No. 17-1107

In the Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN, PETITIONER

v.

PATRICK DWAYNE MURPHY
(CAPITAL CASE)

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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CAPITAL CASE

QUESTION PRESENTED

Whether the State of Oklahoma had criminal jurisdiction to prosecute respondent, a member of the Muscogee (Creek) Nation, for the murder of another Nation member committed within the boundaries of the Nation's historic territory because (1) Congress disestablished the historic territory of the Creek Nation such that respondent's crime did not occur within "Indian country" as defined in 18 U.S.C. 1151(a), or (2) if that territory still could be recognized in some sense, Congress nevertheless conferred criminal jurisdiction on Oklahoma without regard to whether the crime occurred within "Indian country."

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INTEREST OF THE UNITED STATES

The court of appeals held that all lands within the original territory of the Muscogee (Creek) Nation in Oklahoma constitute a present-day "Indian reservation under the jurisdiction of the United States" and therefore qualify as "Indian country" under 18 U.S.C. 1151(a). On that basis, the court held that the federal government, rather than the State, must prosecute crimes committed by or against Indians within that three-million acre area. The United States filed an amicus brief at the petition stage supporting certiorari.

STATEMENT

1. Federal law defines "Indian country" to include "land within the limits of any Indian reservation under

the jurisdiction of the United States." 18 U.S.C. 1151(a).[1] "Criminal jurisdiction over offenses committed in 'Indian country' 'is governed by a complex patchwork of federal, state, and tribal law.'" *Negonsott* v. *Samuels*, 507 U.S. 99, 102 (1993) (citations omitted). Unless Congress has determined otherwise, the federal government generally exercises jurisdiction over crimes committed by or against an Indian in Indian country. See 18 U.S.C. 1152. Offenses by one Indian against the person or property of another Indian within Indian country "typically are subject to the jurisdiction of the concerned Indian Tribe," *Negonsott*, 507 U.S. at 102; see 18 U.S.C. 1152, but the Indian Major Crimes Act, 23 Stat. 385 (18 U.S.C. 1153(a) (Supp. IV 2016)), gives the federal government jurisdiction over certain serious offenses—such as murder, kidnapping, burglary, and robbery—when an Indian is the perpetrator. Absent an Act of Congress to the contrary, federal jurisdiction over crimes involving Indians is exclusive of state jurisdiction. *United States* v. *John*, 437 U.S. 634, 651 (1978). Within Indian country, state jurisdiction generally extends to only those state-law crimes committed by non-Indians against other non-Indians and victimless crimes committed by non-Indians. See generally *Duro* v. *Reina*, 495 U.S. 676, 680 n.1 (1990).

2. a. Respondent is a member of the Creek Nation. He was convicted in Oklahoma state court of the first-degree murder of another member of the Creek Nation,

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[1] "Indian country" also includes "all dependent Indian communities within the borders of the United States," and "all Indian allotments, the Indian titles to which have not been extinguished." 18 U.S.C. 1151(b) and (c). Those definitions are not at issue here. See Pet. App. 17a & n.10.

and was sentenced to death. His conviction was affirmed on appeal. 47 P.3d at 877-880, 888.

In his second application for state post-conviction relief, respondent argued for the first time that the federal government had exclusive jurisdiction over his crime because he and the victim were Indians and the crime occurred in Indian country.[2] The Oklahoma Court of Criminal Appeals rejected that argument and affirmed respondent's conviction. Pet. App. 203a, 222a-224a. Respondent sought this Court's review, and in response to the Court's invitation, the United States filed a brief stating its position that Congress abolished the historic territory of the Creek Nation in Oklahoma. U.S. Amicus Br. at 15-20, *Murphy* v. *Oklahoma* (No. 05-10787). This Court denied certiorari. *Murphy* v. *Oklahoma*, 551 U.S. 1102 (2007).

b. Respondent sought relief in federal court pursuant to 28 U.S.C. 2254. Pet. App. 135a. The district court denied habeas relief, concluding that a "careful review of the Acts of Congress which culminated in the grant of statehood to Oklahoma in 1906, as well as subsequent actions by Congress, leaves no doubt the historic territory of the Creek Nation was disestablished." *Id.* at 192a.

c. The Tenth Circuit reversed. Pet. App. 1a-133a. Applying the three-part framework set forth in *Solem* v. *Bartlett*, 465 U.S. 463 (1984), the court held that respondent's crime occurred in Indian country—and was subject to exclusive federal jurisdiction—because no single Act of Congress "disestablished the Creek Reservation." Pet. App. 95a. In the court's view, the stat-

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[2] Respondent would not be subject to the death penalty in a federal prosecution. See 18 U.S.C. 3598.

utes through which Congress allotted the Creek Nation's lands, abolished its courts, severely limited the powers of its government, and extended the laws of the new State of Oklahoma over the former Indian Territory did not demonstrate congressional intent to disestablish the Nation's historic territory because the statutes lacked "hallmark[]" language present in prior cases finding disestablishment or diminishment of Indian reservations. *Id.* at 96a. The court further reasoned that at *Solem*'s second and third steps, the historical context and subsequent treatment of the land could not "overcome the absence of statutory text." *Id.* at 132a; see *id.* at 119a. The court therefore set aside respondent's conviction. *Id.* at 133a.

SUMMARY OF ARGUMENT

A. The court of appeals' holding that Oklahoma lacked jurisdiction over respondent's crime because it occurred on a present-day Indian reservation is incorrect. Congress disestablished the historic territory of the Creek Nation when, in preparation for and granting Oklahoma statehood, it passed a series of statutes that broke up the Creek Nation's lands, abolished its courts, circumscribed its governmental authority, applied federal and state law to Indians and non-Indians alike in its territory, provided for allotment of almost all of its communal lands to individual tribal members, distributed tribal funds to individual Indians, and set a timetable for dissolution of the Tribe. The statutes enacted by Congress make clear that Congress did not intend for the new State of Oklahoma to include a massive Creek reservation throughout which the Tribe and the federal government would have jurisdiction to the exclusion of the State over all crimes involving Indians.

Congress, the Dawes Commission (which was charged with negotiating with the Tribe, compiling the rolls of tribal members, and making allotments), and members of the Creek Nation all contemporaneously understood that Congress's actions would disestablish the Creek Nation's historic territory and severely limit tribal authority. Subsequent events confirm the point. For nearly a century, both Oklahoma and the United States have treated the statehood-era statutes as having disestablished the Creek Nation's former domain: the State has exercised criminal jurisdiction over offenses committed by Indians on unrestricted fee lands within the Creek Nation's former territory, while the United States has not attempted to exercise such jurisdiction. The crime at issue in this case—which the Oklahoma courts determined occurred on fee lands within the Nation's historic territory, see Pet. App. 219a-222a—did not occur within Indian country.

B. The court of appeals upended the well-established jurisdictional understanding based on a series of errors. The court gave insufficient weight to Congress's clear design in the years before Oklahoma statehood, minimizing Oklahoma's unique history because the statutes through which Congress acted lacked "traditional textual signs" and "hallmarks" of disestablishment. Pet. App. 102a, 107a (citation omitted); see *id.* at 92a. The court also misconstrued references to the Creek Nation's territory and borders and misunderstood Congress's failure to finally dissolve the Creek Nation's government.

C. Even if the Creek Nation's former territory might still be recognized in some sense, Oklahoma would have jurisdiction over respondent's crime. Congress granted

the State jurisdiction to prosecute crimes involving Indians in the former Indian Territory as part of the series of Acts leading to Oklahoma statehood. Nothing in Congress's subsequent enactment of the definition of "Indian country" in Section 1151 in 1948 implicitly repealed that grant of jurisdiction.

