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PROTECTION OR CONTROL? – THE HISTORY & IMPACT OF THE MAJOR
CRIMES ACT ON NATIVE AMERICANS AND ITS FUTURE IN CRIMINAL
LAW

by

CAMERON GARROW
University of Central Florida, 2023

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ABSTRACT

In this thesis, I traced the history of the Major Crimes Act of 1885, focusing on United States Supreme Court cases regarding the Act's enforcement and its constitutionality. In particular, analysis focused on how the USSC's decisions affected Native Americans within the field of criminal law, both as defendants and victims, and how these decisions prove to be contradictory or unjustly detrimental in nature. There is also focus on the ongoing issues in the state of Oklahoma resulting from the Major Crimes Act's enforcement that have begun to spread from a state-level crisis into a nationwide problem. The thesis concludes with proposed ideas for how these ongoing issues may be resolved, as well as how the Major Crimes Act may need to be amended or repealed and replaced in order to do so.

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INTRODUCTION

This thesis focuses on the Major Crimes Act of 1885, which has been used since its passing to give federal courts jurisdiction over criminal cases which take place on tribal land committed by Native American defendants. The Act enumerates which specific major criminal charges fall under federal jurisdiction if they are committed by a Native American in tribal territory and its applicability has been the subject of several United States Supreme Court cases since 1886 and as recently as 2022. The analysis will primarily focus on 1) the U.S. Supreme Court's most relevant decisions and interpretations of the Act on the Native American population, 2) the short-term and long-term impacts these U.S. Supreme Court decisions have had and still have on Native American rights in criminal cases, and 3) potential directions that tribal, state, and the federal governments can take to finally resolve the issues caused by the Major Crimes Act and its enforcement.

DISCLAIMER

It is worth recognizing the reasoning behind the decision to collectively refer to the indigenous peoples mentioned throughout this thesis as “Native Americans.” It is still a widely debated issue as to what the preferable term should be for the indigenous population of the United States, as the answer can vary depending on whether one asks the government, the tribes, or the individual tribal members within them. Legally, the term “Indian/American Indian” was used primarily in earlier statutory law, and “Native American” was coined by the United States government during the Civil Rights Movement. Many tribes prefer to identify themselves as simply “indigenous.” Some choose to identify more specifically as belonging to their tribe (i.e., Navajo) rather than being grouped in the much broader term of “Native American,” as cultural differences and practices can vary widely between each tribe. In many cases, an indigenous person will identify as a member of their tribe first and as a “Native American” second, if at all. This debate has naturally led to some difficulty in how to address the issues all sovereign tribes face collectively, as there is no terminology that is universally accepted by all sovereign tribes.

For this reason, a sense of necessity presents itself to respectfully clarify why this thesis uses the term “Native American” when referring collectively to the sovereign tribes affected by the Major Crimes Act. As this research has been done to bring awareness to the issues impacting their peoples, the utmost respect is required when writing about each of them.

When the term “Native American” or “Native” is used throughout this thesis, it should be taken to refer to all sovereign tribes and their collective members within the United States. When the term “Indian” or “American Indian” is used, it will be limited to the terms’ use within quotations or statutory titles, as they must be referred to by name (i.e. the Indian Appropriation

Acts or when referring to Indian country). When referring to an individual tribe, they will be referred to by their federally recognized name to ensure consistency. Lastly, when referring to an individual person, they will be referred to as a “tribesman/tribeswoman” of the tribe to which they are a member.

BACKGROUND OF NATIVE AMERICANS AND CRIMINAL LAW

Prior to the Major Crimes Act, the primary criminal law statute regarding crimes on tribal land was the General Crimes Act of 1817, which extended federal jurisdiction to crimes committed in recognized tribal lands, or “Indian country,” but did not cover cases where a crime was committed by a Native American against another Native American.¹

This was followed by what are now referred to as the Indian Appropriations Acts, a series of legislation that was passed between 1851 and 1889 that permanently changed how the United States government treated Native American peoples and lands in the realm of criminal law. The Indian Appropriations Act of 1851 established Native American reservations for Western tribes under the government’s protection.² According to the government, this was done in order to protect Native Americans from the increasing number of white American citizens migrating to the region in pursuit of Manifest Destiny.³ The Indian Appropriations Act of 1871 directed that Native Americans were now considered wards of the federal government and removed the recognition of Native tribes as fully independent nations, which essentially made the acquisition of Native lands easier for the United States government.⁴

