at the end of the term, and that of course includes McGirt. To help me with that deep dive I'm delighted to have with me today Liz Reese. Liz is a Bigelow Fellow at the University of Chicago Law School. She researches and writes on constitutional law, race and the law, voting rights, federal Indian law and tribal law. Liz graduated from Harvard Law School, clerked for Chief Judge Diane Wood on the Seventh Circuit and Judge Thapar, then on the District Court now in the Sixth Circuit, worked at the NAACP, LDF and the National Congress of American Indians where she worked on the implementation of the 2013 Violence Against Women Act. Welcome to the show, Liz.

Liz Reese:

Thank you for having me. I'm excited.

Leah Litman:

We're really excited to have you. As I was saying, one of the benefits of the summer recess is that we can do deep dives on cases that really warrant it. And at the end of the term, it was readily apparent that McGirt was one of those cases.

Liz Reese:

Oh yes. I think with just page count it was quite apparent.

Leah Litman:

Yes. Well, especially if you don't count Justice Alito's appendix in the Bostock opinion, then McGirt definitely by page length warranted additional time.

Liz Reese:

Yeah. And also because there was, just immediately after the decision, a lot of, probably, confusion about what the actual holding was, what the effect of the case would be, both in Oklahoma of course itself, for the affected area, but for just people around the country. I think we're suddenly wondering, "Wait, actually, is half of Oklahoma an Indian reservation right now, today, and what does that mean? What did the Supreme Court just do?"

Leah Litman:

Why don't we give our listeners sense about what McGirt actually held and then we can go into some of its implications and some of why it was surprising in some ways. So the legal question in McGirt v. Oklahoma involved technically an interpretation of the Major Crimes Act and surrounding federal statutory provisions. The Major Crimes Act is a provision of federal law that provides that quote within the Indian country, quote, "Any Indian who commits certain enumerated offenses falls within the exclusive jurisdiction of the United States." And a neighboring provision defines Indian country as, all land within the limits of any Indian reservation under the jurisdiction of the United States government. And so the question in McGirt was whether the land on which McGirt committed his crime qualified as Indian country for purposes of the Major Crimes Act thus requiring the United States to exercise jurisdiction over him rather than the State of Oklahoma which had done so in this case. Did I get that right?

Liz Reese:

Yes.

Leah Litman:

Okay. I'm going try to be as precise as I can. I know this is a highly technical and convoluted area of law. The opinion, as we described on the recap was 5-4, with Justice Gorsuch authoring the majority and the Chief Justice authoring the dissent. Justice Gorsuch was joined by the four more liberal justices. And this was, I believe, the only argued 5-4 decision in which the Chief Justice ended up in the minority, in all of the other ones he had been in the majority, so it's interesting in part, for that reason. So bottom line conclusion, the court seemed to say that this land in Oklahoma did fall within the scope of Indian country but the Court's reasoning for why it did so was interesting and significant. And that's part of what we wanted to focus on here.

Liz Reese:

Yeah, so much of the Court's decision rests on this idea of whether or not that land is still an Indian reservation, because being an Indian reservation is one of the things that can make something Indian country. In this case, it's really about a very complicated history. If you think about the word "reservation" itself and you really wind back the clock all the way, that is supposed to mean that this is land that was actually reserved for the Indians, actually, set aside for them to exclusively live on back in the days when the Department of Indian Affairs was in the Department of War. So in some ways it's wild that we're even having this conversation now about whether or not reservations still exist, what type of powers the government has. So we had this promise but we take for granted that we're just going to break it at various points throughout history and then read the breaking of that promise into the legal understanding subsequently.

Leah Litman:

That was so much a part of the argument and also the opinion, because as you outline the definition of reservation, as it was understood, and as it was promised, it should have been land for the tribes and nations to whom it was given. Of course that's not what it is now. And so the question is, well, if some of those promises have been broken, are we going to allow you to break all of them and say it's no longer a reservation in the sense of some of the remaining powers and benefits that flow from that original agreement?

