

Intro:

Mr.Chief Justice, may it please the Court. There's an old joke, that when a man argues against two beautiful ladies like this, they are 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 off our necks."

Melissa Murray:

Welcome back. I'm Melissa Murray, and this is a very special summer episode of Strict Scrutiny. If you've had the chance to listen to our recap episode for October term 2019, you'll know that this term was the term in which the Court became the Roberts Court in more than just name. It was the term in which Chief Justice John G. Roberts really took control of the Court. But if the October 2019 term was a barn burner filled with politically fraught and divisive issues to be decided, October term 2020 which will launch just a month before the presidential election, will also be filled with hot button cases, perhaps even a Bush v. Gore style existential crisis for the Court in the country.

Melissa Murray:

It will also mark the 15th anniversary of John Roberts' appointment as Chief Justice of the United States. So, all of this makes it an especially opportune time for us to reflect on the Chief Justice's tenure on the Court and his legacy going forward. And to help us take stock of the last 15 years and the years to come, we are delighted to have with us one of the doyennes of the Supreme Court beat, Joan Biskupic. Joan is the Legal Analyst with CNN. Before joining CNN in 2017 she was an Editor-at-large for Legal Affairs at Reuters, and previously the Supreme Court Correspondent for The Washington Post and for USA Today. She has been a finalist for the Pulitzer Prize and she has won numerous other honors.

Melissa Murray:

She's also the author of biographies of Sandra Day O'Connor, Antonin Scalia, Sonia Sotomayor and most recently Chief Justice John Roberts. That book, *The Chief: The Life and Turbulent Times of Chief Justice John Roberts*, was published to great acclaim in 2019 including on this podcast where we featured it as one of our notable supreme reads. It will be coming out in paperback in August, just in time for you to get ready for the upcoming Supreme Court term. So, very, very warm welcome to you, Joan. Thanks for joining us.

Joan Biskupic:

Thank you, Melissa.

Melissa Murray:

So, I have some questions, lots of questions about your work on the Court and specifically your coverage of Chief Justice Roberts. So, the first question, just generally, how did you get into this beat? How did you come to cover the Supreme Court in your career?

Joan Biskupic:

It traces back almost 30 years now. I had actually been more of a political reporter covering state legislatures, local city councils, but I had always had an interest in legal affairs and I was at Congressional

Quarterly's Weekly Report, if you remember that publication back in the '80s and '90s. I was quite active in covering issues on The Hill. I covered the Senate Judiciary Committee, the House Judiciary Committee, but also was writing about the Clarence Thomas hearings, the David Souter hearings, and just took a strong interest in the Courts even though my beat was more Hill oriented at the time.

Joan Biskupic:

And in 1992 when the Supreme Court beat opened up at The Washington Post, I applied and was chosen for that. So then I spent nearly a decade there really getting into the Court full-time, and I enjoyed it so much that I then wanted to turn to not just full-time Supreme Court coverage but also to write books on it. And that's when I started on the Sandra Day O'Connor book and started taking different leaves of absence, and one thing led to another and here we are four books later.

Melissa Murray:

Well, and all of the books are fantastic. I will note that many of them, including the one that preceded The Chief, the one about Justice Sonia Sotomayor, are often framing the lives of the Justices in the context of broader historical elements. So, for example, your book about Sandra Day O'Connor really focused on her as the first woman Justice and her rise in tandem with the rise of the Women's Rights Movement, and likewise, Justice Sotomayor's elevation to the Court was also seen in tandem with the rise of Latinos in domestic politics.

Melissa Murray:

The Chief is interesting. Was it your intent that you would frame his rise in politics and law alongside the conservative Legal Movement, or was that just happenstance? Or was it always conscious that you would do that in the book?

Joan Biskupic:

The Chief was not a natural subject when I pitched it to publishers in 2016. It was easy for them to want to buy a book on the first woman Justice who... My analysis of Justice O'Connor really stressed her legislative background, with the thesis that she came to Washington knowing how to count votes. That was a dual framing with the first woman framing for that book. And as you rightly know, this Sonia Sotomayor book was not so much a biography but more about her ability to maneuver in the system that normally would have not included her and rise and prevail and obtain that nomination in 2009. And she was a natural subject for publishers, too, to be interested in, obviously, because she had such a rich, deep, personal story, and ditto with the first Italian-American Justice, Antonin Scalia. But I found that people weren't very interested in John Roberts as a subject, at first.

Melissa Murray:

That is baffling. He is the most interesting man on the Court right now. Maybe he wasn't in 2016, but he definitely has become the most interesting man on the Court.

Joan Biskupic:

That's right. And I actually thought that what made him worthwhile as a subject back in 2016 when he wasn't as pivotal as he's been since Justice Anthony Kennedy retired, was just that people didn't know what he was all about. They didn't know his personal story, they did not know the rich legal career he had had earlier, didn't know who his people were, that kind of thing. So that one was actually a harder

sell back in 2016 because people just thought, "Oh, you know, he's bland, perhaps. He doesn't have this personal story." And, at the time, just as Anthony Kennedy was so crucial to the Court, and the timing of the book turned out, frankly, to be great because it was published in early 2019, as you know, after Anthony Kennedy had retired.

Joan Biskupic:

But I felt it was important to trace his roots, show what he was all about, and show the inherent conflict in his jurisprudence and how he has maneuvered. I found it so fascinating that when he came onto the Court he was only 50-years-old, the youngest Chief Justice in 200 years since Chief Justice John Marshall. And all of his colleagues had served so much longer than he had. There hadn't been a vacancy on the Supreme Court for 11 years, so he comes in, they're all in their settled patterns, he has to navigate these personalities as someone with far less experience, far less seniority in terms of just sheer age than the others, and what was that like.