ARGUMENT

THE STATE OF OKLAHOMA HAD CRIMINAL JURISDICTION OVER RESPONDENT'S CRIME

A. Congress Abolished The National Territory Of The Creek Nation

This Court's prior disestablishment cases have considered whether Congress disestablished or diminished a reservation through "surplus land Acts" passed in the late 19th and early 20th centuries that opened land to non-Indian settlement. *Solem* v. *Bartlett*, 465 U.S. 463, 467 (1984). The "touchstone" for the inquiry is "congressional purpose." *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); see, *e.g.*, *Hagen* v. *Utah*, 510 U.S. 399, 411-412 (1994). "Unfortunately," however, "the surplus land Acts themselves seldom detail" whether Congress intended for "opened lands [to] retain[] reservation status." *Solem*, 465 U.S. at 468; see *id.* at 468-469. To "decipher Congress['s] intentions," this Court has considered the language and purpose of the relevant Acts of Congress, the historical context in which they were passed, and the subsequent treatment of the lands. *Solem*, 465 U.S. at 470-472; see also, *e.g.*, *Yankton Sioux Tribe*, 522 U.S. at 343-344; *Hagen*, 510 U.S. at 410-411.

While those same general principles are relevant and support disestablishment here, this case is distinct from those the Court has considered before. This case does

not concern a single surplus land Act in which Congress "merely opened reservation land to settlement," *Nebraska* v. *Parker*, 136 S. Ct. 1072, 1079 (2016) (quoting *DeCoteau* v. *District Cnty. Court*, 420 U.S. 425, 448 (1975)), or "formally sliced a certain parcel of land off one reservation," *Solem*, 465 U.S. at 468. Congress's goal for the Indian Territory was far more comprehensive: From the late 19th century through Oklahoma statehood in 1907, Congress pursued the creation of a new State by combining the Indian Territory in eastern Oklahoma with the Oklahoma Territory to its west, and by replacing the tribal and federal governments in the former Indian Territory with the government of the new State. Congress determined that this project required, within the Indian Territory, disestablishing the national territories and greatly curtailing the tribal governments of the "Five Tribes" (the Creeks, Cherokees, Chickasaws, Choctaws, and Seminoles) that lived there.

To achieve that transformation, Congress passed a series of statutes in which it abolished the Creek Nation's courts, applied federal and state law to Indians and non-Indians alike in the Nation's territory, provided for the breaking up and allotment of almost all of its communal domain to individual tribal members, and distributed tribal funds to individual Indians. These statutes, properly read in the unique historical context and in light of contemporary understandings and subsequent developments, make clear that Congress did not intend for the new State of Oklahoma to include a massive Creek reservation throughout which the Creek Nation and the United States would exercise jurisdiction.

1. a. In the 1830s, the Creek Nation (like the others of the Five Tribes) was removed from its homeland in the southeastern United States to the then-unsettled region west of Arkansas, in current-day Oklahoma. Unlike many other tribes in the West (including those involved in *Solem* and similar cases), the Creek Nation did not receive its territory as a traditional reservation from the public domain. Rather, the "United States * * * grant[ed] a patent, in fee simple, to the Creek nation of Indians," with the right of perpetual self-government. Treaty of Feb. 14, 1833, U.S.-Creek Nation, art. III, 7 Stat. 419; see *Woodward* v. *de Graffenried*, 238 U.S. 284, 293-294 (1915); *Atlantic & Pac. R.R.* v. *Mingus*, 165 U.S. 413, 436-437 (1897).

After the Civil War, the Creek Nation ceded the western portion of its territory (which was later included in the Oklahoma Territory) but retained title to the eastern portion and the right to self-government. Treaty with the Creek Nation of Indians, June 14, 1866, arts. III, X, 14 Stat. 786-789. The United States entered into similar treaties with the others of the Five Tribes. See *Cohen's Handbook of Federal Indian Law* § 4.07[1][a], at 289 (Nell Jessup Newton et al. eds., 2012 ed.) (Cohen).

Congress's original intention to leave the Creek undisturbed in the Indian Territory changed as hundreds of thousands of non-Indian settlers streamed into the area. See *Marlin* v. *Lewallen*, 276 U.S. 58, 61 (1928); see generally S. Rep. No. 377, 53d Cong., 2d Sess. (1894) (1894 Senate Report). The influx of non-Indians into the Indian Territory left the Indians a fraction of the total population. By 1900, it was estimated that more than 300,000 non-Indians and only 86,000 Indians—including approximately 14,000 Creek Nation members—

lived in the Indian Territory. H.R. Rep. No. 1762, 56th Cong., 1st Sess. 1 (1900). By Oklahoma statehood in 1907, more than 700,000 non-Indians lived in the Indian Territory, H.R. Rep. No. 496, 59th Cong., 1st Sess. 9 (1906) (1906 House Report), and its population was only 9.1% Indian, Bureau of the Census, U.S. Dep't of Commerce and Labor, *Population of Oklahoma and Indian Territory* 9 (1907).

Those demographic shifts presented significant challenges. While each of the Five Tribes had its own government and courts, law enforcement became difficult because tribal courts lacked criminal jurisdiction over the increasing non-Indian population. See 1894 Senate Report 7; *Ex parte Kenyon*, 14 F. Cas. 353 (W.D. Ark. 1878). Non-Indians could not own the land on which they lived and worked or had built towns because it was owned communally by the Five Tribes. See H.R. Doc. No. 5, 56th Cong., 1st Sess. 44 (1899); *id.* at 130-131 (Dawes Commission report); 1894 Senate Report 11. Moreover, although each Tribe held its land in communal title for the benefit of all members of the Tribe, "[a] few enterprising citizens of the tribe, frequently not Indians by blood but by intermarriage, ha[d] in fact become the practical owners of the best and greatest part of these lands." 1894 Senate Report 11.

Congress took the view that the Indians had "invit[ed] white people to come within their jurisdiction, to become traders, farmers, and to follow professional pursuits." 1894 Senate Report 7. And on that view, the Indians "must have realized that when their policy of maintaining an Indian community isolated from the whites was abandoned for a time, it was abandoned forever." *Ibid.*; see *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 448-449 (1899) (quoting 1894 Senate Report).

Congress therefore set out to disestablish the Five Tribes' national territories and prepare the Indian Territory for statehood. From 1870 onward, "[l]egislation to convert" the Indian Territory "into one or more states [was] introduced into every session of Congress." Kent Carter, *The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893-1914*, at 2 (1999). Congress believed that substantial "advantages [could] be derived by the Indians as well as the United States by the surrender of [the Five Tribes'] governments and their incorporation into our system." 1894 Senate Report 1; see *id.* at 12 ("It is apparent to all who are conversant with the present condition in the Indian Territory that their system of government can not continue," but must be "abandoned and a better one substituted."); 1906 House Report 7, 13 (similar). Congress thus sought to do something quite different than simply acquiring surplus lands from the Five Tribes and opening them to non-Indian settlement. Instead, Congress envisioned a complete transformation: "the dissolution of the tribal governments, the extinguishment of the communal or tribal title to the land, the vesting of possession and title in severalty among the citizens of the tribes, and the assimilation of the peoples and institutions of this Territory to our prevailing American standard." H.R. Doc. No. 5, 58th Cong., 2d Sess. 214 (1903) (1903 H.R. Doc. 5) (Dawes Commission report).[3]

b. Congress undertook the transformation of the Indian Territory through a series of statutes passed between 1890 and 1907. Taken together and in light of "all

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[3] The Dawes Commission "was in a very real sense 'the eyes and the ears' of Congress in matters pertaining to affairs in the Indian Territory, and legislation was framed with a special regard to its recommendations." *Woodward*, 238 U.S. at 296.

the circumstances," *Hagen*, 510 U.S. at 412, these provisions clearly demonstrate congressional intent to dismantle the Creek Nation's historic territory.

