REMOVED FROM THE RESERVATION: EXAMINING DUE PROCESS IMPLICATIONS OF TRIBAL JAIL TRANSFERS FOLLOWING *MCGIRT*

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Using the recent Cherokee Nation Prison Agreement as a case study, this Note explores the due process implications of a federally recognized tribe transferring its citizens to serve tribal sentences in out-of-state detention centers. Tribes in Oklahoma have grappled with increased detention needs following *McGirt v. Oklahoma*, a 2020 Supreme Court decision that greatly expanded tribal criminal jurisdiction. The impact of this decision led one such tribe—the Cherokee Nation—to negotiate a multimillion-dollar agreement with a privately-owned detention center and a Texas county government. Under this agreement, Cherokee Nation citizens can be transferred to the Limestone County Detention Center to serve tribal court sentences. This Note argues that the transfers authorized by the Cherokee Nation Prison Agreement, and others that may arise in the wake of *McGirt*, impose hardships on the transferred tribal citizen that invoke a liberty interest giving rise to due process protections.

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INTRODUCTION

On October 26, 2022, a group of people arrived to begin the intake process at the Limestone County Detention Center in Texas.[1] These individuals had embarked from Oklahoma, where they were incarcerated in local facilities, and arrived in Groesbeck, Texas to serve the remainder of their sentences. Receiving transfers from other facilities is routine for any detention center, but the people transferring to the Limestone County Detention Center that day were unique. All of them were tribal citizens arriving to serve sentences handed down by Cherokee Nation courts in Oklahoma.

The arrival of these incarcerated tribal citizens traces back to a landmark Supreme Court decision in 2020. In *McGirt v. Oklahoma*, the Supreme Court held that a large part of Oklahoma remains Indian Country[2] for purposes of the Major Crimes Act, dramatically expanding tribal criminal jurisdiction in the state.[3] The ruling recognized that, despite Oklahoma's actions to the contrary since 1907, the Muscogee Nation's[4] 3.25-million-acre reservation was still

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[1] *See* Chad Hunter, *First CN Prisoners Transported to Texas*, CHEROKEE PHOENIX (Nov. 4, 2022), https://www.cherokeephoenix.org/news/first-cn-prisoners-transported-to-texas/article_eb5c0738-5bbf-11ed-b03a-2f06160bf628.html [https://perma.cc/V894-S9GR].

[2] The term "Indian Country" can have various meanings depending on the context. Colloquially, Indian Country is often used to broadly encompass Native spaces and communities throughout the United States. *See, e.g., NCAI Response to Usage of the Term, 'Indian Country,'* NAT'L CONG. AM. INDIAN (Dec. 27, 2019), https://www.ncai.org/news/articles/2019/12/27/ncai-response-to-usage-of-the-term-indian-country [https://perma.cc/Q7HS-8WFJ] ("'Indian Country' is leveraged broadly as a general description of Native spaces and places within the United States, and it is inclusive of the hundreds of tribal nations that occupy these spaces."). Because this Note is focused on jurisdictional issues impacting Native Americans, the use of Indian Country throughout this Note is consistent with the statutory definition of the term. Thus, Indian Country includes reservations, dependent Indian communities, and all Indian allotments. 18 U.S.C. § 1151.

[3] 140 S. Ct. 2452 (2020).

[4] The tribe's official name is "the Muscogee (Creek) Nation," as enshrined in the tribal constitution. CONSTITUTION OF THE MUSCOGEE (CREEK) NATION, art. 1, § 1. The traditional name of the tribe is the Mvskoke—anglicized as Muscogee—with the addition of "Creek" reflecting a British misnomer for the tribe whose traditional homelands in the southwest were heavily populated with streams and rivers. *The Muscogee Creek – 1600 – 1840*, NAT'L PARK SERV. (May 24, 2021), https://www.nps.gov/liri/learn/historyculture/the-muscogee-creek-1600-1840.htm [https://perma.cc/FY9L-WQCA]. In an effort to reduce public confusion about the name and remove colonialist influences, the tribe announced in 2021 that it is dropping "Creek" and will be publicly branding itself as the "Muscogee Nation"

in existence.[5] With *McGirt* as precedent, the Oklahoma Court of Criminal Appeals has since recognized the reservations of nine more tribes in the state, including the Cherokee Nation in *Hogner v. Oklahoma*.[6] As a result, the federal government and tribal governments now have concurrent criminal jurisdiction over Native Americans in nearly half of Oklahoma that was previously under exclusive state jurisdiction.

Naturally, the expansion of tribal criminal jurisdiction led to an increase in the impacted tribes' caseloads, and a consequent increase in tribal detention populations. In September 2022, two years after *McGirt*, the Cherokee Nation announced a plan to address what it deemed insufficient local incarceration options: a multimillion-dollar deal with a privately-owned detention center and a Texas county government.[7] Under the Agreement, Cherokee Nation citizens convicted in tribal court can be forced to transfer to the Limestone County Detention Center—a six-and-a-half-hour drive from the Cherokee Nation's capital in Tahlequah, Oklahoma.[8] Within

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moving forward, though the official name will remain until the tribal legislature takes action. *See* Angel Ellis, *New Branding Campaign Launched by Muscogee Nation,* MVSKOKE MEDIA (May 5, 2021), https://www.mvskokemedia.com/new-branding-campaign-launched-by-muscogee-nation [https://perma.cc/Y42L-CGV6]. To be consistent with the tribe's current practice, this Note will refer to the tribe as the Muscogee Nation.

[5] *McGirt*, 140 S. Ct. at 2482. *See* Robert J. Miller & Torey Dolan, *The Indian Law Bombshell:* McGirt v. Oklahoma, 101 B.U. L. REV. 2049, 2090 (2021) ("The MCN's jurisdiction over criminal issues is now vastly expanded and encompasses its 3.25 million acre Reservation instead of just the approximately 135,000 acres of 'Indian Country' that was formerly presumed to comprise the MCN's territory."). Notably, the Muscogee reservation includes Tulsa, the state's second-largest city. *Id.* at 2051.

[6] Hogner v. Oklahoma, 2021 OK CR 4, 500 P.3d 629 (Okla. Crim. App 2021) (applying *McGirt* to the Cherokee Nation); Bosse v. Oklahoma, 2021 OK CR 30, 499 P.3d 331 (Okla. Crim. App. 2021) (applying *McGirt* to the Chickasaw Nation); Grayson v. Oklahoma, 2021 OK CR 8, 485 P.3d 250 (Okla. Crim. App. 2021) (applying *McGirt* to the Seminole Nation of Oklahoma); Sizemore v. Oklahoma, 2021 OK CR 6, 485 P.3d 867 (Okla. Crim. App. 2021) (applying *McGirt* to the Choctaw Nation); Oklahoma v. Lawhorn, 2021 OK CR 37, 499 P.3d 777 (Okla. Crim. App. 2021) (applying *McGirt* to the Quapaw Nation); Oklahoma v. Brester, 2023 OK CR 10, 531 P.3d 125 (Okla. Crim. App. 2023) (applying *McGirt* to the Ottawa, Peoria, and Miami Nations); Oklahoma v. Fuller, 2024 OK CR 4, 2024 Okla. Crim. App. LEXIS 6 (Okla. Crim. App. 2024) (applying *McGirt* to the Wyandotte Nation).

[7] *See* Hunter, *supra* note 1.

[8] Chad Hunter, *CN Strikes Detention Deal with Texas Facility*, CHEROKEE PHOENIX (Sep. 20, 2022), https://www.cherokeephoenix.org/news/cn-strikes-

six weeks of the tribe's legislative branch endorsing the Agreement, the first Cherokee Nation citizens arrived in Texas.[9]

While Cherokee Nation officials celebrated the Agreement as an act of tribal sovereignty, some Cherokee citizens have expressed doubt about whether it is wise, or even legal, for the Nation to forcibly relocate its citizens far from their home communities to an unfamiliar state.[10] In 1974, the Supreme Court recognized that due process rights are among the constitutional protections still afforded to incarcerated people.[11] Over the following decade, the Court was asked to define the bounds of those protections in a variety of prison transfers: those within a state's prison system, those to a different state, and those to mental institutions.[12] While the Court found that intrastate and interstate transfers do not invoke due process protections, it has yet to examine the unique situation presented by the Cherokee Nation Prison Agreement: transfers from a tribal nation to an out-of-state facility.[13] Though seemingly analogous to interstate transfers, tribal nations occupy a unique position in American law as "domestic dependent nations" rather than states—a status that requires a more specific analysis.[14]

This Note will argue that the sort of transfer authorized by the Cherokee Nation Prison Agreement, not yet examined by a court, invokes due process protections. In the case of tribal citizens, a transfer to an out-of-state prison to serve a tribally imposed sentence will subject them to consequences that are "qualitatively different" than those characteristically suffered by a tribal citizen convicted in tribal court.[15] Cultural and historic factors unique to Native Americans and tribal nations both magnify the ordinary burdens

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detention-deal-with-texas-facility/article_6e85d7fc-38fb-11ed-8d97-f340a36341c7.html [https://perma.cc/E8ZT-E5EL].

[9] *See* Hunter, *supra* note 1.

[10] *See infra* Section II.A.

[11] *See* Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974).

[12] *See generally* Meachum v. Fano, 427 U.S. 215, 225 (1976) (finding that intrastate prison transfers do not require due process); Vitek v. Jones, 445 U.S. 480, 492–93 (1980) (finding that prison transfers to a mental institution require due process); Olim v. Wakinekona, 461 U.S. 238, 247–48 (1983) (finding that interstate prison transfers do not require due process protections).

[13] *See infra* Section II.C.

[14] Cherokee Nation v. Georgia, 30 U.S. 1, 13 (1831).

[15] *See* Vitek v. Jones, 445 U.S. 480, 493 (1980) (extending due process protections when the "consequences visited on the prisoner are qualitatively different from the punishment characteristically suffered by a person convicted of crime").

associated with out-of-state transfers and supplement them with new dimensions by implicating unique notions of tribal sovereignty and cultural preservation.[16] The Cherokee Nation Prison Agreement—and similar agreements that may arise in the wake of *McGirt*—exposes a gap in existing law that, if left unfilled, may allow for the continuous and systematic violation of incarcerated tribal citizens' due process rights.

Part I summarizes the evolution of criminal jurisdiction in federal Indian law and tribal detention practices, situating the Cherokee Nation Prison Agreement as a troublesome consequence of recent legal and political developments. Part II details the Cherokee Nation Prison Agreement and explores its due process implications, concluding that tribal citizens subjected to an out-of-state transfer for a tribally imposed sentence are entitled to constitutional protections. Part III explores potential means of redress for incarcerated Cherokee Nation citizens who have been transferred out-of-state, outlining their options in both tribal and federal court, and provides recommendations for the Cherokee Nation and similarly situated tribes moving forward.

I. TRACING THE ORIGINS OF THE CHEROKEE NATION PRISON AGREEMENT

To properly examine the Cherokee Nation Prison Agreement and the complex legal issues it invokes, one must understand the legal and political developments that precipitated the Agreement. Accordingly, Section I.A traces the legal evolution of criminal jurisdiction over Native Americans in Indian Country up to *McGirt*. Section I.B then examines the *McGirt* ruling and its aftermath in Oklahoma, focusing on the case's impact on tribal judicial systems and state-tribal relations. Section I.C concludes by providing a snapshot of how tribes in Oklahoma handled their detention needs both pre- and post-*McGirt*, demonstrating how the Cherokee Nation Prison Agreement is a departure from established practice.

A. The Evolution of Criminal Jurisdiction Over Native Americans in Indian Country

Criminal jurisdiction in Indian Country has a long and complex history, and it comes as no surprise that the field is often

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[16] *See infra* Section II.D.

referred to as a "jurisdictional maze."[17] Three competing sovereigns have an interest in exercising criminal jurisdiction in Indian Country: the tribal nation, the state where the land is located, and the federal government. Supreme Court jurisprudence and acts from Congress have attempted to clarify which sovereigns have jurisdiction when crimes occur in Indian Country. Because this Note focuses on Native Americans convicted of crimes in tribal court, the discussion will be restricted to how developments in federal Indian law have impacted Native Americans accused of crimes in Indian Country.

1. The Marshall Trilogy

The "Marshall Trilogy" of cases, spanning from 1823–1832, provides the foundation of federal Indian law. Professor Matthew Fletcher has referred to the three opinions—*Johnson v. M'Intosh*,[18] *Cherokee Nation v. Georgia*,[19] and *Worcester v. Georgia*[20]—as "the house in which American Indian advocates, leaders, and policymakers rise each morning."[21] The latter two cases of the trilogy—sometimes referred to as the "Cherokee Cases"[22]—are particularly instructive.

At the time of the Marshall Trilogy, the Cherokee were concentrated primarily in the State of Georgia.[23] Cherokee-Georgia relations were hostile, and tensions escalated further after the Georgia legislature passed a series of acts intruding on Cherokee

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[17] *See, e.g.*, Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 504 (1976) (notably using the phrase to discuss criminal jurisdiction in Indian Country); Amanda M.K. Pacheco, *Broken Traditions: Overcoming the Jurisdictional Maze to Protect Native American Women from Sexual Violence*, 11 J. L. & SOC. CHALLENGES 1 (2009) (using the phrase when arguing for changes in tribal criminal jurisdiction to address the disproportionately high levels of violence against Native American women); Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1567 (2016) (introducing criminal jurisdiction in Indian Country as a "jurisdictional maze" and crediting Robert N. Clinton for coining the term).

[18] 21 U.S. 543 (1823).

[19] 30 U.S. 1 (1831).

[20] 31 U.S. 515 (1832)

[21] Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 628 (2006).

[22] *See, e.g.*, David H. Getches et al., CASES AND MATERIALS ON FEDERAL INDIAN LAW 118 (7th ed. 2017).