Liz Reese:

Absolutely. And that's what's, I think, so fundamentally tricky about Indian law in generally, but also these types of cases specifically, is that they're so intertwined with all of these moments in history. If history was clear, it would be one thing, but of course it's not because Congress changes its mind about what its policies are going to be with regards to the Indians all the time. And so, because of this back and forth, you see the Court trying to point to different places in the historical record that are very close to one another that signal very different things about what Congress intended for this particular piece of reservation land to be and what it might have intended for the tribe's powers to be over that land. And so the Court now, looking back on all of that history and trying to make some sort of consistent doctrine or consistent rule of law out of all of this, is really struggling. And it's pretty unsurprising because they're not working with something that always plays by clear rules or has consistency in that regard.

Leah Litman:

So let's talk about the rule that the Court announced to determine whether there was still a reservation or whether this land was still Indian country for purposes of the Major Crimes Act because there were a ton of examples of the phenomenon you just identified where Congress was rapidly changing its mind over a short period of time, which is irrelevant to the Court's assessment of whether the land remained Indian country. So in *McGirt*, Justice Gorsuch for the five, says, "In order to determine whether a tribe continues to hold a reservation, there's only one place we may look: the acts of Congress." So I'm going to bracket for this episode, Oklahoma's new argument that it made in this case, which is the land was never a reservation to begin with. And instead we're just going to focus on once there is a reservation, basically, how do you know it still exists or whether it has been, what's known as, disestablished. And Justice Gorsuch says the focus of that inquiry and the dispositive point is whether there's essentially a clear statement in subsequent congressional legislation disestablishing that reservation.

Leah Litman:

Now some of the quick changes in congressional policy you were alluding to happened here, which is that in the early 1900s Congress announced that it had plans to disband the tribal government and reservation in the next five years. But when those five years actually expired Congress enacted a subsequent statute, I think it was in 1906, continuing the tribal government for some purposes. And so it didn't seem like they had actually disestablished it. And so Justice Gorsuch concludes that those statutes don't rise to the level of evidence of the kind of congressional indication that's sufficient to disestablish a reservation. So is that the test that the Court has always applied in these disestablishment cases or how, if at all, did *McGirt* change this assessment of disestablishment?

Liz Reese:

Yeah, so I think that the dissent is probably right in criticizing the majority for actually changing the test pretty substantially. I think Justice Gorsuch has, in a very textualist predictable way, snuck in a rewrite of what the test used to be into now something that is really just a textualist test. So the test from *Solem v. Bartlett* was where it was established originally, is really a three part test. It was first, look at the text, see if there's any clear language setting out either disestablishment or the diminishment of an Indian reservation. So the boundaries just becoming smaller but not necessarily just forthright getting rid of the reservation altogether. Part two, the context, is there a contemporary understanding of what the law meant, that's demonstrated by how people were immediately talking about it or acting at the time.

Liz Reese:

Third, always to a lesser extent though, the demographics of the land and the subsequent actions by the people and government officials who were there afterwards. Find any Indian law professor who... Just as I am teaching this test now, after McGirt, I guess I would say that now the test is just step one. Is there actually any text from Congress that is clearly disestablishing or diminishing the reservation? I think Justice Gorsuch handles step two and step three in the following ways. With step two, he explains that it really doesn't make sense to have a context based test, especially with Indian affairs, because things change so often, the history is a mess, Congress changes its mind, the local agents changed their mind. Then with the third test he does the following, which I think is great, he basically just trashes it. Justice Gorsuch just clearly says and explains that this test is terrible because what it allows people to do is to break the law and turn that breaking of the law and into the law, so might making right.

Leah Litman:

I like that you call it trashing because I was envisioning Neil Gorsuch, the most interesting man in federal Indian law, just doing some radical trashing of the doctrine and it was just a fun vision I had.

Liz Reese:

I like to picture of that too but in a very empowered, "I am the Justice doing justice," slamming it in the trash.

Leah Litman:

Yeah. And I think it's that third aspect of the test that McGirt shoved down to being less significant than it was in the past. I think, in part, for reasons that Justice Gorsuch had given at oral argument, which is, well, if you look at what happened, it looks like a bunch of overeager, nativist, xenophobic white people running roughshod on tribes rights. And if you use that as evidence of either disestablishment or diminishment, it has the problem of might making right and allowing the breaking of these promises to actually break them in the courts of law.

