

2021  NTICC

# SUPREME COURT UPDATE

**SESSION MODERATOR:**

BYRON BLUEHORSE, SOVEREIGN PLANNING

**PRESENTER:**

JUDGE J. MATTHEW MARTIN, AMERICAN BAR  
ASSOCIATION TRIBAL COURT FELLOW

TUESDAY  
SEPTEMBER 28  
2021

10:30 AM - 12:00 PM  
PACIFIC TIME /  
1:30 PM - 3:00 PM  
EASTERN TIME



# MEETING DETAILS

Join the meeting on your mobile device, computer, or by phone.

## Join Zoom Meeting

<https://us06web.zoom.us/j/87200506093?pwd=M0tkRHNmaW0zSGdEK3pLZ1htSEJzUT09>

Meeting ID: 872 0050 6093

Passcode: 247201

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# MEETING HOUSEKEEPING ITEMS

- Today's webinar is schedule to last 1 hour and 30 minutes, including Q&A
- All participants will be muted to enable the speakers to present without interruption
- Questions can be submitted via the chat option at the bottom of your screen
- Private chat messages can be sent to the host(s), or chat messages can be sent to everyone
- The presentation slides and a recording of the presentation will be available at [nticc.org](http://nticc.org) by October 8



# Supreme Court Update

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# Session Goals

At the conclusion of this session, attendees will be able to identify and discuss recent Supreme Court jurisprudence affecting the contours and boundaries of Indian Country, particularly in Oklahoma. Additionally, attendees will be able to reference and describe generally the Supreme Court's recent exposition of the scope of Tribal police power. With knowledge of this case law, stakeholders can devise and, if necessary, revise traffic safety plans with increased and more nuanced awareness of Tribal sovereignty.

# The Supreme Court Grapples with Post-Colonialism

- Overview & Introductions
- *Johnson v. M'Intosh*, the Supreme Court struggles with native lands.
- The Cherokee Cases, the Supreme Court confronts the question of tribes as entities.



# The Removal Period

- The discovery of gold in the Cherokee Nation in the late 1820's sealed the fate of the Southeastern tribes.
- “Those who regretted the violence wished the process of dispossession to proceed as painlessly as possible.”
- This led to soft pressure on Congress to enter into treaties with the Southeastern tribes for the ostensible exchange of their homelands.

# Treaties and the Gateway to *McGirt*

- The treaties between the government and the Southeastern tribes were all extremely similar.
- As a result, these tribes were afforded lands in the Indian Territory, in what is now eastern Oklahoma.
- The Creek Nation has of these treaties. The Supreme Court was asked directly: what does that treaty mean in the 21<sup>st</sup> Century?



# McGirt and the Treaty Power

- Introduction---*Oliphant* and the Major Crimes Act.
- *Oliphant v. Suquamish Tribe* stands for the proposition that Indian Tribes may not exercise criminal jurisdiction over non-Indians.
- The Major Crimes Act, 18 U.S.C. § 1153 provides that the federal court has jurisdiction over certain crimes, including sexual assault and murder committed by an Indian in Indian Country.

# McGirt and the Treaty Power, Cont'd

- McGirt is a member of the Seminole Tribe.
- He committed a terrible sexual assault inside the boundaries of the Creek Nation reservation created by the removal treaty.
- He objected to being tried and sentenced by the State of Oklahoma, arguing that the Major Crimes Act should apply to him.

## *McGirt* and the Treaty Power, Cont'd.

- Oklahoma argued that the treaty with the Creeks had been abrogated, citing a number of theories.
- The result, the theories went, was that the Creek reservation no longer existed.
- And besides, it would be confusing, complicated, and expensive to reconcile the existence of the reservation.

“On the far end of the Trail of Tears was a promise.”

- The Supreme Court swept aside Oklahoma’s protestations.
- The Court recognized the validity of the Creek reservation.
- The Major Crimes Act applied to McGirt and Oklahoma had no jurisdiction.



# Takeaways

- The boundaries of Indian Country are real.
- The treaty power is alive and well and tribes with a treaty or treaties should have an expectation that the Court will uphold them, absent some obvious action by Congress to the contrary.
- Given that the other Southeastern tribes have very similar treaties, virtually all of eastern Oklahoma is Indian Country.

# *United States v. Cooley* and the Police Power

- The new certitude surrounding the boundaries of Indian Country begs the question: how are tribes to police their areas within, and for our purposes—How are they to control the highways and byways within their lands?
- Backstory of *Cooley*.
- Question before the Supreme Court: Do tribal police have the power to detain temporarily and search non-Indians on public rights-of-way within Indian reservations?

# *United States v. Cooley and the Police Power, Cont'd.*

- The short answer is yes, but it is incredible that this was unsettled until June 1, 2021.
- Basically, the Court said it was just sensible that tribal officers have the power to get impaired drivers off of the road and questions of jurisdiction can wait a reasonable amount of time.
- This is a feature of a tribe's inherent sovereignty.



# Takeaways

- Tribes have the power to police the roads within their reservations and, in so doing, are exercising their sovereignty.
- The most dangerous roads in the USA are in Indian Country and now tribes have much more certitude that their power to police them will be upheld.



# McGirt and Cooley Taken Together

- These cases suggest an increasingly expansive view of the territoriality of federally recognized Indian Tribes and their ability to police those territories.
- They raise significant questions for transportation stakeholders:
  - How are cases of impaired driving to be handled?
  - What about commercial vehicles?
  - Can tribal courts and their state court colleagues reach new partnerships on, for example, sharing data and joint jurisdiction?



## Questions, Cont'd.

- Can traffic safety planners take the Court's evolving view of Tribal borders and powers into account going forward?
- In what other ways can planners recognize existing law and also acknowledge tribal sovereignty
- What other questions are raised?