

Welcome to Civil Discourse. This podcast will use government documents to illuminate the workings of the American Government and offer contexts around the effects of government agencies in your everyday life. Now your hosts, Nia Rodgers, Public Affairs Librarian and Dr. John Aughenbaugh, Political Science Professor.

N. Rogers: Hey Aughie.

J. Aughenbaugh: Good morning Nia. How are you?

N. Rogers: I'm feeling fine. How are you?

J. Aughenbaugh: I'm doing all right. I'm doing okay.

N. Rogers: Yay! I know listeners will have heard that we're getting near the end. Now, we're close to the end of this summer of SCOTUS.

J. Aughenbaugh: I'm glad you clarified, cause you kinda paused there...

N. Rogers: I did. We're near the end. That's how the [inaudible].

J. Aughenbaugh: Well, that's rather apocalyptic.

N. Rogers: Exactly. The zombies are at the door. But we have a couple of things that we want to talk about, and the first thing that I want to ask you about for this episode, actually, we're just going to focus on McGirt, right?

J. Aughenbaugh: Yes.

N. Rogers: McGirt versus Oklahoma.

J. Aughenbaugh: Yes.

N. Rogers: I have to tell you that the only way that I knew about this case before I mentioned it to you and of course you are erudite and knew all the actual details, but what I had heard was people's hair falling out in clumps saying, oh my gosh, she's completely changes the entire justice system in Oklahoma and everything's going to fall apart and we're all going to die, and I thought, I bet that's not true. That's not true, is it?

J. Aughenbaugh: No, that's slightly hyperbolic.

N. Rogers: Slightly, you think? What's the deal with the case?

J. Aughenbaugh: What you had with the McGirt case was McGirt had been charged by the state of Oklahoma for a series of sex crimes, and he went ahead and argued that per a treaty in the 19th

century, the state of Oklahoma did not have jurisdiction to try him because he's a member of the Creek Native American Tribe. He went ahead and argued that even when Congress admitted Oklahoma as one of the 50 states, Congress had failed to repudiate the previous treaty. Now, this was an issue that actually arose for the United States Supreme Court in its previous term. We're basically talking about the 2018-2019 term and the Murphy case. But apparently the justices split four to four, and Justice Gorsuch had to recuse himself because in the Murphy case, he actually participated in it when he was serving on the 10th circuit Court of Appeals. The Supreme Court took the McGirt case to basically address the same question, and the question was basically this: Did the state of Oklahoma have the authority to try McGirt or any other member of the Creek Nation for violating state law? The court said, no, that McGirt could only be tried by the federal government for the offenses of sex crime offenses. Yeah, go ahead.

N. Rogers: I'm sorry. I raised my hand. Listeners can't see that, but I raised my hand. I have a question. It's not just that he's creek, it's that its reservation land, right?

J. Aughenbaugh: Yeah.

N. Rogers: Even if he were not creek, there are different rules for tribal lands than there are for county lands or state lands, right? Or city lands. Tribal lands have their own judicial system, right?

J. Aughenbaugh: Yeah. You're talking about basically the issue of who's got jurisdiction.

N. Rogers: Okay. So even if he had not been a member of the Creek Nation, he did that on what they were saying is Creek property.

J. Aughenbaugh: Yeah. It's part of the Creek Reservation, as established.

N. Rogers: In 18 mumbley, mumbley.

J. Aughenbaugh: Yeah, by a treaty in the 19th century. Because basically the Creek Nation was one of those Native American tribes that were forced from their homelands in the trail of tears, and they were sent to what we now call the jurisdiction or state of Oklahoma. But what McGirt argued is,

N. Rogers: I was tried improperly.

J. Aughenbaugh: Yes.

N. Rogers: Because I wasn't tried by tribal...

J. Aughenbaugh: Yeah, by the Creek Nation. The Creek Nation has jurisdiction where the crimes allegedly were committed, and that's why I tell my students all the time, where you commit a crime, determines which government has jurisdiction, which court system has jurisdiction.

N. Rogers: Yeah. Because if you murder someone, which I would suggest you don't murder anyone, ever, but if you do it in a federal park, if you do it in Yosemite, that's a federal crime, but that's not going to be tried by the state. That's going to be tried by the federal government.

J. Aughenbaugh: That's right.

N. Rogers: Similarly if you murder someone in Washington DC.

J. Aughenbaugh: That's right.

N. Rogers: Because that's federal property, that's a federal crime as opposed to if you murdered someone in Richmond, where Richmond is its own locality, not federal property, not currently anyway.

