Intro:

Mr. Chief Justice, may it please the Court. It's an old joke but when a man argues against two beautiful ladies like this, they're going to have the last word.

Intro :

She spoke, not elegantly, but with unmistakable clarity. She said, "I ask no favor for my sex. All I ask of our brethren is that they take their feet of our necks."

Kate Shaw:

Welcome back to Strict-Scrutiny, your podcast about the Supreme Court and the legal culture that surrounds it. We are three of your hosts. I'm Kate Shaw.

Leah Litman:

I'm Leah Litman.

Melissa Murray:

And I'm Melissa Murray.

Kate Shaw:

Today we're going to bring you a recap of some of the big opinions from this last week of the court's term. And we're going to wait until next week to do a big sort of look back at the term with sort of big themes and takeaways. So we're going to stay pretty focused on the big opinions today. Melissa, you want to start us off?

Melissa Murray:

All right. I will start you off. We are not having any breaking news on this episode. Not because nothing has happened. There are lots of things that have happened. Geoff Berman has gone to a luxury hotel where there were sandwiches but he didn't eat but we're not going to talk about that. Instead, we have so many opinions to get through that we're just going to focus on those. And so the first opinion we're going to talk about today is Trump versus Vance.

Melissa Murray:

If you haven't been following the Trump subpoena cases, this is the particular subpoena case that was focused on a subpoena from the Manhattan DA's office to the Trump accountants, the financial team in order to disclose financial documents that would aid in a criminal investigation of whether or not hush money payments had been paid to Stormy Daniels and Karen MacDougal by the President or his campaign to keep these alleged affairs between the President and these women under wraps through the election.

Melissa Murray:

When we talked about this case, when the oral argument was conducted in May, we were pretty complimentary of Carey Dunne who argued on behalf of the Manhattan DA's office. It was his first outing before the court. And he was absolutely phenomenal in that showing. And not surprisingly, he was so phenomenal that the justices all seemed to get on board with his account of things.

Melissa Murray:

The argument that he made in oral argument was that the President could not be above the law, could not be above participating in a criminal investigation. And as precedent for that proposition, he cited two Supreme Court cases; the United States versus Nixon and Clinton versus Jones, on both of which the Court unanimously concluded that the President would have to participate in judicial proceedings on civil judicial proceedings in the case of Clinton and criminal judicial proceedings in the case of the United States versus Nixon, but that the fact of being president at the time did not preclude the president from participating. There was no blanket immunity.

Melissa Murray:

And in an opinion of 5-2-2 set of opinions, the court agreed with this particular proposition rejecting the Department of Justice's and the President's contention that there was a broad blanket of immunity for the president by virtue of his position. The Chief Justice wrote the majority opinion in which justices Ginsburg, Breyer, Sotomayor and Kagan joined. Justice Kavanaugh wrote a separate concurrence in which he was joined by Justice Gorsuch and Justice Thomas and Justice Alito both wrote dissents.

Melissa Murray:

Essentially, in this case, the majority just agreed with this idea that in our judicial system, the public has a right to every man's evidence and the court concluded that there was no blanket immunity, that the President had to at least participate in the process as any private citizen would, which is to say that this case would go back to the New York courts, the President could have an opportunity in the New York court system to lodge defenses against the subpoenas. Either that they were too broad or that they were inappropriate for particular reasons. But the fact of being president by itself was not an immunity defense for the President.

Melissa Murray:

He had all of the same options that any private citizen would have encountering the subpoenas, but it would ultimately be up to the court. What this means as a practical matter is that if the President does go back to the courts and contest the subpoena, they will make a decision about whether these subpoenas can go forward and these documents can be disclosed. If the documents are disclosed, they will only be disclosed to the grand jury, which is to say that they will remain out of public view certainly until the election. They may inform-

Leah Litman:

Or until a New York Times reporter calls the grand jury or DA's office and ask them for it and in Sam Alito's vision for how the world works, then the New York DA just shares everything they've got. I don't think that's going to happen. But, I did want to-

Melissa Murray:

Leah is referring to a rather pitched colloquy between Justice Alito and Carey Dunne at oral argument where Justice Alito, who himself has been a prosecutor in his career suggested that the New York DA's office is regularly on the phone with the New York Times releasing sealed grand jury information to reporters on a regular basis.

Melissa Murray:

I think that's unlikely to happen. Certainly, Carey Dunne said that that was not in the prosecutors code. This is all to say that even if these documents are released per the subpoena, it is unlikely that the public will be able to understand or know what the contents of these documents are certainly in advance of the election. Although the documents may inform any further criminal investigation and indeed criminal prosecutions that might go forward. That was Trump versus Vance. What do you guys think?

Kate Shaw:

So just a couple things to add. It's not only the five plus two, but actually plus two. The Court unanimously rejects this absolute immunity argument that the president's lawyers made. It's like both a subtle and a pretty sharp kind of slap down by the Chief Justice there. It's taken seriously on its own terms. But both the beginning and the end of the opinion are these quotes from the Aaron Burr trial for treason, not for killing Alexander Hamilton. Not just the quote from RBG, that the public has a right to every man's evidence but that there is a history of total exemption from participation in legal process. And the only person historically who's been seen as not subject to the process of law is the king.

Kate Shaw:

We don't have a king. There's actually this very explicit quote from John Marshall to that effect which sort of seems to send the message. That's kind of what you were asking for Trump Team, some kind Royal prerogative to avoid altogether legal process. There's no basis for that in our law. And then there's a secondary holding, which is I think also quite important, which only five of the members of the court joined, which is that even this heightened showing, this sort of special need a test that the Solicitor General's Office sort of offered up to the court is also not warranted.

Kate Shaw:

He says categorically, the Constitution does not entitle the president to absolute immunity or a heightened standard. And well, I think we were all pretty sure coming out of the oral argument that this absolute immunity was a non-starter to the heightened standard. I think we weren't sure about and I think a majority of the courts rejecting that is significant.