Joan Biskupic:

So that interested me. And then, I found his personal family story intriguing. His parents had met in Johnstown, Pennsylvania. They had essentially married across the tracks. His father, John Glover Roberts Senior, had been the 10th child in this large Catholic family, and he... But in a very prosperous family, an English-Irish family that had come to America a generation before his mother's side. His mother's name was Rosemary Podrasky, and her family had struggled much more than Roberts' family had done. So that intrigued me.

Joan Biskupic:

And just as his father was rising in the steel industry, his father was an executive for Bethlehem Steel, the industry itself was on the decline, and that sort of tension interested me, and also just the plain old hierarchy of the steel industry I found comparable to the hierarchy of the judiciary. So those kind of personal themes I felt like it was important to bring out, but also to show people what it was like in dealing with these colleagues over the expanse of what then was only 14 years, but he's only certainly emerged more in terms of his influence and people being curious about Chief Justice John Roberts.

Melissa Murray:

That's fascinating, and good on you for recognizing that this would not only be a good move in 2016, but that it would really be a prescient move looking forward. You've already given us a lot of really good background, but I wanted to dig into his early life because, as you say, that's the part of the Chief Justice that very few people know about. And I was absolutely fascinated with the mother figure here. His mother, Rosemary Podrasky Roberts, who, interestingly, seemed to feed on her son's accomplishments. She was a very smart and canny woman, but was stymied by the time. She didn't attend college although she thought she might, but she really devoted herself to helping her husband rise at Bethlehem Steel, and very much loved the accolades that her son brought home.

Melissa Murray:

In a way he inherited his father's name, but he really inherited his mother's drive, and that was what really struck me in the first part of the book. This is a very focused and driven man, and you open the book with a replica, a facsimile of a letter that John Roberts as I think a 13-year-old writes to the headmaster of the La Lumiere School, which is a sort of tony boarding school in Indiana, and he's seeking admission and he's just very earnest about it. Like, this is what is going to set him apart and

make it possible for him to get a good job in the future, and he's unabashed about it. And it turns out that The Lumiere School is really the beginning of the making of John G. Roberts.

Joan Biskupic:

That's exactly right. He tells the headmaster, as he writes this letter in December of 1968, "I don't want to just go to any old school. I want to go to the best school. I don't want to get just a good education. I want to get the best education. I don't want just a good job. I want the best job." And he writes it in his beautiful cursive penmanship and it did the trick. I went to La Lumiere a couple of times and they have it displayed under glass in the school library. And rightfully so. And you're right, I reproduced that letter in the book and it's the only visual we used and I find that to be so telling of John Roberts.

Joan Biskupic:

And I love how you focused on the mother, because you're exactly right. He has his father's name. He wanted to please his father and he was the only boy in the family of four. He has three sisters, so there were obviously a lot of identifications with the father. It was an era where the young son was expected to be like the father in some ways. But his mother, according to friends and family, was the real driver. She liked to brag on the son as plenty of mothers do about their children, and an early anecdote that I got from his only surviving aunt, his only surviving aunt or uncle, was quite telling.

Joan Biskupic:

She recounted a time back in the '60s when she and her husband were visiting the Roberts family and they come through the door and the first thing Rosemary says is, "Jackie," and at that time John Roberts was known as Jackie. "Jackie got all As on his report card." And the uncle, the spouse of the woman who's telling me this story, says, "That calls for a dollar bill." Now this is... He was born in '55, and this is roughly '61, '62, he was just a little tyke, but there he gets a dollar for those grades, and I thought that was such a nice tale. And this aunt who was quite fond of the Chief, referred to him as "sober puss," in a very fine way because he was always into books and he was quite serious. He wasn't the kind of kid that would naturally be picking up a little dump truck or other toy.

Joan Biskupic:

But the mother, the mother both enhanced the father's career but also her only son. She would clip stories out of The Chicago Tribune and the local newspaper there in Northern Indiana that she thought would help her husband in his career. And so she was always pushing him, she was always quite... Again, a lot of this is what we would expect of many parents, but I think that she got to live out her dream of a superior education through her son. The daughters went to college but they didn't get anything like the education that he got.

Joan Biskupic:

You should know that Catholic boys in the Midwest, they didn't usually go to boarding school at all. He would have just gone to the regular Catholic high school, probably the all-boy Catholic high school, just as his sisters would go to the all-girl Catholic high school. That was the normal matriculation. But lucky for him, he always had a fabulous sense of timing. Just when he was getting ready to go to high school was when this prestigious boarding school opens up, and it wants to model itself on the elite boarding schools in the East, and indeed it does. So he's able to go there. He graduates first in his class from La Lumiere, and then he becomes the first young man, and at that point it was an all-boy school, to go to

Harvard. And then he finished Harvard undergrad in three years and then goes right to Harvard Law School.

Melissa Murray:

So, the book really... again, sober puss is exactly the term, and he is, even as a child, adult beyond his years. And, as you say, he finished his Harvard in just three years, immediately goes on to Harvard Law School where he has a really glittering career as a law student. He's on the Law Review. He gets a clerkship for Judge Henry Friendly. That in turn leads to a clerkship for then Associate Justice William Rehnquist, and he arrives at the Court. He's clerking with Dean Colson who remains a very good friend of his, and he's the little guy in chambers. He is the young one, but yet he's also the oldest soul in the room.

Melissa Murray:

And I thought the parts where you describe his clerkship... And the color you give it is actually amazing. Justice Rehnquist with these mutton chop sideburns and these unfashionable Buddy Holly glasses and terrible ties, really nurturing this young man. And to your point about sense of timing, he is there just as the conservative legal movement is really beginning to take shape, and that clerkship is part of that. But, as he begins his career in Washington, it is as this conservative legal movement is really gaining steam.