J. Aughenbaugh: You can take that even one step further Nia, which local government jurisdiction within the Commonwealth of Virginia can actually try you for a crime. Because the US Constitution says you may only be indicted for a crime in the jurisdiction where you committed the crime. So there's a huge difference. For instance, if you're charged for murder in the city of Richmond or in northern Virginia versus Southwest or Southside Virginia, right?

N. Rogers: Okay.

J. Aughenbaugh: Okay. You understand the point here. That's extremely important because you have different laws, you have different, if you will, prosecutors, you have different juries, you may even have different judges. So when I give the example of, again, if you were to commit murder and whatnot-

N. Rogers: Which we strongly suggest you don't.

J. Aughenbaugh: Yes, we're not encouraging the commission of murder. Okay, let's be very clear.

N. Rogers: We're not trying to tell you how to get away with it.

J. Aughenbaugh: Yes. However, if you were to commit murder in Virginia, and you wanted to avoid getting the death sentence, it would be far better to commit murder up in Northern Virginia, where prosecutors are less likely to want to charge you with capital murder, and juries are less likely to even give that sense than if you were to commit a similar crime in Southwest Virginia, where prosecutors are more likely to charge you with capital murder, and juries are more likely to give you that sentence.

N. Rogers: I'm going to say, that if you were a murderer and you took all that into account, that would be extraordinary, on every level possible, that would be extraordinary. There would be something so wrong with you we just couldn't fix it in this world.

J. Aughenbaugh: Yes.

N. Rogers: But so not only is he Creek, but where he committed the crimes.

J. Aughenbaugh: Yes.

N. Rogers: Is under Creek jurisdiction.

J. Aughenbaugh: Yes.

N. Rogers: He says.

J. Aughenbaugh: Yeah, that's what he claimed.

N. Rogers: The Supremes say...?

J. Aughenbaugh: We agree with you, McGirt.

N. Rogers: Ah. So they upheld the fact that the treaty was not properly dissolved.

J. Aughenbaugh: That's right. They went ahead and said that the land in basically northeastern, eastern Oklahoma, has been reserved for the Creek Nation since the 19th century, and that means that unless the federal government wants to charge him for those crimes, the state of Oklahoma cannot bring charges against him.

N. Rogers: But that doesn't mean that the Creek Nation can't bring charges against him.

J. Aughenbaugh: Yeah.

N. Rogers: Right?

J. Aughenbaugh: Yeah.

N. Rogers: The tribe can do that now, and the federal government can do that, because all land is federal land at some level, right?

J. Aughenbaugh: No, not necessarily.

N. Rogers: No? Okay.

J. Aughenbaugh: Okay. Remember, the Constitution prohibits.

N. Rogers: That little pesky states rights thing. Never mind.

J. Aughenbaugh: Yeah. Again, we've talked about this in previous podcasts episodes. Historically, the police power of government is reserved to the states in this country. So unless the feds can go ahead and tie it to some explicit provision in Article I, and by the way, Article I gives the United States Congress

free reign to do whatever they want with Native Americans. The majority opinion in this case makes that very clear, even though they ruled in favor of McGirt, the majority opinion written by Justice Gorsuch, and by the way, the vote was a little unusual in this case, it was five to four, but it was Gorsuch plus the four liberals.

N. Rogers: Yeah, that's a little odd. Usually, it's John Roberts plus the four liberals.

J. Aughenbaugh: That's right. If anybody's going to splinter. But Gorsuch has an independent streak, and that's where his, if you will, textualist methodology, because remember it was Gorsuch who wrote the majority opinion in the Bostock case, where he went ahead and said the definition of sex has to include gay and transgendered employees. Here, he's a textualist. He made it very clear. If nothing else, Congress was sloppy. Congress, when they admitted Oklahoma, should have explicitly said, "All previous treaties regarding Native Americans within what will be the jurisdiction of the State of Oklahoma are now considered null and void." But Congress never did. Yeah. Gorsuch held Congress accountable.

N. Rogers: Well, I like that, first of all, but also, it's an interesting question given the time we're living in, that they didn't even think that they had to address the Native American question.

J. Aughenbaugh: Yes.

N. Rogers: We can simply do with you what we want. Without regard to any previous agreements we might have made, any previous treaties we might have made, any land we might have ceded you, we're just going to ignore all that because what are we going to do about it? You know what I mean? There's a not even remotely subtle racism in that, in the idea that you can say, "We just don't even have to address any promises we've made this group."