These were followed by the Indian Appropriations Acts of 1885 and 1889, which allowed Native Americans to sell their claimed lands, and opened unassigned lands to white settlers, respectively.⁵ Passed as the final section of the Indian Appropriation Act of 1885 was the Major Crimes Act, which expanded upon the General Crimes Act to grant exclusive federal jurisdiction to crimes committed by Native Americans in Indian country, as well as extending federal jurisdiction to certain enumerated crimes committed by Native Americans against Native Americans.⁶

The Major Crimes Act of 1885 has two subsections.⁷ The first enumerates the crimes that fall under exclusive federal jurisdiction if committed by a Native American within Indian country, which are as follows: murder, manslaughter, kidnapping, maiming, felony sexual or domestic abuse, incest, assault against a minor under the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and felony embezzlement.⁸ So, for example, any acts of felony child abuse committed by a Native American within the borders of Indian country would be tried under federal jurisdiction. The second subsection clarifies that any of those enumerated offenses which are not enforced by federal law with exclusive federal jurisdiction shall be punished in accordance with the law of whichever state in which the offense was committed.⁹ So, using the prior example, if the acts of child abuse committed were misdemeanors rather than felonies, they would still be tried in state court despite the Native American status of the defendant.

RELEVANT U.S. SUPREME COURT CASES & ANALYSIS

1. *U.S. v. Kagama*, 118 U.S. 375 (1886).

Facts: In the Hoopa Valley Reservation in Humboldt County, California, two Hoopa Valley tribesmen, Kagama and his son Mahawaha, were indicted for murder committed on reservation land and charged with the murder of Iyouse, another tribesman residing within the Hoopa Valley Reservation.¹⁰ Major Charles Porter was the federally designated “Indian agent” responsible for the reservation and had begun allotting land to the Hoopa Valley population without the legal authority to do so.¹¹ This also conflicted with the land-person relationship that had guided how the tribe dealt with property ownership for several generations.¹² Due to Porter’s allotment, Kagama had to request title for the land on which he had built his home, and this led to the violent conflict resulting in Iyouse’s murder for which Kagama and Mahawaha were detained.¹³

Issue: First major case to challenge the Major Crimes Act and the authority of federal courts to try Native-on-Native crime.¹⁴

Holding: The U.S. Supreme Court held in a unanimous opinion that federal district court had jurisdiction over the case because the crime occurred within the Hoopa Valley Reservation.¹⁵ This upheld the Major Crimes Act while identifying the Commerce Clause granting the federal government the authority to regulate commerce with foreign nations and among the states, which applies to the Native American reservations due to what the Court referred to as their “semi-independence.”¹⁶

Impact: Since the *Kagama* decision in 1886, the use of the Major Crimes Act has regularly been used to determine jurisdiction for criminal cases with Native American defendants. This has

caused controversy in the past due to perceptions of unfair or prejudicial treatment of Native American defendants under the Major Crimes Act. In several cases, challenges have been presented against it, claiming the Major Crimes Act to be unconstitutional, the strongest of which came in the late 1970s.

2. *U.S. v. Antelope*, 430 U.S. 641 (1977).

Facts: Three defendants, all enrolled members of the Couer d'Alene tribe in Idaho, were tried and convicted in a federal district court regarding the murder of a non-Native American who lived in the boundaries of the Couer d'Alene Reservation.¹⁷ One defendant was convicted on a second-degree murder charge, while the other two were convicted on burglary, robbery, and first-degree murder charges.¹⁸ Federal jurisdiction was granted by the charges being listed in the Major Crimes Act, but the defendants appealed their convictions and argued that they were unlawful as products of racial discrimination; if a non-Native American had committed the crimes they were charged with, then the case would have been prosecuted under Idaho state law, not in federal court under the Major Crimes Act.¹⁹ The defendants also noted that if they were tried under Idaho state law, proof of premeditation and deliberation would have been required.²⁰ The federal law which they were tried under did not require these elements, and thus the burden of proof required was practically easier to meet.²¹

Issue: Rights to equal protection under the due process clause of the 5th Amendment.²²