i. In the Act of May 2, 1890 (1890 Act), 26 Stat. 81, Congress established the Territory of Oklahoma in the western portion of the Indian Territory, which had been ceded by the Five Tribes following the Civil War. §§ 2-28, 26 Stat. 81-93. The 1890 Act also addressed law-enforcement concerns within the Indian Territory. It expanded the jurisdiction of the United States Court for the Indian Territory, which had been established the previous year, to encompass all criminal and civil cases except those over which the tribal courts had exclusive jurisdiction because both parties were Indians. §§ 29, 31, 26 Stat. 93-94, 96. The 1890 Act further provided that the laws of the United States prohibiting crimes in any place within the sole and exclusive jurisdiction of the United States "shall have the same force and effect in the Indian Territory as elsewhere in the United States." § 31, 26 Stat. 96. With certain exceptions, the criminal laws of Arkansas were assimilated and extended to the Indian Territory for offenses not otherwise governed by federal law. § 33, 26 Stat. 96-97.

ii. "In the course of time, changing conditions and the great influx of white people into the [Indian] Territory pointed to the necessity of abolishing, if possible, the tribal organizations, and allotting the land in severalty." *Woodward*, 238 U.S. at 294. In 1893, Congress established the Dawes Commission and authorized it to reach agreements with the Five Tribes to "enable the ultimate creation of a Territory of the United States [in the Indian Territory] with a view to the admission of the same as a state in the Union." Act of Mar. 3, 1893 (1893 Act) § 16, 27 Stat. 645-646; see *Woodward*, 238 U.S. at

295. Congress envisioned that the agreements would "overthrow * * * the communal system of land ownership" and "extinguish[] the tribal titles, either by cession to the United States or by allotment and division in severalty." *Woodward*, 238 U.S. at 294-295; see H.R. Doc. No. 5, 57th Cong., 2d Sess. 9 (1902) (report by the Secretary of the Interior).

The Creek Nation and the other Tribes were reluctant to negotiate, and Congress responded with "strong measures" against them. 35 Cong. Rec. 7204 (1902) (Sen. Stewart). To facilitate allotment, Congress authorized the Dawes Commission to determine citizenship in and fix the final rolls of the Five Tribes. Act of June 10, 1896 (1896 Act), 29 Stat. 339-340. In doing so, Congress declared that it was "the duty of the United States to establish a government in the Indian Territory" to "rectify the many inequalities and discriminations now existing in said Territory and afford needful protection to the lives and property of all citizens and residents thereof." 29 Stat. 340.

In 1897, Congress brought Indians in the Indian Territory under the same regime of federal jurisdictional and substantive laws as was applicable to non-Indians. Congress vested the United States courts in the Indian Territory with "exclusive jurisdiction" to try "all civil causes in law and equity" and all "criminal causes" for the punishment of offenses by "any person" in the Indian Territory. Act of June 7, 1897 (Indian Department Appropriations Act), 30 Stat. 83. And Congress made the laws of the United States and Arkansas in force in the Indian Territory applicable to "all persons therein, *irrespective of race*." *Ibid.* (emphasis added).

The next year, Congress passed the Curtis Act, 30 Stat. 495, which abolished the tribal courts and

banned the enforcement of tribal law in the United States courts in the Indian Territory. §§ 26, 28, 30 Stat. 504-505. Congressional enactments thus "gradually came to the point where they displaced the tribal laws and put in force in the Territory a body of laws adopted from the statutes of Arkansas and intended to reach Indians as well as [non-Indian] persons." *Marlin*, 276 U.S. at 62; see also 31 Cong. Rec. 5593 (1898) (Sen. Bate) (criticizing the Curtis Act for "sweep[ing] all the laws of the Indians away, all their courts of justice, all their juries, all their local officers, and all the rights they have under [their] treaties. * * * [W]e go along and encroach upon them inch by inch, Congress after Congress, until at last you have got to the main redoubt, and here it is destroyed.").

iii. In 1901, the Creek Nation and the United States entered into the Original Creek Agreement, which provided for the allotment of almost all tribal lands and the termination of the tribal government within five years. Act of Mar. 1, 1901, §§ 3, 6, 46, 31 Stat. 862-863, 872. The Agreement directed the Creek Nation's principal chief to execute a deed to each allottee conveying "all right, title, and interest of the Creek Nation and of all other [Creek] citizens" in the land. § 23, 31 Stat. 868. The principal chief was likewise to execute such a deed for the conveyance of town sites and other lands under the Agreement. *Ibid.* And all such conveyances were to be approved by the Secretary of the Interior, "which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States" in such lands. *Ibid.* For the period before the prescribed dissolution of the tribal government, the Agreement substantially diminished its power, providing that no statute passed by the Creek Nation's council affecting the

lands, money, or property of the Tribe (except for "incidental and salaried expenses") would "be of any validity until approved by the President of the United States." § 42, 31 Stat. 872.

Also in 1901, Congress made Indians in the Indian Territory United States citizens. Act of Mar. 3, 1901, 31 Stat. 1447. Following the Civil War, "[t]he only Indians considered United States citizens by birth under the Constitution had been those not born into membership in a tribe or whose tribe no longer existed as a distinct entity." Cohen § 14.01[3], at 926-927; see *Elk* v. *Wilkins*, 112 U.S. 94, 99-101 (1884). In the Indian Territory, as elsewhere, allotment provided one means of conferring United States citizenship. See 2 Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* 754 (1984); Indian General Allotment Act § 6, 24 Stat. 390. But Congress in 1901 went further, making "every Indian in [the] Indian Territory" a citizen of the United States, 31 Stat. 1447, more than 20 years before it provided citizenship to all native-born Indians, Act of June 2, 1924, 43 Stat. 253. Congress took that step because "[t]he independent self-government of the Five Tribes ha[d] practically ceased," and "[t]he policy of the Government to abolish classes in Indian Territory and make a homogenous population [wa]s being rapidly carried out." H.R. Rep. No. 1188, 56th Cong., 1st Sess. 1 (1900).

In 1902, the United States and the Creek Nation entered into a Supplemental Agreement. It provided that the statutes of Arkansas in effect in the Indian Territory were to govern the descent and distribution of allotments, Act of June 30, 1902, § 6, 32 Stat. 501, and that all funds of the Creek Nation, including grazing taxes collected by the Secretary of the Interior and other

tribal revenues, not needed to equalize the value of allotments among allottees were to be paid out on a per capita basis "on the dissolution of the Creek tribal government," § 14, 32 Stat. 503. See *Marlin*, 276 U.S. at 63 (The 1901 and 1902 Agreements "embodied an elaborate plan for terminating the tribal relation and converting the tribal ownership into individual ownership."); *McDougal* v. *McKay*, 237 U.S. 373, 381 (1915) (Congress "undertook to terminate their government."). Two years later, Congress provided that any surplus lands remaining after each member of the Creek Nation had received his allotment of 160 acres would be sold at public auction. Act of Apr. 21, 1904, 33 Stat. 204. And also in 1904, Congress once again provided that "[a]ll the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said Territory, *whether Indian, freedmen, or otherwise*." Act of Apr. 28, 1904 (1904 Act) § 2, 33 Stat. 573 (emphasis added).

iv. In 1906, Congress passed the Five Tribes Act, 34 Stat. 137, to "provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory." The Act abolished tribal taxes and directed the Secretary of the Interior to assume control over the collection of all revenues accruing to the Tribes, including those resulting from the sale of any remaining unallotted lands, and (once all claims against a Tribe were paid) to distribute any remaining funds to tribal members on a per capita basis. §§ 11, 17, 28, 34 Stat. 141, 143-144, 148. The Secretary was directed to take possession of and sell all buildings used for tribal purposes and to take over tribal schools until territorial or state schools were established. §§ 10, 15, 34 Stat. 140-141,