J. Aughenbaugh: Well, Gorsuch's majority opinion, Nia, to that point, Gorsuch's majority opinion and the main dissent, which was written by Chief Justice John Roberts, both admit and chronicle all the ways the US federal government in particular, but to a certain extent, even the State of Oklahoma have ignored or broken existing legal arguments with the Creek Nation or other Native American tribes in this country. There was no escaping what you just mentioned, which is that historically, governments in the United States were racist in regards to Native Americans. They lied, they bribed them, they made explicit promises, and they broke them. There's a long-standing Federal Court case where the Department of Interior is supposed to manage all the royalties for all the natural resources that have been mined on Native American tribes and the federal government, I think was as far back as the Clinton administration, has acknowledged in Federal Court, they don't know where all that money has gone.

N. Rogers: They just screwed the tribes out of their money, they screwed them out of their land. Yeah. I like that he's basically saying the time for that is over.

J. Aughenbaugh: Yes.

N. Rogers: The time for being able to just jack people in that way is no longer acceptable and you're going to need to clean it up.

J. Aughenbaugh: One of the arguments made by Oklahoma was that because of the congress and the State of Oklahoma has basically treated the Creek Nation as though it was part of the State of Oklahoma, that that was the effect, the practice, basically, if you will, set up what the law meant, and Gorsuch said, "No." In fact, according to Gorsuch, that's the definition of lawlessness.

N. Rogers: I like that phrase. I saw that in your notes that the definition of lawlessness is exactly ignoring the law. In the dictionary, right here under ignoring the law, it says lawlessness. In a thesaurus, actually.

J. Aughenbaugh: Yes.

N. Rogers: Did he use the word sloppy? Please tell me he did.

J. Aughenbaugh: No, he didn't, but he was abundantly clear in at least two sections of his majority opinion that he was taking Congress to task.

N. Rogers: Is there anything the Congress can do now to alter that?

J. Aughenbaugh: Yeah. Congress could pass a law tomorrow, Nia, and say, "We are ceding all land that was previously given to the Creek Nation and blah, blah, blah treaty. We're giving it to the State of Oklahoma."

N. Rogers: Is there any chance of that?

J. Aughenbaugh: No. There's very little chance.

N. Rogers: Good, because that would be terrible.

J. Aughenbaugh: Yeah.

N. Rogers: That would be a rubbing salt in the wound of this injustice.

J. Aughenbaugh: Yes.

N. Rogers: Yeah.

J. Aughenbaugh: According to scholars, this is one of the very few Supreme Court decisions that ever came down in favor of Native Americans. Historically, the Supreme Court will just go ahead and say, "Congress has the authority to do whatever they want to to Native Americans, and that's an explicitly enumerated power the framers gave to the Congress and we're not going to get involved in that kind of political dispute." But this was one of the rare times where a narrow majority of the court, and by the way, I got to think that the four liberals wanted to go so much further than Gorsuch. But Gorsuch was just like, "We have an existing treaty that was never overturned, repudiated by Congress, so we're going to hold Congress accountable." Boom, done. That's it.

N. Rogers: Right. This doesn't get into the moral questions or the ethical questions.

J. Aughenbaugh: No.

N. Rogers: That just gets into the technicalities of the law. No, you never stopped having that treaty so you still have that treaty.

J. Aughenbaugh: Yes.

N. Rogers: Aren't we still at war with someone? I can't remember. We have a declared war that it took us years and years and years to end because we just never said, "We're done with that war."? I can't remember what war is now. It's one of the big ones. But anyway, somebody was telling me the other day, we're technically still at war, it's like Korea or World World II or something.

J. Aughenbaugh: In terms of the Korean War, because there has not been a treaty to effectively end that war per the United Nations, we're still obligated to go ahead and defend the DMZ, the demilitarized zone.

N. Rogers: This is what happens to you when you don't do your paperwork.

J. Aughenbaugh: Yes.

N. Rogers: I'm just saying. This is what happens when you don't do the paper. This is what happens when you fail to say, "Wait, is there any paperwork we should clean up before we create the State of Oklahoma?" Somebody should have looked around and said, "Yeah, I got this treaty document, we probably ought to look into that," and instead, they just said, "We don't care about the Native Americans."