Kate Shaw:

I also think that although there is... It's absolutely the case that the opinion allows the president to raise specific objections in the lower court. It's not clear to me what other objections remain. There's no plausible privilege claim. There could be an argument that subpoenas are over-broad but I'm not sure that's likely to go very far. It strikes me that this should all be resolved very quickly in the lower courts.

Melissa Murray:

Well, it's certainly not likely to go very far in the context of just being released to the grand jury. The scope of the grand jury's inquiry is necessarily broad and so it would be very hard, I think, to say that a subpoena was insufficiently narrow in order for the grand jury to get it. What did you make of all of these Hamilton references? I felt like the chief justice and his family were just glued to Disney+ all week.

Kate Shaw:

They're just like us, justices. We were all glued to Disney+.

Melissa Murray:

Justice Kagan was talking about Hamilton, the chief was talking about Hamilton. Everyone is on Disney+.

Kate Shaw:

Leah, I want you to comment. Can I to ask one question, which I feel like you might have thoughts on, which is like so the mention of Ginsburg sort of being channeled through the Chief Justice's opinion highlights something which is the kind of conspicuous absence of and we can do this, skipping ahead a little bit to the Mazars case but the Ginsburg, Sotomayor, Kagan, Breyer, are they just like holding their breath and sticking with the chief because they're happy enough with the bottom line that they don't want to rock the boat to mix metaphors? Why doesn't anybody say anything separately?

Leah Litman:

I think it's a combination of things. It's part that this opinion in particular Trump versus Vance did really, I think, channel the arguments that they would have written or embraced had they written it themselves with the possible exception of how the Chief Justice characterized the disposition in this case and what the Second Circuit had asked the trial court to do.

Leah Litman:

The Chief Justice says, "We're affirming the Second Circuit opinion which had been written by Judge Katzmann" and that we've praised before. But then he indicated he was affirming the disposition which he characterized as a remand to the trial court to adjudicate any more specific challenges to this particular subpoena and how exactly it infringes on the President's powers. And the separate two justices Justice Kavanaugh and Justice Gorsuch concurred in the judgment and again wrote to characterize the disposition as unanimous agreement that the case should be remanded "where the President may raise constitutional legal objections to the subpoena as appropriate".

Leah Litman:

But I'm just not sure that's actually what the Second Circuit was contemplating or inviting, because the footnote in the Second Circuit opinion that the Chief Justice cites says because the president sought only declaratory and injunctive relief, it's basically up to the district court as to whether any further proceedings are necessary. And then the Second Circuit went even further to say that the President had not explained why any burden or established why any distraction from the subpoena to the third party would rise the level of interfering with his duty.

Leah Litman:

That seems to reject any more particular challenges to the subpoena and preclude further proceedings or at least not envision rather substantial ones. But it's not clear that that's what the Chief Justice's opinion or Justice Kavanaugh's concurrence in particular does. And Justice Kavanaugh with Justice Gorsuch concurred and they would have adopted the heightened showing of need standard from Nixon to apply to third party subpoenas for the President's personal papers. And yet they're concurring in the judgment because they think there's enough for everyone in this opinion where they think they got enough from the chief's opinion where they're fine with it. It's just a kind of an odd, I think, opinion that is partially the result of it being the end of the term and they're desperately wanting consensus.

Melissa Murray:

We've seen this before. Obergefell was a sort of sweeping pion to marriage. Justices Kagan, Ginsburg and Sotomayor, none of whom were actually married at the time kind of went along with it. And later, Justice Ginsburg noted when asked about why they had signed on without offering any kind of counterpoint said that they were just so eager to get Justice Kennedy's vote and so unwilling to rock the boat about it that they kind of just shut up and put up and went along with it. I think this is probably another one of those cases where they're just glad to fight another day-

Leah Litman:

And they'll leave it to us to raise the concerns with the opinion such as the arguable mischaracterization of what-

Kate Shaw:

Right, we don't need to write because Strict-Scrutiny is going to read this carefully enough to see the chief being sort of fast and loose with the Second Circuit's actual language.

Leah Litman:

"Baby girl" you got this. Including the footnote. Don't worry Ruth, I've got you.

Kate Shaw:

District court, don't be fooled. Not withstanding that characterization, I think it's a very significant opinion given just what a blow to the rule of law it would have been had it gone the other way even in part.

Melissa Murray:

Was anyone really surprised? I don't think I was surprised that they came out in favor of the Manhattan DA's office. To be clear, I don't think it was a huge stretch to allow the subpoenas to go forward in this context. It's just going to be released to the grand jury. It is in the context of a judicial proceeding. I think was sort of expected. If they had gone the other way, I think that would have been just so radical to be shocking, really. This one didn't surprise me that much. I think what was perhaps more surprising to me was the vehemence of the two dissents.

Kate Shaw:

Well, Alito, yeah. Thomas actually was a little bit more milder in dissent than I expected him to be.

Melissa Murray:

He was milder, yes.

Kate Shaw:

It was less of a presidentialist tone than I would have expected him to write. But Alito has stayed mad. He has been so mad in so many cases this term and this is no exception.

Melissa Murray:

Why is he so mad? He's 70 years old and he looks like he's 50. Celebrate.

Leah Litman:

He got a lot done this term, which we'll talk about in the term recap. I'm sorry, you didn't get everything you wanted Sam.

Melissa Murray:

He did a lot of work though. He got a lot done.

Leah Litman:

Exactly. Think about those 75 to 120,000 women you left without contraception. Smile and be happy. I did appreciate his citation to the census opinion when he quoted the chief saying, "We need not 'exhibit'a naivete from which ordinary citizens are free." Always loving to troll the other justices with their prior opinions. I'm here for it.

Kate Shaw:

That was classic Trollito.

Melissa Murray:

I wasn't on that show when you called him Trollito but I literally almost crashed a car when you said it.

Kate Shaw:

Oh, Melissa.

Leah Litman:

It means so much that you would almost crash a car.