143. Due to concerns arising from delays in the allotment and enrollment processes, see pp. 26-27, *infra*, the Act extended the tribal governments "until otherwise provided by law." § 28, 34 Stat. 148. Congress made clear, however, that it continued to intend "dissolution" of the tribal governments. § 11, 34 Stat. 141. Indeed, two years later, Congress directed every officer or representative of those governments, under pain of criminal sanctions, to pay over all tribal monies and to deliver all tribal property, "including the books, documents, records, or any other papers," to the Secretary. Act of May 27, 1908, § 13, 35 Stat. 316.

v. Finally, Congress passed the Oklahoma Enabling Act of 1906, 34 Stat. 267, which authorized the creation of a new State out of the Oklahoma and Indian Territories. The Enabling Act provided that cases arising under federal law that were pending in the district courts of the Oklahoma Territory and in the United States courts in the Indian Territory were to be transferred to the newly created United States District Courts for the Western and Eastern Districts of Oklahoma, respectively. All other pending cases—*i.e.*, those of a local nature—were to be transferred to the new state courts of Oklahoma, the "successors" to the United States courts in the Oklahoma and Indian Territories. §§ 16, 17, 20, 34 Stat. 276-277, as amended by Act of Mar. 4, 1907 (1907 Act) § 3, 34 Stat. 1286-1288. That category included cases involving Indians on Indian lands, to which the laws of Arkansas had been applied in 1897 and 1904 in the same manner as for all other persons. See pp. 12, 15, *supra*; pp. 28-31, *infra*. The Enabling Act also extended the laws of the Oklahoma Territory over the Indian Territory, in place of the laws of Arkansas, until the new state legislature provided otherwise. §§ 2, 13, 21,

34 Stat. 268-269, 275, 277-278; see *Jefferson* v. *Fink*, 247 U.S. 288, 294 (1908). The next year, Congress amended the Enabling Act to ensure that "[a]ll criminal cases pending in the United States courts in the Indian Territory" not within federal jurisdiction would be "prosecuted to a final determination in the State courts of Oklahoma." 1907 Act § 3, 34 Stat. 1287; see S. Rep. No. 7273, 59th Cong., 2d Sess. 1 (1907).

c. Through these statutes, over the course of two decades, Congress disestablished the historic territory of the Creek Nation and largely eliminated its governmental authority. Unlike this Court's prior cases finding continuing reservations after enactment of surplus land Acts, Congress did not "merely open [the Creek Nation's] land to settlement" by non-Indians and make the proceeds available for the continuing benefit of the Tribe or its members. *Parker*, 136 S. Ct. at 1079 (citation omitted); see, *e.g.*, *Solem*, 465 U.S. at 474-475; *Mattz* v. *Arnett*, 412 U.S. 481, 495-496 (1973); *Seymour* v. *Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 355-356 (1962). Rather, Congress broke up the Creek Nation's territory, substituting individual for communal ownership and distributing the proceeds to individual Indians; made members of the Creek Nation citizens of the United States; eliminated the Creek Nation's tribal courts; provided for the dissolution of the tribal government, divestment of tribal property, and distribution of tribal funds; and paved the way for the Indian Territory to join with the Oklahoma Territory in a new State. These statutes clearly demonstrate that Congress did not intend for the area that formerly constituted the Creek Nation's tribal territory to constitute a continuing reservation for governmental or jurisdictional purposes—one that, if combined with the historic

lands of the other Five Tribes, would encompass nearly *half* the State of Oklahoma.

2. Congress, the Dawes Commission, and the Creek Nation all contemporaneously understood that Congress's actions would disestablish the Creek Nation's historic territory. See, *e.g.*, *Hagen*, 510 U.S. at 416-417; *Solem*, 465 U.S. at 471.

a. As discussed above, pp. 6-10, *supra*, Congress concluded that the system of communal land ownership and tribal government was a "complete failure," *Woodward*, 238 U.S. at 296-297, that could "not continue," 1894 Senate Report 12. In light of the large number of non-Indian settlers and what Congress viewed as weaknesses in the Indian governments, Congress determined that change was "imperatively demanded" and that it required breaking up the Creek Nation's lands and "establish[ing] a government over [non-Indians] and Indians of [the Indian] Territory in accordance with the principles of our constitution and laws." *Id.* at 12-13. Congress declared it "the duty of the United States to establish a government in the Indian Territory," 1896 Act, 29 Stat. 340, and created the Dawes Commission to "enable the ultimate creation of a Territory of the United States [in the Indian Territory] with a view to the admission of the same as a state in the Union," 1893 Act § 16, 27 Stat. 645-646.

b. The Dawes Commission also understood that Congress's goal was not simply to open Indian lands to non-Indian settlement, but rather to "clos[e] the history of these [Indian] nations" by "bring[ing] about such changes as would enable * * * the admission of [a new] State of the Union." H.R. Doc. No. 5, 56th Cong., 2d Sess. 162 (1900). The Commission observed that the "object of Congress from the beginning has been the

dissolution of the tribal governments, the extinguishment of the communal or tribal title to the land, the vesting of possession and title in severalty among the citizens of the tribes, and the assimilation of the peoples and institutions of this Territory to our prevailing American standard." 1903 H.R. Doc. 5, at 214; see H.R. Doc. No. 5, 59th Cong., 1st Sess. 224-225 (1905) (recognizing "the effacement of the tribal governments").

c. The Creek Nation, too, recognized that Congress intended to disestablish its historic territory. In 1893, a Creek Chief observed that Congress's "unwavering aim" was to "wipe out the line of political distinction between an Indian citizen and other citizens of the Republic" so that the tribal governments could be "absorbed and become a part of the United States." P. Porter & A.P. McKellop, *Printed Statement of Creek Delegates*, in *Creek Delegation Documents* 1-3 (Feb. 9, 1893), https://digital.libraries.ou.edu/cdm/ref/collection/grayson/id/162. The Creek Nation objected to Congress's proposed "disintegrating" of "the land of our people" so that it could "be transformed into a State of the Union," which would mean "the civil death of the Muscogee Nation." Creek Memorial, S. Doc. No. 111, 54th Cong., 2d Sess. 1, 5-6, 8 (1897). The Creek sought simply to "preserve[] unimpaired" their "chief safeguard, the national title to the land patented to us," until they had negotiated an agreement to ensure that they were not "overwhelmed by an alien and strange population at the first election" and then "robbed by State taxation" and "oppressed by discriminating laws" when "the [Creek] nation ceases." *Id.* at 1-2.

3. Subsequent events underscore that Congress disestablished the Creek Nation's historic territory. See, *e.g.*, *Solem*, 465 U.S. at 471.

a. "Congress's own treatment of the affected area[] * * * in the years immediately following" Oklahoma statehood, *Solem*, 465 U.S. at 471, confirms that Congress did not intend for the Creek Nation's historic territory to constitute a continuing reservation. Congress enacted several statutes eliminating certain restrictions on the alienation of Creek allotments and subjecting restricted lands to state-court jurisdiction. *E.g.*, Act of May 27, 1908, 35 Stat. 312; Act of June 14, 1918, 40 Stat. 606; Act of Apr. 10, 1926, 44 Stat. 239-240; Act of Aug. 4, 1947, 61 Stat. 731. Those provisions would make little sense if Congress intended to preserve the entire Indian Territory—including *unrestricted* lands—as federal Indian country.