J. Aughenbaugh: Yeah.

N. Rogers: We're going to declare Oklahoma a State, because that's what we want to do and then we just do it.

J. Aughenbaugh: When was it? Oklahoma was admitted into the Union in 1907, I think.

N. Rogers: I don't know. Let me check.

J. Aughenbaugh: He is looking that up right now. We actually have real-time Google searching going on.

N. Rogers: That's right. We have real-time reference checking. 1907. November 16th, 1907.

J. Aughenbaugh: Congress not ending the treaty. I mean, definitely reflected the attitude of members of Congress at that time. That we don't have to go ahead, and publicly, even give Native Americans the respect of saying.

N. Rogers: Of tearing up the treaty.

J. Aughenbaugh: Yeah, we're screwing you. No.

N. Rogers: Go ahead.

J. Aughenbaugh: I mean, in the law that's almost like the worst form of disrespect. We think so little of you, that we're not going to officially go ahead and say, what we are doing to you today, which is effectively going back on a treaty that was supposed to govern your relationship between the Nation and the federal government. That's how little they thought of the Creek Nation.

N. Rogers: Well, indifference is the most cruel emotion, and you just, I didn't even think of you. Like, wow. I'd rather you say I thought of you and didn't care than I didn't think of you at all. Those are two very different things.

J. Aughenbaugh: The hierarchy here, ambivalence at least is better than indifference. Because with differences, I thought so little of you, I didn't even think of you. Ambivalent says, yes, I at least thought of you but still went ahead and chose to harm you.

N. Rogers: But I didn't care. I thought of you but I didn't care.

J. Aughenbaugh: Yes.

N. Rogers: The hand-wringing and the hair clumping that I was mentioning at the very beginning of the episode, what people said was that's going to overturn every single case that's ever been held in Oklahoma and it's the end of justice in Oklahoma, and this guy's going to get off scot-free. None of that is true.

J. Aughenbaugh: No. I mean, because the reality is those Native Americans who had been prosecuted by the state of Oklahoma may file suits, particularly in federal court, claiming the writ of habeas corpus violations. But most federal judges are going to go ahead and say, okay, but you can't go ahead and claim that, when the entire criminal justice system in the state of Oklahoma relied upon this accepted wisdom. You're going to have to go ahead and show that Oklahoma knew that it was violating this treaty when they prosecuted you. Good luck with demonstrating that."

N. Rogers: It's not just Native Americans or it's any crime with happened on tribal property.

J. Aughenbaugh: Yes. But again, the Creek Nation has been in negotiations for the last couple years with the state of Oklahoma, about how to go about, if you will, establishing a legal cooperation between the state and the Creek Nation.

N. Rogers: So it's not like they're suddenly declaring themselves lawless and come here and commit crimes? No. They're fully part integrated into or at least trying to integrate the two systems together.

J. Aughenbaugh: Yeah, I mean, because the Creek Nation doesn't want ramp it lawlessness to occur in that area. They're concerned about the public health and safety of, if you will, of the members of the Nation. Likewise. Sure. The Creek Nation, effectively, now has jurisdiction over roughly the eastern half of what used to be the state of Oklahoma. On the other hand, is the Creek Nation capable of managing all of that? Probably not. They're going to need assistance.

N. Rogers: It's certainly at this point do not have the infrastructure for that. Even if they could slowly build up to it, that's not something you do the next day after this ruling comes out.

J. Aughenbaugh: No. There are incentives for both the state and the Creek nation to negotiate in good faith, and likewise, according to various laws passed by Congress, major crimes that occur on Native American reservation lands still may be prosecuted in federal court. If you're the Creek Nation, do you want individuals on lands that you now have jurisdiction, do you want them to go ahead and be indicted in federal court or would you prefer state court? Federal courts are not always, shall we say, more lenient than state courts. I mean, a lot of it depends on who's running the executive branch, when a crime is committed. I mean, these are all very complicated legal issues. When I was tearing all of the sky is falling, type of teeth gnashing, and my goodness, I'm like, hey, woah woah woah. We're not talking about a return to the Wild West where nobody knows who's in charge here. There are legitimate interests of the Creek Nation, the state of Oklahoma, and the federal government to work this out, and there are significant, if you will, business and commercial interests in working this out.

N. Rogers: I know that listeners know that Aughie often makes notes for me, because cases are somewhat byzantine occasionally. You did mention that the City of Tulsa is now in the Creek Nation.