Joan Biskupic:

Exactly then. The Federalist Society was just a year away from being founded. Reagan is elected in November of 1980, John Roberts distinctly remembers where he was at the Supreme Court in January of 1981 when he hears Reagan's speech, his inaugural speech, and he regards it as really a call to duty. And, fortunately, he's already exactly in the right place at the right time. He's very much moved by Ronald Reagan across the board, what Ronald Reagan stands for.

Joan Biskupic:

But he's already made these intriguing connections. When you were talking about all that La Lumiere represented to him, Ken Starr said to me about La Lumiere that at that school he could be mister everything, because he could exceed in sports. It was a small enough school, he could exceed in sports, he could exceed in academics, everything. But it was Ken Starr who first hires him in the Reagan administration. William Rehnquist makes the call over to the White House. Actually, at the time, it was the Department of Justice, and talks to people in the Department of Justice and says, "I have this young man here who's going eventually want to practice law, but I think it could be great if he could go into the administration." And that's exactly what John Roberts wanted.

Joan Biskupic:

So the first person he's working for is Ken Starr. And he continued to work for Ken Starr, I don't know, through the years there. So he makes the connection to William Rehnquist which is fascinating because he then ends up succeeding him in 2005. He makes the connection to Ken Starr, and, you mentioned Dean Colson who was his dear pal from the clerkship. All these men, and they were mostly men, form a clutch that John Roberts becomes quite loyal to and they become loyal to him. And the night of Justice Scalia's death, only to jump ahead a little bit here, in 2016, he was with Dean Colson in Florida at that very moment. So, the interconnectedness to me was fascinating. In some ways, John Roberts recreated the tight little world of La Lumiere in other settings as he went forward.

Melissa Murray:

That seems exactly right, and the book sort of portrays they are both loyal to him, he is in turn loyal to them, and these bonds are unshakeable. But to your point about the Federalist Society, the Chief Justice is I think interesting among his fellow conservative justices in that he doesn't necessarily profess membership in the Federalist Society, or even due as much with the Federalist Society as other justices have done in recent years. Is he still enmeshed in this world, or does the fact of his appointment as Chief Justice keep him a little bit removed from the actual operations of the conservative legal movement?

Joan Biskupic:

He has tried to separate himself from the Federalist Society for many years and not just as Chief Justice. As Chief Justice he has not gone to the events, the annual conference in November, specifically, as many of his conservative colleagues have who've spoken there. And even before he became Chief, he realized that association with the Federalist Society could be a liability in some quarters. Obviously, it's a benefit when you're trying to get chosen by a Republican president, but it makes it more complicated if you want bipartisan support. So, as a young attorney in Washington, he was attending Federalist Society events, he was part of its mission.

Joan Biskupic:

But, fast forward to his appointment to the D.C. Circuit by George W. Bush, he's nominated in May of 2001 and then he eventually gets on in 2003. Around that time, when the nomination was first made, The Washington Post writes a story about how he's been a member of the Federalist Society, and he calls The Post and he makes clear that he was not a member. He doesn't want that ascribed to him. And then what The Post does in 2005 when he is nominated for Chief Justice, he... Or, he might have been... As you know, he was first nominated to succeed Sandra Day O'Connor in 2005. I'm not sure when The Post did the story, but The Washington Post wrote a story specifically about John Roberts' effort to divorce himself from the Federalist Society.

Joan Biskupic:

I don't have my book in front of me so I might be a little fuzzy on some of the details, but the point was that he had been part of the Federalist Society but then he affirmatively tried to get a major news organization like The Washington Post not to include it as part of his resume. He wanted to separate himself from it. But I do know for a fact that when he was in the running for the 2005 appointment, he met with Leonard Leo of the Federalist Society to talk about his candidacy, so to speak, for that. So I think he's wanted to have it both ways, back then, but now I think he realizes it is not helpful for him to have ties to the Federalist Society as he now presides over the Federal Judiciary.

Melissa Murray:

And there is a kind of studied neutrality that I think, perhaps, comes out of the experience but certainly pervades his time as Chief Justice. So, let's just get into the time as Chief Justice. As you have suggested, this wasn't the job he was originally tapped for. So, in 2005, and I remember where I was when Sandra Day O'Connor announced her retirement, and then there was this flurry of activity and George W. Bush announced that John Roberts of the D.C. Circuit was going to be his nominee to succeed her.

Melissa Murray:

And then the heavens, it seemed, opened up and this unbelievable event happens with Chief Justice Rehnquist unexpectedly passing away, and all of a sudden John Roberts goes from being the nominee to succeed the first woman on the Court to being the person who is tapped to succeed his old boss. And Sam Alito is the one who ultimately gets the O'Connor seat, but, would we have gotten a different John Roberts as a Justice if he had been an Associate Justice as opposed to the Chief Justice?

Joan Biskupic:

I think most definitely. First of all, just think of the series of events that led to that.

Melissa Murray:

The timing. The timing.

Joan Biskupic:

Well, let me tell you how much I remember where I was July 1st, 2005. I was finishing up my book on Sandra Day O'Connor then. That was my first book. It wasn't scheduled to be published until the following January of 2006 because I didn't think she was going to be leaving right away. I knew her husband was very ill, but I didn't think that would prompt her to leave. So, on July 1st, she makes public her interest in leaving. And, remember, she's not just the first woman. By this point she's seen as much more of a centrist conservative than she ever had been. She's really a moderate figure at this point, and so the George W. Bush administration is looking for a successor who's not going to appear extreme.

Joan Biskupic:

And at that point in John Roberts' career, he emerged from his years with Reagan and Bush with one reputation, but then sort of muted that through all his time in private practice. He had no super controversial rulings for his short tenure on the D.C. Circuit, so he had a record that could be cast as much more moderate than, let's say, Michael Luttig or J. Harvey Wilkinson who are contenders from the Fourth Circuit. So he is chosen for that specific opening. If it had been the Chief Justice's seat, William Rehnquist's seat, I'm not sure he would have been chosen.