Moreover, Congress expressly recognized that the Five Tribes were not living on reservations. It excluded Oklahoma from the Indian Reorganization Act of 1934, 25 U.S.C. 5101 *et seq.*, because that Act "was more adapted to Indian[s] living on reservations, * * * and not Indians [in Oklahoma] residing on allotments." *A Bill to Promote the General Welfare of the Indians of the State of Oklahoma and for Other Purposes: Hearings on S. 2047 Before the Senate Comm. on Indian Affairs*, 74th Cong., 1st Sess. 9 (1935); see S. Rep. No. 1232, 74th Cong., 1st Sess. 6 (1935) (recognizing, in connection with the Oklahoma Indian Welfare Act, 25 U.S.C. 5201 *et seq.*, that "all Indian reservations as such have ceased to exist"). In 1942, the Assistant Secretary of the Interior likewise opined that as a result of statutes culminating in the Enabling Act, the "Indian reservations" in the "Indian Territory * * * ha[ve] lost their character as Indian country." App., *infra*, 4a. Subsequently, Congress has repeatedly defined "[r]eserva-

tion" for specific statutory purposes to encompass "*former* Indian reservations in Oklahoma." 25 U.S.C. 1452(d) (emphasis added).[4]

b. This Court's decisions underscore that the Creek Nation's historic territory does not constitute a "reservation" for governmental purposes today. In *Washington* v. *Miller*, 235 U.S. 422 (1914), the Court described a Creek allotment as "lands within what until recently was the Creek Nation in the Indian Territory." *Id.* at 423; see also *Woodward*, 238 U.S. at 285 (referring to land in Muskogee County as "formerly part of the domain of the Creek Nation"). In *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598 (1943), the Court noted that while some "Indian tribes [are] separate political entities with all the rights of independent status," that "condition * * * has not existed for many years in the State of Oklahoma." *Id.* at 602. Members of the Five Tribes, the Court explained, "are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions." *Id.* at 603. Thus, the Court noted, "Oklahoma supplies for them and their children schools, roads, *courts, police protection* and all the other benefits of an ordered society." *Id.* at 608-609 (emphasis added).

c. The manner in which "local judicial authorities" treated the land, *Solem*, 465 U.S. at 471, confirms that Congress disestablished the Creek Nation's historic territory. Immediately following statehood—and for a century thereafter—the United States and Oklahoma

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[4] Accord, *e.g.*, 12 U.S.C. 4702(11); 25 U.S.C. 2020(d)(1) and (2), 2719(a)(2)(A)(i), 3103(12), 3202(9); 29 U.S.C. 741(d) (Supp. IV 2016); 33 U.S.C. 1377(c) (Supp. IV 2016); 42 U.S.C. 2992c(2), 5318(n)(2); see also Cohen § 4.07[1][b], at 292 n.41.

operated on the understanding that the State had jurisdiction to try offenses committed by Indians within the historic boundaries of the Creek Nation, with the exception, since the late 1980s, of trust lands and the remaining restricted allotments, which comprise less than five percent of the land within the Creek Nation's historic territory. See pp. 29-33, *infra*. Oklahoma's continuous "assumption of jurisdiction over the territory * * * further reinforces" that the Creek Nation's historic territory was disestablished. *Yankton Sioux Tribe*, 522 U.S. at 357.[5]

B. The Court Of Appeals' Contrary Holding Rests On Several Errors

The decision below would upend that hundred-year history. The court of appeals held that Congress never disestablished the Creek Nation's territory as a governmental or jurisdictional matter, and that the State lacks criminal jurisdiction over crimes committed by or against Indians in a three-million acre area of eastern Oklahoma, including most of the city of Tulsa. That holding, if permitted to stand, would vastly increase the scope of federal and tribal jurisdiction. And if the logic of the decision were extended to the historic territories of each of the Five Tribes, the federal government would have—and the State would lack—criminal jurisdiction over crimes by or against Indians in nearly all of eastern Oklahoma.

The court of appeals reached that conclusion through several errors. In considering the relevant statutes, the

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[5] Demographic evidence also supports disestablishment. See, *e.g.*, *Solem*, 465 U.S. at 471. Even by the time the 1901 Agreement was enacted, more than 75% of the population in the Indian Territory was estimated to be non-Indian. See pp. 8-9, *supra*.

court searched too narrowly for textual "hallmarks" of disestablishment identified in this Court's surplus-land Act cases, failing to recognize that the ultimate "touchstone" is "congressional purpose." *Yankton Sioux Tribe*, 522 U.S. at 343. The court of appeals also misconstrued references to the Creek Nation and misinterpreted Congress's failure to finally terminate the tribal government.

1. The court of appeals faulted the State for failing to point to a particular statutory provision containing what it termed the "traditional textual signs" of disestablishment, such as the words "public domain," or "cede," or the provision of "a lump-sum payment." Pet. App. 59a, 76a, 102a (citation omitted); see *id.* at 74a-76a, 95a. In contrast, the court observed, prior treaties with the Creek, which had resulted in its removal to the Indian Territory and its sale of the western portion of its lands following the Civil War, had used language of cession and provided for sum-certain payments. *Id.* at 99a-100a; see *id.* at 97a-98a (noting examples involving other tribes).

The court of appeals' analysis does not withstand scrutiny. While certain phrases may suggest diminishment, this Court has made clear that Congress need not use any particular phrasing. See, *e.g.*, *Hagen*, 510 U.S. at 411-412 (rejecting "clear-statement rule" that would have required specific language to show diminishment). The absence of specific language does not "command a determination that reservation status survives in the face of congressionally manifested intent to the contrary." *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 587 (1977).

Rejection of a magic-words approach makes particular sense in the unique historical context of Oklahoma.

Congress sought not to open Indian lands to non-Indian settlement (which already predominated in the Indian Territory), but instead to break up the Creek Nation's domain, eliminate its courts, and provide for the dissolution of its government, the divestment of its property, and the distribution of its funds in order to prepare the territory for creation of a new State. In that context, the phrase "public domain," language of cession, and the provision of "a lump-sum payment," Pet. App. 59a, 76a, 102a (citation omitted), would have been inappropriate.

"In the 19th century, to restore land to the public domain was to extinguish the land's prior use—its use, for example, as an Indian reservation—and to return it to the United States either to be sold or set aside for other public purposes." *Parker*, 136 S. Ct. 1079. Here, however, the Creek Nation's historic territory was not "reserved" from the "public domain" in the first place; it was held by the Tribe in fee simple. See p. 8, *supra*. And in connection with Oklahoma statehood, the land was not returned to the United States; the land or its proceeds were distributed among tribal members. Language of cession to the United States thus also would have been inapposite. Instead, the 1901 Agreement provided for the Creek Nation to convey "all right, title and interest" directly to the allottees, grantees of town sites, or other recipients of conveyances. See § 23, 31 Stat. 868. And to the extent language of cession in surplus land cases can also connote a relinquishment of tribal governmental authority over the land, see *Rosebud Sioux Tribe*, 430 U.S. at 597-598, here, Congress expressly removed almost all of the Creek Nation's governmental power over its territory through a series of statutes, and the 1901 Agreement itself provided for

dissolution of the Tribe. The phrases "lump sum payment," Pet. App. 76a, and "sum certain," *e.g.*, *Yankton Sioux Tribe*, 522 U.S. at 798, likewise could have had no application. Those phrases denote "an unconditional commitment from Congress to compensate the Indian tribe for its opened land." *Solem*, 465 U.S. at 470. But Congress did not purchase communal land from the Creek Nation in order to open it to non-Indian settlement; instead, it broke up the Creek Nation's domain, allotting almost all of its land directly to individual tribal members, distributing any additional proceeds to those individuals, and providing for dissolution of the government to which a "lump sum payment" might have been made. See generally pp. 10-18, *supra*.