J. Aughenbaugh: Yes.

N. Rogers: One of the hand-wringing things that I heard was that the Creek Nation could now declare itself a state separate from Oklahoma. I know they can't do that for a variety of reasons. You don't just become a state because you want to, and ask Texas, you can't just leave when you feel like it. There are rules to be followed, but also, all the people living in Tulsa don't want to necessarily be in another country and they would be like, "Wait, what? No, I don't want another state. No, I'm an Oklahoman. I was born in Oklahoma, raised in Oklahoma." The hand-wringing, I think it needs to stop. But, you mentioned something else which I found, I was very excited and I know that listeners can't see me, but my fingers are doing that Dr. Evil thing where I'm tapping them against each other, because isn't that where a huge amount of the oil in Oklahoma is found?

J. Aughenbaugh: Yes. A huge amount of the oil and natural gas produced in the state of Oklahoma and processed by refineries in Oklahoma is in the eastern part of the state, which according to the Supreme Court ruling, is still technically the jurisdiction of the Creek Nation.

N. Rogers: The taxes from those businesses and the leasing rights and all that other stuff, all of that can now financially benefit the Creek Nation.

J. Aughenbaugh: That's right.

N. Rogers: I assume that Oklahoma's sweating just a little bit.

J. Aughenbaugh: Well, let's just put it this way.

N. Rogers: Well, let's make a negotiation. Aren't we friends? Let's be friends. Let's all get along, because that's a huge amount of state income, I would assume.

J. Aughenbaugh: Yes. Let's just put it this way, if, and I don't know because I'm not a native of Oklahoma, but let's just say theoretically, hypothetically, if the state of Oklahoma was dragging its feet in negotiating with the Creek Nation before this ruling, that feet dragging isn't going to work anymore, because the Creek Nation now has significant leverage. Again, the Creek Nation doesn't have the infrastructure to go ahead and tax all the businesses and ensure all the royalties are flowing to the Creek Nation. They're going to need help with this. It's not like the Creek Nation is going to go ahead and say, no, you need me.

N. Rogers: We get all the money. Go away.

J. Aughenbaugh: Okay.

N. Rogers: Because they'd have no way to administer.

J. Aughenbaugh: Yes. They're going to want those businesses to continue to make money, but also pay for the rights, for all those natural resources. Again, that's something that states historically do. What do we have a resource that other people are willing to pay money for, that businesses are willing to go ahead and manufacture, and sell and distribute across the country or the world? Well, now, that's in the jurisdiction of the Creek Nation.

N. Rogers: Do you think what we'll probably see is some 50-50 split or 60-40 split? Like the state will say, we will continue to administer these kinds of things, we'll continue to do that, but we will increase the cut. I don't even know if there was a cut, but I assume there were some agreement. Although I'm saying that optimistically, there may have been no agreement, but they might say, "We'll do that, but we want the lion share of the profit because we are doing the administering."

J. Aughenbaugh: I don't know if Oklahoma would be able to go in and say we're going to get the lion share or the bulk. It might be an administration fee because right now, the leverage basically rests with the Creek Nation. But there are a lot of incentives for an agreement to be reached. By the way, this will be an agreement that will have to be ratified by Congress.

N. Rogers: Really? Why?

J. Aughenbaugh: Again, which level of government controls the nation's relationship with the Native American tribes? The federal government, particularly the United States Congress. Yes.

N. Rogers: The Bureau of Indian Affairs.

J. Aughenbaugh: Okay. Yes.

N. Rogers: Is it still called Indian Affairs, or have we changed it to Native American Affairs?

J. Aughenbaugh: I think it's still Indian Affairs.

N. Rogers: We should look into that.

J. Aughenbaugh: Yeah, yeah. It would not surprise me if with the rather significant changes that are being made currently in this country, that the name of that particular federal government agency changes. But think about this, Nia, Congress still has to ratify the recognition of Native American tribes in states. We've seen this in Virginia, what? In the last four or five years?

N. Rogers: Yeah. That's right.

J. Aughenbaugh: Yeah. But Congress had to pass a law recognizing certain Native American tribes that had been in existence in the Commonwealth of Virginia for centuries.

N. Rogers: Correct. We were here the whole time, but you go ahead and pretend we just arrived and you're going to recognize us.

J. Aughenbaugh: Yes. Well, with that recognition also comes certain benefits that are written into federal law. Was the ruling a shock? Yes. Are there potentially huge ramifications? Yes. On the other hand, I would caution people on both sides, those who were in favor of the Supreme Court ruling or those who were against it, hey, wait a minute here. Typically in this situation, cooler heads prevail. Individuals who are going to want a functioning government system to operate in the Eastern half of what used to be the state of Oklahoma, will more than likely sit down and say, "Okay, how do we make this work?"