Joan Biskupic:

In fact, in all likelihood, he wouldn't have been because, again, he was younger than all the other contenders, he had less experience, and he was not seen right then as somebody who would have been as conservative as William Rehnquist. He was more seen as somebody who would not shatter too much the ideological makeup of the Court in succeeding Sandra Day O'Connor. But one thing you forgot, Melissa, even though you flipped at it a bit by saying the heavens opened, Chief Justice Rehnquist died on September 3rd, right in the aftermath of Hurricane Katrina. And that was an episode that the George W. Bush administration had so much turmoil with. Obviously, all these people were dying and suffering. Down in Louisiana and adjoining states, it was just such a catastrophe for the administration as well as for all these people on the scene.

Joan Biskupic:

It was so sad and George W. Bush had seemed inept in how he was handling this, certainly. So, in the middle of all of this, he suddenly gets this opening for a Chief Justice position, and by this point John Roberts has had all his courtesy calls with senators, he's had this beautiful rollout of the nomination

where he gives this fine speech, he's able to talk to senators of both sides of the aisle, present himself the way he does exceptionally well, and-

Melissa Murray:

And that beautiful family. Like the two towheaded children, the lovely wife. I mean, it's really a perfect tableau.

Joan Biskupic:

It was and he was able to, again, start greasing the skids for his confirmation for that Sandra Day O'Connor vacancy. President Bush is in his office early the morning of September 4th. It's a Sunday morning, he's just... The whole thing with Hurricane Katrina is just killing him, and he's got this opening, and someone like Dick Cheney is thinking, "Well, let's look at Scalia, possibly." Antonin Scalia to possibly be a successor to the Chief Justice.

Joan Biskupic:

And other people had other horses in the race, certainly, but President Bush was like, "No. I don't have... I do not want any more turmoil right now. I'm going with Roberts." That's all he said and nobody fought him on it, and that's how that happened. So, in an instant, John Roberts goes from fairly predictable nominee to succeed Sandra Day O'Connor suddenly vaulted up to the top spot, and he's approved. He makes history.

Melissa Murray:

Is he different as a Chief Justice than as an Associate Justice? That's a question I think a lot of people have suggested over time, that we would get a very different John Roberts were he in the Sam Alito position as opposed to leading the Court. And second, and this is more tea-spilling than anything else, what was it like for the other Justices of the Court to have this whippersnapper come in and suddenly be in charge? Like, someone who had never been on the Court before to take that position.

Joan Biskupic:

He himself has acknowledged that he would be a different Associate Justice than a Chief Justice. And that's because he'd have more leeway. First of all, he's in such a remarkable position right now, not only leading the Court but he's at the ideological center of the Court. But even before then, let's just look at the pre-2018 record of Chief Justice John Roberts. It's called the Roberts Court. He does not want to be presiding over a bench that is lunging too far to the right or to the left. In his case, obviously, it would be more to the right. So he has said that he will sometimes call upon, he will sometimes drop a concurrent. He will sometimes just try to find consensus in a way that he might not have had the incentive to if he were an Associate Justice.

Joan Biskupic:

And I think we saw that very dramatically in 2012 when he voted to save Obamacare. I think that's definitely the situation. So even before we got to this moment where he's completely buffeted by the Trump administration and trying to preserve some institutional integrity, even before then, I think he was tamping down some of his ideological instincts and trying to be at the center as much as he could.

Joan Biskupic:

Now, I will caveat all that all the time about certain areas of the law. Sure, we saw that on the Affordable Care Act case in 2012, but on race and religion and campaign finance, I think those votes there have been consistent with a very strong conservatism that would have manifested itself as an Associate Justice and as manifesting in itself as a Chief Justice also.

Melissa Murray:

That's really helpful. We, also, have noticed that he, despite the praise that he's received from some quarters for being a moderating influence, he's been very consistent on a lot of things, even in this term which has been kind of bonkers of a term, he's been very conservative in terms of his votes on some of these emergency voting issues that have come down and his tap on race I think has been remarkably consistent, even from his early days on the Court. I mean, I will note that in this year's DACA case, it was Justice Sotomayor who was by herself and noting that the Equal Protection claim that the DACA petitioners had offered, in her view, should still be allowed to go forward.

Melissa Murray:

He's kind of wrangled with her a bit on questions of race, and he joined Justice Alito and Justice Kagan in the Ramos opinion this year, their dissent, in which Justice Alito suggested that talking about race, talking about racism, was in some way an uncivil act among colleagues. Where do you think this comes from? Is this just blanket conservatism or is this the vestiges of a Midwestern upbringing where perhaps civility and a specific kind of civility was prized? But where does this come from, this particular take on race and the conservatism that underlays it?

Joan Biskupic:

John Roberts and race, we could talk all day. It is such a deep pattern for him. He-

Melissa Murray:

Is he aware of it, that it's a pattern?

Joan Biskupic:

I'm sure he's aware that he's been consistent. He just sees it through a much different lens, a lens that, back in the Reagan years was... And the '70s, that era known as the color-blind approach which is an unusual way to describe it when it exacerbates all sorts of racial divisions. But he has not wavered on this. He took a strong stand within the Ronald Reagan administration against any kind of enhancement of the Voting Rights Act or restoration of the Voting Rights Act, because at that point in 1981, '82, Congress was actually trying to restore some provisions that the Court had curtailed.