[23] Rennard Strickland, *The Tribal Struggle for Indian Sovereignty: The Story of the* Cherokee Cases*, in* INDIAN LAW STORIES 61, 64 (Carole Goldberg et al. eds., 2011).

sovereignty.[24] The acts extended Georgia state law to apply on Cherokee lands, declared those lands to be Georgia's "Cherokee County" open to settlement by non-Cherokees who obtained a permit from the state, and denied Native Americans and tribal nations the right to appear in state court to contest the legislation.[25]

The newly heightened tensions culminated in *Cherokee Nation v. Georgia*, the second case of the Marshall Trilogy.[26] Unable to seek relief in state court, the tribe opposed the new legislation by claiming jurisdiction in the Supreme Court under Article III, Section 2, which grants the Court original jurisdiction over disputes between two domestic states or those between a domestic and a foreign state.[27] Chief Justice Marshall rejected this argument, finding that tribes are neither foreign nor domestic states. Instead, the Court held, they fall into their own category of "domestic dependent nations," leaving the Supreme Court without original jurisdiction to hear the case on its merits.[28] The decision was unsurprisingly rife with condescension towards tribes, reasoning that the result was compelled by tribes' existence in a "state of pupilage" and comparing their relationship to the United States as "that of a ward to his guardian."[29] Nevertheless, Chief Justice Marshall concluded by adding that the question of the Georgia statutes' validity "might perhaps be decided by this court [sic] in a proper case with proper parties," possibly as a signal to the Cherokee.[30]

The Cherokee found their proper party in Samuel Worcester. Worcester, a missionary from Vermont living in Cherokee territory, was arrested by Georgia authorities for failing to secure a license that the recently-enacted state law required for white people residing in Cherokee land.[31] As a citizen of Vermont in dispute with the State of Georgia, the Supreme Court had jurisdiction to hear Worcester's

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[24] *Id.*

[25] *Id.* at 65.

[26] Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

[27] *Cherokee Nation*, 30 U.S. at 17–18; U.S. CONST. art. III, § 2 (The judicial power shall extend to all cases . . . between two or more states . . . and between a state and . . . foreign states . . .").

[28] *Cherokee Nation*, 30 U.S. at 20.

[29] *Id.* at 15. Further reflecting the paternalistic beliefs of the Court, Chief Justice Marshall went on to state that "tribes look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father." *Id.*

[30] *Id.*

[31] Strickland, *supra* note 23, at 73.

claim that he was illegally detained under unconstitutional laws.[32] In *Worcester v. Georgia*, the Court held that the Georgia laws were unconstitutional because states lack criminal jurisdiction in Indian Country.[33] The Court left little room for ambiguity when articulating states' roles in regulating Indian affairs:

> The Cherokee nation, then, is a distinct community . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and [the Cherokee] nation, is by our constitution and laws, vested in the government of the United States.[34]

The Cherokee Cases established two unshaken principles that provide the foundation for federal Indian law. The first is that, while tribal nations are neither foreign nor domestic states, they still retain a set of legal rights as domestic dependent nations. The second principle is that domestic states do not have the authority to regulate affairs with tribal nations. Together, these principles can serve to protect tribal nations' rights to self-governance and sovereignty by granting them a unique classification in American law and shielding them from the state interference that has historically led to the erosion of tribal rights.[35]

2. Post-Marshall Trilogy Limitations on Tribal Sovereignty

Returning to the question of which sovereign has jurisdiction over a Native American who commits a crime in Indian Country, the Marshall Trilogy would dictate that the tribal nation where the crime occurred must have exclusive jurisdiction. However, an 1883 Supreme Court case spurred new developments that would shift the landscape created by the Marshall Trilogy.

Nearly fifty years after the *Cherokee Cases*, a murder on Sicangu Lakota Oyate[36] land reignited public interest in criminal

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[32] *See* U.S. CONST. art. III, § 2 ("The judicial Power shall extend to . . . Controversies . . . between a State and Citizens of another State . . .").

[33] Worcester v. Georgia, 31 U.S. 515, 562–63 (1832).

[34] *Id.* at 561.

[35] *See, e.g.*, Section I.A.2 (elaborating on the Supreme Court's post-Marshall Trilogy erosion of tribal sovereignty).

[36] Sicangu Lakota Oyate, or "Burnt Thigh People," is the proper name for the tribe referred to at the time of the incident as Brule Sioux. *History and Culture*,

jurisdiction over Native Americans in Indian Country. Kȟaŋǧí Šúŋka (Crow Dog), a Sicangu Lakota Oyate tribal member, was accused of murdering Chief Siŋté Glešká (Spotted Tail) in 1881. The tribal council responded in accordance with Lakota law by ordering restitution for Chief Spotted Tail's family.[37] Even though the issue had been settled under tribal law, Bureau of Indian Affairs agents swiftly arrested Crow Dog for Spotted Tail's murder, and the First Judicial District Court of Dakota subsequently sentenced him death.[38] By 1883, Crow Dog's appeal of his death sentence reached the Supreme Court in *Ex parte Crow Dog*.[39] The Court found that, absent a "clear expression" from Congress to the contrary, allowing a federal court to exercise jurisdiction over Crow Dog for Spotted Tail's murder "would be to reverse . . . the general policy of the government towards the Indians, as declared in many statutes and treaties, and recognized in many decisions of this court, from the beginning to the present time."[40] In granting Crow Dog's writ of habeas corpus, the Court upheld longstanding precedent respecting tribes' exclusive criminal jurisdiction over Native Americans in Indian Country.

No less than two years after the ruling, Congress provided future courts with the "clear expression" needed to overcome *Ex parte Crow Dog*'s ruling through its passage of the Major Crimes Act.[41] The Act granted the federal government exclusive jurisdiction over certain enumerated felonies committed by Native Americans in Indian Country, extinguishing for the first time tribal nations' right to exercise jurisdiction over crimes by its people within its territory.[42]

ROSEBUD SIOUX TRIBE, https://www.rosebudsiouxtribe-nsn.gov/history-culture [https://perma.cc/6LGV-CBG3]. Today, the tribe is federally recognized under the name Rosebud Sioux Tribe of the Rosebud Indian Reservation. Indian Entities Recognized by and Eligible to Receive Services from the U.S. Bureau of Indian Affairs, 87 Fed. Reg. 4636, 4639 (Jan. 28, 2022).

[37] Timothy Connors & Vivek Sankaran, *Crow Dog vs. Spotted Tail: Case Closed*, 89 MICH. B.J. 36, 36 (2010).

[38] Sidney L. Harring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 A.M. INDIAN L. REV. 191, 202–12 (1988). While the traditional account of *Ex parte Crow Dog* stresses public outcry at the leniency of Crow Dog's punishment as the impetus for Crow Dog's arrest, Harring argues that the Bureau of Indian Affairs and the Justice Department "ha[d] already developed a legal theory through which to extend American criminal law to Indians . . . and were only awaiting the fortuity of an appropriate 'test case.'" *Id.* at 200.

[39] *See* Ex parte Crow Dog, 109 U.S. 556 (1883).

[40] *Id*. at 572.

[41] *See* 18 U.S.C. § 1153.

[42] When originally enacted, the Major Crimes Act included seven crimes: murder, manslaughter, rape, assault with intent to kill, arson, burglary, and

By stripping tribes of jurisdiction over their own citizens, the Major Crimes Act reflected a congressional belief that tribes were incapable of sufficiently prosecuting serious crimes. Scholars commonly attribute the roots of the Major Crimes Act to the events underlying *Ex parte Crow Dog*, [43] but it is perhaps more simply explained as an extension of socially rooted notions of paternalism and bigotry towards Native Americans.[44]

The Major Crimes Act's intrusion on tribal sovereignty and upheaval of longstanding precedent did not go unchallenged. In *United States v. Kagama*, the Supreme Court was asked to rule on the Act's constitutionality.[45] The United States argued that Congress derived its power to pass the Act from the Commerce Clause, an argument swiftly rejected by Justice Miller in his unanimous opinion.[46] Nonetheless, the Court upheld the Major Crimes Act as a constitutional exercise of congressional authority. Unable to find a textual basis for Congress's authority, Justice Miller articulated a strengthened version of what is now known as Congress's "inherent plenary power" over Indian affairs:

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larceny. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385. Today, the Major Crimes Act includes murder, manslaughter, kidnapping, maiming, incest, assault against a minor, felony child abuse or neglect, arson, burglary, robbery, and felonies under chapter 109A (sexual abuse), section 113 (assault), and section 661 (larceny). 18 U.S.C. § 1153(a).

[43] *Cf.* Jon M. Sands, *Indian Crimes and Federal Courts*, 11 FED. SENT'G REP. 153, 154 (1998) ("The Major Crimes Act expressed the congressional view that tribal law was insufficient to punish major crimes adequately."); Harring, *supra* note 38, at 192 (stating that the dominant narrative is that the Major Crimes Act was a direct response to *Ex parte Crow Dog*).

[44] For a discussion on how racist ideals and paternalism shaped Native American history broadly and underpinned the Major Crimes Act specifically, see W. Tanner Allread, *The Specter of Indian Removal: The Persistence of State Supremacy Arguments in Federal Indian Law*, 123 COLUM. L. REV. 1533, 1556–1576 (2023) (analyzing the rhetoric used by state politicians to justify supremacy over tribal nations, done by painting Native peoples as savages unable to govern themselves); Adam Crepelle, *Lies, Damn Lies, and Federal Indian Law: The Ethics of Citing Racist Precedent in Contemporary Federal Indian Law*, 44 N.Y.U. REV. L. & SOC. CHANGE 529, 540–553 (2021) (attributing foundational legal decisions in federal Indian law to commonly held racist beliefs about Native peoples).

[45] United States v. Kagama, 118 U.S. 375 (1886).

[46] *Id.* at 378–79 ("But we think it would be a very strained construction . . . that a system of criminal laws for Indians . . . was authorized by the grant of power to regulate commerce with Indian tribes.").

> The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.[47]

Justice Miller reasoned that the power to pass the Major Crimes Act must exist and, because it must exist, that it must lie with Congress. The circularity of the Court's logic and its lack of textual basis has been widely and harshly criticized by legal scholars.[48] Nevertheless, *Kagama* remains good law.[49]

After the Major Crimes Act, criminal jurisdiction over Native Americans in Indian Country lay with the federal government for the enumerated felonies and the tribes for all other, less serious, crimes. However, in 1953, the passage of Public Law 280 inserted states back into the equation in some instances.[50] Wielding its plenary power

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[47] *Id*. at 384–85.

[48] *See, e.g.*, Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 34–35 (1996) (describing the decision in *Kagama* as "a whirlwind of circular reasoning" and an "embarrassment of constitutional theory, . . . logic, [and] . . . humanity."); Daniel L. Rotenberg, *American Indian Tribal Death – A Centennial Remembrance*, 41 U. MIAMI L. REV. 409, 423 (1986) ("*Kagama* should be remembered as one more item on the long litany of injustices to the American Indian."); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 175 (2002) ("The Court [in *Kagama*] simply turned prior precedents on their head and cited them for arguments they had rejected."); Mary Kathryn Nagle, Standing Bear v. Crook*: The Case for Equality under Waaxe's Law*, 45 CREIGHTON L. REV. 455, 472–77 (2011) (arguing that the *Kagama* Court's characterization of tribes was "a factual aberration at best—and an oppressive remnant of genocide at worst"); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 62 (2002) ("The most remarkable aspect of Justice Miller's analysis was the complete absence of any reliance on the Constitution as the basis for national authority."); Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 215 (1984) ("*Kagama* . . . reflect[s] a laissez-faire judicial attitude . . . more than a prescription concerning the proper balance of the interests at stake.").

[49] *Kagama* was cited by the Supreme Court as recently as 2011. United States v. Jicarilla Apache Nation, 564 U.S. 162, 180 (2011).

[50] 18 U.S.C. § 1162 (originally enacted as Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588).

over Indian affairs, Congress altered the jurisdictional scheme by granting six states criminal jurisdiction over Native Americans in Indian Country and providing the option for other states to adopt Public Law 280 with the impacted tribes' consent.[51] Since its enactment, Public Law 280 has been adopted in some form by several states. But Oklahoma, where the Cherokee Nation sits, is not one of them.[52] Without having adopted Public Law 280, Oklahoma has no criminal jurisdiction over Native Americans in Indian Country; instead, jurisdiction remains with the federal government and tribes under the scheme established by the Major Crimes Act.

B. *McGirt* and its Aftermath

McGirt v. Oklahoma[53] did not alter the jurisdictional scheme for crimes committed by Native Americans in Indian Country, but it did greatly increase the size of Indian Country in Oklahoma and, accordingly, the amount of land over which tribes hold criminal jurisdiction. Since its statehood in 1907, the state of Oklahoma had been exercising criminal jurisdiction over lands originally granted to tribes, many of whom found themselves in Oklahoma following their forced removal from their ancestral homelands on the Trail of Tears.[54] Oklahoma's treatment of those lands as its own, rather than as part of Indian Country, was not recognized as unlawful until the 2020 decision.[55] Therefore, a key effect of *McGirt*—and the subsequent Oklahoma state court decisions applying its ruling to nine

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[51] 18 U.S.C. § 1162. The mandatory states are Alaska (except for the Metlakatla Indian Community on the Annette Island Reserve), California, Minnesota (except for the Red Lake Reservation, Nebraska, Oregon (except for the Warm Springs Reservation), and Wisconsin. 18 U.S.C. § 1162(a).

[52] The states that have opted into full or partial Public Law 280 jurisdiction are Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington. For a detailed review of Public Law 280 states and their unique jurisdictional schemes, see 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 6.04[3] (Nell Jessup Newton et al. eds., 2019) [hereinafter COHEN'S HANDBOOK].

[53] 140 S. Ct. 2452 (2020).

[54] *See* Robert J. Miller & Torey Dolan, *The Indian Law Bombshell:* McGirt v. Oklahoma, 101 B.U. L. REV. 2049, 2066 (2021); Conor P. Cleary, McGirt v. Oklahoma*: A Primer*, 93 OKLA. B.J. 6, 7 (2022).