Liz Reese:

Yes, exactly. If I'm teaching Indian law classes after McGirt, the way that I'm describing this three part test of text, context and Indian character or demographics, is that the test is now just part one. It's just part one, thank you Justice Gorsuch. And then what McGirt does with part two, is just say this doesn't matter because it's impossible to make any sense of this because this is Indian affairs, right? Congress changes its mind all the time, and this is 18 and 1900s, in periods of time where you're looking at historical records that are... People are on horses! These are letters and documents that are close in time for historians to evaluate but it's not very clearly created records that you can narrow down in time like we would have now. So it's just impossible.

Leah Litman:

It's interesting to me to see that written by Justice Gorsuch, who is obviously a very prominent and self-identified originalist in constitutional interpretation, yet here he is saying the context around this period was just insufficiently clear to shed light on the statute. Now maybe that's unique to this, either area of law or it's unique to this particular application of this legal standard. I don't know. But it was interesting for me to see him admit that, putting aside the text, the historical record about what this text meant at the time was just not sufficiently settled or was being worked through to a point where we just can't definitely say it amounted to disestablishment.

Liz Reese:

I think you're right to point out that that is fairly inconsistent with originalism in some regards. But I think in other regards, this is the West, this is Oklahoma and there's a reason why the wild west is called that, things are changing and are more in flux in an interesting way, especially with regards to Indian affairs. Like I said, Congress and the President and the local Indian agents are changing their minds a lot.

Leah Litman:

I did want to think more about whether this case and Justice Gorsuch's adjustment of the legal standard represented a triumph of textualism, or textualism and something else or just the something else. Because in some respects this opinion is very much simpatico with Justice Gorsuch's method of statutory interpretation, which is, I care about the text just the text and nothing but the text. And you're saying I'm not going to read into context and I'm not going to look at subsequent practice or consequences. And in that respect, it is a textualist opinion. In other respects though I wonder whether we are jumping too quickly to the conclusion that textual interpretation is driving these conclusions rather than textual interpretation infused by substantive considerations. What do I mean by that? One is, why do we have this clear statement rule that requires there to be clear evidence in the statutory text in order to conclude that there is diminishment or disestablishment? It protects tribal sovereignty and native governance.

Leah Litman:

And that might be a one substantive consideration that's infusing how the court sets up the rules about statutory interpretation in this context. But the other more important indication to me was just reading this opinion. It was hard for me not to come away from this opinion without the conclusion that Justice Gorsuch was extremely sympathetic to the tribe's assertion of sovereignty. The opening line is, "On the far end of the trail of tears was a promise." And throughout the opinion, it is littered with opinion writing that is critical of state and federal diminishment of tribal sovereignty. And so, even if I think that his best interpretation of the statutes was doing a lot of work, it was an interpretation of the statute said, in some ways was consonant with his assessment about what was right in the bottom line of this case. Is that wrong? Or... because it just feels like he does this several times in federal Indian law cases where he is receptive to arguments of tribal sovereignty and tribal authority.

Liz Reese:

Yeah. So there's so much there. And I... Let's dig into all of it. So Justice Gorsuch in Indian law is absolutely someone to watch and a very interesting figure who, keeping in mind he comes out of the Tenth Circuit which gets a lot of Indian law cases, he's been in Denver, which is right next to the headquarters of the Native American Rights Fund, and when he's nominated, a lot of tribes come out and of him based on his Indian law record. There was even, I think, stress about whether the native organizations were... what they were going to do, because a lot of the other civil rights or racial justice advocacy groups had come out against his appointment.

Liz Reese:

And the native orgs, I think, stayed quiet because of this record that he has of generally being a judge, when he was on the Tenth Circuit, who was sympathetic to tribal sovereignty. The question I think is, why and sort of what's going on there? I think there's maybe two possible ways to think about that. One is just this sovereignty question. I've always liked to think sometimes conservatives should find tribal sovereignty way more appealing than they do because it's like, "Come on guys, state sovereignty, you

love it when governments get to have power in a more direct way and make rules for themselves and just do the things, come on. We got 574 of them ready to do it."

Liz Reese:

But I think there's also just this sense of just the justice of it all, and just the rule of law and just there's going to be a promise, but it got broken and we're just trying to hold the pieces together in some doctrine that attempts to make it coherent. And instead just says, "We should not be breaking promises, let's hold the government to its word." As he also says, at the beginning of the opinion, "The law means something, rely on the law," is also very much coming through the opinion and probably motivating his sympathies for tribes in this regard.