2. The court of appeals also relied on a handful of references to the Creek Nation's territory or boundaries in the Oklahoma Enabling Act and subsequent legislation. Pet. App. 101a; see Br. in Opp. 10. But while the Enabling Act created an electoral district comprising "all the territory now constituting the Cherokee, Creek, and Seminole nations," § 6, 34 Stat. 271-272, that reference simply used the Creek Nation as a convenient geographic description, rather than as an expression of congressional intent that the territories would continue after statehood as domains under the jurisdiction of the Tribes and the United States. Cf. *Yankton Sioux Tribe*, 522 U.S. at 355-356 (declining to decide whether "references to the Yankton Reservation in legislative and administrative materials" were "a convenient geographical description" or "a considered jurisdictional statement"). And while some maps produced by the Interior Department labeled the Indian Territory as including reservations until 1914, J.A. Vol. II, as of 1919 the Department's maps made clear that the former Indian

Territory did not include any reservations, Records of the Bureau of Indian Affairs, *Central Map File, Record Grp. 75.26, Entry 414 (Administrative Maps), Indian Reservations West of the Mississippi River* (1919), goo.gl/1v64Ec.

The court of appeals further relied (Pet. App. 101a) on a provision in a 1906 appropriations act that defined the boundary line between "the Creek Nation" and "the Territory of Oklahoma." Act of June 21, 1906, 34 Stat. 364. But that reference resolved old business. Prior to the Enabling Act's passage, the Secretary of the Interior had informed Congress that as a result of "erroneous surveys" in the late 19th century, the Creek Nation was "entitled to payment for all land between [a particular] line * * * as surveyed" and "the line as it should have been run." S. Rep. No. 2561, 59th Cong., 1st Sess. 54 (1906). Congress's correction of a survey line first drawn in 1871 does not undermine its longstanding intent to disestablish the Creek Nation's boundaries.

3. The court of appeals also found it significant that the pre-statehood statutes did not ultimately terminate the Creek Nation's tribal government. Pet. App. 93a, 105a-107a. While the Original Creek Agreement provided that the government would expire on March 4, 1906, Congress later extended that deadline indefinitely in the Five Tribes Act. § 28, 34 Stat. 148.

The Five Tribes Act does not demonstrate congressional intent to restore full governmental authority to the Tribes or extend their governments in perpetuity, much less to treat their former territories as reservations under tribal and federal jurisdiction. Instead, it reflects more practical considerations. With the deadline for termination of the tribal governments looming,

allotment was incomplete and title to some land remained in the Tribes. 40 Cong. Rec. 2975-2976 (1906) (Sen. Teller). Moreover, in 1866, Congress had granted several railroad companies a right-of-way across the Indian Territory. Act of July 25, 1866, § 9, 14 Stat. 238. Congress was concerned that if the Indian title was extinguished prior to allotment, such that the land became "public lands of the United States," title would vest automatically in the railroads, *Harjo* v. *Kleppe*, 420 F. Supp. 1110, 1129 (D.D.C. 1976) (citation omitted), aff'd, 581 F.2d 949 (D.C. Cir. 1978); see generally 40 Cong. Rec. 2973-2978. The right-of-way covered millions of dollars' worth of coal lands. See S. Doc. No. 213, 56th Cong., 2d Sess. 25 (1901); 40 Cong. Rec. at 2975-2976 (Sen. Teller). Congress thus extended the tribal governments to ensure that the process of conveyances by the Tribes to allottees could be completed and that the valuable coal lands would not automatically revert to the railroads as a "gift"—not because it had abandoned its plans for breaking up the Creek Nation's territory and tribal governance of it. 40 Cong. Rec. at 2974 (Sen. Bailey); see *Harjo*, 420 F. Supp. at 1129.

In the years that followed, Congress failed to set a new deadline for terminating the tribal governments. And, decades later, as part of a broader shift in Indian policy, it authorized the Tribes to re-form governments and reconstitute tribal courts. Oklahoma Indian Welfare Act, 25 U.S.C. 5203; see *Muscogee (Creek) Nation* v. *Hodel*, 851 F.2d 1439, 1443-1447 (D.C. Cir. 1988), cert. denied, 488 U.S. 1010 (1989). But that restoration did not detract from Congress's statehood-era intent to disestablish the territory of the Creek Nation or reconstitute that territory.

C. The State Of Oklahoma In Any Event Had Jurisdiction Over Respondent's Crime

Even if the former territory of the Creek Nation might still be recognized in some sense, Oklahoma would have criminal jurisdiction over respondent's crime. The statutory history of Oklahoma jurisdiction over crimes involving Indians in the former Indian Territory is unique. In the run-up to Oklahoma statehood, Congress enacted statutes to treat Indians the same as non-Indians in the Indian Territory. And then, upon Oklahoma's admission to the Union, it subjected Indians as well as non-Indians to state law, including state criminal law. Nothing in Congress's subsequent enactment in 1948 of the general definition of "Indian country" to include "Indian reservation[s] under the jurisdiction of the United States," 18 U.S.C. 1151(a), reveals an intent to implicitly repeal the relevant Acts of Congress and divest state jurisdiction.

1. Four of the Acts discussed above are especially significant to Oklahoma's criminal jurisdiction over crimes involving Indians. First, in 1897, Congress granted the United States courts in the Indian Territory "exclusive jurisdiction" to try "all civil causes in law and equity" and all "criminal causes" involving offenses by "any person" "irrespective of race." Indian Department Appropriations Act, 30 Stat. 83. The goal was "to place Indians upon precisely the same plane as the [non-Indians], giving them the same rights" under the law. 29 Cong. Rec. 2324 (1897) (Sen. Berry); see *id.* at 2305 (Sen. Vest) (similar).

Second, the Curtis Act "abolished" "all tribal courts in Indian Territory" and provided that "the laws of the various tribes or nations of Indians shall not be enforced

at law or in equity by the courts of the United States in the Indian Territory." §§ 26, 28, 30 Stat. 504.

Third, the 1904 Act confirmed that the application of Arkansas law "embrace[d] all persons and estates in [the Indian] Territory, whether Indian, freedman, or otherwise." § 2, 33 Stat. 573.

Fourth, the Enabling Act extended the territorial laws in force in the Oklahoma Territory over the entire State. §§ 2, 13, 21, 34 Stat. 268-269, 275, 277-278; see *Stewart* v. *Keyes*, 295 U.S. 403, 409-410 (1935); *Jefferson*, 247 U.S. at 292-293. The Enabling Act also sent pending criminal cases that did not arise under federal law—*i.e.*, cases of a local nature—to the new Oklahoma state courts. §§ 16, 20, 34 Stat. 276, 277. The Enabling Act thus brought the members of the Five Tribes under the jurisdiction and substantive laws of the State. The next year, Congress amended the Enabling Act to ensure that "[a]ll criminal cases pending in the United States courts in the Indian Territory" not within federal jurisdiction would be "prosecuted to a final determination in the State courts of Oklahoma." 1907 Act § 3, 34 Stat. 1287.

2. After statehood, the federal and state courts consistently interpreted these Acts to confer broad criminal jurisdiction on the State. The sole judge of the new United States District Court of the Eastern District of Oklahoma ordered that "all prisoners" then awaiting trial "in the custody of the United States marshals" be delivered to the "state authorities," except where the offense was "of a federal character," on the ground that the Enabling Act had deprived the federal courts of jurisdiction over such cases. *Ex parte Buchanen*, 94 P. 943, 945 (Okla. 1908); see *Many May Escape Law*, Mus-

kogee Times-Democrat, Dec. 4, 1907, at 1. The Supreme Court of Oklahoma held that state courts had assumed jurisdiction of all crimes "not of a federal character" in the former Indian Territory, which it described as crimes not committed "within a fort or arsenal or in such place in said territory over which jurisdiction would have been solely and exclusively within the jurisdiction of the United States, had it at that time been a state." *Ex parte Buchanen*, 94 P. at 944. Oklahoma state courts regularly exercised criminal jurisdiction over crimes involving Indians in the former Indian Territory. *E.g.*, *McGlassen* v. *State*, 130 P. 1174, 1174 (Okla. Crim. App. 1913); *Rollen* v. *State*, 125 P. 1087, 1088 (Okla. Crim. App. 1912); see Pet. Br. 39-42.