Kate Shaw:

Almost. Everybody's fine.

Melissa Murray:

Don't drive while listening.

Kate Shaw:

Okay. So maybe let's move on to the other subpoena case. Trump versus Mazars which I think it's right that we were all expecting the outcome in Vance, not necessarily all of the reasoning. But Mazars was a harder case to call in certain respects. We were very critical after the oral argument, which was telephonic as was Vance, of the house lawyers performance and sort of seeming inability to demarcate any limiting principles to Congress's subpoena power.

Kate Shaw:

And the court also seemed skeptical of that failure. Basically, to break this opinion down, this is also a seven-two opinion that is a win for Trump more than the Vance case is for sure. But it is also a mixed bag in that it does not adopt the extremely broad arguments that the President offered which would make it very difficult for Congress to do much investigation of the president at all.

Kate Shaw:

Just a reminder, this case involves a few different congressional committees and a bunch of different subpoenas to financial institutions; Mazars, Deutsche Bank and others, seeking a range of materials for a bunch of different articulated purposes. Ethics, legislation, investigation of foreign interference, things like that. And the House basically came to the court and said, "All we have to do is articulate a legitimate legislator purpose and we can basically get anything we want." And the court pretty squarely rejected that kind of broad assertion of Congress's investigative authority, but also again, rejected the President's desire to have the court really, really place limits on Congress's ability to investigate the president.

Kate Shaw:

It reaffirms Congress's power of inquiry and says that when we're talking about subpoenas that are directed to the President's personal information, and I should say just as a sidebar, something that I thought was a little strange both in this case and Vance's, is that the court kind of treats these as subpoenas to the President. Right? There's even a footnote in Vance's that says that. And that seems to me to kind of allied a really important distinction between subpoenas to the president directly even for personal papers and subpoenas to a third party.

Kate Shaw:

And thus, it's just at least atmospherically easier to understand why there would be burdens where if the court, I think, was more accurate in its characterization of what these requests really are, they don't actually... Not only do they not require much of the President, they require nothing of the President. And that's a little bit... One of these places where I was surprised that there wasn't a short separate concurrence to make clear that there is a salient distinction between a subpoena like this one, which is to a third party and a subpoena to the president directly, which the court sort of treats these subpoenas as.

Kate Shaw:

But in any event, the court says when we're talking about subpoenas seeking the President's Personal records and again, if these were official records, everyone agrees that some different degree of solicitude would be required because then you maybe do run into actual encroachment upon the President's Article II duties and powers.

Kate Shaw:

But in a case like this one, there's basically this multi-factor test that courts should use to evaluate the permissibility of these subpoenas, how important it is to access the President's papers? Is the subpoena sufficiently narrow? Is the purpose really valid? What kinds of burdens would it impose?

Kate Shaw:

I'm not sure how different that honestly is from what the courts did here but it basically... Maybe all this does is kick the can down the road. And the right answer ultimately is some of these subpoenas, at least maybe the House Intelligence Committee subpoena actually is pretty narrow in the purposes pressing. And there's no other way to get this material and maybe the others are too broad.

Kate Shaw:

But that, again, is the sort of outcome that I think kind of keeps any particular player in our separation of power schemes from aggrandizing too much power. Josh Travis had a piece in The Times that sort of just this was a big loss for Congress. And I credit his view of these things a lot. But I'm not sure... I think it could have gone a lot worse for Congress. In a court that is pretty skeptical in certain respects of congressional authority, except when we're talking about vis a vis administrative agencies when it only wants Congress to do all the work and not the agencies, I think that it at least reaffirms some kind of core power in a way that I think is significant.

Melissa Murray:

There's one part of the opinion I think that makes clear how much the court has adopted the president's framing of this. There's this part of the majority's opinion where the Chief Justice refers to Congress as a rival political branch.

Melissa Murray:

And the use of that language to me is just so stunning. It's not a coordinate branch. It's not a co-equal branch. It is like a rival political faction. They've sort of bought into this idea that Congress is an antagonist.

Kate Shaw:

Is that just Madisonian rival risk centers of power?

Leah Litman:

But adapting it in the context of this dispute suggests a disdain for the conduct of both the President and the Congress in this case, particularly when the lead up to this opinion was the court describing how typically these disputes are resolved between branches without courts intervention. And again, this framing buys into the President's argument, which is both sides are somehow equally to blame and I just think that is wrong.

Melissa Murray:

Well, and to Kate's point earlier about no one in the majority actually points out that this is not a subpoena to President but rather to these third parties, the reason there are subpoenas to third parties is because everyone knows the President will not provide this information and will not go through the "hurley burly" of negotiation and compromise. It's kind of rich that the Chief Justice devotes almost five pages to discussing the ordinary course of things where there is this back and forth between the two branches about what will eventually be a mutually amenable compromise.

Melissa Murray:

And then they also refuse to sort of acknowledge that the reason that this is different from subpoenas to the president is because the president can't be subpoenaed or won't be subpoenaed because everyone knows he won't actually participate in the process. So there is a kind of weird whataboutism or sort of willful blindness in this opinion too that I find disheartening.

Melissa Murray:

To contrast it with Vance and I think Josh Chafetz is the one who raised this, you can almost see the outcome in Vance comes more easily to the court in part because it is squarely in the court's domain as

opposed to within the domain of the political branches. They have more trust of the courts than they do of Congress.

Leah Litman:

And it's really weird to me to give a state criminal process, a state DA more power to exercise oversight of the president than a co-equal branch of government Congress. And here, it's true that the court both rejects the President's absolute argument for immunity that Congress has no power to enact legislation against the president and also formally rejects the Solicitor General's request for a heightened showing of need, but then in its articulation of the standard, it seemed to put more of a thumb on the scale in favor of the president than I think was warranted. Part of it is we just don't know what the standard is and what it will look like since the court just made it up.