Leah Litman:

Yeah. And it's a way that he is extremely different from two of his fellow conservatives on the Court, in particular, both Justice Alito and Justice Kavanaugh, are much less formalist than Justice Gorsuch is, both in constitutional interpretation and statutory interpretation, and also in this area. At the Sharp arguments, which was the first iteration of this case argued and in the McGirt arguments, both Justice Alito and Justice Kavanaugh kept coming back to the idea of, well, what are the consequences if we rule for the tribe? Isn't this going to create this fundamental instability? What about the fact that no one asserted this claim that this was a reservation for the last 100 years? So I just want to play these two oral argument clips really quickly of Alito and then Kavanaugh making this point.

Justice Alito:

There's a fundamental principle of law that derives from Sherlock Holmes, which is the dog that didn't bark. And how can it be that none of this was recognized by anybody or asserted by the Creek Nation, as far as I'm aware, for 100 years.

Justice Kavanaugh:

But even if they were ambiguous on the text, the historical practice for a century has been against you and stability is a critical value in judicial decision making. And we would be departing from that and creating a great deal of turmoil.

Leah Litman:

Part of what is interesting about this to me is it brings into stark relief where the sympathies of the Justices lie. Justice Alito and Justice Kavanaugh are extremely concerned about the implications on people other than the tribes. Whereas I read Justice Gorsuch's opinion to be quite concerned, and rightfully so, with the consequences for the tribe if the ruling had gone the other way. And so it's not entirely a formalism functionalism to me, it's about where do you assess or how do you assess the equities in this case? Because what's getting lost here is if you all of a sudden say, "Reservation is no longer a reservation," what is going to happen to the provision of tribal services that has been happening all over Eastern Oklahoma?

Liz Reese:

Yeah. And it's not just the tribe, it's all tribes. That is part of the frustration again with Indian law is that even though a lot of these are individual agreements, individual treaties, really contracts, between different governments with vastly different histories, the context of what power relationships they

might've had with the U.S. Government, this body of law, Indian law, for the most part treats them very similarly. And we'll read a decision about one as having quite sweeping implications for the powers of the others. And so a loss for one tribe is going to have huge effects for the tribes across the rest of the country.

Liz Reese:

If you look at Oliphant, the case where the tribes lost criminal jurisdiction over non-Indians, the Court for the most part looked at the facts of the Susquamish reservation that was involved in that case when, in effect, it also stripped criminal jurisdiction over non-Indians across the entire country, which created massive problems in terms of public safety on lots of reservations. And when you're talking about where do the concerns of the Court lie, it's also who. Is it with not just the tribe as a sovereign, but with the Indian people who live on this land of both this reservation but other reservations, who are trying to assert rights and live their lives in safe and effective ways?

Leah Litman:

I feel like my sense is, you mentioned the implications for not just the tribe whose actual land was implicated in this particular case but other tribes who would have been governed by a similar rule of decision. And I think part of the concern is that the fact specific inquiry that the Court does in cases like Oliphant, when those rulings go against the tribe, they somehow tend to be universally or generally applicable. Whereas rulings for a tribe, the concern is those end up being more limited to their facts. So for example, in the lead up to this case, the big decision that I think was most favorable to McGirt and to the tribe here was Nebraska v. Parker, which dealt with the lands in a very small town in Nebraska. And I think some people...Pender.

Liz Reese:

I feel like there's a lot of people being like, "Oh, Pender."

Leah Litman:

Some people, not unfairly, in the lead up to this decision were like, "Well, Tulsa is not Pender. These are different places and so the rule that the Court laid down in that case is not necessarily going to be good for the tribe here." And so that kind of asymmetry in how the Court's cases played out was part of the backdrop to the dynamic you're describing.

