THE THIRD BRANCH:

The Supreme Court of the United States (SCOTUS) Week 3

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West Virginia et al v. Environmental Protection Agency

Facts of the Case

- **2015** – Obama administration adopted the **Clean Power Plan (CPP),** which sought to reduce carbon pollution from power plants by shifting electricity production from coal/gasoline to natural gas or wind. CPP **set individual goals for each state to cut emissions by 2030**.
- **2016** – **SCOTUS stayed CPP** in response to challenges by several states and private parties.
- **2019** – Trump administration repealed the CPP, **replacing it with the Affordable Clean Energy (ACE) Rule, which gave states discretion** to set standards and power plans flexibility in complying with those standards.
- **2021 – D.C. Circuit vacated both the CPP and the ACE Rule** and sent issue back to the EPA

West Virginia et al v. Environmental Protection Agency (cont.)

Question

- **Does the EPA have the authority to regulate greenhouse gas emissions in virtually any industry**, so long as it considers cost, non-air impacts, and energy requirements.

D.C. Circuit Court ruled for the government; the Clean Air Act gives the EPA expansive power over carbon emissions.

SCOTUS in 6:3 (partisan) Decision overturned, ruling for consortium of States and Power Companies.

West Virginia et al v. Environmental Protection Agency (cont.)

Majority Opinion - by Roberts, joined by Kavanaugh, Barrett, Gorsuch, Alito, and Thomas

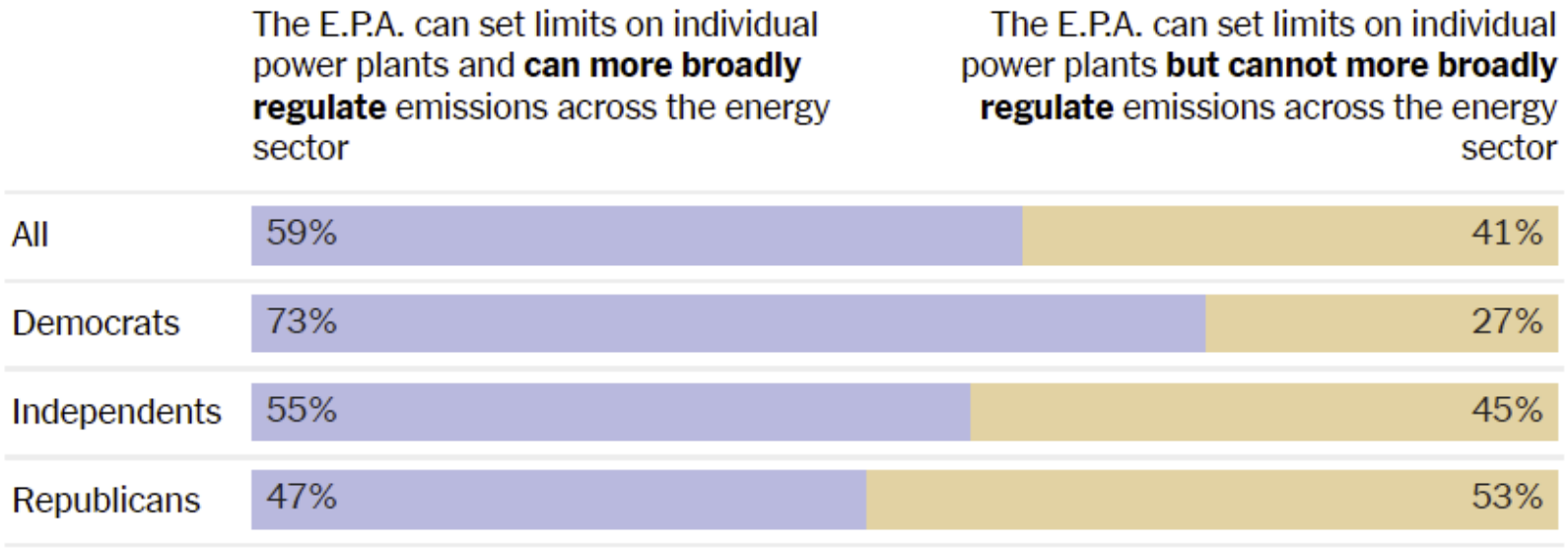
- **Standing** - Even if both CPP and ACE have been vacated, **challengers have right to SCOTUS review because the Biden administration has signaled plans to issue a new rule** on carbon emissions from power plants, similar to CPP.
- **Ruling** - EPA's industry-wide, generation-shifting changes **violate the *"major-questions doctrine"*** – the idea that if Congress wants to give an administrative agency the power to make "*decisions of vast economic and political significance,*" it must say so clearly.