Leah Litman:

But the court's articulation of what courts need to take seriously including the imposition on the president again in the context of this case, makes me a little nervous. Again, because I also think the court just did an unfair characterization of what the lower courts did in this case. The court has to acknowledge that the DC Circuit said that there were a separation of powers concerns in the case, even though it's reason for remanding the case to the lower courts is because the lower courts purportedly did not take into account separation of powers considerations.

Leah Litman:

And the DC circuit's explanation for why these subpoenas were appropriate was basically like, "It's for the personal records to a third party. The imposition on the president is not significant." Those are reasons that the courts are going to repeat when this case is on remand. And so I just don't understand really the point of a remand.

Melissa Murray:

Well, the point of the remand is the real winner in this case is Chief Justice Roberts, who was at great pains to avoid embroiling the court in what is I think, a politically fraught dispute on the eve of what will be a politically fraught election. He's the winner here. He gets to kick this back. He gets to Trump appointees to sign on to the majority and he can honestly say that there are no Trump judges, there are no Obama judges, there are just federal judges doing their level best. And the court comes out of this with the veneer of non-partisanship. And that's exactly what he wants. He's the winner here.

Leah Litman:

I think that's right.

Kate Shaw:

I'm sure he would have preferred unanimous opinion.

Leah Litman:

Oh sure.

Kate Shaw:

In some ways, like in 2020, with this court, I feel like 7-2 actually is kind of unanimous. There's no universe in which you would actually could get Thomas and Alito in a case.

Melissa Murray:

It's a curve. It's a unanimity curve.

Leah Litman:

But isn't this like the bigotry of low expectations? We're like wow, it's a great victory, because Lord knows you can never get Thomas and Alito to sign on to any reasonable argument in a case involving the Trump administration. And wow, this is a huge win because the court didn't say presidents can never be investigated or can only be investigated when Congress can make a specific demonstrable showing of need, what a win! And it's like, yes, this guy didn't fall for the rule of law, but I still think again that the court's articulation of this multi-factor approach might end up favoring the executive down the long run just because presidents are...

Leah Litman:

It's easier for presidents to say, "I'm doing all of these important things and I have these national security powers and this is interfering in my ability to do my super important job." And also, I just did not care for the court's, again, suggestion that in the context of this case, Congress can't use the president as a case study for general legislation because when you think about the financial services or the oversight subpoenas, there was a really good reason to use the president as a case study for possible conflicts of interest or money laundering investigations and possible statutory reform, which is the New York Times and other outlets uncovered evidence that there was a very real possibility that he was engaged in tax, insurance or property fraud.

Leah Litman:

And so we should know about his financial entanglements because again, we had reason to suspect that at least this particular person and family and business have fallen through the cracks.

Melissa Murray:

To your point Leah, that Congress may engage in fact finding without a clear idea of what the outcome would be. And so the solicitation of information may not be particularized in the way that the standard might contemplate because they actually don't know what the outcome is. They just know that they generally need in the realm of this information in order to be able to figure out what the problem is and that isn't actually accounted for in the standard either.

Leah Litman:

And then, if we're talking about this opinion, having something for everyone, it has this wonderful quote from, I don't know how to pronounce the case name, United States versus Rumely, the 1953 case where the court quotes that part of the decision as, "It's a proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees." And I'm like, "Yes." That's what's going on in this case and I would have preferred if the court would have said one valid legislative function is oversight for the sake of oversight.

Melissa Murray:

Marty Lederman said something really interesting yesterday on this in lieu of Fun Show that Leah and I were on and I wondered at the time what you thought about it, Leah, but he sort of equated this particular opinion to DACA and also the census case, which is to say that the Chief Justice dislikes pretexts in any form from any person and probably understood these subpoenas and the reasons that Congress offered to support these subpoenas as simply being pretextual for harassing the president.

Leah Litman:

If that is how we should understand this opinion, that raises real alarm bells for me because it indicates his perception about how this standard might be applied to contexts like this one and I just don't think that for example, the Intelligence Committee's stated purpose of wanting to know whether the President has financial entanglements with foreign governments or foreign businesses, that seems like its actual purpose. And the point is they don't know what they're going to uncover and so they can't really state what else they want to do with any information they might receive.

Leah Litman:

And as I was saying about the Financial Services and Oversight Committee, subpoenas, yeah, it's very possible that Congress might want to enact general legislation once it figures out what the heck is going on here. But it just can't say more than that. And I think it would be strange to suggest that that possibility of legislation and the exercise of oversight is not what is happening here.

Kate Shaw:

I think Marty would say that, yes, the Intelligence Committee's purpose, stated purpose here is clearly a valid legislative purpose but that at least the Financial Services Committee, the kind of general interest in doing money laundering or regulatory legislation broadly is a little attenuated from a need for a particular family's personal records. And maybe they should be more forthright about this sort of... This is investigation of potential wrongdoing by the Trump org, Trump himself or Trump's family.

Kate Shaw:

And I think it is right that at least to a degree, the committee was concerned about doing exactly what Judge Rao and Justice Thomas, in dissent here, accuse the committee of infamously doing which is essentially investigating in a way that should be done in furtherance of impeachment as opposed to in furtherance of potential legislation.

Melissa Murray:

But that seems markedly different from go back and lie better which is where we came out in terms of the census case. There's no reasonable connection between adding a question to the census and enforcing the Voting Rights Act. It's clear-

Leah Litman:

Not in the eyes of civil rights hero, Wilbur Ross. And also the four dissenting justices, talk about the bigotry of low expectations of Thomas, Kavanaugh, Alito, and Gorsuch.

Melissa Murray:

But the way that Kate just said it, maybe it is for the purpose of finding out if this whole family is involved in a series of fraudulent or problematic financial transactions. Even narrowing or particularizing

why the request is not about lying or pretax, it's just about saying explicitly, "Yes, I think the President is involved in something super shady and we want to find out why." And that seems like even if Congress said that, that would not be enough here.

Leah Litman:

Yeah, it's very possible. Only Justice Thomas adopted what was Judge Rao's views in the DC circuit, which is these particular subpoenas had to proceed under the impeachment power.

