CARPENTER V. MURPHY,
NO. 17-1107 (2018)

MUSCOGEE (CREEK) NATION RESERVATION
BOUNDARIES LITIGATION IN UNITED STATES
SUPREME COURT

Presentation to the Tribal In-House Counsel Association
and Indian Law and Policy Center 2018 Annual
Conference, by Philip H. Tinker, Kanji & Katzen, PLLC

Philip H. Tinker -- Kanji & Katzen, PLLC
Carpenter v. Murphy,
No. 17-1107 (Supreme Court 2018)

■ Petitioner: Carpenter, Warden of OK State Penitentiary
■ Amici for Petitioner: 6 Briefs
  – United States (Argument Time)
  – State governments; Oklahoma District Attorneys; Governmental and Private Entities and Organizations

Philip H. Tinker -- Kanji & Katzen, PLLC
Carpenter v. Murphy,
No. 17-1107 (Supreme Court 2018)

- Respondent: Patrick Murphy, Muscogee (Creek) Citizen and Oklahoma State prisoner
- Amici for Petitioner: 6 Briefs
  - MCN (Argument Time)
  - Former State officials; Former United States Attorneys; Tribal governments and tribal entities and organizations

Philip H. Tinker -- Kanji & Katzen, PLLC
Muscogee (Creek) Nation Family Violence Prevention Program Office Locations
Muscogee (Creek) Nation Lighthorse Police Force

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How did we get here?

- 1999 – Homicide within Muscogee (Creek) Nation’s 1866 Treaty Boundaries
- State charges Mr. Murphy
- Death Penalty imposed

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Nebraska v. Parker,
136 S. Ct. 1072 (2016)

- Reaffirmed the Supreme Court’s “well settled” reservation diminishment framework.

- Only congress can divest a reservation of it’s land.

- Its intent to do so must be “clear.”
Nebraska v. Parker, 136 S. Ct. 1072 (2016)

- Statutory language that clearly evidence’s Congress’s intention to change the Reservation’s Boundaries is “the most probative” evidence of diminishment.

- “[U]nequivocal evidence" of the contemporaneous and subsequent understanding of the statute’s effect on the Reservation’s boundaries can also be considered.

- Subsequent history and modern demographics can “‘reinforce’ a finding of diminishment or non-diminishment based on the text.”
Murphy v. Royal,
866 F.3d 1164 (10th Cir 2017)

Statutory Text

- Creek Allotment Act, 31 Stat. 861 (1901)
  - No language of cession or diminishing Reservation boundaries.
  - All lands allotted to tribal members.
  - Preserved Nation’s legislative authority over “the lands of the Tribe, or of individuals after allotment, or the moneys or other property of the Tribe, or of the citizens thereof.” §42.
Murphy v. Royal,
866 F.3d 1164 (10th Cir 2017)

■ Surrounding Circumstances

– Creek Allotment Act, 31 Stat. 861 (1901)
  ■ “The tribal government of the Creek Nation shall not continue longer than March fourth, nineteen hundred and six, subject to such further legislation as Congress may deem proper.” § 46.

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Murphy v. Royal, 866 F.3d 1164 (10th Cir 2017)

Surrounding Circumstances

- Five Tribes Act, 31 Stat. 861 (1901)
  - “The tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all intents and purposes authorized by law, until otherwise provided by law.”

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Post-Allotment History -- 1907 to 1936

- “An orgy of plunder and exploitation probably unparalleled in American history.”

- “Legalized robbery”

- “Systematic and wholesale exploitation of the Indian through evasion and defiance of the law
  - Angie Debo, And Still the Waters Run (1940)
Murphy v. Royal,
866 F.3d 1164 (10th Cir 2017)

■ Post-Allotment History -- 1936 to Present
  - Restoration of Nation’s Governmental Powers
    ■ Oklahoma Indian Welfare Act (1936)
  - Constitution of the Muscogee (Creek) Nation (1979)
    ■ “The political jurisdiction of the Muscogee (Creek) Nation shall be as it geographically appeared in 1900 which is based upon those Treaties entered into by the Muscogee (Creek) Nation and the United States of America.”

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"We conclude Congress has not disestablished the Creek Reservation. The most important evidence – the statutory text – fails to reveal disestablishment at step one. Instead, the relevant statutes contain language affirmatively recognizing the Creek Nation’s borders. The evidence of contemporaneous understanding and later history, which we consider at steps two and three, is mixed and falls far short of ‘unequivocally revealing’ a congressional intent to disestablish.”