[55] *See McGirt*, 140 S. Ct. at 2477–78 (rejecting Oklahoma's arguments justifying its exercise of criminal jurisdiction over Indian Country and concluding that "once more, it seems Oklahoma asks us to defer to its usual practices *instead of* federal law, something we will not and may never do").

additional tribes[56]—was to restore criminal jurisdiction over significant areas of land in Oklahoma to the tribes. But the increase in tribal criminal jurisdiction also meant an increase in the number of tribally incarcerated people and, naturally, an increased need for space to house those people. Thus, without *McGirt* and the Oklahoma state court decisions that followed, the conditions that created the Cherokee Nation Prison Agreement would not have materialized.

1. The Ruling

Jimcy McGirt, a citizen of the Seminole Nation of Oklahoma, was sentenced to life in prison by an Oklahoma court in 1997 for sexual crimes he committed in Broken Arrow, Oklahoma.[57] McGirt appealed his sentence, arguing that, contrary to Oklahoma's more than a century-long exercise of jurisdiction, Broken Arrow was not state land. Instead, he argued, it was tribal land lying within the Muscogee Nation's federally recognized reservation.[58] If Broken Arrow was indeed tribal land, then the federal government would have exclusive jurisdiction over McGirt's crimes under the Major Crimes Act and the sentencing court would have lacked subject-matter jurisdiction to prosecute McGirt at all.[59]

The state of Oklahoma argued that Congress disestablished the Muscogee reservation during the allotment and assimilation era in the 1880s[60] and that, just as Oklahoma had acted since 1907, the

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[56] McGirt v. Oklahoma, 140 S. Ct. 2452 (2020); Hogner v. Oklahoma, 2021 OK CR 4, 500 P.3d 629 (Okla. Crim. App. 2021) (applying *McGirt* to the Cherokee Nation); Bosse v. Oklahoma, 2021 OK CR 30, 499 P.3d 331 (Okla. Crim. App. 2021) (applying *McGirt* to the Chickasaw Nation); Grayson v. Oklahoma, 2021 OK CR 8, 485 P.3d 250 (Okla. Crim. App. 2021) (applying *McGirt* to the Seminole Nation of Oklahoma); Sizemore v. Oklahoma, 2021 OK CR 6, 485 P.3d 867 (Okla. Crim. App. 2021) (applying *McGirt* to the Choctaw Nation); Oklahoma v. Lawhorn, 2021 OK CR 37, 499 P.3d 777 (Okla. Crim. App. 2021) (applying *McGirt* to the Quapaw Nation); Oklahoma v. Brester, 2023 OK CR 10, 531 P.3d 125 (Okla. Crim. App. 2023) (applying *McGirt* to the Ottawa, Peoria, and Miami Nations); Oklahoma v. Fuller, 2024 OK CR 4, 2024 Okla. Crim. App. LEXIS 6 (Okla. Crim. App. 2024) (applying *McGirt* to the Wyandotte Nation).

[57] Petition for Writ of Certiorari at 4–6, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020), (No. 18-9526).

[58] *Id.* at 6.

[59] *Id.*

[60] The allotment era refers to the shift in federal policy towards tribes following the passage of the General Allotment Act of 1887, commonly known as the Dawes Act. The federal government's goal in this era was to assimilate Native Americans into American society, which the Dawes Act was meant to facilitate by allotting tribal lands to individual tribal citizens and disrupting the status quo of common

land was state-owned.[61] Oklahoma's arguments to the Court stressed the "staggering ramifications" a decision in favor of McGirt would have on public safety in the state.[62] Oklahoma claimed that recognizing the land as Indian Country would "plunge the State into uncertainty for decades to come," allowing "thousands of state convictions" to be reopened.[63] The State has faced widespread criticism due to its failure to provide any evidentiary basis for these claims.[64]

Despite Oklahoma's attempts to catastrophize public safety consequences, the Court ruled in favor of McGirt. Specifically, it held that the Muscogee reservation had never been disestablished by Congress and is thus considered Indian Country for purposes of the Major Crimes Act.[65] Since *McGirt*, nine other tribes in Oklahoma—including the Chickasaw, Seminole, Choctaw, Quapaw, Ottawa, Peoria, Miami, and Wyandotte Nations—have used the same reasoning to apply *McGirt* to their own reservations.[66] In a 2021

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tribal ownership. For a detailed discussion on the allotment era and its failures, see COHEN'S HANDBOOK, *supra* note 45, § 1.04.

[61] *McGirt*, 140 S. Ct. at 2463 (2020).

[62] Brief for Respondent at 42, *McGirt*, 140 S. Ct. (No. 18-9526).

[63] *Id.* at 43, 46.

[64] *See, e.g.*, Jonodev Chaudhuri, *Reflection on* McGirt v. Oklahoma, 134 HARV. L. REV. F. 82, 85 (2020) ("Oklahoma has never offered any evidence or support to back up this bold claim [that thousands of state cases would be reopened if the Court ruled for McGirt], and it has since been thoroughly refuted."); Rebecca Nagle, *Oklahoma's Suspect Argument in Front of the Supreme Court*, THE ATLANTIC (May 8, 2020), https://www.theatlantic.com/ideas/archive/2020/05/oklahomas-suspect-argument-front-supreme-court/611284/ (on file with the *Columbia Human Rights Law Review*) ("If the potential consequences of affirming the reservations in eastern Oklahoma are going to persuade how the justices vote, those consequences should be real, . . . fact-based, [a]nd . . . proven. Despite the state's claims in court, that's not the case here."); Jeffery Yufeng Zhang & Michael K. Velchik, *Restoring Indian Reservation Status: An Empirical Analysis*, 40 YALE J. REGUL. 339, 402 (2023) (using empirical studies to evaluate Oklahoma's arguments on the economic impacts of *McGirt* and concluding that "we observe no statistically significant change in real economic activity in the aftermath of the *Murphy* and *McGirt* decisions"); Robert J. Miller & Torey Dolan, *The Indian Law Bombshell:* McGirt v. Oklahoma, 101 B.U. L. REV. 2049, 2076–78 (2021) (referring to Oklahoma's arguments as "'chaos theory" and a "'sky-is-falling argument'" which the majority rightfully rejected).

[65] *McGirt*, 140 S. Ct. at 2482.

[66] Bosse v. Oklahoma, 2021 OK CR 30, 499 P.3d 331 (Okla. Crim. App. 2021) (applying *McGirt* to the Chickasaw Nation); Grayson v. Oklahoma, 2021 OK CR 8, 485 P.3d 250 (Okla. Crim. App. 2021) (applying *McGirt* to the Seminole Nation of Oklahoma); Sizemore v. Oklahoma, 2021 OK CR 6, 485 P.3d 867 (Okla. Crim.

ruling, the Oklahoma Court of Criminal Appeals held that the Cherokee Nation reservation had never been disestablished by Congress, extending *McGirt*'s ruling to the tribe's 7,000-square-mile reservation.[67] As it stands today, nearly half of Oklahoma is now Indian Country for purposes of the Major Crimes Act.[68]

2. The Aftermath

Though *McGirt* was celebrated as a win for tribal sovereignty across Indian Country,[69] the dominant narrative among non-Native

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App. 2021) (applying *McGirt* to the Choctaw Nation); Oklahoma v. Lawhorn, 2021 OK CR 37, 499 P.3d 777 (Okla. Crim. App. 2021) (applying *McGirt* to the Quapaw Nation); Oklahoma v. Brester, 2023 OK CR 10, 531 P.3d 125 (Okla. Crim. App. 2023) (applying *McGirt* to the Ottawa, Peoria, and Miami Nations). *But see* Martinez v. Oklahoma, 2021 OK CR 40, 502 P.3d 1115 (finding that the Kiowa-Comanche-Apache Reservation was disestablished by Congress and declining to apply *McGirt* to the three tribes); Oklahoma v. Fuller, 2024 OK CR 4, 2024 Okla. Crim. App. LEXIS 6 (Okla. Crim. App. 2024) (applying *McGirt* to the Wyandotte Nation).

[67] Hogner v. Oklahoma, 2021 OK CR 4, ¶ 18, 500 P.3d 629, 635 (Okla. Crim. App. 2021).

[68] Immediately following *McGirt*, media reports erroneously stated that half of Oklahoma was now Indian Country when in fact the ruling only applied to the Muscogee Nation's roughly 5,000 square mile reservation. *See* Matthew L.M. Fletcher, *News Media Writers: Please Stop Saying "Half" of Oklahoma is "Indian Lands" or "Indian Territory" – It's Not (Yet)*, TURTLE TALK (Aug. 20, 2020), https://turtletalk.blog/2020/08/05/news-media-writers-please-stop-saying-half-of-oklahoma-is-indian-lands-or-indian-territory-its-not-yet/ [https://perma.cc/JY6Q-3PSX]. However, with the application of *McGirt* to additional tribes, this figure is now more accurate. For a visual representation of what is now Indian Country in Oklahoma, which includes the Muscogee, Cherokee, Chickasaw, Seminole, Choctaw, Quapaw, Ottawa, Peoria, Miami, and Wyandotte Nations, see *Tribal Jurisdictions in Oklahoma*, OKLA. STATE GOV'T (Apr. 9, 2008), https://oklahoma.gov/content/dam/ok/en/oja/documents/10%2037%20Federally%20Recognized%20Tribes%20in%20OK.pdf [https://perma.cc/G2ZV-VLN3].

[69] *See, e.g.,* Kolby KickingWoman, *Supreme Court Ruling 'Reaffirmed' Sovereignty*, INDIAN COUNTRY TODAY (Dec. 27, 2020), https://ictnews.org/news/supreme-court-ruling-hailed-as-sovereignty-win (on file with the *Columbia Human Rights Law Review*); Julian Brave NoiseCat, *The* McGirt *Case Is a Historic Win for Tribes*, ATLANTIC (July 12, 2020), https://www.theatlantic.com/ideas/archive/2020/07/mcgirt-case-historic-win-tribes/614071 (on file with the *Columbia Human Rights Law Review*) ("Tribal attorneys 'will be quoting that decision for the rest of their lives.'"); Lenzy Krehbiel-Burton, *'Icing on the Cake': Native Americans Hail Ruling That East Oklahoma Is Tribal Land*, THE GUARDIAN (July 15, 2020), https://www.theguardian.com/environment/2020/jul/15/oklahoma-court-ruling-native-american-sovereignty [https://perma.cc/NH4T-MRA4] ("Tiger and many

people in Oklahoma was far different. Following the ruling, state officials engaged in an extensive campaign to malign the decision and its impacts.[70] On *McGirt*'s impact, Oklahoma Governor Kevin Stitt made several claims with tenuous connections to reality and an underlying discriminatory tone towards tribal citizens. Independent fact-checkers disputed many of Governor Stitt's musings on *McGirt*, including his claims that murderers and rapists were regularly being released (only 18 individuals had been released due to *McGirt* at the time of his statement); that crime had gone up due to the ruling (post-*McGirt* crime statistics had not been released at the time of his statement); and that 3,000 to 4,000 tribal members filed motions protesting Oklahoma's authority to tax them (fewer than 10 such motions could be found at the time of his statement).[71] In Oklahoma's first State of the State address following the ruling, the first issue Governor Stitt addressed was *McGirt*: "Oklahoma has been robbed of the authority to prosecute crimes. Put simply," he said, "*McGirt* jeopardizes justice."[72]

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other tribal citizens, locally and nationally, see Thursday's decision as a victory for tribal sovereignty and a precedent-setter for other tribes.").

[70] *See* Stephen H. Greetham, *Lessons Learned, Lessons Forgotten: A Tribal Practitioner's Reading of* McGirt *and the Thoughts on the Road Ahead*, 57 TULSA L. REV. 613, 616–618 (2022).

[71] Clifton Adcock, *From a Convicted Murderer's Release to Contested Taxes, We Fact Checked Gov. Stitt's Claims about the* McGirt *Ruling*, THE FRONTIER (Apr. 23, 2021), https://www.readfrontier.org/stories/from-a-convicted-murderers-release-to-contested-taxes-we-fact-checked-gov-stitts-claims-about-the-mcgirt-ruling/ [https://perma.cc/T4UZ-U6ZB]. Governor Stitt's statement that murderers and rapists were regularly being released was "somewhat true." The fact checkers found that thirty-six individuals had their cases overturned by *McGirt* as of April 19, 2021. Of those, only eighteen individuals had been released from custody, with tribes commenting to the writer that several of these cases were under review for prosecution. The various charges against these eighteen individuals included second-degree murder; first degree manslaughter; lewd acts with a child under sixteen; robbery and shooting with intent to kill. *Id.* The following two statements regarding crime rates and tax protests were rated "false." *Id.*

[72] Governor Kevin Stitt, 2022 State of the State Address (Feb. 7. 2022) (transcript available at https://oklahoma.gov/content/dam/ok/en/governor/documents/2022StateoftheStatefulltextversion.pdf) [https://perma.cc/W3YB-X4Z5]. In response to Governor Stitt's remarks, Muscogee Nation Principal Chief David Hill shared that the Governor was "again us[ing] tragedy and fear-mongering for his own gain." Liz Gray, *Chief Hill Reacts to Stitt's State of State*, MVSKOKE MEDIA (Feb. 9, 2022), https://www.mvskokemedia.com/chief-hill-reacts-to-stitts-state-of-state/ [https://perma.cc/KXY7-LH2P].