West Virginia et al v. Environmental Protection Agency (cont.)

Dissent - by Kagan, joined by Breyer and Sotomayor

- **Standing** – There was **no reason for the court to weigh in at** this stage at all, because the Biden administration has announced that it plans to issue a new rule.
- **Ruling** – The majority's reasoning "*rests on one claim alone: that generation shifting is just too new and too big a deal for Congress to have authorized it*" through the Clean Air Act. But that is exactly what Congress intended, because of the EPA's expertise on environmental issues.
- **Warning** – Ruling "*prevents congressionally-authorized agency action to curb power plants' carbon dioxide emissions. The Court appoints itself – instead of Congress or the expert agency – the decision-maker on climate policy. I cannot think of many things more frightening.*"

Where the public stands



Question wording: Under federal law, the Environmental Protection Agency (E.P.A.) has the authority to set emissions standards using "the best system of emission reduction." Some people think this means that the E.P.A. can set emissions limits on individual power plants and can also more broadly regulate emissions across the entire energy sector. Other people think that the E.P.A. can set limits on individual power plants but cannot more broadly regulate emissions across the entire energy sector. What do you think? | Source: SCOTUSPoll

Biden v. Texas
Ending Trump's "Remain in Mexico" Program

Facts of the Case

- **2018** – The Trump administration announced the Migrant Protection Protocols (MPPs), also known as the "Remain in Mexico" policy, which required migrants arriving at the southwest border to be returned to Mexico during their immigration proceedings.
- **Challenges** – The MPPs engendered several legal challenges from District Court and 9th Circuit, but **SCOTUS allowed its implementation**.
- **June, 2021** – The Biden administration sought to end the policy, but **Texas and Missouri challenged**, arguing that the termination violated the Administrative Procedure Act of 1946 (APA) which governs the way agencies of the federal government may propose and establish regulations and grants U.S. federal courts oversight over all agency actions.

Biden v. Texas (cont.)

Facts of the Case (cont.)

- **District Court –** Sided with Texas & Missouri, ordering the Biden administration to implement the MPPs in good faith or initiate new agency action in compliance with the APA.
- **5th Circuit & SCOTUS** declined to block the ruling.
- **October, 2021 –** Department of Homeland Security **(DHS) issued new decision ending the policy**, supported by a memorandum explaining the decision.
- **District Court & 5th Circuit –** Again **ordered DHS to continue CPPs**.
- **Biden Administration –** Requested **expedited review** from SCOTUS

Question – Must DHS continue to enforce the MPPs or does the DHS decision ending the policy have legal effect?

Biden v. Texas (cont.)

Majority Opinion – **by Roberts**, joined by Kavanaugh, Breyer, Kagan and Sotomayor.

- **No Lower Court Standing** – A federal statute provides that ***"no court (other than the Supreme Court)*** *shall have jurisdiction or authority to enjoin or restrain the operations of"* several immigration-enforcement laws.
- **Merits of the Case – The Immigration and Nationality Act** provides that the federal government "may" return an asylum seeker who arrives at the U.S border with Mexico or Canada to that county to await a hearing, thus **giving the government discretion in the matter**.
- **Foreign Affairs Consequences** – The federal government cannot return asylum seekers to Mexico without **the Mexican government's cooperation.**