Joan Biskupic:

So he was so... He had put his cards on the table very early on that. Ditto with affirmative action, and I think one of his most memorable lines... In fact, so many of his most memorable lines come from race cases, from the parents involved versus Seattle Schools decision where he says, "The way to stop discrimination based on race is to stop discriminating based on race." And just as John Paul Stevens and other liberals which were so taken aback that he could say that. But he offers no apology, he does not mince his words in this area, and, to get to your point about how he can be quite firm, defensive even, when other members of the Court want to talk about race, he also steps forward and says, "This is not

what we should be projecting to Americans." In 2014 he was so angered by Justice Sotomayor's dissent in the Schuette case. Remember that Michigan case-

Melissa Murray:

Yeah. The only way to get past this past is to actually have frank conversations about race.

Joan Biskupic:

Exactly, and she talked about the snickers, the slights, everything that people of color experience. And he did something he hardly ever does. He wrote a separate concurrence to complain about that, and to say... It was almost as if he felt like they were airing some sort of dirty laundry to be talking [crosstalk 00:33:10]

Melissa Murray:

All the incivility of it.

Joan Biskupic:

Right.

Melissa Murray:

The incivility of talking about it.

Joan Biskupic:

But there are plenty of things that we could say that lack civility, but it's the topic of race that gets at him. So, you extend that line all the way up to issues even in the Wisconsin case that we had this term, where five justice majority led by John Roberts says, "No, we're cutting off those mailing ballots," just as Ginsburg rights for the liberals say, "Think about all the people you're disenfranchising." Now, that was not a case with overt racial overtones, but voting has such a strong racial component. Affirmative action has such a strong racial component. It's just there, and he has said that he just thinks the Equal Protection Guarantee just does not cover these remedial measures. And he has not shied away from saying that.

Joan Biskupic:

There are plenty of areas where he wants to couch things and act like he's... He wants to minimize what he's doing. I think of his campaign finance writings where he says, "We're not doing too much here. We're not disturbing the law." He wrote the concurrence in Citizens United, and things he said through the years in that area where he doesn't really want to outright own the changes. But on race, he does not pull back.

Melissa Murray:

The point you make about his response, the defensiveness of his response to Justice Sotomayor's Schuette dissent is really interesting, especially when we contrast it to what we talked about at the beginning and this very strong mother figure who was in his life. He's on a Court where he actually has some very strong female figures who aren't afraid to go toe-to-toe with him on some of these questions. Does he respect or admire their efforts? Do you think he's ever swayed by some of the things that they

talk about, or persuaded by them? Or, is he sort of more Midwestern conservative from the 1950s than perhaps we even appreciate?

Joan Biskupic:

I would not treat all the women equally. There are plenty of Midwesterners and plenty of Midwestern conservatives who do not subscribe to its views entirely, so I don't know if I would chalk it up to the regionalism. He certainly regards Sonia Sotomayor in a certain way, but I don't think he regards Elena Kagan the same way. I think Elena Kagan has his ear. I think she is quite persuasive with the Chief. I think that Justice Sotomayor has not been as effective in persuading the Chief.

Joan Biskupic:

Obviously, they're coming from different points of view. Justices Ginsburg and Sotomayor don't really want to compromise on some things they really believe, some real strong and liberal principles. Justice Kagan is more willing to work the middle. I think that's obvious. We saw that in the Little Sisters case, we've seen that in religion especially.

Melissa Murray:

Yes.

Joan Biskupic:

And I think you're right to bring it up in the Dreamers' case because there's Justice Sotomayor writing alone, reminding everyone of President Trump's racist statements about Mexicans, saying, "Guys, remember all this. Remember this. Remember why his administration might be trying to roll back the DACA benefits here. Think of what he said. Let's at least let them go forward with the claim." She wasn't saying she necessarily agreed with it. She wasn't saying, "This is the way I'd rule." She said, "Let that at least be aired."

Joan Biskupic:

And obviously the Chief didn't want that and the other liberals who joined him in the plurality opinion didn't feel the need to do that. But they also might have felt the need to reward him for coming as far as he did on DACA. And that's another thing that Justices Breyer, Stephen Breyer and Elena Kagan certainly have done. They see this as a much more of a fluid process of giving and taking, and Justices Sotomayor and Justice Ginsburg I think have a... believe that there are certain places that they're just not going to compromise.

Melissa Murray:

That's a good point, and the idea that the liberals did not join her opinion in order to sort of reward the Chief Justice for coming along with them. We've actually seen some nod to that among the media in the last couple of weeks, sort of an effort to praise Chief Justice Roberts for his moderate, more liberal votes this term. And my colleagues on Strict Scrutiny and I noted that it was the same kind of tactic that individuals use when they're training killer whales or dolphins, like that you just lavishly praise them for doing really minor things so that they'll then move on and do bigger things like jump through a hoop or do flips or whatnot.

Melissa Murray:

Do you think that's what's going on? One, do you think he is a killer whale and is susceptible to this kind of praise, and if we praise him lavishly enough will he lurch to the center or to the left? And, is this effective, the whole idea of praising him? Does he respond to it?

Joan Biskupic:

Well, I think he does respond to it. I think he does. And I also think the liberals start this enterprise with a weak hand. They have only four votes, so they have to decide how they're going to use these four votes. I mean, this is me just, obviously, as an outsider, trying to figure out what motivates the individual justices on the left. And I think for Justices Kagan and Breyer, they think, "We're already playing with a weak hand. If we're going to lure him over to this side, we are going to have to give up praise to plenty of things that are part of the persuasive effort to bring him over."

Joan Biskupic:

Now, I think there is a lot of very good discussion over whether certain compromises have been worth it. And I think of Trinity Lutheran in 2017 when Justice Kagan and then to a lesser extent Justice Breyer compromised but Justices Sotomayor and Ginsburg just dug in against where the Chief was going. I think they know what's going on inside. I tried to find out as much as possible what's going on inside, but it's a call that they all make as individuals. They're not... I tend to sometimes presume the left is going to be a little bit more organized than I think they really are, because if you're dealing with a weaker hand, you might want to get a little organized, or try to strategize a little bit more.