The state's rhetoric further strained tribal-state relations.[73] By February 2021, less than one year after the ruling, communication between the governor and tribes came to a halt.[74] Cherokee Nation Principal Chief Chuck Hoskin Jr. said of Governor Stitt, "[i]t is really breathtaking how quickly one governor has set back state-tribal relations that have taken decades to build."[75] Choctaw Nation Chief Gary Batton said that Stitt's "failure again to work with the 39 tribes across the state of Oklahoma is creating chaos and uncertainty in the state."[76] In contrast, some supporters of Governor Stitt have pointed fingers back at the tribes for their role in straining relations.[77] By the summer of 2023, even state leaders within the Governor's own party began to vocally push back against Governor Stitt's hostile treatment

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[73] Carmen Forman & Molly Young, *Gov. Kevin Stitt, Tribal Leaders Not Meeting as* McGirt *Rhetoric Hits Boiling Point*, THE OKLAHOMAN (Dec. 16, 2021), https://www.oklahoman.com/story/news/2021/12/16/choctaw-cherokee-nation-hunting-oklahoma-governor-stitt-tribes-stop-meetings-mcgirt-ruling/6433140001 [https://perma.cc/S7FB-Q2MW]. Also contributing to the strain in tribal-state relations was a brewing conflict between the Governor and tribes over gaming compacts. In 2019, Governor Stitt announced that long-established gaming compacts were set to expire and should be renegotiated—a notion that tribes disputed. Jennifer N. Lamirand et al., *Each Roll of the Dice and Spin of the Wheel: The Future of Oklahoma Tribal-State Gaming Compacts*, OKLA. BAR J., 12 (2022). Litigation ensued by late 2019. *Id.* In July 2020, less than two weeks after *McGirt*, the Supreme Court of Oklahoma issued an opinion finding that Governor Stitt unconstitutionally negotiated gaming compacts with tribes. Treat v. Stitt, 2020 OK 64, ¶ 8 (Okla. 2020).

[74] Forman & Young, *supra* note 73.

[75] *Id.*

[76] *Id.*

[77] *See, e.g.,* Clifton Adcock & Dylan Goforth, *Poisoned Relationship Between Oklahoma Tribes and Gov. Kevin Stitt Doomed a Forum to Failure*, THE FRONTIER (July 15, 2021), https://www.readfrontier.org/stories/poisoned-relationship-between-oklahoma-tribes-and-gov-kevin-stitt-doomed-a-forum-to-failure [https://perma.cc/YDT7-R4QB] (noting that, while tribes had criticized a panel hosted by Governor Stitt for its lack of tribal representation, the same tribes had not responded to an invitation to attend the panel); Jonathan Small, *Reality Check for Cherokee Leaders May Be Positive Sign*, OKLA. COUNCIL PUB. AFFS. (June 27, 2022), https://ocpathink.org/post/analysis/reality-check-for-cherokee-leaders-may-be-positive-sign [https://perma.cc/FPY5-HZS4] ("Most Cherokees don't embrace a worldview pitting them against their non-Indian neighbors and family members. That contrasts with many comments from some tribal leaders."); Jonathan Small, *Tribes Go AWOL on* McGirt *Response,* OKLA. COUNCIL PUB. AFFS. (Aug. 3, 2021), https://www.ocpathink.org/post/tribes-go-awol-on-mcgirt-response [https://perma.cc/ZCJ6-VPLM] ("Gov. Kevin Stitt and district attorneys from areas affected by *McGirt* showed they are prepared to lead. . . . That's in sharp contrast to tribal officials.").

of the tribes.[78] In 2024, state-tribal hostilities remain. The Muscogee Nation filed felony charges against an Oklahoma county jail employee after he allegedly assaulted a tribal officer attempting to transfer a tribal citizen to the Okmulgee County Jail.[79] In late February 2024, Oklahoma Attorney General Gentner Drummond filed a motion in federal court challenging the tribe's authority to prosecute the jailer, initiating what may be yet another protracted legal battle between tribes and the state.[80] Regardless of who is to blame, Oklahoma-tribal relations are undoubtedly strained at a time when tribes would ideally be in open communication and collaboration with state officials about the implementation of the complex jurisdictional transfer mandated by *McGirt*.

The ruling, of course, also had practical implications for tribes in Oklahoma. By September of 2021, five of the largest tribes in Oklahoma had brought charges in 6,965 felony and misdemeanor cases and had issued 2,700 traffic citations as a result of *McGirt*.[81] To help manage the increase in jurisdictional authority, individual tribes began entering into additional cross-deputization agreements—which authorize one entity's law enforcement officers to act on behalf of another entity—with tribal, state, and federal authorities.[82] Federal

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[78] *See* Adolfo Flores, *In Oklahoma, Governor Picks Unusual Fight with Tribes—and Fellow Republicans*, WALL ST. J. (Aug. 6, 2023), https://www.wsj.com/articles/kevin-stitt-oklahoma-governor-tribes-money-58531a8c (on file with the *Columbia Human Rights Law Review*) ("The governor has run into a wall of opposition not only from tribes but also from fellow Republicans . . . Many Republicans have worked to thwart his efforts to deal unilaterally with tribes.").

[79] Tres Savage & Tristan Loveless, *'Sad State of Affairs': After Altercation, Muscogee Nation Charges Okmulgee County Jailer*, NONDOC (Dec. 21, 2023), https://nondoc.com/2023/12/21/after-altercation-muscogee-nation-charges-okmulgee-county-jailer/ [https://perma.cc/TW6H-XDEE]

[80] Curtis Killman, *Oklahoma AG Challenges Muscogee Nation's Authority to Charge Okmulgee County Jailer in Scuffle with Tribal Police*, TULSA WORLD (Feb. 29, 2024), https://tulsaworld.com/news/state-regional/crime-courts/tribal-sovereignty-dispute-results-in-scuffle-between-okmulgee-jailer-lighthorse-police/article_a968de70-a00e-11ee-a4ff-97db6cbdf477.html (on file with the *Columbia Human Rights Law Review*).

[81] Inter-Tribal Council of the Five Civilized Tribes Res. No. 21-34, 2021 Council (2021), http://fivecivilizedtribes.org/Docs/Resolutions/2021/ITC%20R21-34.pdf [https://perma.cc/PU7J-L8W6].

[82] *See* Nancy Marie Spears, *Tribal Law Enforcement Officials Say* McGirt *Strengthening Public Safety*, INDIAN COUNTRY TODAY (Nov. 3, 2021), https://ictnews.org/news/tribal-law-enforcement-officials-say-mcgirt-strengthening-public-safety [https://perma.cc/DMC5-6TPW].

and tribal authorities alike were forced to allocate additional resources to manage the increase in caseloads as a result of *McGirt*.[83]

C. Tribal Detention Practices Pre- and Post-*McGirt*

While the preceding Sections reviewed the legal and political landscape from which the Cherokee Nation Prison Agreement emerged,[84] this Section will conduct a brief examination of tribal detention practices prior to the Agreement and reveal the novelty of its out-of-state component. The implementation of Public Law 280 shows that the legal framework within which a tribe operates can vary widely based on state- or tribe-specific contexts.[85] Within Oklahoma alone, there are thirty-eight federally recognized tribes.[86] Accordingly, this Section will focus primarily on the Cherokee Nation's own practices and those of other tribes impacted by *McGirt's* ruling.

1. Pre-*McGirt* Detention Practices

Recalling that *McGirt's* ruling only expanded the area considered Indian Country for purposes of the Major Crimes Act, it is no surprise that many tribes were already exercising criminal jurisdiction in Oklahoma prior to *McGirt*. Some tribes, like the Caddo Nation of Oklahoma, do not have established tribal courts and therefore cannot exercise their criminal jurisdiction though

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[83] *See* Chris Casteel, *FBI Anticipates 7,500 Cases in Oklahoma Next Year in Wake of McGirt Ruling*, THE OKLAHOMAN (July 16, 2021), https://www.oklahoman.com/story/news/2021/07/16/mcgirt-v-oklahoma-ruling-thousands-new-cases-fbi-director-christopher-wray/7979571002 [https://perma.cc/BN4J-9HN7] (reporting that Congress provided $70 million in funding to the Department of Justice and $10 million in funding to the Bureau of Indian Affairs for *McGirt*-related expenses); Bennett Brinkman, *'So Much Work': Tribal Criminal Justice Systems Discussed at Sovereignty Symposium*, NONDOC (June 9, 2022), https://nondoc.com/2022/06/09/so-much-work-tribal-criminal-justice-systems-discussed-at-sovereignty-symposium [https://perma.cc/CK5Q-L3KU] (quoting Cherokee Nation Principle Chief Chuck Hoskin Jr. discussing the cost and resource-strain on the tribe following *McGirt*).

[84] *See supra* Section I.A (explaining the legal and political history of tribal criminal jurisdiction); Section I.B (explaining the *McGirt* ruling and its impact).

[85] *See, e.g.*, *supra* Section I.A.2 (discussing legislation such as Public Law 280 which can alter the jurisdictional scheme for some entire states and some individual tribes).

[86] *Indian Country*, U.S. ATT'Y OFFICE FOR THE N. DIST. OF OKLA. (last updated July 19, 2022), https://www.justice.gov/usao-ndok/indian-country [https://perma.cc/3F3V-GYK8].

prosecuting crimes. Instead, they rely on the federal government's assistance in prosecuting crimes through Courts of Indian Offenses operated by the Bureau of Indian Affairs (BIA).[87] Tribes not covered by the Courts of Indian Offenses operate their own tribal court systems and, accordingly, have detention needs to address.

With the exception of the Sac and Fox Nation's Juvenile Detention Center, there were no tribally owned detention centers operating in Oklahoma prior to *McGirt*,[88] leaving contracts with non-tribal facilities as the dominant solution to tribal detention needs. In the case of the Cherokee Nation, the tribe only began exercising criminal jurisdiction over its lands in 1990 with the re-establishment of its criminal courts in the Tenth Circuit case *Ross v. Neff*.[89] Following the ruling, the Cherokee Nation formed a new Marshal Service and followed BIA advice to use cross-deputization and detention agreements to handle its newly recognized criminal jurisdiction.[90] These partnerships were mutually beneficial, with the Cherokee Nation providing free specialized policing services and donating hundreds of thousands of dollars to its local law enforcement agency partners.[91] For detention needs, the Cherokee

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[87] CT. OF INDIAN OFFENSES, BUREAU OF INDIAN AFFS., https://www.bia.gov/CFRCourts [https://perma.cc/3F3V-GYK8] (last visited Jan. 8, 2023).

[88] BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 252155, JAILS IN INDIAN COUNTRY, 2017—2018 13 (2020).

[89] Ross v. Neff, 905 F.2d 1349 (10th Cir. 1990). Prior to *Ross*, Oklahoma had been exercising exclusive criminal jurisdiction on Cherokee lands. The suit arose when Cherokee Nation citizen Ronnie Ross brought Section 1983 claims against Adair County Sheriff's Department officers after sustaining injuries during his arrest that later required the amputation of his leg. Along with a claim that the officers used excessive force during his arrest, Ross also claimed state police lacked jurisdiction to arrest him on tribal trust land. *Id.* at 1351–52. The Court sided with Ross and the Cherokee Nation's ability to exercise criminal jurisdiction was restored, requiring the re-establishment of Cherokee Nation criminal courts. *Id.* at 1353. It is worth noting that Oklahoma furthered similar arguments in *Ross* that it would later use in *McGirt*, warning the *Ross* court that a ruling returning criminal jurisdiction to the Cherokee Nation would create "a land in which there is no law." *Id.* at 1353.

[90] Grant D. Crawford, *Teaming Up: Cross-Deputization Allows Cooperation Between Agencies, Tribal Marshals*, TAHLEQUAH DAILY PRESS (May 29, 2018), https://www.tahlequahdailypress.com/news/local_news/cross-deputization-allows-cooperation-between-agencies-tribal-marshals/article_d2a62aba-1aa9-5e42-936a-5c6e268a6558.html (on file with the *Columbia Human Rights Law Review*).

[91] *Id.*; Chrissi Ross Nimmo, *Oklahoma Cities and Towns in Indian Country Are Not Immune From the U.S. Supreme Court's Holding in* McGirt, 93 OKLA. BAR J. 12, 12, 15 (2022).

Nation contracted with counties across Oklahoma to form detention agreements wherein the Cherokee Nation pays the county a daily flat rate per pre- or post-conviction Cherokee citizen in exchange for space in a county's detention center.[92] While there is not much publicly available information on how the Nation assigned specific citizens to each contracted facility, one such facility's administrator noted that the tribe would aim to have citizens serve in the facility that is closest to their home community.[93]

Likely because detention needs were much more limited prior to *McGirt*, little information is publicly available on how other *McGirt*-impacted tribes handled their detention needs in this period. However, given that none of their post-*McGirt* detention agreements include out-of-state arrangements, as will be demonstrated in the following subsection, it is likely that most tribes in Oklahoma followed the Cherokee Nation's practice of contracting with local detention centers.

2. Post-*McGirt* Detention Practices

An obvious consequence of expanded criminal jurisdiction and heightened caseloads is an increase in detention needs. Within the Cherokee Nation, the post-*McGirt* transition was at times difficult to manage: just short of a year after *McGirt*, the Cherokee Nation Marshal Service Director noted that the agency spent the "lion's share" of its time transporting prisoners to and from court across the 14 counties where its contracted-detention centers sit.[94] To manage increased detention needs, the tribe began renegotiating existing detention agreements with Oklahoma counties.[95] The tribe also began seeking out agreements with towns and cities, successfully securing

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[92] Nimmo, *supra* note 91, at 16; Crawford, *supra* note 90.

[93] *Scope of Tribal Law Can Be Confusing to Some*, TAHLEQUAH DAILY PRESS (Jan. 28, 2015), https://www.tahlequahdailypress.com/news/features/scope-of-tribal-law-can-be-confusing-to-some/article_8de62136-a724-11e4-bee2-538e8ee7f3de.html [https://perma.cc/PKE4-D2RF].

[94] Chad Hunter, *Cherokee Nation Marshals, Attorneys Dealing with* McGirt *Fallout*, CHEROKEE PHX. (July 19, 2021), https://www.cherokeephoenix.org/council/cherokee-nation-marshals-attorneys-dealing-with-mcgirt-fallout/article_2f07ffbc-e80a-11eb-b8d6-0f0e4f7a4603.html [https://perma.cc/N2TK-5FMW].