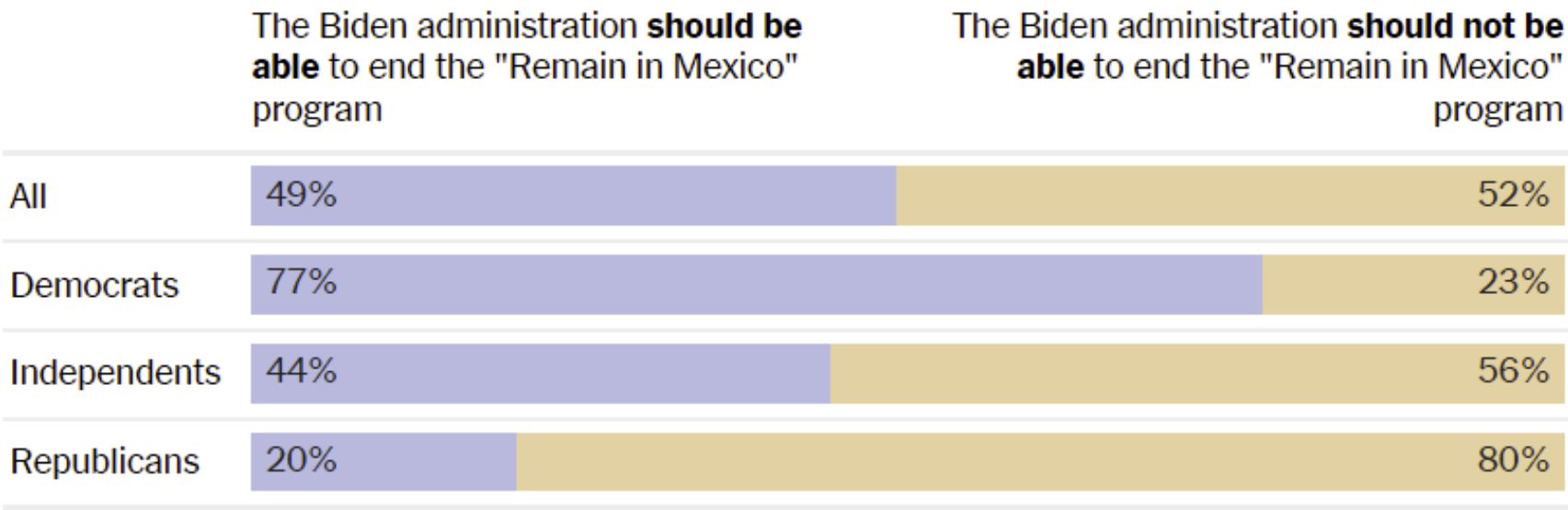
Biden v. Texas (cont.)

Additional Majority Opinion – **Kavanaugh** wrote separately to **criticize the failure of Congress** to provide the Department of Homeland Security with the **funding to allow it to detain ALL asylum seekers**.

Dissent 1 – **by Barrett**, joined by Thomas, Alito and Gorsuch, argued the standing decision, **preferring to send the case back to the lower courts** to determine whether they had the power to enter an injunction requiring the Biden administration to reinstate MPP.

Dissent 2 – **by Alito**, joined by Thomas and Gorsuch, challenged Biden administration's contention that it is NOT required to either detain asylum seekers or return them to Mexico. **Its practice to "simply release into this country untold numbers of aliens** who are very likely to be removed" after hearings is a practice that "**violates the clear terms of the law**, but the Court looks the other way."

Where the public stands



Question wording: The U.S. Department of Homeland Security required noncitizens trying to reside in the U.S. to wait in Mexico while immigration officials process their cases. The Biden administration issued an order ending this "Remain in Mexico" program. In response, several states sued, saying that the administration did not have adequate justification in ending the program. Some people think that the Biden administration should be able to end this program. Other people think that the Biden administration should not be able to do so. What do you think? | Source: SCOTUSPoll

United States v. Zubaydah - State Secrets

Facts of the Case

- **Zubaydah**, a Palestinian, was captured by U.S. forces in Pakistan in 2002 and **thought to be a top leader in al-Qaeda.**
- He was subsequently **transferred to a CIA "dark site" in Poland**, where he was **repeatedly waterboarded** and subjected to other abusive interrogation tactics for several months.
- In 2006, the **CIA formally concluded it was all a mistake**; Zubaydah *"was not a member of al-Qaeda,"* **yet he remains imprisoned at Guantanamo today**.
- In 2014, the **Senate Intelligence Committee** released a lengthy **classified report detailing the CIA's use of torture**, the unclassified executive summary of which **mentions Zubaydah's name 1,343 times**.