Melissa Murray:

The end.

Kate Shaw:

He could have written the one sentence for the reason... Once upon a time, they used to say, "For the reasons given by the lower courts, I would affirm or I would reverse," and he basically could have done that because it's sort of her opinion. But...

Melissa Murray:

What Neomi said.

Kate Shaw:

Exactly. And then Alito also writes separately to basically suggest some very heightened standards should be required of Congress if it's seeking documents that touch the president.

Leah Litman:

Those two opinions together actually really interesting and just sort of completely stripping congress of any kind of check on the present. The only check is impeachment and we saw how that worked or alternatively complying with this much more rigorous standard to seek information from the president.

Kate Shaw:

But only two of them.

Melissa Murray:

That's true.

Kate Shaw:

There should be zero. I agree with you Leah but two is a long way from five.

Leah Litman:

Not really.

Kate Shaw:

I don't think anyone else is close to this position, at least not absolutist position. And I sort... If there was a President Biden soon, I highly doubt that they're going to be as solicitous of presidential prerogatives vis a vis congress.

Leah Litman:

Well, this was part of what was annoying to me is that the majority opinion in Mazars basically says, "Well, the legitimate legislative purpose is not a real limit on Congress," because, "Congress's powers are so broad they can legislate on any topic related to education, to health reform" and I was like, "Where was this?"

Melissa Murray:

Like in ACA?

Leah Litman:

Exactly. Like, where was this in all of the Affordable Care Act litigation when he refused to uphold the minimum coverage requirement under Congress's commerce power. They were too busy engaged in some paranoid frenzy about broccoli, but whatever.

Kate Shaw:

Maybe another beat or two. Leah, you raised a good question which was this opinion assignment question. The chief and Kavanaugh each had two opinions for the May telephonic sitting. Breyer and Sotomayor didn't get any. That's sort of unusual. What do you guys make of that?

Melissa Murray:

Flush gate.

Leah Litman:

This was Steve's punishment. You don't get to write opinions for him.

Kate Shaw:

Sit in the corner and think about what you've done while we write these opinions.

Leah Litman:

But then what's the answer for Justice Sotomayor? Two for you Glen Coco, you go Glenn Coco, none for Gretchen Wiener. What is this?

Melissa Murray:

I think she's being punished for not figuring out the mute button quickly enough.

Leah Litman:

Interesting, interesting.

Melissa Murray:

These are both punishments for failures to actually adapt to the telephonic argument quickly enough.

Kate Shaw:

This is a good theory.

Leah Litman:

I like it. The chief going kind of mean girls on the other justices. "Get it together Heather." Put you in line.

Kate Shaw:

He did keep a lot and he was kind of a little greedy, I would say. I think it was probably appropriate here. These are the kinds of cases, particularly two, we just talked about, where it is best for the chief probably to speak for the court and this sort of grade on a curve unanimous court.

Leah Litman:

Although if he was going to adopt a multi-factor balancing test, which by the way he shit all over in June Medical Services and said courts were incapable of administering, he might as well have given it to Steve Breyer, who literally lives and breathes from balancing tests.

Kate Shaw:

Well but Breyer was in the corner.

Melissa Murray:

Right. Exactly.

Leah Litman:

Another opinion we wanted to cover was Our Lady of Guadalupe versus Morrissey-Beru. This is the case on the so-called ministerial exception to potentially a bunch of statutes. Justice Alito wrote this opinion. It was also a 5-2-2 break down. The five were interestingly Justice Alito, the Chief Justice, Justice Kavanaugh, Justice Kagan and Justice Breyer and the ministerial exception refers to the idea that generally applicable civil rights statutes like Title VII, which prohibits discrimination on the basis of race or sex or sexual orientation or gender identity or the Pregnancy Discrimination Act or the Americans with Disability Act, those statutes would prohibit a variety of forms of discrimination cannot be applied to entities or individuals who are considered ministers.

Leah Litman:

Everyone agrees for example, you cannot say the Catholic Church has to hire female priests because if they did not they would be discriminating on the basis of sex and violation of Title VII. But the question is who else basically is entitled to a ministerial exception? And these cases involved religious teachers, as the court characterized them, at religious schools. And the court said, "These teachers fall within the scope of the ministerial exception such that the non-discrimination statutes do not protect them."

Leah Litman:

The court defined the core inquiry that determines whether an individual falls within the scope of the ministerial exception as whether that person has a role in conveying church message or carrying out the church's teachings. And it discounted the significance of whether a person was denominated as a minister or the particular educational or background requirements for their positions. Instead, what matters is "What the employee does."

Melissa Murray:

I thought this was really interesting. The case where the court first articulates this so-called ministerial exception which for the record is not in the Constitution, but rather the court interprets or implies from the First Amendment. So the protections that apply to religious institutions, the court then extends to their hiring decisions for ministers. But it seems like this actually makes it a lot firmer and puts more of the onus on the religious institution itself to define what the job duties or job descriptions of various employees will be.

Melissa Murray:

And in doing so, they can actually write the job description such that they can then be outside of the ambit of the statute. What matters is what the employee does and they then go on, the majority then goes on to cite church documents that specify that teaching is an important part of the religious mission of the school.

Melissa Murray:

It basically invites religious institutions, whether they're schools or charities that have secular purposes but are religious nonetheless, to basically draft their job descriptions or their mission statements in ways that really over-emphasize the religious content in order to avoid being included in the ambit of anti-discrimination law.

Kate Shaw:

You mentioned charities, Melissa. One big question, just to skip ahead for a minute coming out of this case is how applicable its reasoning is going to be to institutions beyond just parochial schools, so universities and charities, nonprofits, things like that.

Leah Litman:

Hospitals.