[95] *See* Daisy Creager, *Cherokee, County Officials Close to a Final Detention Agreement*, BARTLESVILLE EXAM'R-ENTER. (June 26, 2021), https://www.examiner-enterprise.com/story/news/2021/06/26/cherokee-nation-washington-county-officials-close-final-detention-agreement/5352866001 [https://perma.cc/PP9X-C7MN].

detention agreements with the city of Tahlequah and the town of Muldrow.[96] According to the Cherokee Nation, it also entered into negotiations with local state and private entities, but the discussions were ultimately unsuccessful.[97]

Other *McGirt*-impacted tribes also utilized local, primarily in-reservation, solutions. For example, the Choctaw Nation entered into agreements with all of the counties within its reservation's boundaries, assigning Choctaw citizens to their local detention center when possible.[98] To reduce transportation stress imposed by having Choctaw citizens detained across the 11,000-square-mile reservation, the tribe instituted remote conferencing policies throughout its court system and ensured that all contracted detention centers have access to requisite video conferencing technology.[99] The Muscogee Nation announced five detention contracts with counties across its reservation following *McGirt*, noting that the contract with Tulsa County does not have a cap on available space for Muscogee citizens.[100] The Chickasaw Nation established a new Office of Detention Administration to focus on detention needs, securing eleven agreements with counties across Oklahoma and one agreement with the Sac and Fox Nation's tribally operated juvenile detention center.[101] As is demonstrated by both the pre- and post-*McGirt* detention arrangements outlined above, Oklahoman Native Americans sentenced in tribal court served their sentences in Oklahoma-based, often in-reservation, detention centers, whether

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[96] Nimmo, *supra* note 91, at 16.

[97] Council of the Cherokee Nation, Res. 22-075, 2021 Tribal Council (Cherokee Nation 2021), https://cherokee.legistar.com/Legislation.aspx (search "22-075") [https://perma.cc/FZ5W-CUH4] ("[N]either the State of Oklahoma Department of Corrections nor private facilities in the state could or would meet the detention needs of the Cherokee Nation regarding incarceration.").

[98] Derrick James, *Choctaw Nation's Top Prosecutor Outlines* McGirt *Process*, MCALESTER NEWS-CAP. (Apr. 10, 2021), https://www.mcalesternews.com/news/crime/choctaw-nations-top-prosecutor-outlines-mcgirt-process/article_20d91bb3-a565-58d4-b844-0f97079572b2.html (on file with the *Columbia Human Rights Law Review*).

[99] *Id.*

[100] Morgan Taylor, *LPD Gives an Update on the Justice System Changes Since* McGirt, MVSKOKE MEDIA (Jan. 3, 2023), https://www.mvskokemedia.com/lpd-gives-an-update-on-the-justice-system-changes-since-mcgirt [https://perma.cc/EWN6-2ZRN].

[101] Tony Choate, *Chickasaw Nation Expands Criminal Justice Capabilities*, ADA NEWS (Mar. 16, 2022), https://www.theadanews.com/news/local_news/chickasaw-nation-expands-criminal-justice-capabilities/article_efccbeb0-046f-5d19-9676-48f055f75731.html [https://perma.cc/9L7C-GLGD].

tribe-, county-, or city-owned, up until the passage of the Cherokee Nation Prison Agreement.

II. DUE PROCESS IMPLICATIONS OF THE CHEROKEE NATION PRISON AGREEMENT

The Cherokee Nation Prison Agreement is one manifestation of how the practical impacts of *McGirt*, namely the increase in tribal detention needs, collided with the weakened tribal-state relations driven by political leadership. Citing the insufficiency of in-state detention options in light of *McGirt*, and Oklahoma's inability—or unwillingness—to meet its needs, the Cherokee Nation announced a multilateral agreement authorizing a privately-owned Texas facility to house its tribally sentenced citizens.[102] Tribal leaders celebrated the Cherokee Nation Prison Agreement as an "affirmation of . . . tribal sovereignty."[103] However, citizens within the Nation have expressed concern about the impacts the decision will have on individual tribal members and the community more broadly.[104] Transferring a tribal citizen to an out-of-state facility would surely impose some sort of burden on the individual, but there has yet to be discussion on whether such burdens give rise to due process protections.

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[102] *See* Res. 22-075, Cherokee Nation Tribal Council (2022), https://cherokee.legistar.com/Legislation.aspx (on file with the *Columbia Human Rights Law Review*) (enter "22-075"in the search bar and select "All Years" from the first drop-down menu) ("[N]either the State of Oklahoma Department of Corrections nor private facilities in the state could or would meet the detention needs of the Cherokee Nation regarding incarceration.").

[103] *See* Hunter, *supra* note 8.

[104] When asked about their views on the prison agreement, three Cherokee Nation citizens conveyed different levels of comfort with the tribe's decision but all shared concerns about its impacts on the broader community. Written Correspondence with David Cornsilk, 2023 Candidate for Principal Chief, Cherokee Nation, to Author (Jan. 12, 2023) (on file with Author) ("There is never an instance, in my opinion, when it's right to deport Cherokees to a foreign state, especially not a racist state like Texas."); Written Correspondence with James Cooper to Author (Jan. 24, 2023) (on file with Author) ("I am extremely concerned about [the agreement] which will see our Cherokee citizens removed from our reservation, and isolated from our communities and their families. The Cherokee Nation must build our own detention center/prison within our reservation."); Written Correspondence with Shawn Wright to Author (Jan. 25, 2023) (on file with Author) ("As a desperate move to deal with a state-created problem of inadequate space, I accept it's necessity. My desire is to hear the plan to build in-reservation penal facilities that obsolete this practice.").

Section II.A provides an overview of the Cherokee Nation Prison Agreement. Section II.B then examines due process obligations imposed on tribes through federal legislation, as well as those imposed on the Cherokee Nation specifically through tribal law. Section II.C reviews existing due process law concerning prison transfers, finding that past precedent does not address the transfer authorized by the Cherokee Nation Prison Agreement. Finally, Section II.D concludes by analyzing the particular interests at stake in tribal detention transfers under the framework employed by the Supreme Court in other prison transfer cases to argue that post-conviction incarcerated Cherokee citizens are at risk of due process violations.

A. The Cherokee Nation Prison Agreement

On September 12, 2022, the Cherokee Nation Tribal Council's Rules Committee convened for a special session to consider whether to endorse a detention agreement with LaSalle Corrections and Limestone County in Texas.[105] Claiming to have exhausted in-state options, the Cherokee Nation negotiated an agreement with the privately owned correctional center developer and the Texas county. Under the Agreement, the Cherokee Nation is "charged $97.50 per inmate per day" to devote 150 beds to Cherokee Nation citizens at the Limestone County Detention Center.[106] The facility is roughly six-and-a-half hours away from the Cherokee Nation's capital of Tahlequah, Oklahoma.[107] The contract will run for two years, with options for additional renewals at the same rate; it would cost about $5.3 million annually to the Cherokee Nation.[108] By a vote of sixteen to one, the Council passed the resolution endorsing the Agreement on September 12, 2022 and the Nation executed the Agreement.[109] About

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[105] *Meeting Details for Rules Committee Special Session*, COUNCIL OF THE CHEROKEE NATION (Sept. 12, 2022, 5:00 PM), https://cherokee.legistar.com/Calendar.aspx (on file with the *Columbia Human Rights Law Review*) (enter "special session" into the search bar; choose "2022" from first dropdown; then choose "Rules Committee" from second dropdown). For a recording of the full meeting, see Cherokee Nation, *Special Rules Committee Meeting - 9/12/2022*, YOUTUBE (Sep. 12, 2022), https://www.youtube.com/watch?v=XUc00J2_pMI [https://perma.cc/4JQS-BSUU].

[106] Hunter, *supra* note 1.

[107] *Id.*

[108] *Id.*

[109] *Published Minutes for Rules Committee Special Session*, COUNCIL OF THE CHEROKEE NATION (Sept. 12, 2022, 5:00 PM), https://cherokee.legistar.com/Calendar.aspx (on file with the *Columbia Human*

six weeks later, on October 26, the Cherokee Nation transported its first group of incarcerated tribal citizens to the privately-owned Texas facility.[110]

In her presentation before the Tribal Council, Cherokee Nation Attorney General Sara Hill provided the most comprehensive information on the Cherokee Nation Prison Agreement to date. Under the Agreement, only post-conviction tribal citizens would be eligible for transfer to the Limestone County Detention center.[111] When selecting which tribal citizens to transfer, Attorney General Hill stated that the Nation would prioritize sending those with sentences of at least six months, but she did not foreclose the possibility that citizens with shorter sentences may be transferred.[112] Attorney General Hill also stated that the Limestone County Detention Center will be subject to a general inspection from the tribe and that the Agreement allows the Cherokee Nation to conduct surprise visits in response to complaints from its incarcerated citizens.[113] She noted, however, that the Nation's ability to investigate abuse claims will be fairly limited given its lack of jurisdiction over the facility.[114] Attorney General Hill stated that, in addition to having access to a law library, incarcerated citizens will have access to web-conferencing technology to visit with attorneys and family members approved by the Cherokee Nation Marshal Service and messaging capabilities with approved phone numbers.[115] Once sentences are completed, the tribe would arrange transportation of Cherokee Nation citizens back to an Oklahoma county jail for eventual release.[116]

While the Rules Committee special session sheds some light on the details of the Agreement, questions remain unanswered. It is unknown, for example, whether other tribes in Oklahoma may follow the Cherokee Nation's lead by adopting similar agreements, risking further rights violations caused by out-of-state transfers. While no other *McGirt*-impacted tribe has announced such an out-of-state agreement, Attorney General Hill stated that she is "assuming [other

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Rights Law Review) (enter "special session" into the search bar; choose "2022" from first dropdown; then choose "Rules Committee" from second dropdown).

[110] Hunter, *supra* note 1.

[111] Cherokee Nation, *supra* note 105.

[112] Cherokee Nation, *supra* note 105.

[113] Cherokee Nation, *supra* note 105.

[114] Cherokee Nation, *supra* note 105.

[115] Cherokee Nation, *supra* note 105. When asked whether the law library would contain tribal law resources, Attorney General Hill was unable to answer but indicated the Nation would be willing to donate resources if necessary.

[116] Cherokee Nation, *supra* note 105.

tribes] are looking at similar solutions."[117] Further, the Cherokee Nation has not discussed, at least publicly, the procedures for transfers. Crucially, there is no information as to whether citizens will have any means to contest their transfers. The swiftness with which the Cherokee Nation executed transfers following the Tribal Council's endorsement indicates that due process protections were likely not in place. However, without official confirmation, it remains uncertain what, if any, procedures were involved.

B. Tribal Nations' Due Process Obligations

While the Constitution explicitly provides due process protections against the federal government in the Fifth Amendment and against state governments in the Fourteenth Amendment, it contains no provision imposing due process obligations on tribal governments.[118] Nor is there an implicit constitutional obligation: in 1896, the Supreme Court held that constitutional individual rights protections, including due process rights, do not apply to tribal governments because tribal powers of local governance were created independently of the Constitution.[119] However, tribes were given a statutory obligation from the United States to protect individual rights with the passage of the Indian Civil Rights Act (ICRA) in 1968.[120]

ICRA extends certain individual rights enshrined in the Constitution to tribal citizens, stating that "[n]o Indian tribe in exercising powers of self-government shall" violate a list of rights closely modeled after the Bill of Rights.[121] The most relevant subsection is based on the Due Process Clause, which prohibits a tribe from "depriv[ing] any person of liberty or property without due process of law."[122] Interpretation of ICRA clauses modeled after

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[117] Cherokee Nation, *supra* note 105.

[118] U.S. CONST. amends. V, XIV.

[119] Talton v. Mayes, 163 U.S. 376, 384 (1896) ("[T]he powers of local self-government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution on the National Government.").

[120] 25 U.S.C. §§ 1301–04.

[121] 25 U.S.C. § 1302(a). This section contains language mirroring many clauses in the Bill of Rights, among them the Free Exercise Clause, the Free Speech Clause, the Free Press Clause, the Assembly Clause, the Petition Clause, the Double Jeopardy Clause, and the Just Compensation Clause.

[122] 25 U.S.C. § 1302(a)(8).

constitutional provisions can either follow or stray from the traditional federal interpretation of the corresponding provision. Historically, federal courts tend to interpret these ICRA provisions in line with their constitutional counterparts, an approach endorsed by the Office of Legal Counsel.[123] Some tribal courts also adopt this approach,[124] while others have distinguished ICRA from the Bill of Rights and instead interpret its provisions in light of tribal customs and norms. [125] Federal means of redress for ICRA violations are vastly more limited than those available for violations of ICRA's constitutional counterparts, however. ICRA's only remedial provision, Section 1303, extends "[t]he privilege of the writ of habeas corpus" in federal court to "any person" to "test the legality of his detention by order of an Indian tribe."[126] The Supreme Court later held that the Section 1303 habeas provision is in fact the sole method of federal

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[123] Tribal Restrictions on Sharing of Indigenous Knowledge on Uses of Biological Resources, 23 Op. O.L.C. 235, 242 (1999) ("[W]e believe that the better view is that conventional constitutional principles should generally apply where the language of title I of the ICRA closely tracks that of the Constitution."). *See, e.g.,* United States v. Lester, 647 F.2d 869, 872 (8th Cir. 1981) (interpreting the ICRA provision against unreasonable searches and seizures under Fourth Amendment standards); Selam v. Warm Springs Tribal Corr. Facility, 134 F.3d 948, 952 (9th Cir. 1998) (interpreting the ICRA's compulsory process clause under Sixth Amendment standards due to its "identical" language); United States v. Nealis, 180 F. Supp. 3d 944, 949 (N.D. Okla. 2016) (denying the defendant's ICRA claim because it was not applied to tribal government actors, but noting that the defendant's due process rights were not violated under Fourth Amendment analysis).