United States v. Zubaydah (cont.)

International Politics of the Case

- In 2015, the **European Court of Human Rights** determined that Zubaydah was held at such a site in Poland.
- Zubaydah's lawyers and several human rights groups joined forces and ultimately **persuaded the Polish government to investigate** whether any Polish officials contributed to this abuse.
- Zubaydah's lawyers **asked a U.S. court to compel the testimony of two psychologists who helped develop and oversee the torture techniques** and were paid $81 million by the CIA.
- The U.S. government argued against such testimony in the interest of national security, but the **9th Circuit found that, *"in order to be a 'state secret,' a fact must first be a 'secret.'"***
- Thus, the **U.S. government appealed for relief** from SCOTUS.

United States v. Zubaydah (cont.)

Question

- **Did the** U. S. Court of Appeals for the **9th Circuit err in rejecting the federal government's assertion of the state-secrets privilege** based on its own assessment of the potential harms to national security that would result from disclosure of information pertaining to clandestine CIA activities?

SCOTUS – **Yes**, in 7:2 opinion

United States v. Zubaydah (cont.)

Majority Opinion – **by Breyer**, joined by Roberts, Thomas, Alito, Kagan, Kavanaugh, and Barrett

- The court was faced with ***"only a narrow evidentiary dispute."*** It did not condone terrorism or torture.
- Zubaydah's request makes clear that the **contractors' responses** ***"would tend to confirm (or deny)*** *the existence of a CIA detention site in Poland."*
- Zubaydah's **need for location information is not great**, perhaps close to nonexistent. Rather he seeks information about events.
- If the federal government confirms that there was a CIA "black site" in one country, the intelligence service in not only that country but also other **countries will be less likely to cooperate** with U.S. intelligence services in the future.

United States v. Zubaydah (cont.)

Additional Majority Opinions:

- **by Thomas**, joined by Alito – Zubaydah **hasn't demonstrated that he really needs the information he is seeking**, so the government doesn't need to support its claim of state secrets privilege.
- **by Kagan** – She preferred sending the case back to the **district court**, where they should be able to **separate information about location from events at that location**.

United States v. Zubaydah (cont.)

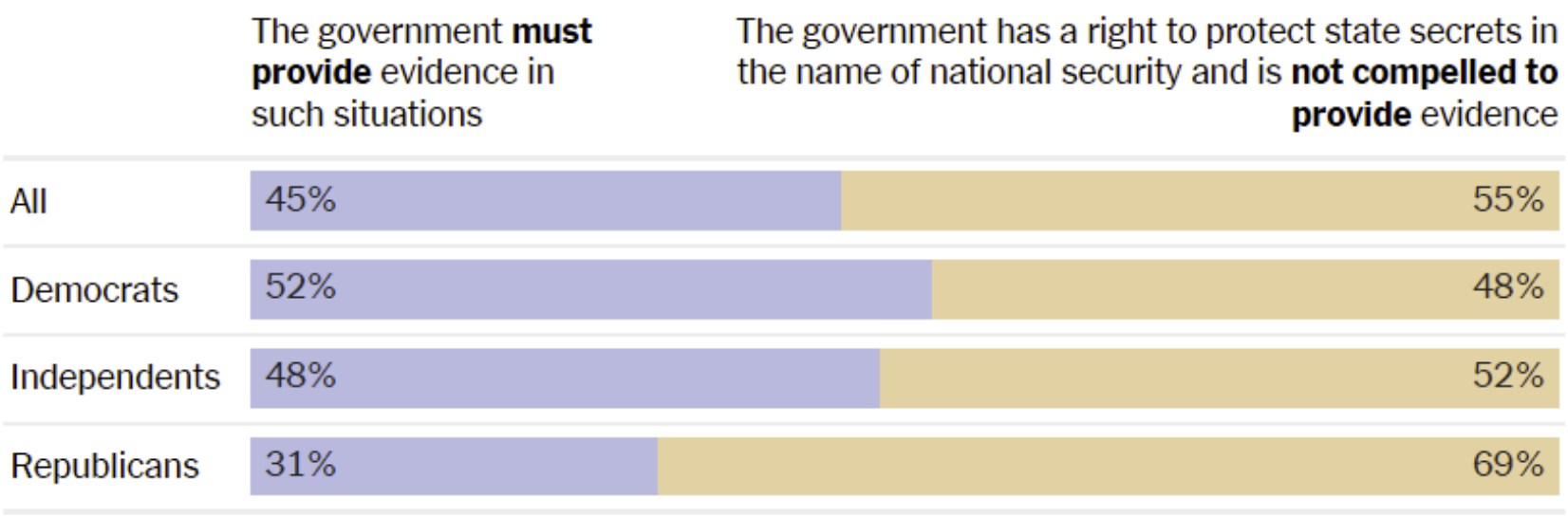
Minority Opinion – **by Gorsuch**, joined by Sotomajor, lamenting the "*overclassification of government documents*" and undue deference to the Executive.