Leah Litman:

So I did want to talk a little bit about the aftermath of the decision because I feel like this underscores where the equities lie or who stood to win or lose, no matter how the Court ruled. So in the immediate aftermath of this decision, the state of Oklahoma and the Creek Nation and other affected tribal nations released an agreement in principle, which outlined a plan for implementing the Court's decision. But in the backdrop of this, there have been some rumors and I think some news reports quoting the Oklahoma Senator, Inhofe, said that he was considering legislation that would actually overturn the decision and disestablish the reservation. But the point that I wanted to make is just the Court's ruling underscoring that the reservation exists gives the tribes more political power to be at the negotiating table in order to make decisions about how jurisdiction and authority and social services are going to be effectuated and carried out.

Liz Reese:

Yeah. So I want to be really clear about what this case holds and what it doesn't hold. So in the opinion that Justice Gorsuch writes, he is very clear to say that the holding applies to the Major Crimes Act. So as a matter of interpreting the Major Crimes Act and this one tribe, so the Muskogee Creek Nation and its reservation boundaries, the Major Crimes Act shall be interpreted such that those boundaries are still intact and the reservation has not been disestablished. What's very important about that is he is not saying that the rest of Indian country's jurisdictional framework immediately applies both to these lands on the Muskogee Creek Nation and to the other four tribes who have very similar histories as the Muskogee Creek Nation, and so whose claims would likely be adjudicated similarly.

Liz Reese:

In fact, he explicitly says, "Those tribes have to also come to Court, we'll resolve those in due time. We're not deciding this case along with those other tribes interests." When I saw that my immediate reaction was this is very strategic and careful because Indian country's jurisdictional framework is incredibly complicated. What sovereign has jurisdiction over what persons, in which circumstances, both criminally and civilly requires a complex series of charts. That large of an area of land with that many people living on it, going from being not Indian country to Indian country overnight, and therefore having to abide by all of those rules would be very confusing. And it would be a challenge for all of the government people involved to switch over and effectively figure out those rules.

Liz Reese:

What Justice Gorsuch did was effectively kick all of the affected parties, so the tribal government representatives and the State and probably members of Congress, into negotiating rooms where exactly, like you said, the tribes now have more bargaining power to try and reach agreements about how this land is going to be governed going forward, that will hopefully be more workable for all involved. I've been watching very closely as various folks are debating what to do. And the tribal government representatives are still continually in negotiations.

Leah Litman:

And then you layer on top of that whatever agreements they are able to hammer out, there are also a complicated background set of rules. You noted, rightfully, that the decision is really just about criminal jurisdiction under the Major Crimes Act, but there's a complicated set of rules governing civil jurisdiction on Indian country or reservation lands. And those rules are entirely separate and distinct and I think much more restrictive of tribes' authority than the Major Crimes Act.

Liz Reese:

Yeah. Well, it depends on how you think of it. I think Indian law's complex jurisdictional framework resists all generalizations, but tribal civil jurisdiction is fairly limited. So with the Major Crimes Act you're talking about, for the most part, the federal government's jurisdiction as opposed to tribal jurisdiction. With tribal civil jurisdiction though, that's been eroded pretty swiftly by the Court over recent years too.

Liz Reese:

So that was an interesting thing that kept coming up because going back to this question of, what were people sort of really worried about and what were they the interests that were really at play in the case that were going to motivate the outcome? People kept talking about what happens, what happens to all these people? What happens to all of this land if we say that it's a reservation? And-

Leah Litman:

And specifically to non-Indians, right? That was a concern of the Chief, Justice Breyer, Justice Alito and Justice Kavanaugh, what do you say to the person who is non-Indian and wakes up the next day knowing that they're on a reservation?

Liz Reese:

My favorite line was, just the first thing, like, "They built their lives on all this law."

Justice Breyer:

They have built their lives, not necessarily on criminal law, but on municipal regulations, property law, dog-related law, thousands of details. And now if we say really this land, if that's the holding, belongs to the tribe, what happens to all those people?

Liz Reese:

What would happen is that this giant complicated regulatory framework that you guys have come up with would apply. But it would mostly not affect them and their lives because the Supreme Court has, for the most part, severely scaled back the powers that tribal governments have over, particularly, non-Indian conduct on non-Indian owned land, which is the vast majority of this area.