[124] Seth E. Montgomery, *ICRA's Exclusionary Rule*, 102 BOS. U. L. REV. 2101, 2122 (2022) (noting tribal courts that have interpreted ICRA as incorporating at minimum the federal standard for the relevant constitutional provisions) (first citing Swinomish Indian Tribal Cmty. v. Reid, 11 Am. Tribal L. 182, 185 (Swinomish Tribal Ct. 2012); then citing Coeur d'Alene Tribe v. Goddard, 38 Indian L. Rep. 6019, 6021 (Coeur d'Alene Tribal Ct. 2011); and then citing Davisson v. Colville Confederated Tribes, 10 Am. Tribal L. 403, 408 (Colville Tribal Ct. App. 2012)).

[125] *Id.* at 2121 (noting tribal courts that have not automatically interpreted ICRA provisions under the federal standards for the relevant constitutional provisions) (first citing Palencia v. Pojoaque Gaming, Inc., 28 Indian L. Rep. 6149, 6152 (Pojoaque Tribal Ct. 2001); then citing Navajo Nation v. Rodriguez, 5 Am. Tribal L. 473, 478 (Navajo 2004); then citing Nevayaktewa v. Hopi Tribe, 1 Am. Tribal L. 306, 314 (Hopi App. Ct. 1998); and then citing Cheyenne River Sioux Tribe v. Williams, 19 Indian L. Rep. 6001 (Cheyenne River Sioux Ct. App. 1991)).

[126] 25 U.S.C. § 1303.

review in ICRA cases, thus barring private civil causes of action entirely.[127]

It is important to note that due process protections were not merely imposed on the Cherokee Nation by outside forces. In an exercise of its sovereignty—crafting its national constitution—the Cherokee Nation explicitly granted these rights to its citizens. Article III, section 3 of the Cherokee Nation Constitution includes a word-for-word incorporation of the Due Process Clause, stating that "[t]he Cherokee Nation shall not deprive any person of life, liberty or property without due process of law . . . ."[128] By including these rights in its tribal constitution, the Cherokee Nation has signaled that the protection of due process rights is in accordance with tribal, and not only federal, values.

C. Existing Due Process Jurisprudence Regarding Prison Transfers

Though incarceration necessarily implies the loss of many individual liberties, the Constitution still extends some rights, including due process rights, to incarcerated people.[129] The issue of due process rights in prison transfers has been addressed multiple times by the Supreme Court, but given tribal nations' unique status in American law, there is no analogous ruling for the type of transfer authorized in the Cherokee Nation Prison Agreement.

The Court first addressed prison transfers in *Meachum v. Fano* in 1976, finding that intrastate transfers do not invoke due process protections.[130] There, six men incarcerated in a Massachusetts prison were forced to transfer to other in-state facilities which they alleged provided substantially less favorable conditions.[131] The six incarcerated men argued that their due process rights were violated because prison administrators made the transfer

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[127] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71–72 (1978) (finding that Congress intentionally included federal review in habeas corpus proceedings under ICRA to address the most serious offenses by tribes, and its failure to include additional causes of action reflected a congressional intent to limit intrusions on tribal self-governance).

[128] CONST. OF THE CHEROKEE NATION, art. 3, § 3 (1999).

[129] Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country . . . [Incarcerated people] may not be deprived of life, liberty, or property without due process of law.").

[130] Meachum v. Fano, 427 U.S. 215 (1976).

[131] *Id.* at 216–17.

decisions without an adequate fact-finding hearing.[132] In a six-three decision, the Court held that the Constitution does not require that intrastate transfers involve a fact-finding hearing, nor any procedural protections at all:

> The initial decision to assign the convict to a particular institution is not subject to audit under the Due Process Clause, although the degree of confinement in one prison may be quite different from that in another. . . Neither, in our view, does the Due Process Clause in and of itself protect a duly convicted prisoner against transfer from one institution to another within the state prison system. Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose.[133]

With this ruling, the Court validated state authority to transfer incarcerated citizens freely between its in-state prisons and jails.

Four years later, the Supreme Court examined a different sort of transfer in *Vitek v. Jones*—that from a prison to a mental institution.[134] The Court found that, in contrast to intrastate transfers, due process protections are constitutionally required in transfers to mental institutions.[135] Writing for the Court, Justice White reasoned that, while "[a] conviction and sentence extinguish an individual's right to freedom from confinement for the term of his sentence, they do not authorize the State to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections."[136] The Court held that the state must afford an individual notice, a hearing, and legal counsel if they cannot afford it.[137] *Vitek* provided what would soon be used as the new test for whether liberty interests are invoked in a transfer: whether "[s]uch consequences visited on the prisoner are *qualitatively different* from the punishment characteristically suffered by a person convicted of crime."[138]

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[132] *Id.* at 222.
[133] *Id.* at 224–25.
[134] Vitek v. Jones, 445 U.S. 480 (1980).
[135] *Id.* at 494.
[136] *Id.* at 493–94.
[137] *Id.* at 496–97.
[138] *Id.* at 493 (emphasis added).

Three years after that, in *Olim v. Wakinekona*, the Court had an opportunity to apply the *Vitek* test to interstate prison transfers.[139] Delbert Kaahanui Wakinekona was serving a sentence of life imprisonment in a prison in his home state of Hawai'i.[140] After a series of alleged disciplinary infractions by Wakinekona, a prison committee held a hearing and ultimately decided to transfer Wakinekona to a California prison.[141] As Justice Marshall noted in his dissenting opinion, the impact of the prison committee's decision was especially profound as it mandated that "[f]or an indeterminate period of time, possibly the rest of his life, nearly 2,500 miles of ocean will separate [Wakinekona] from his family and friends."[142] Wakinekona contested the decision, alleging a due process violation in which he was denied an opportunity to be heard by an impartial committee prior to the transfer.[143] The Court rejected Wakinekona's claim that the transfer subjected him to the sort of "qualitatively different" consequences required to invoke the Due Process Clause under *Vitek*.[144] The Court reasoned that a person sentenced to a term of imprisonment has "no justifiable expectation that he will be incarcerated in any particular State," noting that federal prisoners are routinely transferred to serve their sentences out of state.[145]

In sum, the Supreme Court has found that intrastate and interstate transfers do not implicate due process interests, but that transfers to mental institutions do.[146] In the case of the Cherokee Nation Prison Agreement, involving a transfer from a reservation located entirely within one state to a state wholly outside of reservation boundaries, the closest analog is the interstate transfer in *Wakinekona*, which the Court held did not invoke due process protections.[147] However, because a tribe is not a state, but a "domestic dependent nation,"[148] this sort of transfer cannot be properly

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[139] Olim v. Wakinekona, 461 U.S. 238 (1983).

[140] *Id.* at 240.

[141] *Id.* at 241.

[142] *Id.* at 252–53 (Marshall, J. dissenting).

[143] *Id.* at 243.

[144] *Id.* at 245.

[145] *Id.* at 245–46.

[146] Meachum v. Fano, 427 U.S. 215, 216 (1976) (holding that intrastate prison transfers, even when to a prison with substantially worse conditions, do not require due process protections); Olim v. Wakinekona, 461 U.S. 238, 248 (1983) (holding that interstate transfers do not require due process protections); Vitek v. Jones, 445 U.S. 480, 494 (1980) (holding prison transfers to mental institutions require due process protections).

[147] *See* Olim v. Wakinekona, 461 U.S. 238, 248 (1983).

[148] Cherokee Nation v. Georgia, 30 U.S. 1, 26–27 (1831).

characterized as interstate. Thus, the type of transfer authorized by the Cherokee Nation Prison Agreement has not been directly examined by courts. This leaves open to Cherokee Nation citizens the possibility of challenging the practice by alleging due process violations.

D. Due Process Rights of Individuals Forced to Transfer Under the Cherokee Nation Prison Agreement

The sort of transfer authorized by the Cherokee Nation Prison Agreement, previously unexamined by courts, subjects an incarcerated Native American to qualitatively different consequences than those characteristically suffered by a Native American convicted of a crime in Indian Country. Section II.D.1 argues that the ordinary burdens associated with out-of-state prison transfers—which the dissent in *Wakinekona* argued give rise to due process protections on their own—are greatly magnified for tribal citizens. Section II.D.2 argues that, by forcing Native Americans to be subjected to an unfamiliar state's criminal jurisdiction, these transfers cut against notions of tribal sovereignty that seek to shield tribal members from state jurisdiction. Section II.D.3 details cultural beliefs around the importance of remaining close to one's home community, which make it particularly harmful for a Cherokee Nation citizen to be virtually exiled from their community.

1. Burdens Imposed by Out-of-State Transfers

As the dissent in *Wakinekona* noted, when incarcerated people are forced to transfer to a facility far from where they were convicted, they "may be entirely cut off from [their] only contacts with the outside world, just as if [they] had been imprisoned in an institution which prohibited visits by outsiders."[149] For the Cherokee Nation citizens forced to transfer to the Limestone Facility in Groesbeck, Texas, they will find themselves a six-and-a-half hour drive—nearly 400 miles—from the Cherokee Nation's capital of Tahlequah, Oklahoma.

The difficulty in maintaining connections with friends and family, as noted in the *Wakinekona* dissent, is a typical hardship inflicted on incarcerated people forced to transfer to an out-of-state facility.[150] But while these burdens exist for any inmate subjected to an out-of-state prison transfer, citizens of the Cherokee Nation face heightened and nearly insurmountable barriers. Namely, for many Cherokee families, the cost of embarking on a thirteen-hour round trip to visit incarcerated relatives will be prohibitively expensive. A comprehensive study on household income between 2015 and 2019 revealed that Native American households had a median annual income of $43,825, roughly $20,000 less than non-Hispanic white families.[151] The most recent official data provided on Native Americans, from 2018, revealed that Native Americans had the highest poverty rate among races at 25.4 percent—nearly five percentage points higher than the second highest category, Black Americans.[152] Several counties within Cherokee Nation boundaries suffer from the highest poverty rates in the state of Oklahoma, a state already among the nation's ten poorest states.[153] Therefore,

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[149] *Wakinekona*, 461 U.S. at 253 (Marshall, J. dissenting).

[150] *Id*.

[151] Gloria Guzman, *Household Income by Race and Hispanic Origin: 2005–2009 and 2015–2019*, U.S. CENSUS BUREAU (Dec. 10, 2020), https://www.census.gov/content/dam/Census/library/publications/2020/acs/acsbr19-07.pdf [https://perma.cc/E47Y-BEUN].

[152] *The Population of Poverty*, POVERTY USA, https://www.povertyusa.org/facts [https://perma.cc/Y3DW-3QKW] (last accessed Dec. 20).

[153] *See* Chad Hunter, *Poverty Report Shows Impact in Cherokee Nation*, CHEROKEE PHX. (Oct. 4, 2020), https://www.cherokeephoenix.org/news/poverty-report-shows-impact-in-cherokee-nation/article_190a7aac-d8aa-54ab-804b-9c0279c63d9e.html [https://perma.cc/7W77-SS69]; Carly Putnam, *Latest Poverty, Health Insurance Data Show That Oklahoma Still Has Work to Do*, OKLA. POL'Y INST. (Sept. 16, 2022), https://okpolicy.org/latest-poverty-health-insurance-data-show-that-oklahoma-still-has-work-to-do/ [https://perma.cc/2BTC-TRVE].

coupling the distance with the income data demonstrates that Native Americans are more likely to be impacted by the increased expense imposed on those who wish to visit their incarcerated loved ones.

2. Burdens Imposed by the Jurisdictional Switch Inherent in Out-of-State Transfers

The Cherokee Nation Prison Agreement is unique in that it forcibly removes incarcerated tribal citizens and places them under an unfamiliar state's jurisdiction. Cherokee Nation citizens routinely find themselves under Oklahoma state criminal jurisdiction when traveling outside of the reservation but rarely find themselves within Texas state jurisdiction. Additionally, because the Cherokee Nation does not operate its own correctional facilities, tribal citizens have regularly been transferred to other Oklahoma facilities to serve their sentences.[154] Accordingly, Cherokee Nation citizens can reasonably foresee that they may be housed in a facility outside of the tribe's jurisdiction, but within the state of Oklahoma's. This is certainly the case for tribal citizens in the initial transfers and remains true, albeit to a lesser extent, for those in future transfers who were unaware of the Agreement's execution. By forcing incarcerated Cherokee Nation citizens into a Texas facility, the Cherokee Nation is departing from its typical practice and subjecting citizens to an unknown state's jurisdiction.

On its face, this sort of jurisdictional switch may seem similar to that experienced by Wakinekona, who was forced to move from Hawaii to California state jurisdiction against his will. However, in examining that state-to-state transfer, the Supreme Court in *Wakinekona* was not confronted with the unique issues implicated by the domestic dependent nation-to-state transfer presented by the Cherokee Nation Prison Agreement. Situated against the historic practice of states attempting to assert criminal jurisdiction over Native Americans as a means of weaking tribal self-governance,[155] this forcible subjection to Texas state jurisdiction is incompatible with notions of tribal sovereignty and cuts against the Supreme Court's longstanding ruling that states have no place in the regulation of Indian affairs. [156] Protecting its citizens from state intrusion is not only beneficial for a tribal nation's preservation, but also provides benefits for the individual tribal citizen by shielding them from a

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[154] Nimmo, *supra* note 91, at 12.

[155] *See supra* Section I.A.1 (detailing the Cherokee Cases).

[156] *See* Worcester v. Georgia, 31 U.S. 515, 520 (1832).

sovereign that does not possess tribal cultural knowledge and values. While in the Limestone County Detention Center, Cherokee Nation citizens are vulnerable to facing additional Texas state charges for crimes committed while incarcerated or receiving punishment for disciplinary infractions, resulting in extended sentences.[157] These citizens did not consent to being under Texas state jurisdiction, and should not be forced to do so without adequate protections in place.