- The court **should not unquestioningly accept the government's assertion** of national security harm. Supporting details should be provided, and the **court should decide if the privilege applies**.

  "The constitution did not create a President in the King's image but envisioned an executive regularly checked and balanced by other authorities."

- The government's case boils down to a desire to obstruct the Polish criminal investigation "*and* ***avoid (or at least delay) further embarrassment for past misdeeds****. . . But as embarrassing as these facts may be, there is no state secret here. This Court's duty is to the rule of law and the search for truth.* ***We should not let shame obscure our vision."***

Where the public stands



Question wording: A terrorism suspect currently being held in Guantánamo Bay says the C.I.A. used enhanced interrogation techniques and wants it investigated. The government has declassified some information, but it claims it has a right to protect state secrets in the name of national security and is not compelled to provide evidence connected to the investigation. Some people think that the government has a right to protect state secrets in the name of national security and is not compelled to provide evidence. Other people think that the government must provide evidence in such situations. What do you think? | Source: SCOTUSPoll

ELEPHANT IN THE ROOM

Despite CIA's admission that he was NOT a member of al-Qaeda, Zubaydah remains in indefinite, law-of-war detention at Guantanamo today at an estimated cost of $13 million per year per prisoner!

GUNS: ***New York State Rifle & Pistol Assn. v. Bruen***

- New York requires a person to show a special need for self-protection to receive an unrestricted license to carry a **concealed** firearm outside the home. Nash and Koch (and the NYSRPA) challenged the law after New York rejected their concealed-carry applications based on failure to show "proper cause."
- The question in this case is whether New York's law (in effect since 1911), requiring that applicants for unrestricted concealed-carry licenses demonstrate **a special need for self-defense**, violates the Second Amendment.
- The NY rule said that this must be **a non-speculative need for self-defense** in order to establish a proper cause to grant a license.
- Nash and Koch (two plaintiffs in the suit) only had a 'generalized interest in self-defense' and were thus denied their concealed carry license by NY.
- This is the first major gun-rights case in more than a decade and the first to be heard by the six-member conservative majority.

2nd Amendment: 'A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.'

- *District of Columbia v. Heller (Heller)* and *McDonald v. Chicago (McDonald)* are both cited by the majority in *Bruen* as standing for the proposition that the 2nd and 14th amendments protect an **individual** right to keep and bear arms for self-defense.
- The *Heller* case, written by the late Antonin Scalia, affirmed that U.S. citizens did have an individual right, unconnected to a "well-regulated militia", to possess guns within their own homes under the Second Amendment.
- If protecting militias had been the only reason for the 2nd Amendment, then it could have instead referred to "the right of the *militia* to keep and bear arms" instead of "the right of the *people* to keep and bear arms".
- *Heller* stands for the proposition that, **in order to justify a firearm regulation the government must demonstrate that the regulation is consistent with the Nation's 'historical tradition of firearm regulation.'**

Notes on the History of the 2nd Amdt.