Joan Biskupic:

But I don't know what exactly happens. I know that Elena Kagan certainly appears from the outside to be excellent at what she's doing, but that I also know that then causes tension, perhaps, with Justice Sotomayor's people who think, "Come on, we've got to dig in here." And maybe that would be more effective. But look what happened this term. There was enough coalition building at the center that obviously served the Chief Justice and gave the liberals some wins, so there is a sense of, "Be happy with what you've got," I think some of the members of the left would say.

Joan Biskupic:

And in terms of media coverage, it is remarkable the idea that certain rulings can define the whole term. I don't agree with that, obviously. I think that there were a lot of actions this term, the high profile ones, granted, seemed like a move to the left, but when you step back from the whole term, it's just much more complex. And we obviously are seeing that with some of these orders, and we're reminded of that, I should say. We have to see and we're reminded of it, but we could have been reminded of it before. Shelby County is not going anywhere. Parents Involved isn't going anywhere. We know where the Chief is at on those.

Joan Biskupic:

And religion, the three religion rulings all broke to the interest of the Justices on the right wing, and I think that there's no way that we can anticipate any kind of retrenchment in that area of providing more votes to... more the conservative ideals of religious liberty than we've had in the past.

Melissa Murray:

So Trinity Lutheran is actually a good place to offer up this question. Is the Trinity Lutheran when it was first announced was framed as a very incremental decision on... The footnote was parsed over and over again, just about the playgrounds. And then it led to Espinoza and Espinoza I think will, in turn, generate more. But it's interesting that the two figures, jurisprudential figures in John Roberts' past are Henry Friendly, who was studiedly neutral about things, and then William Rehnquist who was an ardent conservative but also a master tactician who took the whole term with a longitudinal view about how the whole process was going to play out.

Melissa Murray:

Everyone else is playing checkers, he's playing chess. And, interestingly, John Roberts, I think, wants to present himself as a Henry Friendly figure, this is the, "I call balls and strikes. I'm just an umpire. There are no Bush judges. There are no Obama judges. There are no Trump judges." But, on the ground and in the Court, he's really more like Rehnquist and some of these moves are incremental and surgical. But if you take a long view they are really sedimentary and building up to these lurches to the right that won't seem like lurches when they actually occur.

Joan Biskupic:

I think that's exactly right. One of the best lines I got about John Roberts was offered up by someone who was once a dear pal of his but then turned out to be a rival and is now a very-

Melissa Murray:

Is this Luttig?

Joan Biskupic:

... very much a critic. Right. Exactly. Mike Luttig. Mike Luttig.

Melissa Murray:

So, if you haven't read the book, Mike Luttig is sort of the John Roberts counterfactual. Like he was supposed to be John Roberts and then he wasn't.

Joan Biskupic:

Right. And he said to me... I went to see him in Chicago when he was working at Boeing at the time for a couple of interviews, and he gave me a great line about John Roberts always being able to see ahead what's going to happen with pristine clarity. I'm paraphrasing that a little bit but the key part is, seeing ahead and having pristine clarity. And I think that's right. Look, John Roberts is someone who 80 to 90% of the time can anticipate what's going to happen. He gets caught up in that remaining 10 or so percent of the time. He is a chess player. If I had a nickel for everyone who told me he was playing three-dimensional chess, I'd be rich. And after this term people were like, "He's playing five-dimensional chess."

Joan Biskupic:

So, whatever metaphor you want to use, usually people give me sports ones about how he can see the whole floor. But he does see ahead, he knows where he wants to go, he likes moving in those incremental steps, but he's got the vision thing as they say. He knows where he's headed, and I think his colleagues are not blind to that, but they will take what they can get along the way. That's why I think

Trinity Lutheran, with that footnote that this is only about playgrounds everyone, you know, Justice Kagan probably thought, "Okay, this might lead to something more but at least from 2017 to now, 2020, we've got this held." So, I don't know, I'm not inside the heads of any of them, but I think that that's the best they can hope for, are the incremental wins, because they're not winning the long game.

Melissa Murray:

Let's flip to his conservative colleagues, because there's definitely appetite I think on the conservative wing of the Court to be less incremental and to just lurch and to really move to the right, and I think we saw this term a very angry Justice Alito who at times, I think, sort of questioning the Chief's conservative bona fides, or at least the way they are reflected in some of these decisions. I think we definitely got a sense that there are at least two Justices on the Court, possibly three, who would like to move more quickly to the right than the Chief Justice is willing to do.

Joan Biskupic:

Oh, I think that's absolutely clear. Yes, I think that... Well, first of all, look at with the... We saw who dissented in abortion, so we know where Justices Kavanaugh, Gorsuch, Alito and Thomas are on abortion. We know where those four were on DACA Dreamers case. We know where at least three of them were on the gay and transgender rights case, and those are just the obvious ones. And then also with the Trump document, the subpoenas. You had Justices Thomas and Alito break away on those, too.

Joan Biskupic:

So I think they are very frustrated by his hedging on the conservatism. I think that they might understand in terms of the pressures, sometimes, of the institution, but they don't like it. They don't like it at all.

Melissa Murray:

Let's look at this term in view, and maybe this term will help us think about the last 15 years of John Roberts' career on the Court. Were there particular opinions from him this term that surprised you, or particular votes that surprised you?

Joan Biskupic:

I would say the one that I wondered about most was probably going to be abortion, and I'll tell you why abortion as opposed to... And the gay rights and I'll separate... And DACA. I'll tell you what I thought on that. I'll start with the easy one. I actually thought he was going to end up voting the way he did on the young undocumented immigrants' case from the start. Everybody else heard him in a different way, but I've just been so-

Melissa Murray:

Oh, he seemed skeptical at oral argument. I mean he did seem like he was skeptical.