N. Rogers: Right, because we want Oklahoma's borders to stay the same because otherwise, it gets really confusing with the other square states about where their edges are. Map makers everywhere are like no, we just got this, no, we surveyed it, we know where things are. No, I kid. But it is unlikely that the State of Oklahoma will suddenly stop having borders the way it has them.

J. Aughenbaugh: Yeah.

N. Rogers: Unlikely that Tulsa will suddenly be something else. It's all going to still be Oklahoma. People need to not wring their hands. There are some things that are going to change, but a lot of those things

are for the better, recognizing the Creek Nation, recognizing their rights, that's huge. That's huge for other tribes in other parts of the nation, who are also going to see some of this, even when their treaties had been revoked, there's some question about the fairness of that and the ethics of that. This is, I think, in a lot of ways, a very positive step forward. I think it's great that the liberals were like, "Let's let Gorsuch write this. There will be a lot less complaining if the one who crossed over is the one who writes it." He chose to write something that sounds like it doesn't talk about the morals, and the ethics, and the time in which we live. It talks about, straight up, no, you can't make a treaty with people and then not acknowledge the treaty. That's not okay. It's just not fair play.

J. Aughenbaugh: Yeah. Nia, Gorsuch's is majority opinion, kept on coming back to this idea that we're a nation of laws, and if we don't follow the language of the law, then yes, that's the definition of lawlessness. You're right. The way the votes shook... came out, Ginsburg would have been the senior most associate justice. So she would have had to decide to give Gorsuch the majority opinion. Now, I think it was very smart on her part to give Gorsuch the majority opinion because let's just say, for instance, she had given it to herself or one of the three other liberals on the court and they talked about morality and ethics and the long history of how the American federal government and state government broke all their promises to Native Americans, right?

N. Rogers: That would be judicial activism.

J. Aughenbaugh: Gorsuch would have written a concurring opinion, which would have called into doubt all of that written in the majority. Instead, we have a clear majority opinion that says, if the United States Congress has not repudiated a treaty with a Native American tribe, guess what? The treaty still holds even today. Boom, done. Thank you for coming to the ballpark.

N. Rogers: I imagine that lawyers everywhere are checking all the other treaties to see if they have been properly removed because if they haven't this could have a carry on effect. We could have a carry on, in fact, there. This as a big precedent in that sense. In reality, it's going to affect finances more than it's going to affect anything else, taxes and the natural resources. That's going to be the biggest effect of it on the ground but a greater carry on effect may be that they find out, oh turns out we didn't take care of the Utes. Name a tribe in the West where we just ignored it and accepted the state without dealing with that. That's going to ensure people everywhere are like, can I have the treaty of blah blah blah. I'd like to know if it's still in effect, which is great. That also will help settle their court if those treaties have been dissolved, then that will be a known thing. That will be established and a known thing and the question of whether it's ethical or moral is a separate question that we would settle politically anyway or should settled politically.

J. Aughenbaugh: Yeah.

N. Rogers: So I like that Gorsuch stuck to the no. Here's the law. The law is if you signed a treaty and then nobody ever tears it up or says never mind then it's still a treaty. That's the way treaties work. It's like the way IOUs work. If I write you an IOU and we never resolve the IOU then I still owe you that money.

J. Aughenbaugh: Yes. For those of us who follow the court or think about how important, for instance, it was that Gorsuch whose basically spent most of his life out West, how important his role was on the court.

N. Rogers: You mentioned that, that he's one of the few justices that has lived in the West. I didn't realize that. I never realized that there are really a lot of East Coast folks. Has that always been true of the Supreme Court?

J. Aughenbaugh: It's been dominated by people who've lived on the East Coast. Yeah. We had a period in the '80s and '90s when we had both O'Connor and Rehnquist who were from Arizona. Occasionally, we've had justices from California. But historically, the Supreme Court has been dominated by East Coast, but in particular Northeast. Northeasterners. Yeah.

N. Rogers: That interesting. Explore that sometime because that would have a huge effect I would think on how you see a lot of different issues.

J. Aughenbaugh: Yeah, that's right.

N. Rogers: That's why we need a broader cultural mix. Clearly, he's brought a point of view to this that the others didn't have for whatever reason probably, because they didn't live in it. I didn't understand water rights until I lived in Utah. Now I'm like, "Oh, it's a thing," because in the East, it's not a thing. We don't have water rights issues the same way that they have in the Western States and that it is life or death in the Western states. Your farm, your ranch doesn't go if you don't have water. I didn't understand any of that till I lived out West and I didn't do that till I was an adult. So I can see where it would bring a different perspective.