- The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.
- A well regulated militia, being the best security of a free state, the right of the people to keep and bear arms, shall not be infringed.
- The Senate returned to this amendment for a final time on September 9. A proposal to insert the words "for the common defence" next to the words "bear arms" was defeated. A motion passed to replace the words "the best", and insert in lieu thereof "necessary to the" . The Senate then slightly modified the language to read as the fourth article and voted to return the Bill of Rights to the House. The final version by the Senate was amended to read as:

  A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

14th. 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

- *McDonald* affirmed this was a right that was incorporated against the states by way of the 14th amendment. However, the question of gun ownership outside of one's home had not yet reached the Supreme Court, and we had/have an inconsistent framework of state laws and federal court decisions.
- Many of these prior decisions that upheld state regulations on public gun possession generally rested on ***long-standing common law that the government has the ability to regulate firearms in public spaces***.
- In over one thousand cases since *Heller*, most federal appeals courts have used intermediate scrutiny rather than strict scrutiny to judge the validity of public-carry gun control laws, which laws defer to the states' 'compelling interest' to protect the public by restricting possession of guns in public spaces.

GUNS: ***New York State Rifle & Pistol Assn. v. Bruen***

- The Supreme Court's 6-3 decision against Bruen (New York): NY's 'proper-cause' requirement violates 14th Amdt./2nd Amdt.
- Lower court's two-step test, i.e. combining a look at history with 'means-end' scrutiny, is rejected in favor of a single test:
  - **Historical Analysis** is the only real test.
  - 'Intermediate scrutiny' results often defer to state legislatures.
  - The courts must assess whether modern firearm regulations are consistent w/ 2nd amendment text and historical understanding:
    - Do the **modern** and **historical** regulations impose a **comparable burden** on the right of armed self-defense?
    - Is the regulatory burden *comparably* justified?

GUNS: ***New York State Rifle & Pistol Assn. v. Bruen***

- Having set forth these broad parameters, the court looks at this case:
  - The 2nd Amdt protects Kock & Nash, which does not draw a distinction between home and public for keeping and bearing arms; 'bear' naturally means in public.
  - The burden is therefore on NY to show that the proper-cause requirement is consistent with the ***historical tradition*** of firearms regulation.
    - The court dismisses their historical arguments, finding them ambiguous at best, as there were (apparently) few public carry regulations at the time of the amendment.
    - The court seems to say that restriction of 'dangerous and unusual weapons' as happened in the early republic does not justify regulation of handguns, which are in common use today (not unusual?).
    - The court also dismisses other public carry restrictions after the passage of the constitution as not relevant, because they were not as restrictive as NY's law. This was because a showing of 'special need' was only required after an individual was reasonably accused of an intent to injure or some other breach of peace.

2nd Amendment: 'A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.'

- Video: https://www.youtube.com/watch?v=nuSMozTUojs
- Do we all understand the distinction made between 'keeping' and 'bearing' arms?
- Do we all understand the distinction between 'may' issue states, 'shall' issue states and 'permitless' states?
- I understand the professor here to be saying that this case is somewhat limited in the sense that the court is intolerant of 'may' issue states that allow a somewhat subjective process, but tolerant of 'shall' issue states even if the restrictions are somewhat strict.
- https://en.wikipedia.org/wiki/Gun_laws_in_the_United_States_by_state#/media/File:Right_to_Carry,_timeline.gif

Oklahoma v. Castro-Huerta

Do *states* have the authority to prosecute non-Natives who commit crimes against Natives on Native American lands?