One may view the Agreement itself as an exercise of tribal sovereignty—indeed, one government's act of negotiating with another and entering into consensual contracts is often viewed as an affirmation of that government's sovereignty. It is important to recall, however, the conditions that necessitated the Prison Agreement. As the Cherokee Nation Tribal Council stated, "neither the State of Oklahoma Department of Corrections nor private facilities in the state could or would meet the detention needs of the Cherokee Nation regarding incarceration."[158] For an agreement to be truly representative of tribal sovereignty, it must be one that the tribe made willingly. In this case, the Cherokee Nation did not have any in-state options. The Nation's past practices and its statements highlighting the necessity of the Agreement indicate that, had the Nation been presented with in-state options, it would have elected to place incarcerated citizens close to their homes and within the state of Oklahoma. But in strategically alienating tribes following *McGirt*, Oklahoma effectively forced the Cherokee Nation to turn to out-of-state options to the detriment of its citizenry.[159] Just as the early treaties between tribes and the federal government—which tribes often entered into under coercion—are a poor reflection of a tribe's wishes, the Cherokee Nation Prison Agreement should not be mistaken as one aligned with the will of the Cherokee people. As a

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[157] Incarcerated people do not become immune from prosecution for crimes committed while incarcerated, which may result in a new sentence of incarceration. Additionally, incarcerated people often earn "good time credits" that can reduce their sentences and result in early release. The Cherokee Nation does not have a published good time credit policy but does acknowledge the existence of these credits in tribal law by explicitly disallowing them for certain crimes. *See* Cherokee Nation Tribal Code, tit. 21, § 567.1(5)(c). These good time credits can be removed based on the results in prison disciplinary proceedings, sometimes without any due process protections. *See* COLUM. HUM. RTS. L. REV., A JAILHOUSE LAWYER'S MANUAL 610–11 (12th ed. 2020).

[158] Res. 22-075, 2021 Tribal Council (Cherokee Nation 2021), https://cherokee.legistar.com/LegislationDetail.aspx?ID=5811144&GUID=E28C3E76-E26B-425F-9D41-D44EE7D597B9 [https://perma.cc/W9YC-TRFN].

[159] For perspectives from Cherokee Nation tribal members on how the Agreement will impact the Cherokee people, see *supra* note 104.

result of state interference with tribal self-governance, the Cherokee Nation finds itself in a position where its citizens will be harmed by an agreement for which only the Nation can be held liable. Despite its unfortunate position, the Cherokee Nation should nonetheless be held to its obligation to protect the individual rights of its citizens.

3. The Heightened Impact of Separation from Community in Native American Cultures

Though *Wakinekona* seems to have shut the door on separation from one's community giving rise to due process protections in the prison transfer context, it did so without being faced with the heightened cultural norms around this burden present in tribal communities. While Native Americans are not a monolith and individuals may have varying value systems, for many Native peoples, including the Cherokee, proximity to one's homeland and connection to family is of paramount importance. Writing of the differences between Indigenous and Western conceptions of land, one legal scholar said, "[b]eyond [the land's] obvious historical provision of subsistence, it is the source of spiritual origins and sustaining myth which in turn provides a landscape of cultural and emotional meaning. The land often determines the values of the human landscape."[160] One Cherokee scholar noted that his elders told him that, as Cherokee people, "[w]e are obligated to 'honor the spirit of this land' as a matter of upholding our relationships with the nonhuman world, with place, and with the Creator."[161] For many Cherokee people, the disconnection from one's community that will result from the transfers authorized by the Cherokee Nation Prison Agreement will have significant negative impacts on not only the transferred citizen, but their whole community.

The factors described in this Section are unique to Native Americans, and to citizens of the Cherokee Nation in particular. Together, they are sufficient to overcome judicial scrutiny of retained liberty interests for incarcerated citizens. Cherokee Nation citizens who are transferred to the Limestone County Detention Center without requisite procedural protections have a cognizable claim to

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[160] Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246, 250 (1989).

[161] Clint Carroll, *Cherokee Relationships to Land: Reflections on a Historic Plant Gathering Agreement Between Buffalo National River and the Cherokee Nation*, 36 PARKS STEWARDSHIP F. 154, 155 (2020).

contest their transfers as a due process violation under the Cherokee Nation Constitution and ICRA.

III. RIGHTING REMOVAL: PATHS FORWARD FOR THE CHEROKEE NATION

This Part will explore potential paths forward for the Cherokee Nation and its citizens in light of the due process threat imposed by the Cherokee Nation Prison Agreement. Part III.A provides recommendations for impacted Cherokee citizens, outlining the immediate steps that a Cherokee citizen wishing to contest their transfer under the Agreement can take. Understanding that the Cherokee Nation remains beholden to Oklahoma state officials' willingness to alleviate the in-state conditions necessitating an agreement of this nature, Part III.B closes with long-term recommendations for the Cherokee Nation and similarly situated tribal nations.

A. Immediate Steps for Impacted Tribal Citizens

A tribal citizen forced to a transfer to an out-of-state detention center to serve a tribally imposed sentence without procedural safeguards may contest their transfer in court as a due process violation under ICRA and the tribal constitution, should it include a due process provision like that of the Cherokee Nation. The first step for an impacted tribal citizen is to determine whether the procedures offered in their transfers met the minimum standards recognized by the Supreme Court. If there were deficiencies in the process, the tribal citizen can then turn to tribal courts, and eventually federal courts, for relief. This Section walks through both steps, using the example of a tribal citizen transferred under the Cherokee Nation Prison Agreement.

1. Identifying Procedural Minimums

In determining the minimum procedures required by due process, consideration must be given to the particulars of the situation, including the nature of the function being exercised by the government and that of the liberty interest at stake.[162] Here,

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[162] Wolff v. McDonnell, 418 U.S. 539, 560 (1974) (first quoting Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961); and then quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

previously identified procedural minimums serve as a guideline. *Vitek v. Jones* provides the sole guidance from the Supreme Court on what procedures may be required in the case of a prison transfer.[163] This is not a perfectly analogous case: the transfer in *Vitek* was to a mental institution, and the Court found that the risk of social stigmatization and involuntary treatment stemming from the transfer made the incarcerated person's liberty interest more compelling than that of someone who is merely transferred between two prisons in different states.[164] Still, the procedural minimums recognized provide a baseline against which procedures can be measured.

In *Vitek*, the court found that the following procedures satisfy due process requirements: (1) written notice to the incarcerated person, both of the upcoming transfer and their associated rights, (2) a written statement of the evidence relied on to select the incarcerated person for transfer, (3) an opportunity to be heard, where the incarcerated person may present arguments and/or witnesses to contest the transfer, and (4) a final decision rendered by an independent decisionmaker.[165] These procedures may be overinclusive given the factual distinctions between the transfer in *Vitek* and that in the Cherokee Nation Prison Agreement. Nevertheless, the precise procedures required to satisfy due process in the Cherokee Nation Prison Agreement are not yet established as the Agreement has not been reviewed by any judicial body. To ensure maximum protections for Cherokee citizens, any deviance from previously recognized procedural requirements should be contested until the bounds of the appropriate level of protection are set by statute or common law.

2. Initiating Court Action

Recalling that the Cherokee Nation's due process obligations are derived from the ICRA and the tribal constitution,[166] remedies must be tailored to both sources of law. Here, principles of exhaustion

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[163] Vitek v. Jones, 445 U.S. 480 (1980).

[164] *Id.* at 494.

[165] *Id.* at 494–96 (finding that the procedures identified by the district court were appropriate). The Court also found that the appointment of counsel to indigent defendants was appropriate, but connected this explicitly to the implication that the defendant is mentally ill and thus may have a greater need for assistance. *Id.* at 496–97. Because this requirement was closely tied to the mental health aspect of the case, and similar circumstances are not present in the Cherokee Nation Prison Agreement, it is omitted here.

[166] 25 U.S.C. § 1302(a)(8); CONST. OF THE CHEROKEE NATION, art. 3, § 3 (1999).

require that actions under either source of law be initiated in tribal court.[167] The exhaustion doctrine, arising from a 1985 Supreme Court case, generally requires that plaintiffs exhaust tribal remedies before bringing their claim in federal court, though whether exhaustion applies will depend on the claim and may vary among circuits.[168] Due to principles of tribal self-governance, federal courts will generally not address issues of tribal law over certain claims unless the exhaustion requirement is met, and even then, the federal court will leave interpretations of tribal law to the tribal court.[169]

A petition for writ of habeas corpus under 25 U.S.C. § 1303 is the sole means of redress for ICRA violations in federal court.[170] In considering Section 1303 habeas petitions, a court would almost certainly require exhaustion of tribal remedies. In 2013, tribal law expert Carrie Garrow conducted the first extensive survey of Section 1303 federal habeas corpus petitions since ICRA's enactment in 1968.[171] Garrow concluded that federal courts usually require exhaustion in Section 1303 habeas review—only five of the 30 cases examined did not require exhaustion, and this was primarily due to the non-Indian status of the petitioner.[172] In the Tenth Circuit, where

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[167] For more information on the exhaustion requirement, including the narrow instances in which the exhaustion requirement does not apply, see generally COHEN'S HANDBOOK, *supra* note 52, § 7.04.

[168] Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 (1985) (holding that exhaustion is required before a federal court can review a challenge to tribal jurisdiction). While *National Farmers* held that exhaustion is required in jurisdictional challenges, the exhaustion requirement applies more broadly to many tribal matters. *See, e.g.,* Cohen's Handbook, *supra* note 52, § 7.04[3] ("Even when a federal court has jurisdiction over a claim involving Indians, if the claim arises in Indian country, the court generally will be required to stay its hand until the plaintiff exhausts available tribal remedies."). *National Farmers* and subsequent cases have provided very narrow exceptions to the exhaustion doctrine—such as the tribe acting in bad faith or in violation of express jurisdictional provisions, or the non-existence of a tribal court—though these are exceedingly uncommon. *See* Hunter Cox, *ICRA Habeas Corpus Relief: A New Habeas Jurisprudence for the Post-Oliphant World?*, 5 AM. INDIAN L.J. 597, 625–626 (2017).

[169] COHEN'S HANDBOOK, *supra* note 52, § 7.04[2][a].

[170] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71–72 (1978) (finding that the congressional intent of the ICRA was for Section 1303 habeas corpus to be the sole means of federal review).

[171] Carrie E. Garrow, *Habeas Corpus in Federal and Tribal Courts: A Search for Individualized Justice*, 24 WM. & MARY BILL RTS. J. 137 (2015).

[172] *Id.* at 148 ("The most common exception [to the exhaustion requirement] was the non-Indian status of the petitioner, over which the tribal court lacked jurisdiction according to *Oliphant*." (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211–12 (1978), *superseded by* 25 U.S.C. § 1301 (1979))).

the Cherokee Nation sits, federal courts construe the exhaustion requirement broadly and require it in Section 1303 habeas review absent a showing of bad faith or futility of pursuing relief in tribal court.[173] The Fifth Circuit, where the Limestone County Detention Center sits, sees a substantially lower number of Section 1303 cases when compared to the Tenth Circuit, which highlights this jurisdiction's unfamiliarity with issues concerning Cherokee Nation citizens.[174] Still, the Fifth Circuit seems to require exhaustion in the limited instances it has addressed the question.[175]

As exhaustion demands, a Cherokee Nation citizen should begin in tribal court, contesting their detention in the Texas facility as a due process violation under the Cherokee Nation Constitution and the ICRA.[176] The power to review writs of habeas corpus is explicitly granted to the Cherokee Nation Supreme Court in the tribal constitution.[177] Thus, an incarcerated citizen can file a habeas corpus petition in the Cherokee Nation to contest their transfer.

While there are seemingly no publicly available cases involving writs of habeas corpus in the Cherokee Nation to look to for

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[173] *See, e.g.,* Chegup v. Ute Indian Tribe of the Uintah & Ouray Reservation, 28 F.4th 1051, 1060–61, 1071–72 (10th Cir. 2022) (remanding a lower court's decision with instructions to first determine whether the exhaustion requirement was met or falls under its narrow exceptions before addressing underlying claims on a Section 1303 habeas corpus petition); United Keetoowah Band of Cherokee Indians v. Barteaux, 527 F. Supp. 3d 1309, 1322, 1324 (N.D. Okla. 2020) (noting that the Tenth Circuit requires a strict showing of exhaustion in Section 1303 habeas corpus cases, but granting an exception to the exhaustion requirement given plaintiffs substantial showing of futility); Thlopthlocco Tribal Town v. Stidham, 762 F.3d 1226, 1239 (10th Cir. 2014) (noting that the Tenth Circuit requires a substantial showing of exhaustion in Section 1303 habeas corpus cases, and that "exceptions are applied narrowly") (citing Kerr-McGee Corp. v. Farley, 115 F.3d 1498, 1502 (10th Cir. 1997)).

[174] A LEXIS search on September 4, 2024, for cases citing 25 U.S.C. § 1303 returned 103 results in the Tenth Circuit, compared to three results in the Fifth Circuit. Similarly, a LEXIS search on the same date for cases using the phrase "Indian Civil Rights Act" or "ICRA" returned 203 results in the Tenth Circuit, compared to twenty-one results in the Fifth Circuit.

[175] *See, e.g.,* Pais v. Sinclair, No. EP-06-CV-137-PRM, 2006 U.S. Dist. LEXIS 80553, at *7 (W.D. Tex. Nov. 2, 2006) (declining to hear claims of ICRA violations where the plaintiff did not exhaust tribal remedies); Tribal Smokeshop v. Ala.-Coushatta Tribes, 72 F. Supp. 2d 717, 720 (E.D. Tex. 1999) (requiring tribal exhaustion on a breach of contract claim).

[176] 25 U.S.C. § 1302(a)(8); Constitution of the Cherokee Nation 1999, art. 3, § 3.