J. Aughenbaugh: That's why, Nia, when, for instance, I teach courts and politics and I ask students, do you think presidents should take into account non-talent, non-merit issues in the selection or the nomination of a justice? A lot of times students are like, "No. It should be the most talented people." I'm like, "Okay, wait a minute here."

N. Rogers: Who defines talent?

J. Aughenbaugh: Yeah. One, there is the myth of merit because let's face it. Scholars can identify maybe a handful of justices who had no business serving on the Supreme Court because they weren't all that talented. But most of them by and large we're smart people.

N. Rogers: Right. But plenty of smart people don't go to Harvard.

J. Aughenbaugh: Yes, and plenty of smart people shouldn't serve on a small decision-making body like the court.

N. Rogers: Right.

J. Aughenbaugh: That's not their niche.

N. Rogers: Simply strong suit.

J. Aughenbaugh: Yeah. But how do you go ahead and make sure, for instance, that the interests of people who live out in the West might get reflected or considered on the court? How do you go ahead and make sure that, for instance, religious or non-religious people have their interests considered on a court? African Americans, women, Hispanics, Asian Americans. These are all legitimate concerns because you get the right case with a justice who quite clearly... Gorsuch knew his stuff here. When you read his majority opinion, you're like, "Wow, this guy knows this stuff."

N. Rogers: Well, because these are real issues in his world that he's dealt with as a judge.

J. Aughenbaugh: Yeah. Okay.

N. Rogers: They're not theoretical. He's ruled in cases.

J. Aughenbaugh: Yeah. When I teach constitutional law and we talk about federalism and how federalism got resurrected in the late 1980s, early 1990s on the Supreme Court, I said, think about the influence of Justice Sandra Day O'Connor, who actually served in the Arizona State Legislature and served on the Arizona State Supreme Court. These were important issues to her because in part she lived those issues professionally.

N. Rogers: Yeah.

J. Aughenbaugh: Okay. These weren't theoretical issues, these were issues she dealt with on the job. I think she was Senate Majority Leader for the Arizona State legislature for a number of years. This is a person who knows how to go ahead and deal with state issues. She gets on the Supreme Court and she shows a lot of interest in federalism, not a big surprise. The other thing to take note of here, and again, this is just fascinating to me, is how the Supreme Court understood that it was an important enough issue in the Murphy case, went ahead and said, "Okay, we're not going to hand down a ruling." By the way, they didn't go ahead and say, "We affirm the lower court's ruling." They didn't come to a conclusion on it because they knew they were going to take a similar case. They issued the ruling to McGirt and then a few days later, went ahead and told the lower court, now you settle the Murphy case in accordance with what we ruled in McGirt. This is fascinating stuff. This is a government body that was a just like, "Hey, wait a minute here, we know this is an important case, we need to address it. Is there were similar case, i.e McGirt, to where we can look at this?"

N. Rogers: Gorsuch couldn't do the other one because he had ruled on it.

J. Aughenbaugh: In the lower courts.

N. Rogers: Yeah, he had to recuse himself. They were like, "No, we need all nine of us, so let's find a case, okay, that one, and once we rule on that, then that will carry-over everything else." It's pretty clever.

J. Aughenbaugh: Yeah.

N. Rogers: Although what's fascinating to me is I wonder when they did that, if Roberts thought it would go a different way. Hindsight 2020, as we've discussed about this year, if he thought he was going to get a different ruling.

J. Aughenbaugh: Well, Nia, remember our conversation in Listeners, if you run to the episode where we talk about the Supreme Court granting a cert rich, rich of cert award.

N. Rogers: Earlier in this season.

J. Aughenbaugh: Yeah. The summer of SCOTUS. What is it? The second or third one. Living in a pandemic, and we're very empathetic for all of our listeners, if the days blend for you guys, it certainly just blend for us.

N. Rogers: Yeah, today is blur's day.

J. Aughenbaugh: Yeah, because Nia and I will start talking about future podcast episodes and we're like, have we touched upon that issue?

N. Rogers: Yeah. Sorry, it's coming or it was already, sorry. Yeah. I feel like, I don't know if you know Dr. Who.

J. Aughenbaugh: Yes.

N. Rogers: When he always says that his life works out time-wise differently than everybody else because he flips back and forth in time. If you don't know what I'm talking about, feel free to look that up on Google.