Kate Shaw:

The list is actually long. The number of employees kind of shockingly large, if in fact, this decision has really broad applicability. So Kagan and Breyer join and they join in full. They don't write separately. I have to imagine that they did that in part so that they could shape to a degree the way the opinion was written. I do think there are things in the opinion that suggest not that it won't necessarily have the broadest possible application. So there's a footnote suggesting okay, these teachers based on their job descriptions and what they did, which was lead the students in prayer and actually do religious instruction, inculcating the faith. That is one thing and courts are not really going to intrude on that kind of employment relationship.

Kate Shaw:

But if we're talking about say, a teacher who teaches world religion, that individual is not inculcating the faith and is going to be able to avail themselves of generally applicable anti discrimination laws. And it seems to me to follow that even if we're just talking about parochial schools, other kinds of teachers and other staff members would presumably also fall outside the ambit of this opinion.

Kate Shaw:

At least it's possible to read it that way. And then this question of how specific to the logic of a school that is teaching and raising future members of the religious community, I suppose, in the vision of the school how distinct that potentially is from a service providing organization with a broad clientele. It strikes me that it's at least possible. And I presume, again, Breyer and Kagan must have thought it was possible in order to join without writing separately to read the opinion that way.

Melissa Murray:

I really think that was naive. Because you can imagine for example Catholic Charities, just drafting a new mission statement that says, "We are a Catholic organization. We engage in charitable or philanthropic activities but we do so in full view of the tenets of our faith." Every employee is a role model of faith. Given this opinion, I think that would be weighty.

Melissa Murray:

One of the things they talk about here is that the teachers not only lead the children in prayer but were understood to be role models of faith, even if they were not Catholic.

Leah Litman:

And I think the naivete was partially on display this term. Because, of course, the court bulldozed through the limitations on its prior free-exercise clause case, Trinity Lutheran when it decided Espinoza versus Montana Department of Revenue and I think that it's extremely likely that there will be five votes to bulldoze through whatever limitations there are on our Lady of Guadalupe whether or not Justice Kagan or Justice Breyer would have joined it and obtained that limiting language this time as they did in Trinity Lutheran.

Leah Litman:

I think it's likely that this decision will end up having broader applicability than just religious teachers at religious schools and the combined effect of this decision and Espinoza is that basically, the government is required to fund more religious entities that the government cannot subject them to civil rights protections and anti-discrimination norms. And I think that the combined effect of those decisions and potentially others is going to be concerning.

Melissa Murray:

The facts of these two cases were also really heart wrenching. Both of the litigants challenging the employment decisions of their institutions were teachers. One alleged to have been fired because of her age and the other alleged to have been fired because she was undergoing cancer treatment and needed time off and was let go because of it. There's no recourse for this.

Melissa Murray:

And to be really clear, neither of them were even at the remedies phase of this. They were simply asking to be allowed to bring a claim under Title VII or the age discrimination and Employment Act. And they're sort of shut out. This is as much an access to justice issue as it is a question of religious liberty and the law governing religious institutions.

Leah Litman:

Anything else in this case?

Melissa Murray:

It was a good day for parochial schools between Espinoza and-

Leah Litman:

Like I said, I don't get why Sam is so mad, right. He got a lot done this term.

Melissa Murray:

He put in work.

Leah Litman:

You better work bitch.

Kate Shaw:

McGirt versus Oklahoma, huge, fascinating, really important case that we are actually thinking hold off on debriefing because we want to do it justice on its own episode. Is that where we came down on that?

Leah Litman:

Yes. And I want to reiterate a plea I made on Twitter, which is Rebecca Nagle, if you're listening, we would love to do that recap with you. But we do hope to do a longer recap shortly.

Leah Litman:

This is the case that held that members of the Creek Nation could not be tried in state court for crimes that were committed within the reservation boundaries of the Creek Nation because Congress had not disestablished that reservation when Oklahoma was admitted as a state or afterwards.

Kate Shaw:

Okay, so stay tuned. We're going to bring you more on that. And maybe we'll just stock Rebecca Nagle and try to get the pod. Okay, but so let's also recap another case from the very homestretch of the term, which is the faithless electors case of Baca and Chiafalo.

Kate Shaw:

So quick reminder, this is a case involving whether presidential electors or other people who actually cast the votes that choose the President can be required by state law to vote consistent with a state popular vote and then removed or fined if they don't. Or rather, if they have a constitutionally grounded right to basically go rogue to vote if they want to. The 2016 election, they voted for Colin Powell who wasn't running for president. Maybe 2020 they could vote for Kanye West if they want to. Is that a thing?

Melissa Murray:

Oh gosh. The horror.

Kate Shaw:

We're not doing any form of discussion of that. But, do they have a right to do that or can states punish or remove them if they try? When we debrief the argument in this case, we were pretty sure that these

faithless electors were not going to prevail and we were definitely right. I'm not sure. I foresaw a unanimous opinion, which is what the court gave us, but in fact, it did. This is an opinion by Justice Kagan, which holds that no electors don't have a constitutional right to go rogue. And that states can coerce or sanction them.

Kate Shaw:

To go back to our point about how difficult it is to get unanimity on this court, it's actually kind of interesting that this is not in a tiny little statutory interpretation case that's totally uncontroversial, but in a case that is about this variable consequential sort of political and constitutional moment is still unanimous decision. And I think a few things are probably responsible for that. One, the kind of so-called chaos principle, which came up in oral arguments but actually, it was weirdly kind of sublimated in the actual opinion.

Kate Shaw:

So there isn't... Leah, I think you said really they're mostly all consequentialists or like eight of them are. And that is... Or when the rubber hits the road, they often are. I don't want to misquote you. Was that basically what you said?

Leah Litman:

Yeah. Yeah, yeah, yeah.

Kate Shaw:

Kagan doesn't sort of forthrightly say, we have to rule this way, because we don't want to throw the country into turmoil, if all of a sudden every electoral college can just decide how to vote. And yet I think that actually was somewhat driving the result in the case. So instead, she sort of says there are... Basically constitutional text or history kind of point in the same direction. Whatever the original intention and design of the electoral college because there is some language from the founding era about men of wisdom and discernment, choosing the president, which suggests like you're making an independent choice.