This Court's decision in *Hendrix* v. *United States*, 219 U.S. 79 (1911), also reflects the understanding that the State obtained general criminal jurisdiction over Indians in the former Indian Territory. There, an Indian defendant indicted for murder prior to statehood had successfully moved to transfer his case from the Court for the Indian Territory to a federal court in Texas, under a special statute to protect against bias. Following statehood, he contended that the Enabling Act required the transfer of his case to state court in Oklahoma. This Court rejected that argument, concluding that the pre-statehood statute continued to authorize the defendant's prosecution in the Texas court. *Id.* at 90-91. But the Court did not question the premise of the defendant's argument that criminal cases involving Indians pending in the Court for the Indian Territory were to be transferred to state court.

3. If state courts did not have jurisdiction over crimes committed by Indians against other Indians fol-

lowing statehood, then *no court* would have had jurisdiction over most such crimes. Federal jurisdiction over such crimes was limited to listed major crimes, Indian Major Crimes Act § 9, 23 Stat. 385, and the tribal courts, which would have had jurisdiction over non-major crimes, had been abolished since 1898. Thus, if the decision below were correct, then from statehood through the reestablishment of the tribal courts years later, see *Hodel*, 851 F.2d at 1443-1447, no court would have had jurisdiction over non-major crimes committed by Indians against other Indians in the former Indian Territory.

4. The statutory definition of "Indian country," which includes "land within the limits of any reservation under the jurisdiction of the United States," 18 U.S.C. 1151(a), does not alter this analysis. Congress enacted that definition as part of its comprehensive revision of the federal criminal code in 1948. Act of June 25, 1948, 62 Stat. 757 (18 U.S.C. 1151). That general provision does not specifically address or aptly describe the unique status of the former Indian Territory. And there is no indication that Congress intended to implicitly repeal the existing jurisdictional framework there. See, *e.g.*, *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 662 (2007) ("repeals by implication are not favored") (citation omitted).[6]

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[6] The Secretary of the Interior reached a similar conclusion in a 1963 opinion, stating that codification of the "Indian country" definition "does not appear to require revision" of the Department's earlier determination that Oklahoma maintained jurisdiction "over offenses committed by and against Indians on restricted allotments" in the former Indian Territory. App., *infra*, 8a.

5. Thus, for 80 years—from Oklahoma statehood until the late 1980s—the United States and Oklahoma understood that the State had jurisdiction over crimes involving Indians throughout the former Indian Territory. The state courts regularly exercised that jurisdiction, and the issue appeared settled in 1936, when the Oklahoma Court of Criminal Appeals held (albeit on a different theory) that the State had jurisdiction over the murder of one Choctaw Indian by another on a restricted allotment. *Ex parte Nowabbi*, 61 P.2d 1139, 1156.

In the late 1980s, however, the Oklahoma courts held that the State "does not have jurisdiction over crimes committed by or against an Indian" on restricted allotments within the former Indian Territory. *State* v. *Klindt*, 782 P.2d 401, 403 (Okla. Crim. App. 1989). *Klindt* rejected *Nowabbi*'s reasoning and found that any "existing doubts" were "extinguish[ed] * * * in favor of federal jurisdiction" in 1948, *id.* at 404, when Congress defined "Indian country" to include "all Indian allotments, the Indian titles to which have not been extinguished," 18 U.S.C. 1151(c). Accord *Cravatt* v. *State*, 825 P.2d 277, 279 (Okla. Crim. App. 1992); *State* v. *Brooks*, 763 P.2d 707, 710 (Okla. Crim. App. 1988), cert. denied, 490 U.S. 1031 (1989). In 1992, the Tenth Circuit agreed. *United States* v. *Sands*, 968 F.2d 1058, 1061-1063, cert. denied, 506 U.S. 1056 (1993).

In its amicus brief in support of certiorari in *Brooks* (No. 88-1147), and in its response to the certiorari petition in *Sands* (No. 92-6105), the United States argued that the State had jurisdiction over crimes committed by or against Indians throughout the former Indian Territory, including on restricted allotments. This Court, however, denied the petitions, and the United

States has exercised jurisdiction over crimes committed by or against Indians on trust lands and restricted allotments in the former Indian Territory since 1992. See U.S. Br. at 15 & n.8, *Murphy* v. *Oklahoma*, 551 U.S. 1102 (2007) (No. 05-10787) (declining to urge the Court to grant certiorari on this issue).

Because the Tenth Circuit did not address petitioner's allotment theory, see Pet. App. 17a & n.10, there is no occasion for the Court to address the United States' jurisdiction over trust lands and restricted allotments in this case. This Court can and should consider, however, the government's position that even if Congress did not entirely eliminate any recognition of the former territory of the Creek Nation, Congress did grant Oklahoma criminal jurisdiction over those lands, and that the 1948 definition of "Indian country" to include Indian reservations did not implicitly repeal that jurisdiction with respect to lands that are not trust lands or restricted allotments.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 2018

APPENDIX A

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON

Office of the Solicitor

Aug. 17, 1942

The Honorable

The Attorney General.

Sir:

In a letter of April 28, 1941, from the Assistant Attorney General (your file WB:CAP:vng 90-2-017-60) the views of this Department were requested respecting the jurisdiction of the State and Federal courts in Oklahoma in cases involving crimes committed by and against Indians on the restricted Indian allotments in the area which was the Indian Territory and those in the area which was the Oklahoma Territory.

A mass of statutory provisions showing the changing and developing jurisdiction of courts in these areas has been found and most of the relevant provisions have been summarized or quoted in the attached memorandum. Because of the complexities of the matter this Department cannot speak with certainty with respect to the present jurisdiction but is presenting the following analysis and conclusions for your consideration.

Prior to the creation of the Oklahoma Territory and the Indian Territory by the act of May 2, 1890 (26 Stat. 81), the whole area was known as the Indian Territory. During this period the Government recognized the ex-

clusive jurisdiction of the Indian tribes over their own members and even over nonmembers within their territories. There were a few statutes defining crimes within this Territory and providing for a United States court for the prosecution of these crimes. However, as indicated in the reference to these statutes in paragraphs 1, 2, and 3 of the attached memorandum, these statutory provisions excluded from their application crimes committed by Indians. The act of March 3, 1885 (23 Stat. 385, 18 U.S.C. sec. 548), probably did not apply to the old Indian Territory, since there were no Territorial organization, laws and courts to function under the statute (*In re Jackson*, 40 Fed. 372. C.C. Kans., 1889).

Upon organization under the act of May 2, 1890, the United States district courts in the Oklahoma Territory and the Indian Territory were given jurisdiction by sections 12 and 36, respectively, of crimes by Indians against Indians of other tribes to the same extent as if such crimes were committed by citizens. This grant of jurisdiction increased the jurisdiction which I believe these courts automatically obtained under section 548 of title 18 of the named crimes committed by Indians against Indians or others. These district courts had a dual role. As United States courts they enforced the Federal laws and as Territorial courts they enforced the Territorial laws, being at the outset the laws of Nebraska in the Oklahoma Territory and the laws of Arkansas in the Indian Territory. As United States courts enforcing Federal law they had jurisdiction over crimes committed by white persons against either Indians or other persons under section 217 of title 25 of the United States Code (*Brown v. United States*, 146 Fed. 975 (C.C.A. 8th, 1906)). As Territorial courts

they could enforce section 548 of title 18 by the trial of the Indians committing the crimes named therein in the same manner as such crimes were tried when committed by other persons. As Territorial courts they could also try Indians for crimes committed against Indians not members of the tribe in the same manner as in the case of other persons.