Joan Biskupic:

I know. But I actually thought I heard him looking for an offering up on the Reliance issue. I mean, again, a little bit hung up on his references to the de facto officer doctrine. But I did think that he was looking for something there. So I wasn't surprised about his DACA vote. That one I felt like... And again, because it was the Trump administration I thought that might also be one where he could be a little bit more

scrutinizing of what the administration was doing, and indeed it was almost as if it was a replay of what he had done on census the year before with the Administrative Procedure Act.

Joan Biskupic:

So I wasn't surprised about that one. On abortion, I'll tell you what hung me up, what I wondered about on abortion. He had never voted to strike down an abortion regulation. I know that this is an area that really matters to him, but I thought the weight of precedent could make him go with the Liberals there. So, I guess those two were easy enough for me to anticipate. The gay, lesbian and transgender workers case on Title VII, he has never embraced the kind of textualism that Neil Gorsuch has. So, Neil Gorsuch's vote was predictable in some way, especially after we had heard the oral arguments.

Joan Biskupic:

The Chief, I didn't think it was a natural candidate for that. But I'll tell you, once I heard what was going on, I could... Once you know what's going to happen you can rationalize it and I thought of a couple of things. I thought that, as some people might have reminded you during the Obergefell oral arguments, he had actually made some comments about Title VII and discrimination when someone might... When Tom might like Suzie or Tom might like Jane. You know what I'm talking about, right?

Melissa Murray:

No, I remember, there was that... Like that, couldn't this be a form of sex discrimination?

Joan Biskupic:

Exactly. He had said that. He had said that and it was Title VII, it wasn't a matter of Constitutional concern the way Obergefell had been. I had put a lot of stock in his dissent from the bench on Obergefell. I thought that was a really defining moment for him. You know, his first and only dissent.

Melissa Murray:

Who do we think we are?

Joan Biskupic:

Yeah. Yeah.

Melissa Murray:

Who do we think we are?

Joan Biskupic:

But I could understand, once I picked up where he was headed, I could rationalize it fairly easily even without the textualism that was obviously where Neil Gorsuch was going with it, is that this was a different matter, it was Title VII, it did recall what he had said during the Obergefell one, and that most of corporate America is already there. Most of corporate America is already subscribing to the view that the Supreme Court adopted here. So I didn't... Obviously, he didn't write separately to explain himself, but I didn't think it was a jolt so to speak to use a word of his.

Melissa Murray:

I had forgotten about his comments and oral argument in Obergefell. That's a really excellent point and also the idea that, for him, at least, this might just be a kind of consensus move, so much of the country is already there that this isn't shocking in the way that maybe Obergefell might have been shocking in 2015 still for some quarter of the country. Do you think, looking over the arc of his career, that there are certain votes or opinions that he regrets or would do over? Or does he regret nothing?

Joan Biskupic:

I don't think he's the kind of person who has those kinds of regrets. He might second-guess himself slightly, but I think he believes, as probably most of them up there do, that they did the best they could in that moment, and perhaps he might reconsider some language. I would say, the language of the Obergefell dissent, I don't think he intended it to be heard as harshly as it's been heard, and I wonder why. I know that he probably didn't want to echo... The echos of Justice Scalia were so strong at that moment, and Justice Scalia had so angrily and vividly rejected gay rights at every turn with real animus, that I think that the Chief did not want to be in that kind of category but his language did resonate that way. It did. And he compared the ruling to Dred Scott.

Joan Biskupic:

So, I don't know what he won back from that. The line you just mentioned, "Just who do you think we are?" Or some of the things that Judge Richard Posner went after, I mean, there were lots of things in there that maybe he might revisit if he had another chance. And the other thing is, for as much as I say that he's so dug in on race, I just wonder if he has any regrets for that statement about the way to stop discrimination is to stop discriminating based on race, only because it's shown such a blinded view of what America is all about and what's happening here.

Joan Biskupic:

And what was happening then, what's always been happening, it's not just this moment, it's not just 2013 when he said it, it's not everything that preceded it. It just showed a certain kind of tone-deaf attitude, that, again, even his colleagues who are quite sympathetic to him found it just so misguided. So, maybe he does. But I don't know. He never expressed it to me.

Melissa Murray:

It is an interesting sort of sentiment from someone who clearly understands that perception and optics matter. I mean, he's very concerned, I think, about the way the Court is portrayed, and I imagine the way he is portrayed as a leader of the Court, so it is a surprising misstep for him. This year I think was an interesting one for him because not only was he really in the middle of things as a vote to be captured on the Court, he also had to leave the Court in January to go across the street to preside over the impeachment trial of a sitting president. What do you think that experience was like for him? Or what do you think he took from it, and how did that perhaps shape the end of the term?

Joan Biskupic:

I think he enjoyed the historical moment. Only three Chief Justices have played that role. So, and he's all-

Melissa Murray:

But he did not take the opportunity to exhibit any sartorial flair as his predecessor had. He played it down the middle.

Joan Biskupic:

No, no. That's exactly right. That many people who'd match William Rehnquist and his Gilbert and Sullivan obsession and desire for stripes on his sleeves. I think he was pleased to be part of a historical moment. I think it was wearying, obviously it was tense, he didn't like being in the public eye so much. At the Supreme Court there are no cameras there. He does his job so much out of the public eye, and when he's in the public eye, he can be incredibly scripted and it could be a very short, controlled setting. But there he is in the Senate, and for his control as the impeachment trial setting was and that he worked off of a text for just about everything he said, it was still the camera on him, people saying, "Hey, look at that watch, that fancy watch he has." You know, the different things that viewers picked up on and that journalists wrote about, I think it probably drove him nuts that... The accounts of him fidgeting up there, which, you know, he was trying to be so restrained and controlled and steady. And he was for the most part.