[177] Constitution of the Cherokee Nation 1999, art. 8, § 4 ("[T]he Supreme Court shall have power to issue, hear and determine writs of habeas corpus . . . .").

guidance,[178] a tribal court may prove more receptive to arguments based on community and cultural ties. In her survey of habeas corpus petitions under the ICRA, Carrie Garrow found that federal courts are not suited to provide individualized justice for tribal defendants and that tribal courts are better positioned to adjudicate these claims.[179] In following the Navajo Nation's treatment of habeas corpus petitions, Garrow concluded that tribal court, as opposed to federal court, was the best venue for Navajo habeas corpus petitioners because its courts provided careful attention to tribal customs, values, and laws while also incorporating more individualized and restorative forms of justice.[180] While Garrow's study indicates that a petitioner from the Cherokee Nation would be more successful in tribal court, and principles of exhaustion demand the initial claims go through the Cherokee Nation courts, a federal court is still available as the final option should Cherokee Nation courts prove unaccepting of the claim.

B. Forward-Looking Recommendations for the Cherokee Nation and Similarly Situated Tribes

While tribal citizens can contest their transfers on a case-by-case basis, the most efficient way to ensure the rights of incarcerated Native Americans is for tribes to change the practice posing the risk of harm. In this case, an obvious solution for the Cherokee Nation would be to terminate the Cherokee Nation Prison Agreement and restrict its solutions to in-reservation alternatives, whether through constructing its own detention center or negotiating contracts with non-tribally owned facilities. However, in addition to likely penalties for breach of contract, building a new detention center would come at an exorbitant cost to the tribe and take years to implement.[181]

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[178] There has been one case where the Cherokee Nation Supreme Court considered a writ of mandamus. Wilson v. Cherokee Nation Election Comm'n, 2019 Cherokee Nation Supreme LEXIS 11, at *1 (Cherokee Nation Sup. Ct. February 10, 2019). A search for cases involving a writ of habeas corpus returned no results.

[179] Garrow, *supra* note 171, at 161–62.

[180] Garrow, *supra* note 171, at 177.

[181] Jail construction costs are difficult to estimate due to the long timelines associated with these projects which, in some cases, can take decades. Chris Mai et al., *Broken Ground: Why America Keeps Building More Jails and What It Can Do Instead*, VERA INST. OF JUST. (Sept. 2019), https://www.vera.org/downloads/publications/broken-ground-jail-construction.pdf [https://perma.cc/V5EH-JTJE]. In 2002, the Office of the Inspector General estimated the cost of building a new federal prison as between $98 and $162

Rushing the construction of a facility to meet the instant need would neither be practical nor wise if the end goal is a detention center capable of safely and securely holding tribal citizens. Additionally, factors outside of the Cherokee Nation's control, namely the political environment in Oklahoma, have made it difficult for the tribe to negotiate in-state alternatives.[182] Recognizing these realities, this Section suggests unilateral actions the Cherokee Nation can take to alleviate the harm imposed under the current contract.

1. Instituting Protective Measures to Protect Individual Rights of Tribal Citizens

First and foremost, the Cherokee Nation must institute baseline procedural safeguards in all future transfers to the Limestone County Detention Center. To adapt the analogous procedures discussed in the preceding Section to the instant case,[183] this should include, at minimum: (1) written notice to the incarcerated person, both of the upcoming transfer and their associated rights, (2) an opportunity to be heard, where the incarcerated person may present arguments and/or evidence supporting a unique hardship stemming from the transfer due to financial or otherwise personal circumstances, and (3) a final decision rendered by an independent decisionmaker. By providing these basic procedural safeguards, the Cherokee Nation can both ensure that it is living up to its self-imposed due process obligations[184] and minimize

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million. OFF. OF THE INSPECTOR GEN., US DEP'T OF JUST., NO. 02-32, FED. BUREAU OF PRISONS MGMT. OF CONSTRUCTION CONTRACTS (2002). In 2022, the construction of a new county jail in Oklahoma City was estimated at $297 million and, 10 years into the planning of the new facility, is still years from completion. *See* Keaton Ross, *The Effort to Build a New Oklahoma County Jail is a Decade in the Making*, OKLA. WATCH (June 23, 2022), https://oklahomawatch.org/2022/06/23/the-effort-to-build-a-new-oklahoma-county-jail-is-a-decade-in-the-making [https://perma.cc/MAH6-96W3] (noting the estimated costs of the project and quoting contractors projecting completion by 2026); Meghan Mosley, *County Commissioner Discusses Next Steps for New Oklahoma County Detention Center*, KOCO NEWS (Feb. 16, 2023, 4:44 PM), https://www.koco.com/article/oklahoma-county-commissioner-next-steps-detention-center-jail/42943250 [https://perma.cc/4T3W-EMLT] (quoting the Oklahoma County Commissioner as stating that the county is still seeking land for the construction site and an architect for the project).

[182] *See supra* Section I.B.2.

[183] *See supra* notes 162–164 and accompanying text.

[184] *See* CONSTITUTION OF THE CHEROKEE NATION 1999, art. 3, § 3 ("[T]he Cherokee Nation shall not deprive any person of . . . liberty . . . without due process of law . . . .").

the hardship imposed on incarcerated Cherokee citizens and their loved ones. In the tribe's cost-benefit analysis of implementing these safeguards, the advantages of reducing hardships imposed on incarcerated Cherokee Nation citizens need not only be seen as a moral act conferring some sort of intangible benefit to the tribe. Instead, optimizing the allocation of the Cherokee detention population to be responsive to individual needs can be viewed as advancing the Cherokee Nation's stated public safety priorities.[185] A wealth of evidence supports the theory that positive mental health and more frequent visitations reduce the likelihood of recidivism.[186]

Due process protections can help inform where tribal citizens are incarcerated and whether they are transferred out-of-state, by allowing an independent factfinder to overrule transfers that would impose an undue hardship on the individual. However, there are inevitable hardships associated with out-of-state, long-distance transfers that any incarcerated individual may endure, though perhaps to a lesser extent for those shielded from transfer by procedural safeguards.[187] Even so, there are policy changes that can, and should, be implemented to help mitigate the risk of harm

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[185] In a statement from Cherokee Nation Principal Chief Chuck Hoskin Jr. on a recently passed $3.5 billion budget—the largest in the tribe's history—for the 2023 fiscal year, public safety was listed as a top priority for the Cherokee Nation. *See* Chuck Hoskin Jr., *Record Budget Will Keep Northeast Oklahoma Safer, More Secure*, NATIVE NEWS ONLINE (Sept. 11, 2022), https://nativenewsonline.net/opinion/record-budget-will-keep-northeast-oklahoma-safer-more-secure [https://perma.cc/GD2D-7ANQ] ("[M]uch of our focus will be on providing a blanket of protection for all . . . on the Cherokee Nation Reservation. . . . Keeping our people safe and ensuring justice weigh on the shoulders of every Cherokee Nation leader.").

[186] *See, e.g.*, Danielle Wallace & Xia Wang, *Does In-Prison Physical and Mental Health Impact Recidivism?*, 11 SSM – POPULATION HEALTH 100569 (2020) (providing a multi-state statistical analysis of health outcomes and recidivism and concluding that improved mental health while incarcerated correlated with lower odds of recidivism); MINN. DEP'T OF CORR., THE EFFECTS OF PRISON VISITATIONS ON OFFENDER RECIDIVISM (2011) at 2, 18 (concluding from a Cox regression analysis of 16,420 incarcerated Minnesotans that visitations have a "statistically significant effect on the risk of reconviction" that compounds with additional visitors and visits); Leah Wang, *Research Roundup: The Positive Impacts of Family Contact for Incarcerated People and Their Families*, PRISON POLICY INITIATIVE: BRIEFINGS (Dec. 21, 2021), https://www.prisonpolicy.org/blog/2021/12/21/family_contact [https://perma.cc/23KL-FDDY] (summarizing research on the impact of visitations on the outcomes of incarcerated people from the 1970s up to 2021 and noting that the findings suggest positive effects on reducing recidivism in particular).

[187] For a discussion on the burdens associated with long distance transfers, see *supra* Section II.D.

inherent in out-of-state transfers. First, the Cherokee Nation can take low-cost steps to increase the accessibility of teleconference communications at the Limestone County Detention Center and across Cherokee Nation. While tribal officials stated that those incarcerated at the Limestone County Detention Center will have access to technology for external communications, all contacts must be approved by the Cherokee Nation Marshal Service.[188] Further, while family members and attorneys may be contacted via web-conferencing technologies, contact with other individuals is restricted to messaging services.[189] To facilitate critical social connections, any decision by the Cherokee Nation Marshal Service to reject an incarcerated Cherokee's contact request should be subject to review to ensure that there is a legitimate reason for the denial.[190] Additionally, the Cherokee Nation should consider offering web-conferencing technology access within the reservation for Cherokee Nation citizens who may lack the requisite technology to communicate with loved ones incarcerated at the Limestone County Detention Center.

2. Long-Term Paths Forward in Post-*McGirt* Oklahoma

Ideally, the Cherokee Nation, and other tribes reckoning with an increase in criminal cases, would seize the unique opportunity posed by *McGirt* to invest in restructuring their own criminal punishment systems to be more reflective of tribal notions of justice.[191] Doing so would serve to strengthen Cherokee Nation tribal sovereignty by allowing the tribe to remove colonialist structures that have permeated its government and ensure that Cherokee Nation citizens sentenced in criminal courts can maintain the cultural and community ties that are central to the survival of the Cherokee Nation. However, if the viewpoint of current leadership is indicative,

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[188] *Special Rules Committee Meeting, supra* note 105, at 7:50-8:15.

[189] *Id.*

[190] *See supra* Section II.D.3 (discussing the heightened importance of community connections in Cherokee culture); *supra* notes 186–187, and accompanying text (connecting evidence demonstrating increased visitations' impact on reducing recidivism with the Cherokee Nation's stated priorities).

[191] For further reading on traditional justice in Native American cultures, see Samuel C. Damren, *Restorative Justice - Prison and the Native Sense of Justice*, 47 J. OF LEGAL PLURALISM & UNOFFICIAL L. 83, 83 (2002) (contrasting Indigenous ideals on restorative justice with the modern nation state's carceral approach); Carey N. Vincenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 JUDICATURE 134, 134 (1995) (arguing for the incorporation of Indigenous values and principles into the development of tribal court systems).

the future of the Cherokee Nation's criminal justice system is more likely to evolve under the existing framework of state collaboration.[192]

Cherokee Nation Attorney General Hill cautioned against tribes "re-invent[ing] the wheel" through building their own systems rather than utilizing the existing structures within the state.[193] While the use of existing systems will always prove speedier than the construction of new ones, tribes should not shy away from pushing the bounds of the current system and imagining new ways of operating. Tribes must not relinquish their bargaining power in the pursuit of efficiency through acquiescing to Oklahoma's ways of handling crime and detention. Tribes are best positioned to strategize programs, structures, and policies in detention systems that are responsive to the cultural and social needs of its citizenry. If the Cherokee Nation and other tribes cede criminal jurisdiction back to the state as Attorney General Hill recommends,[194] they must ensure that this arrangement acknowledges the distinct needs of tribal citizens.

If Oklahoma is given the authority to prosecute and incarcerate tribal citizens in Indian Country in the same manner that they would any other Oklahoman, what remains of the aspects of *McGirt* that initially spurred nationwide celebrations[195] of strengthened tribal sovereignty? Recalling that the sovereignty exercised when entering into the Cherokee Nation Prison Agreement is marred by the coercion of outside factors,[196] the cession of tribal criminal jurisdiction back to Oklahoma should be viewed with similar scrutiny. In designing its path forward, the Cherokee Nation can draw inspiration from its ancestors' fierce resistance against state coercion—resistance that culminated in the legal protections

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[192] *See* Sara E. Hill, *Restoring Oklahoma: Justice and the Rule of Law Post-McGirt*, 57 TULSA L. REV. 553, 586–590 (2022) (discussing potential solutions for tribal detention needs and other issues stemming from *McGirt*, Cherokee Nation Attorney General recommends that tribes and Oklahoma pursue a non-Public Law 280, congressionally-approved route to cede jurisdiction to the state rather than tribes building up their own systems).

[193] *Id.* at 587–588.

[194] *Id.* at 586–590 (recommending that tribes and Oklahoma pursue a congressionally-approved route for tribes to cede criminal jurisdiction to the state outside of that provided by Public Law 280).

[195] *See supra* note 69.

[196] *See supra* Section II.D.2.

established by the Cherokee Cases that tribes across the United States still rely on today.[197]

CONCLUSION

McGirt was celebrated across Indian Country as a win for tribal sovereignty, but less attention was paid to the aftermath of the decision. While *McGirt* did reaffirm tribes' inherent right to self-government, it also renewed the energy of those opposed to tribal sovereignty and self-governance. Following *McGirt*, Oklahoma allowed little time for tribes and federal authorities to adjust to the new jurisdictional scheme before launching a coordinated campaign designed to foment a public fear of tribal governance. With tribal-state relations at a new low, there was limited cooperation between tribes and the State of Oklahoma. The result of Oklahoma's failure to work cooperatively with the Cherokee Nation was a prison agreement that reflected the Nation's desperation rather than its aspirations.

Under this agreement, Cherokee Nation citizens sentenced in tribal courts will find themselves transferred hours away from their communities for the sole purpose of alleviating the stress put on tribal systems by the new influx of cases. However, as this Note has demonstrated, these transfers amount to an individual rights violation for Cherokee Nation citizens forced to relocate without due process protections. The Cherokee Nation was under significant pressure to find a solution to its inmate housing crisis but, in turning towards this agreement, the Nation has unintentionally weakened its sovereignty by subjecting its citizens to Texas jurisdiction against their will and leaving itself liable for the results. The harms inflicted by the Cherokee Nation Prison Agreement will tragically be concentrated within the walls of the Limestone County Detention Center, hampering the public's ability to grasp its full scope. However, in the current climate where tribes are facing attacks on their sovereignty across the nation, tribes must ensure they are protecting all aspects of their sovereignty, which ultimately hinges on the survival of its people.

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[197] For a discussion on the Cherokee Cases—Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1832), see *supra* Section I.A.1.