Kate Shaw:

But from very early on, it has been the case that states have required their electors to vote consistent with the state popular vote and that both the original constitution and the 12th Amendment which followed the kind of debacle of an election of 1800 kind of reinforced that principle. All these things, she says, sort of point in the same direction. And in fact, these electors don't have a right to vote their consciences.

Kate Shaw:

One thing to flag is that even though the court says or doesn't say, even though the court clearly is animated by a desire to avoid chaos, it's not totally clear this opinion can do that because only about two thirds of states actually do bind their electors. It's not the case that they have to, just that they may and so in 18 states in November, it's still I think, is the case that they could decide to go rogue if they wanted to in a very close electoral college contest, that still could make the difference.

Melissa Murray:

Although this could be seen as an invitation to states to actually firm up what obligations electors have.

Kate Shaw:

Potentially. I wonder if it'll be on the agenda in any states. There's so little time that remains but that seems like a possibility. But it is like a wonderful historical romp, the Kagan opinion and it also-

Leah Litman:

And a pop cultural romp. There's beef references, there's Hamilton.

Kate Shaw:

She talks about the Article II language about presidential selection. And then she says, "But don't get attached. It doesn't last long." And she goes to the 12th Amendment. It's just very colloquial and fun and I am excited for people to read-

Melissa Murray:

Brisk and breezy. It is brisk and breezy. Do you think that one of the things she's doing here, given that... I think the outcome here was foreordained, maybe not the lineup, but I think the outcome was foreordained. I kind of took her opinion as sort of sowing the seeds to undermine originalist arguments going forward.

Melissa Murray:

There's this whole discussion in the opinion about how the Constitution's text by itself cannot be determinative, but rather it's necessarily broad, it's necessarily opaque. And in order to fully understand its meaning, you have to rely on context and custom to and I sort of took that as a rejoinder to the originalist position that the text itself is conclusive.

Kate Shaw:

That's interesting. I think she suggests the text actually does... I think she should just say the text doesn't actually tell us anything and all that we have here is context and practice and she doesn't go that far but she did have to keep together a cord and a unanimous one here.

Kate Shaw:

But so in a subtle way like she is crafty. That may well have been what is at play because it just isn't the case that the spare text of Article II and the kind of long but not particularly clear on this point text of the 12th Amendment, say anything at all about whether the term vote either carries with it the discretion to vote in an unfettered fashion or clearly precludes that meaning.

Kate Shaw:

We don't know. We have to look elsewhere. And so I think you're right. That is definitely a dynamic in my opinion.

Melissa Murray:

Well, to that point, I think Thomas's concurrence may actually be responding to what she's doing, because he seems to be saying the 10th Amendment as a limit on what states might do, what the

federal government might do. And so he doesn't believe that Article II actually answers this question, but rather that the 10th amendment answers this question.

Melissa Murray:

And there's this really sort of, I thought, interesting part of the opinion where he references United States versus Darby, which is one of those new deal commerce clause cases and he cites it approvingly of this idea that the 10th Amendment perhaps provides a doctrinal home to allow the states to limit the actions of electors.

Melissa Murray:

But Darby actually guts the 10th amendment as a limit on anything that the states might do. That was the case that overruled Hammer versus Dagenhart and said that the 10th Amendment was but a truism. He kind of resuscitates and recharacterizes Darby in a way, that's a little, I don't know, sort of shady almost in making this point about the 10th amendment being the appropriate doctrinal home to limit it. And I think the use of the 10th Amendment is meant to counteract her view, that originalism doesn't get you all the way there. Am I totally off on this or?

Leah Litman:

No, I mean, I think it's another example where... And there's some interesting parallel to how the solicitor general and the President were using the cases of United States versus Nixon and Clinton versus Jones in the presidential immunity cases. I don't know if you'll remember this from argument but the President and the Department of Justice said those cases stand for the proposition that the President is special. Therefore, the President is entitled to all of this additional protections.

Leah Litman:

And I remember Justice Kagan and a few other justices saying, "Really? That's what you take from those decisions?" We're pretty sure we rejected the most muscular view that the President is special and therefore entitled to additional protections in those cases. And here, that's kind of what I saw Justice Thomas doing with the 10th Amendment is using Darby to kind of reinvigorate the 10th Amendment when that's not at all what Darby did.

Melissa Murray:

To reimagine Darby.

Leah Litman:

Yes.

Melissa Murray:

In an event. I think that's a longer term project of his to kind of resuscitate or reinvigorate the 10th Amendment as providing to the state's powers that aren't actually specifically enumerated.

Kate Shaw:

Definitely. And he also cites, Lee and I talked about this in the argument recap, I think that Term Limits versus Thornton case in which he almost but not quite gets a fifth vote for a very strong vision of the 10th Amendment.

Melissa Murray:

The last case up is bar versus the American Association of Political Consultants which challenged the Telephone Consumer Protection Act, which bans robocalls to cell phones. And so in 2015, Congress added an exception to the law that permitted robocalls collecting government backed debts. And a group of political consultants brought this challenge arguing that this exception was a violation of the First Amendment because it was impermissible content restrictions, which allowed certain kinds of speech but not the political consultants particular speech which is to say robocalls in favor of particular political positions.

Melissa Murray:

The court in this case held that the 2015 exception does violate the First Amendment because it is a content based restriction. But rather than striking down the entire law, which is what the Association of Political Consultants would have preferred, the court only invalidated the exception that pertained to the country backed debt. This means that political robocalls are still illegal, but so are robocalls to collect government backed debt.

Melissa Murray:

Not a total win for the political consultants. Also not a win for the First Amendment in interesting ways. But it's an extremely fractured opinion. Justice Kavanaugh issued the judgment and wrote the opinion for himself as well as the Chief Justice, Justice Alito and Clarence Thomas, who joined the First Amendment positions but did not join as to the remedy. Justice Sotomayor concurred in the judgment but believed that the restriction should be reviewed under intermediate scrutiny rather than strict scrutiny but that it would still fail even under this lower standard.