Leah Litman:

You're right. Because the default is the inherent sovereign powers of tribes don't extend to non members, unless there is an agreement that has been entered into consensually. So I guess if there was an agreement between a person and a business and the tribe, that's like, "I allow you to govern dog-law..." I don't know what Justice Breyer was envisioning, I appreciate Justice Breyer is concerned for dogs, I'm a dog person. I just... part of me was like, "Do you not remember all of the law your Court has made about-"

Liz Reese:

And then the other exception is that it interferes with the political integrity, health and welfare of the tribe, which has been read so unbelievably narrowly by this court. But the other hypothetical with dog relate to law that I tried to come up with something like, it would be dog-trained terrorists or something, something crazy.

Leah Litman:

So that was part of the aftermath of the decision. One other small piece of aftermath that came up at the oral argument in Sharp when it was initially argued and then again in McGirt was, well, if we say that the federal government has exclusive jurisdiction over this instead of the states, how many people could this potentially affect? That is, persons who have already been convicted in state court proceedings, what is going to happen to them? And Lisa Blatt, in her closing in the initial argument told the Court that they were going to free something like 2,000 people and she listed a particular number of what she identified as murderers and rapists as is, for want, extremely colorful. But I think the reality is it's a little bit more complicated than that because of restrictions on post-conviction review for people who are tried and convicted in state court.

Leah Litman:

And in particular, as we've been talking about, the ruling in this case is a statutory ruling. It is about the Major Crimes Act, and so the convictions in these cases, they would violate a federal statute. And there's actually a separate doctrine that limits the ability of state court prisoners to raise federal statutory claims in their habeas proceedings and so they have to overcome a certain threshold in order to do so. On top of that, there are also limits on second or successive habeas petitions. So if you've already filed one habeas petition in federal court, you can only file a second one if you show there is clear and convincing evidence of your innocence or a new constitutional rule of criminal procedure that the Supreme Court has established retroactively. If it's far from clear that either of those conditions are satisfied, the Tenth Circuit has said they would not be. And so the number of people affected by this ruling or who can actually gain the benefit of it might be quite small.

Liz Reese:

There's all that federal habeas law that's already going to make it hard and unlikely that there's that many people with claims out there that are still alive, but that's also interacting with the types of cases that fall under the Major Crimes Act itself. So these are only cases that the federal government would have been the exclusive prosecuting authority because they are a serious enough type of crime. For a lot of the people affected, they are people who might have committed these types of crimes, but they've also been in prison for a long time at this point and a lot of times they've already brought these habeas petition so they have exhausted these rights and those two are kind of intersecting in a way that is likely going to make it that there aren't that many still live claims out there. At least that's my that's my guess.

Liz Reese:

But I also have heard lots of different variations on the numbers from Oklahoma representatives over time. So I think we'll have to just sort of see. And certainly, if there was going to be a flood of people coming in and saying, "Oh, actually let me out of prison, this is Indian country." You would have expected to see it after the Tenth Circuit's decision and no such flood happened.

Leah Litman:

Right and so in addition to the... You're right, the Major Crimes Act only applies to certain enumerated offenses, so it's not all persons who identify as tribal members. It's the persons who identify as tribal members, committed their crimes on these lands and those crimes were the certain enumerated offenses.

Liz Reese:

Or non-Indians who committed crimes against tribal members.

Leah Litman:

Yes. One additional avenue that people could file for relief is actually in state post-conviction proceedings. But there, the state basically has control about how freely or narrowly to grant post-conviction relief. And so if they were super concerned about a possible wave of litigation, states can and do adjust their post-conviction relief procedures to impose certain time limits or limits on other bars. But yeah, anyways.

Leah Litman:

So those were the aftermaths of the decision that I had kind of wanted to touch on. But I thought maybe it might be worth to talk with our listeners just about what McGirt means about this Court. Are we at a crossroads for federal Indian law at the core? How excited should we be? How cautiously optimistic should we be? How pessimistic-

Liz Reese:

I think that at least Indian country is feeling cautiously optimistic, which is a weird feeling. Indians aren't generally used to winning, especially cases like this, that involved such huge non-Indian interests, where you had up to half of the state of Oklahoma, 1.8 million non-Indians, potentially freaking out about the status of their land. And the Supreme Court was like, "No, we're going to hold the Government to its word."