Holding: The U.S. Supreme Court held that equal protection requirements were not violated in this case, notwithstanding the disparity between state and federal law.²³ The Major Crimes Act was not based upon racial classifications and was applied to the defendants in this case, because

they were enrolled members of the Couer d'Alene tribe.²⁴ It was “of no consequence” that the burden of proof required under federal law differed from the state criminal code of Idaho.²⁵

Impact: Perhaps the first substantial challenge to the Major Crimes Act post-*Kagama* was with *Antelope*, where the U.S Supreme Court was faced with the task of reconciling the enforcement of the Major Crimes Act with the due process clause of the 5th Amendment. The only legal basis for the jurisdiction of the case was the defendants’ Native American status, which called into question their rights to equal protection.²⁶ By deciding that one’s status as a Native American is based not on ethnic background, but on enrollment and/or membership status with a tribe, the U.S. Supreme Court categorically altered the definition of “Native American” in the legal system.

Starting with the *Antelope* decision, courts have held Native American status to be a political classification rather than a racial classification. However, this still proves contradictory, as the majority of tribes require individuals to have a specified level of connection to their lineage, otherwise known as a “blood quantum,” in order to be an enrolled member.²⁷ For example, a tribe may require that an individual should have at least one Native grandparent in order to meet the blood quantum of the tribe. If this is the case, then the political classification of being an enrolled member of a tribe is still, in essence, based on one’s racial classification.

The *Antelope* decision effectively discredits itself. The U.S. Supreme Court’s decision establishes that the defendants were subject to federal jurisdiction because they were enrolled members of the Couer d’Alene tribe and not because of their racial status, but fails to recognize or acknowledge that this enrollment is based on racial status to begin with. Furthermore, the decision exposes the biggest weakness of the Major Crimes Act: it applies to Native Americans without defining what qualifies an individual as Native American. In the case of *Antelope* and its lasting

impact, this malleability allowed the U.S. Supreme Court and the federal government to assert an immense level of control over the Native American population that has proven difficult to reduce.

3. *U.S. v. Wheeler*, 435 U.S. 313 (1978).

Facts: A Navajo tribesman was sentenced to up to 75 days in jail by a Navajo court after being charged with disorderly conduct and contributing to the delinquency of a minor.²⁸ He was then charged with statutory rape in federal court and sentenced to another 15 years' imprisonment.²⁹ The defendant filed a motion to dismiss, claiming that the double jeopardy clause barred his federal prosecution due to the conviction of a lesser included offense by the Navajo court.³⁰

Issue: Protection from double jeopardy under the 5th Amendment applied to Native American defendants/Sovereignty of Native American tribal courts.³¹

Holding: The U.S. Supreme Court held that, although Native American tribes are within the physical territory of the United States and subject to federal control, they remain a separate people with the power to regulate their internal and social affairs.³² This is a part of inherent tribal sovereignty as delegated to Native American tribes by Congress.³³ Since this authority is separate from federal authority and the Navajo tribe acted as an independent sovereign when the defendant was previously prosecuted in their court, the double jeopardy clause does not apply, as it does not prohibit prosecution by two separate sovereigns.³⁴

Impact: With the *Wheeler* decision, the U.S. Supreme Court held that a defendant could be tried both in tribal court and in federal court without violating their right to protection from double jeopardy granted by the 5th Amendment.³⁵ The reasoning behind this decision was that tribal court

proceedings constituted sovereignty separate from that delegated to the tribes federally, so the defendant was subject to the jurisdictions of both sovereigns.³⁶

On one hand, this can be seen as a method of ensuring that the defendant received a strong enough punishment for his crimes. In this case, the Navajo tribesman in question had committed statutory rape of a 15-year-old Navajo girl and only received a sentence of 75 days from the tribal court on the charge.³⁷ From a non-Navajo perspective, the federal sentencing of 15 years was certainly a more appropriate punishment at that time. However, a key difference between the Navajo court and the federal government's approaches to criminal justice lies in their primary goals with sentencing.