The act of June 7, 1897 (30 Stat. 83), and subsequent statutes relating to the Indian Territory completely altered the situation in that Territory with respect to jurisdiction over Indian crimes. The 1897 act placed in the district courts jurisdiction over all crimes committed by any person in the Indian Territory, and the laws of Arkansas in force in the Territory were made to apply to all persons, regardless of race. Subsequent acts abolished the Indian courts and tribal jurisdiction and organization. These acts, therefore, removed the essential characteristic of the Indian country, which was the application of tribal laws within the area. Since the Territorial laws were made to apply to all persons in the Indian Territory, both section 548 of title 18 and section 217 of title 25 were apparently superseded. This conclusion is fortified by the act of March 3, 1901 (31 Stat. 1447), which gave citizenship to every Indian in the Indian Territory and by the last proviso in the act of May 8, 1906 (34 Stat. 182), which provided that the Indians in the Indian Territory should not be covered by the provision subjecting all Indian allottees to the exclusive jurisdiction of the United States until the issuance of fee simple patents. No similar changes in jurisdiction were made in the Oklahoma Territory.

Upon the organization of the State of Oklahoma pursuant to the Enabling Act of June 16, 1906 (34 Stat. 267), the State courts succeeded to the jurisdiction of the Territorial courts, except as to the crimes defined by Federal law which were placed within the jurisdiction of the Federal courts. The State courts, therefore, apparently acquired jurisdiction of all Indian crimes in that part of the State which had been the Indian Territory. In that part of the State which had been Oklahoma Territory it is my opinion that the second part of section 548 of title 18 had immediate application, placing in the Federal courts jurisdiction of the named crimes committed by Indians in Indian reservations in the States. This part of section 548 did not apply to the Indian Territory part of the State, since the Indian reservations therein had lost their character as Indian country.

The conclusions of this Department thus follow substantially the decision of the Supreme Court in the case of *United States v. Ramsey*, 271 U.S. 467, and the opinion of the Oklahoma Supreme Court in *Ex parte Nowabbi*, 61 P.(2d) 1139. The *Ramsey* case held that a restricted allotment on the Osage Reservation, which had been a part of the Oklahoma Territory, was Indian country within the meaning of section 217 of title 25, and that therefore the Federal court had jurisdiction of a crime committed by a white person against an Indian. Of course, any jurisdiction under section 217 of crimes exclusively involving white persons on the Indian reservations was lost by the acquisition of statehood, as in the case of other States. The *Nowabbi* case held that the State courts had jurisdiction over a crime by one Indian against another committed on a restricted allotment in the area formerly the Indian Territory.

The conclusions of the Department may be summarized as follows:

(1) In that part of Oklahoma which was the Indian Territory a restricted Indian allotment is no longer Indian country and section 217 of title 25 does not apply to give the Federal courts jurisdiction of crimes against Indians and section 548 of title 18 does not apply to give the Federal courts jurisdiction of the named crimes by Indians. Jurisdiction of all crimes by and against Indians is in the State courts.

(2) In that part of the State which was Oklahoma Territory a restricted Indian allotment continues to have the character of Indian country in the same manner as restricted allotments and reservations elsewhere in the country, with the possible exception of crimes committed by Indians against nonmember Indians, which crimes are apparently within the jurisdiction of the State courts as a result of the 1890 statute. On these allotments both section 217 of title 25 and section 548 of title 18 apply. Crimes between Indians of the same tribe which are not covered by section 548 remain subject to tribal jurisdiction.

The presentation of these legal conclusions should be accompanied by some statement of the practical situation. None of the tribes in Oklahoma has exercised criminal jurisdiction in recent years and none has a court of Indian offenses established either by the tribe or under the regulations of this Department. It is therefore important that some definite criminal procedure be established for crimes not embraced by Federal or State law. In view of the complexities of jurisdiction in Oklahoma and in view of this practical problem this Department would be glad to receive your suggestions

as to the substance of a bill which might be presented to Congress on the subject.

Very truly yours,

(Sgd.) OSCAR L. CHAPMAN
Assistant Secretary.

Enclosure 690427.
CTL:mvp

APPENDIX B

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D.C.

Mar. 27, 1963

Dear Mr. Attorney General:

On November 29, 1962, you wrote me seeking an opinion as to whether it would be a constructive measure for the Department of Justice to appear *amicus curiae* or on behalf of Indians in court cases where States, under questionable authority, have asserted criminal jurisdiction over offenses committed by Indians in Indian country.

Mr. Barry, the Solicitor of the Department of the Interior, has spoken informally with Assistant Attorney General Clark in the interval since your letter was received, pointing out that our reply would be delayed because of the complicated nature of the problem and the need for giving it additional study.

As you are no doubt aware, several States had asserted civil and criminal jurisdiction in Indian country prior to the passage of Public Law 280, 83d Congress, despite the fact that no Federal statutes of relinquishment and transfer had been enacted. Foremost among these were Michigan, Oklahoma, North Carolina, and Florida. Jurisdiction was also been asserted by certain counties in such States as Washington, Nevada, and Idaho. Following the enactment of Public Law 280, Nevada, Washington, and Florida passed legislation either bringing Indian country under their jurisdiction, or

permitting tribes to petition for such jurisdiction, or providing local option for the assumption of jurisdiction by individual counties. The other States mentioned above did not take such action, although they have continued to assert jurisdiction. Officials of both Oklahoma and North Carolina have contended in letters to this Department that they have criminal jurisdiction over the Indians of their States irrespective of the fact that they do not have such jurisdiction under a specific Federal statute, and the States themselves have not taken positive action under the provisions of Public Law 280.

On August 17, 1942, the views of this Department concerning the jurisdiction of the State of Oklahoma over offenses committed by and against Indians on restricted Indian allotments in the State was furnished your Department. Your reference on the matter was WB:CAP 90-2-017-60. The adoption in 1948 of the current statutory definition of Indian country in 18 U.S.C. § 1151 does not appear to require revision of the jurisdictional conclusions stated in our 1942 letter and summary. These conclusions were that restricted Indian allotments in the part of Oklahoma which was formerly Indian Territory were no longer Indian country, but that such allotments in the part of the State which was formerly Oklahoma Territory continued to have the character of Indian country in the same manner as restricted allotments elsewhere in the country, with the possible exception of crimes committed by Indians against non-member Indians. In the latter instance, it was pointed out that such crimes apparently were within the jurisdiction of the State courts as a result of the Act of May 2, 1890 (26 Stat. 81).

It is generally true that in the areas where States are exercising criminal jurisdiction under doubtful authority, the Indian tribes are not in a financial position to assume any law and order responsibility for themselves. Furthermore, the Bureau of Indian Affairs at this time does not have sufficient staff nor funds to take over law enforcement for them. If, however, the jurisdiction of the States within Indian country were to be successfully challenged by the Federal Government, it would then appear incumbent on our Department to provide the Indians appropriate substitute systems of law and order. In this connection, we would need to explore present capabilities for establishing reservation courts, and you would undoubtedly wish to consider the impact that the prosecution of petty offenses under 16 U.S.C. § 1132 would have upon your United States Attorneys and the Federal Courts. Consideration will also have to be given to the fact that many of those Indians have long since abandoned tribal self- government and have become accustomed to looking to the State for the maintenance of law and order in their communities.

I therefore feel it vital to the overriding interest of the Indians in the maintenance of law and order that members of our two Departments confer on what presently can be done by our Departments to see that where States are determined not to have criminal jurisdiction over Indians in Indian country, a breakdown of law enforcement will not occur. I am suggesting that Solicitor Barry designate someone to represent his office in such discussions, and shall also ask Commissioner of Indian Affairs Phillco Rash to select a representative for this Bureau. These persons will, I am sure, be available to explore this matter further at a time agree-

able with you and whichever officials for the Department of Justice you may designate as your representatives.

Sincerely yours,

(Sgd.) STEWART L. UDALL
Secretary of the Interior

Hon. Robert F. Kennedy
Attorney General
Department of Justice
Washington 25, D.C.

Followup PRS 0755