Liz Reese:

That's wild. A lot of Indian law scholars and experts have described the doctrine as often just bending to the interests of non-Indians regardless of what coherent rules or doctrine or law would command. And so seeing this not happen was just a huge deal. And I absolutely, in my networks of Indian law folks or just native American people, saw mass shock and celebration. It's just really worth pausing and marking that because especially for this demographic of people that has felt like the rule of law just didn't apply to us, we just could not count on the word of what's supposed to be our government actually meaning anything.

Leah Litman:

Especially in what the Supreme Court has explicitly called Courts of the Conqueror.

Liz Reese:

Yes, exactly.

Leah Litman:

Right. That's how this is playing out.

Liz Reese:

Exactly. The absolute seed cases in Indian law are very clear that there will be injustice in this because this is a court system of the conqueror. So while we started with the assumption that tribes retain all things that haven't been explicitly taken away, whether that lands, rights or powers, it slowly started flipping to getting closer to the assumption that tribes only have that which has been explicitly granted. Watching that, the doctrines slowly evolve, not with any sort of clear basis for flipping in that way. So this is really different. This case marks a very interesting time period. Originally it's a different case that's argued, Sharp v. Murphy is argued and Justice Gorsuch is recused because he participated in, I think, the en banc at the Tenth Circuit?

Liz Reese:

This case is decided by Justice Gorsuch 5-4, so it's very clear that his presence on the Court and in writing this opinion is the thing that makes a difference. So, if you go back to 2015 and think about the Dollar General case, which the Court heard in December 2015, this is a big civil jurisdiction case for tribal courts, things looked pretty bleak. It looked very likely that tribes were going to lose the Dollar General

case and it would be yet another instance of tribal governments having even less power over non-Indians, in this case, over the ability of non-Indians to even consent to civil jurisdiction. But then in February Justice Scalia dies and, lo and behold, in the following summer the case comes out and it's 4-4. So Justice Gorsuch coming in as the replacement for Justice Scalia is just... It's a huge change in terms of the expectation for Indian country, for the people who litigate Indian law cases and what the Court is going to be doing and the types of cases it's going to be deciding.

Leah Litman:

And I'm so glad you tied this Dollar General case to the term Justice Scalia because, of course, Justice Gorsuch is the justice who was eventually nominated to replace Justice Scalia and in a lot of ways he is Justice Scalia's heir. He is publicly, avowedly originalist, textualist who disclaims concerns for consequences, says, "I don't care what people are telling me, I have my methods and that's what's going to decide these cases." But in this important area it appears that he might be quite different because it's not like *McGirt* is the first decision on the Supreme Court where he had joined with his more liberal colleagues to vote in favor of tribal authority as happened with *Herrera v. Wyoming* and in *Cougar Den*. I think *McGirt* was probably a more significant case, in some ways, at least in its implications, but... So it's possible we are turning a corner. I feel like this an oddly optimistic take for both this podcast and for me. I'll take it when I can get it.

Liz Reese:

Well its hard to... I mean, that's the thing with Indian law or also with advocating for tribal sovereignty. It's like the bar was so low that it's like... But no, because it really was. One of the weird things about looking back at how bad it was and how many times tribes were losing after it really feeling that bleed. It did just seem that the best course of action was to keep cases out of the Court so that there wouldn't be more damage to tribal sovereignty. Especially in times like this and at many other times throughout histories, tribal governments are sometimes just not pushing for their powers or exercising rights that they may believe they have because they just know what the political winds are or because of just the circumstances of the current, whether it be administration or Congress, etc. And so, know that maybe just the move is to just sit and wait.

Leah Litman:

That's a really important point about what we make of the fact that these claims have not been raised or litigated before. You alluded to this earlier, but basically the consequences for public safety when you restrict the authority of tribes over non tribal members for criminal prosecutions because... And this came up a little bit in the argument in this case but under the Major Crimes Act, the result of the statute was supposed to transfer cases out of state court and either to federal court or, if tribal courts existed, tribal courts for crimes that tribes were allowed to prosecute, which as you mentioned after *Oliphant* did not include crimes in which they would have been prosecuting a non-Indian member. So it's a complicated maze of jurisdiction as was this piece in the University of Chicago Law Review Blog outlines.