While United States courts tend to focus on stronger punishment with the aim to deter criminal offenses from being committed, the Navajo judicial system focuses heavily on rehabilitation in the form of a principle known as *hozho*, which refers to a form of "restorative justice" in which the Navajo justice system attempts to "bring the offender back into their community" with the ultimate goals of reform and rehabilitation overseen by the Navajo-administrated Probation and Parole Services (PPS).³⁸ Under the rehabilitative goal of restoring *hozho* to the community, Navajo courts typically enact sentencing durations much shorter than what is considered standard practice from a non-Navajo perspective. Taking this cultural difference into account, if a tribesman is then sentenced to multiple years in federal prison, as was the case in this instance, then the Navajo community would find it much more difficult to restore *hozho*, and their freedom of religious practices are interfered with as well as their 5th Amendment right to protection from double jeopardy.

Another consequence of the *Wheeler* decision is that it provided a legal precedent for preventing the 5th Amendment from its intended application in criminal cases. As held by the U.S. Supreme Court in 1957, the purpose of the right to protection from double jeopardy is to prevent citizens from being subjected to trial and/or possible conviction more than once for the same offense, with the goal of saving them from the extended embarrassment and anxiety that would result from such a strain.³⁹ The decision to separate the tribal sovereignty and federal sovereignty in these circumstances allows and even encourages this strain of multiple trials to happen to Native defendants, thus creating an unfair exception that directly affects the Native American population.

Furthermore, the *Wheeler* decision goes against the language of the General Crimes Act of 1817, which was the primary legal standard on criminal cases with Native American defendants before the Major Crimes Act. Under the General Crimes Act, federal jurisdiction does not extend to “any Indian committing any offense in the Indian country who has been punished by the local law of the tribe.”⁴⁰ Put simply, this should mean that a Native American defendant’s charges are not subject to federal jurisdiction once they are tried and punished in tribal court, and their case should not be able to be tried in federal courts. If this is true, then not only is the precedent set by the *Wheeler* decision unfair to Native American defendants, but it is also unlawful in violation of the General Crimes Act of 1817, which further displays the convoluted nature of the laws that determine Native American criminal cases.

4. *McGirt v. Okla.*, 140 S. Ct. 2452 (2020).

Facts: In 1997, petitioner Jimcy McGirt was convicted on three sexual offenses in Oklahoma state court.⁴¹ He argued in a post-conviction proceeding that the state of Oklahoma lacked the

jurisdiction to prosecute him, as he is an enrolled member of the Seminole Nation and his crimes had taken place on Creek Reservation land.⁴² He cited two treaties from 1833 and 1856 which essentially fixed borders for the Creek Reservation and alleged that the Creek Reservation lands, which covered a significant portion of northeastern Oklahoma, had never been diminished or disestablished by Congress since.⁴³ This presented a challenge to the state of Oklahoma's right to prosecute Native American defendants for crimes committed in this region of Oklahoma.⁴⁴

Issue: Borders of Indian country within the state of Oklahoma.⁴⁵

Holding: The U.S. Supreme Court held that Congress had never effectively disestablished Creek Reservation lands in the state of Oklahoma, and so it remains recognized as Indian country under the Major Crimes Act.⁴⁶ This decision meant that the state of Oklahoma had no right to prosecute Native Americans in criminal cases committed within the region, which included most of the city of Tulsa.⁴⁷

Impact: While the *Antelope* and *Wheeler* decisions proved controversial from a legal perspective, the recent U.S. Supreme Court decisions in *McGirt* and *Castro-Huerta* have presented a different kind of controversial issue that has yet to be completely resolved. In invoking the Major Crimes Act to settle a jurisdictional issue, *McGirt* in turn resulted in a significant number of criminal cases in Oklahoma suddenly unable to be tried in state courts.⁴⁸ The federal government was also stretched thin with the sheer number of cases abruptly added to their load, going from about 250 cases filed before the *McGirt* decision in July 2020 to nearly 900 cases only a year later.⁴⁹ While the U.S. Supreme Court decided that they needed to hold the government to their word and continue to honor a previously existing agreement with the Native American tribes in the region, the burden of doing so has begun to overwhelm the regional court systems.