- This was a 5-4 decision, this time on the issue of tribal sovereignty
  - Victor Manuel Castro-Huerta, a non-Native, was convicted in Oklahoma state court of child neglect, and he was sentenced to 35 years. The victim, his stepdaughter, is Native American, and the crime was committed within the Cherokee Reservation.
  - Castro-Huerta challenged his conviction, arguing that under the Supreme Court's 2020 decision in *McGirt v. Oklahoma*, states cannot prosecute crimes committed on Native American lands without federal approval. Oklahoma countered that *McGirt* involved a Native defendant, whereas Castro-Huerta is non-Native, so *McGirt* does not bar his prosecution by the state.
  - Kavanaugh wrote the majority opinion: The federal government and the state have ***concurrent jurisdiction*** to prosecute crimes committed by non-Natives against Natives on Native American land.

Oklahoma v. Castro-Huerta

Do states have the authority to prosecute non-Natives who commit crimes against Natives on Native American lands?

- The Court has previously held that States have jurisdiction to prosecute crimes committed by non-Natives against non-Natives on Native American lands.
- Native American land is not separate from state territory and States have jurisdiction to prosecute crimes committed on Native American land unless *preempted*. This may occur either:
  - under ordinary principles of federal preemption, or
  - when the exercise of state jurisdiction would unlawfully infringe on tribal self-government.
- Kavanaugh finds that neither situation applies here.
- Justice Neil Gorsuch authored a dissenting opinion, joined by Breyer, Sotomayor, and Kagan. Gorsuch argued that the Court's decision reneges on the federal government's centuries-old promise that tribes would remain forever free from interference by state authorities. Gorsuch was the author of the referenced *McGirt* opinion.

Denezpi v. US

…nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb…

- This is another decision involving crimes committed on tribal land and, in this case, the so-called double jeopardy clause of the 5th amendment (above).
- Denezpi and VY, both members of the Navajo nation, traveled to the house of a friend of Denezpi's on the Ute Mountain Ute Tribe's reservation.
- Denezpi proceeded to commit several crimes against VY, probably including false imprisonment, assault and sexual assault.
- The Ute Mountain Utes do not have their own tribal court, however. Instead they make use of the Southwest Region CFR court (explain). While the tribe does not have its own court system, it adopted its own penal code enforceable in that court.

Denezpi v. US

…nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb…

- So Denezpi is first charged in the CFR court, and sentenced to time served (140 days) by the magistrate.
- But then he is later indicted by a Federal Grand Jury on one count of aggravated sexual abuse in Indian Country, an offense covered by the federal Major Crimes Act.
- Denezpi says 'no fair!' I've already been convicted and served my time from that incident, this is a violation of my 5th amendment right against double jeopardy.
- His argument is that 'the Feds came for me twice!' First the BIA, through the CFR court, prosecuted me, and now the justice department in Federal District Court.

Denezpi v. US

…nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb…

- The Court's opinion, by Justice Amy Barrett, finds that this dual prosecution does not in fact violate the 5th Amendment.
- Denezpi's single act transgressed two laws: the Ute Mountain Ute Code's assault and battery ordinance and the United States Code's proscription of aggravated sexual abuse in Indian country.
- The Ute Mountain Ute Tribe exercised its "unique" sovereign authority in adopting the tribal ordinance. The fact that its sovereign authority was used by employees of the Federal Govt. through the CRF court, and not a tribal court, does not change this.
- The dissent by Gorsuch is concerned about the dual-sovereignty exception in the first place, and emphasizes that both sets of laws are Federal, and both prosecutors are Federal; joined by Sotomayor and Kagan.
- Q – what's the most common dual-sovereign situation we tend to hear about in the news? How many trials could you wind up in for the same incident?

Clash of Sovereigns

Mississippi v. Tennessee: A case of original jurisdiction

- 1. Does Mississippi have sole sovereign authority over and control of groundwater naturally stored within its borders?
- 2. Is Mississippi entitled to damages, injunctive, and other equitable relief for the groundwater taken by Tennessee?
- 3. **Holding**: The waters of the Middle Claiborne Aquifer are subject to the judicial remedy of equitable apportionment; Mississippi's complaint is dismissed without leave to amend.
- This was a unanimous decision written by the Chief Justice.
- Note ***Virginia v. Maryland*** (VA could take water etc. from the Potomac) from 2003.
- Colorado River?