Melissa Murray:

Justice Breyer who is joined by Justices Ginsburg and Kagan agreed to the severability position but no to simply collapsing the idea of commercial speech with all other forms of speech and he too agreed with Justice Sotomayor that the appropriate standard of review here was intermediate scrutiny.

Melissa Murray:

Justices Thomas and Gorsuch also concurred in part. And so Leah, you flagged that you thought this case had some really interesting issues for remedies and how we dealt with constitutional violations.

Leah Litman:

Yeah. So you mentioned it's bad for the First Amendment. Part of the reason it's bad for the First Amendment of course, is that the court ends up as a result of this decision criminalizing speech that Congress wanted to be protected, namely the ability for robocalls, collecting government backed debts to proceed.

Leah Litman:

As a result of this decision, more speech is criminalized rather than less, so not a great day for the First Amendment. But the remedial portion is even more interesting because sometimes we talk about courts striking down or invalidating statutes when in actuality, what courts are doing is just saying, well, this provision can be given no legal effect because it violates the constitution or something else.

Leah Litman:

But here, the political consultants who came to court, the only provision that could be enforced against them was the ban on robocalls. The exception permitting collection of government backed debts, that was never going to be enforced against them. It's not like the court merely declined to give effect to a legal provision that could have been applied to this group of political consultants.

Leah Litman:

Instead, even though the court says, "Well, we never invalidate statutes. We just decline to give them legal effect." Here, the court is effectively saying, "Well, in the future, we're going to decline to give effect to this exception to anyone to whom it might have been applied." And so it's just an interesting, I think, remedial question about what exactly the power to invalidate or enjoying statutes is when the court felt able to do this in this particular decision.

Melissa Murray:

This didn't really get a lot of play.

Leah Litman:

It's hard for that issue to get traction at the same time, the court is deciding contraception, ministerial exception and presidential immunity cases which fair in some ways unfair for the federal courts nerds of us out there.

Kate Shaw:

But this sort of complicated both First Amendment and remedial questions explain a little bit both why they... Remember when the court decided what cases to hear in May and what to put over to the fall, we were like, "Robocalls? Why would they even bother?" But it's actually a pretty interesting kind of rich case.

Kate Shaw:

And then once they did argue it, they started deciding other cases from the main sitting but not this one. And again, I was just like, "Why are they not giving us robocalls?" But in fact, it's a fairly complicated and obviously fractured opinion. And so that I think is why.

Leah Litman:

And if they wouldn't have scheduled this we might never have gotten flush gate.

Kate Shaw:

Oh, was it during this case? I had forgotten.

Leah Litman:

Yeah. This was the toilet flush heard around the world. Okay.

Kate Shaw:

We got a handful of cert grants following the end of the term. Leah, did you follow this? What did we get?

Leah Litman:

We had six grants. The cases included a follow on to Seila Law, a case involving a challenge to the constitutionality of the Federal Housing Finance Association as well as some other cases. But I just had wanted to briefly flag that of the six grants, which really were four grants and some were consolidated or cross petitions, all of the six grants involve cases where men were the lead counsel.

Leah Litman:

And in fact, there were more grants of petitions that had lead counsels by the name of Jeff than there were grants of petitions where the lead counsel was a woman.

Melissa Murray:

I'm shocked.

Kate Shaw:

Were there any Pauls?

Leah Litman:

Of course, there was a Paul. Of course, there was a Paul. There's always a Paul and this one was Paul Clement-

Kate Shaw:

Of course.

Leah Litman:

Shocking.

Kate Shaw:

50% Paul or Jeff.

Leah Litman:

Right. Literally. 50% of the grants went to Paul or Jeff.

Kate Shaw:

Everyone do better.

Melissa Murray:

This was a kind of whirlwind week. They literally were just like we are out of here and they just dropped everything on top of us.

Kate Shaw:

I'm exhausted. Are you guys exhausted?

Melissa Murray:

I'm fully exhausted.

Kate Shaw:

I'm sure they're exhausted.

Melissa Murray:

Yes.

Kate Shaw:

And their clerks. Didn't you think a lot this week about like what the last few weeks of the life of those clerks has been like?

Leah Litman:

I know. I know. They don't get to interact with one another. And it's all remote.

Kate Shaw:

I wrestle with my home printer occasionally to try to get an opinion printed out of it. When I'm editing something high stakes, I need to do it on paper own. [crosstalk 00:56:24]. Of course where they're all a disaster. I'm sure the clerks are too if they even have them. And when you're going to submit the final final, another reporter's office polishes it up, but you want it to be good when you're signing off on it. And without a functioning printer, for some reason I kept obsessing over this. I just think it might have been hard. I think it must have been hard for them.

Melissa Murray:

What's the onboarding of the new clerks going to look like? It's one thing to sort of end the term on Zoom in your closet. No shade, Kate. Sorry.

Kate Shaw:

It was fair. It was fair. I'm not in here all day, by the way. I'm just in here when we do this.

Leah Litman:

So you say.

Melissa Murray:

So you say. It must be awful to just You know, start a new job where you don't get to interact with your colleagues in person. What are we? Are we not in the fourth month of this?

Leah Litman:

I've lost track. Fourth month, fourth lifetime, who is to say?

Melissa Murray:

Yeah.

Leah Litman:

So thanks everyone for listening. As we mentioned at the outset, we will have a term recap to come. We will also be on a summer schedule after that which we will talk more about during the term recap, but we'll still of course, have some content for you over the summer.

Leah Litman:

Thanks to our producer, Melody Rowell. Thanks to Eddie Cooper for making our music and thanks as always to all of you. You can support the show by subscribing to our Glow Campaign at glow.fm/strictscrutiny. Or you can support the show by giving yourself a new look/merch at strictscrutinypodcast.com. Thanks, everyone.