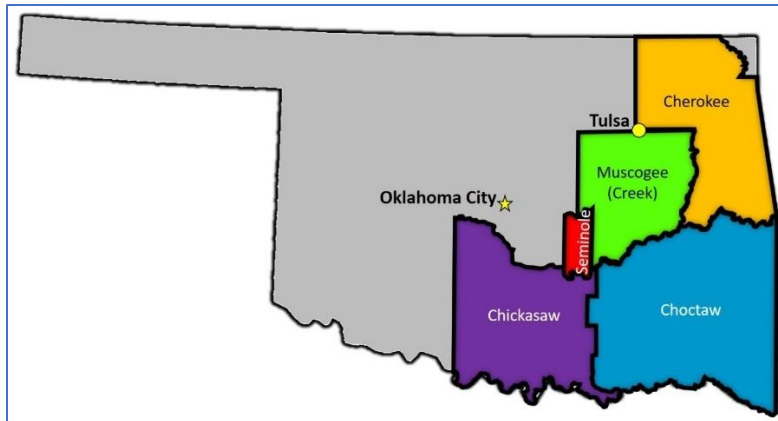


Figure 1: Map of Oklahoma depicting reservation borders affected by the McGirt decision.⁵⁰

While the Creek Reservation was the Indian country under dispute in the *McGirt* case, the Seminole, Cherokee, Choctaw, and Chickasaw tribes were also recognized under the same treaty that was brought to judicial attention by McGirt, and thus were also held to be Indian country along with the Creek Reservation.⁵¹ As shown in the map above, these lands account for about half of the state of Oklahoma, thus creating a problem of having to manage the shift of jurisdiction from state to federal throughout such a large portion of the state. Due to the sudden jurisdictional shift, several criminal cases have had to be dismissed due to expiring statute of limitations, key witnesses passing away, or evidence being lost in the process, among other issues.⁵² Numerous cases have also been dismissed and inmates released after the *McGirt* decision as the state government realized their cases should have been tried in federal court instead.⁵³ This situation has made prominent another weakness of the Major Crimes Act: it has aged to such a degree that it is no longer practical to uphold or enforce.

While the *McGirt* decision was made with intentions of goodwill from a U.S. Supreme Court that recognized the value of honoring their word and their obligations to the Native American population, the consequences of upholding the Major Crimes Act to such a widespread scale have created an ongoing issue within the state of Oklahoma that is still being debated today.

The fundamental issue with the decision is not the legal basis behind it; the Major Crimes Act and the treaties cited in McGirt’s appeal are both still recognized by law. Rather, the issue lies in the fact that the field of tribal jurisdiction has outgrown and surpassed the statute meant to guide its proceedings.

5. *Okla. v. Castro-Huerta*, 142 S. Ct. 2486 (2022).

Facts: Defendant Castro-Huerta was convicted for child neglect by the state of Oklahoma in 2015.⁵⁴ While his appeal was pending, the U.S. Supreme Court decided on *McGirt v. Okla.*, which led to Castro-Huerta’s argument that the federal government had exclusive jurisdiction over his case; although he was not a Native American, the crime he committed was against his Cherokee stepdaughter.⁵⁵ Furthermore, the crime had occurred in Tulsa, which was now recognized as Indian country after the *McGirt* decision, so the state of Oklahoma lacked the jurisdiction to prosecute and convict him.⁵⁶

Issue: Jurisdiction over crimes committed by non-Native Americans against Native Americans in Indian country.⁵⁷

Holding: The U.S. Supreme Court ruled that the state of Oklahoma had concurrent jurisdiction with the federal government to prosecute crimes committed against Native Americans by non-Native Americans in Indian country.⁵⁸ Since the Major Crimes Act does not enumerate coverage of crimes of this nature, the Court referred to the language of the General Crimes Act of 1817. The General Crimes Act does not grant the federal government exclusive jurisdiction, but simply “extends” jurisdiction to federal courts for crimes committed within Indian country.⁵⁹

Impact: Since the *McGirt* decision, the state of Oklahoma has been the subject of an ongoing debate as to how the federal government can ease the overflow of court cases it has suffered in a manner that can leave all citizens satisfied. Simply overturning the decision is not within the rights of the state, as the only way to change the recognition of Indian country borders or to revoke the cited treaties would be a decision from Congress.⁶⁰ This has not stopped Oklahoma Governor Kevin Stitt from consistently aiming to make progress to undo the results of the *McGirt* decision, despite his status as a Cherokee citizen.⁶¹ There have also been cases of political fearmongering and misinformation being spread throughout the state about Native Americans, creating more incentive for a way to resolve the issues left in the wake of *McGirt*.⁶²

In 2022, the *Castro-Huerta* decision presented a partial solution on how to proceed in the field of tribal jurisdiction post-*McGirt* by granting concurrent jurisdiction to cases where defendants are non-Native Americans committing criminal acts against Native Americans within Indian country.⁶³ Under the General Crimes Act of 1817, cases similar to *Castro-Huerta* were able to be shifted back to state jurisdiction. However, the issue of the federal courts being stretched thin is still not fully resolved, as they will still have to hear the numerous cases regarding Native-on-Native criminal activities, which the General Crimes Act does not apply to.