J. Aughenbaugh: But in a previous podcast episode that I know is all a blur because I've actually listened to it. We talked about the Supreme Court's Rule of Four. Four justices have to agree to hear a case. But we talked at length about how strategic it is because if you vote to take a case, you're hoping, projecting that a majority of the court is going to vote in the way you want them to. But if you don't know for sure, do you actually vote to take a case? Because once the Supreme Court rules, that's a precedent.

N. Rogers: Well, this set a huge precedent.

J. Aughenbaugh: Oh, my goodness, yes.

N. Rogers: This is enormous.

J. Aughenbaugh: Yes.

N. Rogers: It's interesting. I wonder if if John Roberts, when this came out, if he laid in bed at night and went, "Well, that was a mistake." I don't know. I like to think that John Roberts, I don't know him obviously, but I like to think that he thought, well, that's how it plays out. He, I think has the long view of things where he knows that sometimes he's not going to get necessarily what he wants, but that over the arc of his career, he wants to do the right thing, he wants to protect the institution, and part of the institution is independence. It's Gorsuch saying, "Hey, I appreciate that you think I'm a Conservative justice, but in this particular instance, I'm snuggling up with Ginsburg, metaphorically." I doubt physically. You know what I mean? But I think that's what's so great about. We've mentioned it several times, but that's so great about the court, is that the Justices say, "Yeah, you think I'm conservative, but in this particular instance, the conservative view is to do the thing that most people think is liberal." The conservative view is to look at the law and say, "No, that treaty was never dissolved. That's not a thing."

J. Aughenbaugh: Yeah. That's the last point that I was going to make, Nia, and this is something I say to my students all the time. You got to be careful with how we label Justices as liberal or conservative. Or this Justice is a strict constructionist, which means that they are conservative. This Justice sees the Constitution or the law as a living document so they must be liberal. Well, Neil Gorsuch, nobody would accuse Neil Gorsuch, of being a liberal. But the method he uses, which is a version of being a stricken instructionist, known as textualism, will at times produce what politically we would say is a liberal result. He can do that because he's on an institution that is politically independent. He doesn't have to worry about conservative voters holding him accountable and saying, "You're not a faithful conservative." Well, Neil Gorsuch is a federal court judge, and he can go ahead and say, na-na na-na.

N. Rogers: I would give money to see that, just in case you were wondering. But he can because what's going to happen if Justice Ginsburg votes with the Conservatives over something? What are they going to do? They're going to take away her birthday? I don't think so, that's not how it works.

J. Aughenbaugh: Yeah, listeners, in a future podcast episode, Nia and I are going to do a summary of the Supreme Court term, and one of the big story lines is how John Roberts voted with the "Liberals" a number of times.

N. Rogers: Don't ruin it.

J. Aughenbaugh: But it's one of the story lines, one of a number of story lines. But what's really fascinating is John Roberts, in this case, was in the minority, he was one of the dissenters. We just finished a Supreme Court term with one of the lowest number of decided cases since the mid-1800s, and the pandemic affected the overall number. John Roberts was the in minority only like three or four times. That's almost unheard of. Again, to your point, if John Roberts voted to take this case, he had to be thinking, "Hey, wait a minute here. Historically, we've ruled against Native Americans, let's not blow up all of the legal, and governmental, and business systems in the eastern part of Oklahoma, blah, blah, blah." But it didn't matter, it was one vote of nine.

N. Rogers: Yeah. Turns out being the guy who has to sign off on the administrative crap and has to do all the paperwork doesn't get you anything really, except you get to sit in the middle and you get to go first.

J. Aughenbaugh: Yeah.

N. Rogers: That's it. That's all it gets you.

J. Aughenbaugh: If you're lucky enough to be in the majority, you get to sign the majority opinion, but otherwise, you're just one vote of nine. That's it.

N. Rogers: That has to be in some ways very humbling.

J. Aughenbaugh: I bet it is.

N. Rogers: We're going to wrap this episode up, but we are going to be back with, I think a couple of more, we just have a couple more. I think we're going to talk about some taxes. We are going to talk about DACA, in case people were wondering, we haven't done that yet, but we are going to talk about DACA, and what it means going forward. Then we'll have a little wrap up. So thank you so much for talking to me today.

J. Aughenbaugh: No, hey, I enjoyed it.

N. Rogers: Bye.

J. Aughenbaugh: Bye.

You've been listening to civil discourse brought to you by VCU Libraries. Opinions expressed are solely the speaker's own and do not reflect the views or opinions of VCU or VCU Libraries. Special thanks to the Workshop for technical assistance. Music by Isaak Hopson. Find more information at guides.library.vcu.edu/discourse. As always, no documents were harmed in the making of this podcast.