Joan Biskupic:

So, I don't think that was easy in the moment, although it was important. He regarded it as, obviously, important work, but he got to see up close all the partisan wranglings, and the tensions between the Trump administration and the Democratic-run House with the Republican-led Senate on the side of the Trump administration. And then to have that as his backdrop when the Trump documents cases come to the Court, I think that was just another incentive to lower the temperature, try to get as close to a unanimous ruling as possible. He was, I'm sure, aware of the weight of the two precedents in this area, *US v. Nixon*, and *Clinton v. Jones*, both decided by unanimous Courts. And he wasn't going to get that with Clarence Thomas and Sam Alito, but he probably got as close as he was going to get with these nine members.

Melissa Murray:

Do you think that's why he chose to write both of those decisions? I mean, it was noticeable that neither Justice Breyer nor Justice Sotomayor had any opinions from the May sitting and the Chief wrote both of those majority opinions.

Joan Biskupic:

The Chief tends to take the big cases and save them for himself. He does that more than Chief Justice Rehnquist did. So I frankly had no doubt he was going to take both of these and that's a bit of his pattern.

Melissa Murray:

We don't know that much about the Chief Justice other than what we can glean from his writings and what we can get from your book. And interestingly the book, although it talked lots about him, doesn't say a lot about his family. So we know that he is married to Jane Roberts, and she is sort of a leading figure in the feminist pro-life movement. What else do we need to know about the Chief Justice? Justice Souter was sort of famous in that he ate an apple and yogurt for lunch every day. Does the Chief Justice have any other abstemious quirks that we should know about? What does he do for fun? What has he been doing in quarantine?

Joan Biskupic:

Okay. So he's probably headed right now up to the place they own in Maine, in Hupper Island, that they like to vacation at. So he has that pursuit. He and his wife Jane like to travel when they can travel. The two kids, Josie, the daughter, just turned 20 and the son, Jack, is about to turn 20 in December. He works out, you know that he fell when he was over at the Chevy Chase Club and banged his head. Had to be taken by ambulance to a suburban hospital here, and he did not want that known. It's amazing, Melissa, that it even stayed under wraps for nearly two weeks until The Washington Post got the story.

Melissa Murray:

We talked about this. We could not believe that it stayed under wraps for a month.

Joan Biskupic:

I know. That place is just half a mile from where I live. Everybody lives around where he lives and where he was walking and plenty of people-

Melissa Murray:

Walking for exercise. Walking for exercise.

Joan Biskupic:

Yeah, walking for exercise, although, it was right near the golf course, you know. So he has athletic passions. He spends time with his family, obviously. Jane is quite accomplished as a legal recruiter. Has her own business now. Before she had been with other international firms, but she has her own business now. So I would say that his pastimes are pretty standard ones. He likes to read history, he likes to read judicial bios, not mine, but others. And I think he feels like he has a pretty full schedule. And, one of the fears that we all had when we heard about the report that he had fallen and had to be taken to the hospital was, could this possibly have been part of what might-

Melissa Murray:

A seizure.

Joan Biskupic:

Yes. Because he's had at least two publicly reported seizures from before. So, he is 65, we're not worried about him at all. 65 is like such a youth on the Supreme Court. All of our attention is directed toward Ruth Bader Ginsburg, certainly, at age 87 and fighting off yet another occurrence of cancer. But he's got the ups and downs of life, also, and I think that he's probably so happy to be getting away given, again, not just the stress of the normal term but having to deal with his colleagues from nine isolated spots, and communicate mostly through teleconferences, through emails. There's nothing that can replicate the one-on-one human contact.

Melissa Murray:

That's certainly the case. So, last question for you, Joan. What can we anticipate in the upcoming term? Because this upcoming term I think is going to be a doozy. They haven't taken as many cases as they ordinarily do, I think likely, because they anticipate having some skirmishes over voting, possibly even an enormous election-style crisis about the presidency. What can we expect from Chief Justice Roberts in this next term and in the terms to come?

Joan Biskupic:

First of all, we have another Affordable Care Act showdown. I don't anticipate any real surprise there. He's twice voted to uphold it. I don't see that changing. We have new disputes come in related to religion, we'll have replays of what we had this term, minus the Trump documents. I think what we're going to see will depend on who is elected president in November. If Joe Biden is elected president and he is able to have an opportunity to remake this Court in the next four years, I wouldn't be surprised if John Roberts starts edging back to the right. So, I think that that's a dynamic that could occur, and I also think that once we get out of this election year a majority might be more willing to bite off more.

Joan Biskupic:

Right now you've rightly observed that they haven't taken as many cases as they usually would have at this point, but I think once we get through this politically conflicted time, this polarization that we've experienced with the Trump administration, that the Chief Justice could recalibrate.

Melissa Murray:

We will look forward to the recalibration, I'm sure. But, Joan, thank you so much for sharing these insights. You know more about the Chief Justice than I think anyone other than his immediate family, and we're so excited that you decided to share it with us today. So, Joan's most recent book, *The Chief: The Life and Turbulent Times of Chief Justice John Roberts*, is out in paperback at all of your local booksellers this August, and it is fantastic. So, get on it. Thanks so much for joining us today.

Joan Biskupic:

Thank you, Melissa.

Melissa Murray:

That's another wrap on *Strict Scrutiny*. We hope you enjoy this special summer episode. We will be bringing more of this kind of content to you over the summer, and so let us know what you'd like to hear about and we will keep doing all of the things that we do while the Court is on hiatus. So, many thanks to our producer, Melody Rowell. I'm Melissa Murray, and we will see you soon. Thanks so much.