Additionally, despite the good intentions of lightening the load of the federal courts, which was successfully accomplished, the *Castro-Huerta* decision creates a potential problem for prosecuting crimes committed against Native Americans that reaches farther than just Oklahoma. The General Crimes Act has been utilized in Oklahoma to grant concurrent jurisdiction to state and federal courts to prosecute crimes committed by non-Native Americans in Indian country.⁶⁴ Now that this has been established by the U.S. Supreme Court, such cases can be tried with

concurrent state and federal jurisdiction across the entirety of the United States.⁶⁵ The ramifications of this have not been fully realized yet, but there is now the potential of the *Castro-Huerta* decision taking away an avenue of justice from Native American victims in a manner that will prove hard to come back from in the long-term.

To demonstrate, compare two scenarios similar to *Antelope*, where a group of Native American defendants argued that being tried in Idaho state court would be more beneficial to their case, as the state court's burden of proof required additional elements of premeditation and deliberation to be proven compared to the federal court's burden of proof.⁶⁶ In other words, this created a disadvantage where their conviction was more easily achieved in federal court and more difficult to achieve in state court.⁶⁷ After the *Castro-Huerta* decision, if a non-Native American defendant in Idaho allegedly murders a Native American in Indian country, their case may be heard in state or federal court. If the case is heard in Idaho state court, then their conviction is now more difficult to achieve than it otherwise would be in a federal court. However, if the roles are reversed, and the Native American defendant allegedly murders a non-Native American in Indian country, the Major Crimes Act exclusively allows them to be tried in federal court, where their conviction would be more easily achieved. Due to the *Castro-Huerta* decision, the non-Native American defendant in the first scenario has a higher likelihood of being acquitted than the Native American defendant in the second scenario, despite both being charged for the same crime.

The *Castro-Huerta* decision partially resolved the regional issue of Oklahoma's Native American criminal cases overwhelming the federal courts. However, this regional resolution cannot be reconciled with the legal disadvantage that Native American defendants are now faced with on a nationwide scale. Despite the best intentions of the U.S. Supreme Court, the decision has

opened the door for a new national issue that again displays the weaknesses of the Major Crimes Act, and the Native American population is still subject to the consequences of decisions that they did not make.

CONCLUSION: WHAT COMES NEXT?

1. Cross-Deputization Agreements Should Be More Common

In Oklahoma, the biggest issue has been finding a reliable method of reducing the strain on the federal courts from their drastically increased caseloads, which has only been perpetuated by Governor Stitt's opposition to the results of the *McGirt* decision and the subsequent attempts to reverse the decision. The first step that needs to be taken is for the state government to begin working with tribal authorities instead of against them. Since the state has no authority or ability to disestablish tribal lands, the best-case scenario for all involved is to move forward in a way that encourages collaboration to better serve Oklahoman citizens, including the Native American citizens.

One way to accomplish this is through cross-deputization, which has already been established in federal law. State and tribal governments can enter agreements with assistance from the Attorney General, including cross-deputization, with the expressed goals of effectively reducing and combating crime in Indian country and surrounding communities.⁶⁸ In cross-deputization agreements, officers are “cross-commissioned” between state and tribal jurisdictions and can make arrests without having to check if a defendant is Native American or if they are within Indian country first.⁶⁹ Since these officers are permitted to make arrests in both state and tribal jurisdictions, they can determine which jurisdiction the defendant is subject to after making the arrest rather than before, which saves time for both ensuring public safety and for prosecution proceedings. Before the *McGirt* decision, some cross-deputization agreements already existed in Oklahoma, but since the decision there have been at least 57 new cross-deputization agreements made between Oklahoma and the Cherokee Nation alone.⁷⁰

These agreements, through their successful speeding-up of prosecution proceedings, have been another post-*McGirt* method of reducing the strain on federal courts, and should continue to benefit Oklahoman citizens in the long-term. Depending on the needs of other states with sizable Native American populations, similar cross-deputization agreements should be encouraged by the federal government to ensure efficient collaboration between tribal and state governments across the nation.