Leah Litman:

But what I wanted to think about is one thing that I saw in the aftermath of this decision is some people suggesting that, "Oh, actually, you liberals who are all happy about this decision should be sad because this means that there won't actually be prosecutions of these crimes if states don't have the authority to prosecute them because the federal government, as we know, just has fewer resources, prosecutes for

your crimes particularly for some land that might be remote and not near the US Attorney's Office or something. Maybe they aren't going to investigate or prosecute the crime."

Leah Litman:

This feels a little bit like, heads I win, tails you lose, because it's only as a consequence of so vastly restricting tribal authority and starving tribes for money, that we have created this situation in which tribes aren't able to make up the difference between state and federal prosecution.

Liz Reese:

Yeah, tribes would love to be able to prosecute these cases and they would love to have the power back to be able doing that. They've been screaming at the top of their lungs for to give them that power back as a matter of public safety ever since Oliphant was decided and all of the subsequent cases which have stripped them of jurisdiction. And similarly the fact that all of the federal prosecutor's offices who are tasked with doing the work of prosecuting, particularly not just major crimes committed by Indians or against Indians but also non Indian crimes on reservations are underfunded. That is also something that is entirely the federal government's fault. And so they can also fix that.

Liz Reese:

And one of the things that people who do work in this field, like I used to back when I was at NCAI, are really hopeful of is that with all of the attention on this case and now with having to think about how all of this land in Oklahoma now qualifies as Indian country will actually think about, okay, what do the budget of these federal prosecutions need to be, in order to do the job that we've said they need to do? Or, maybe, does it even make sense to have them doing that? Or should we be letting tribes do more of this? Hopefully reconsidering some of these questions so that we can come up with a more workable solution.

Leah Litman:

I just think it will be interesting if, let's say hypothetically, a candidate for President was coming under attack for being insufficiently attentive to public safety. What if that candidate responded and was like, "My solution to public safety is let's do the vowel fix and empower tribes to serve as local governments." That would be a criminal justice fix in favor of public safety. I'm waiting for Joe Biden to do this. So Joe, I just gave you free advice tip on the pod if you're listening.

Liz Reese:

Yeah, there are lots of ways that tribes can be empowered to do a lot of great things on the ground, not just with public safety but also with things like voting. Every time there's some election debacle, especially that reaches Indian country in a particularly challenging way, I always think to myself, "Gosh, why aren't tribes running elections like states are?"

Leah Litman:

So for those who are interested in what tribal governments can teach us about American law, Liz has a fascinating paper that is forthcoming in the Stanford Law Review, "The Other American Law" that our listeners should check out and we will post when it is publicly available.

Liz Reese:

In writing that paper and just generally in my experience working with tribal governments across the country, the reality of tribal governments kept coming up all the time. Also when I was thinking about the McGirt decision and listening to the oral arguments, because a myriad points of times it's very clear, especially when there is this fear mongering coming in about what will happen if the Muskogee Creek Nation is making these laws? I kept thinking, "Why is everyone so afraid? Have you met them? I have, they're nice." They're a thoughtful group of politicians who have an established government that's very capable of doing things and what's going on isn't Oklahoma or chaos and lawlessness, it's Oklahoma or, in some very certain contexts that are very limited for reasons that we've talked about, Muskogee Creek Nation, which is a government that is real and competent and makes laws, that you should not be inherently afraid of because it is this unknown.

Liz Reese:

Tribal law is so knowable, tribal governments are so knowable to the rest of America and they should be more knowable, and that's one of the things that I hope that piece will get across to legal academics and practitioners across the country. Because I think it's really important that tribes get really seen in that regard because not seeing them or just being afraid of this unknown has done a lot of damage when it comes to Indian law in particular.

Leah Litman:

Yeah, because you got Steve Breyer amusing about the horrors of subjecting people to tribal law, dog-law.

Liz Reese:

I'm sure that the people of Muskogee Creek Nation are also dog lovers and are not going create crazy dog-law if they were...

Leah Litman:

Right. Well, again, Steve if you're listening maybe you can think about that too.

Leah Litman:

So thanks everyone for listening. Thank you do much Liz for appearing on this episode and informing us all about federal Indian law.

Liz Reese:

Thank you so much.

Leah Litman:

Thank you to our producer, Melody Rowell. Thank you to Eddie Cooper who makes our music. And thank you to Erica Schuman, a second year law student at the University of Michigan who helped with some research for this episode.