2. Federal Funding to Increase Judicial Productivity

In order for cross-deputization and other collaborative efforts between tribal and state governments to succeed, funding from the federal government is necessary to ensure that the legal infrastructure of the affected jurisdictions are able to grow to meet their newly established needs. For example, within Oklahoma's Indian country, there is a need for more courthouses within the Creek, Cherokee, Choctaw, and Chickasaw lands in order to meet the drastic litigious burdens placed on the districts post-*McGirt*.⁷¹ Subsequently, these courthouses will need to have more legal professionals to properly handle the sheer number of criminal cases placed in their jurisdiction, including an increase in the number of public defenders and criminal prosecutors available, as well as judges and clerks to preside over them.⁷²

Furthermore, if cross-deputization agreements are to become more commonplace, there will also be a need to increase funding to state and tribal law enforcement agencies, as more officers will need to be hired to improve the efficiency of the agreements and coordination between tribal and state jurisdictions moving forward. The goal should be to establish a positive working relationship between the tribes and the states, and since the federal government is solely responsible for the Native American population under the Commerce Clause, as upheld by

Kagama, it must also be their responsibility to provide the necessary funding for any collaborative efforts that do not fall under the sole obligation of the states.

3. Legislative Change is Needed Most

Aside from the practical aspects required to move forward, the most necessary change required to fully resolve the issues that have faced Native Americans in criminal cases is in the statutes that affect the matter. The Major Crimes Act of 1885 was written over 140 years ago and is still the primary dictator of how to handle cases involving Native American defendants, and its age has begun to show in cases such as *Antelope*, *Wheeler*, and *McGirt*. In these cases and many others, the Major Crimes Act has caused more harm than help, not just to Native Americans, but to entire regions of the United States, which was not the intention of the Act when it was first passed. The federal government passed the Indian Appropriation Acts, which included the Major Crimes Act, with the goal of taking the Native American population under their protection in order to ensure that the sovereignties of both Native American tribes and the federal government could coexist.⁷³ However, as time has passed, the federal government has failed to match the evolution of the nation with the evolution of how tribes have been treated in the field of criminal law.

In *Antelope* and *Wheeler*, the U.S. Supreme Court was bound by their textualist approaches to justify the Major Crimes Act from being overturned, even at the expense of the due process and double jeopardy clauses of the 5th Amendment. With the cases of *McGirt* and *Castro-Huerta*, the U.S. Supreme Court found themselves in a series of moral dilemmas, where there would be negative consequences no matter what decision they made. In all of these cases, the issue was a clash between the Major Crimes Act and the good intentions of the government. The reemergence of the General Crimes Act of 1817 in the *Castro-Huerta* decision only further complicates the

issue by placing a new disadvantage in the way of Native American criminal justice, and also perpetuates the issue of aging statutes, as it was passed decades before the already-outdated Major Crimes Act.

The clear solution is that legislative change is desperately needed. This change would ideally come in the form of a comprehensive amendment to the Major Crimes Act. Due to the sheer number of recognized Native American tribes within the United States, this amendment would need to take more into account than just a standard legal perspective. The cultural similarities and differences between all of them must be considered, including principles similar to the Navajo Nation's *hozho*. Native peoples have the right to be tried under federal jurisdiction without their belief systems being violated or majorly interfered with. The Major Crimes Act's enforcement has left the Native American population in a very one-sided struggle against the federal government. The U.S. Senate has had a permanent Committee of Indian Affairs since 1984, and their attention to these ongoing issues is strongly needed so that some solution can be found. Legislation must be drafted that can serve Native American communities as equitably as possible. Hearings should be held with willing tribes to contribute their thoughts on what changes to the Major Crimes Act would make its enforcement more beneficial than detrimental to their people. Admittedly, this will take time and a potentially herculean level of collaboration between federal lawmakers and tribal governments. However, the judicial issues of the Major Crimes Act have grown to the point where they must take legislative action if any lasting progress is to be made.

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