

Recorded Audio:

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.

Recorded Audio:

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. This is Strict Scrutiny. I'm Melissa Murray.

Leah Litman:

And I'm Leah Litman.

Melissa Murray:

And we have a special summer episode of the pod for you. So this is a podcast about the Supreme Court and the legal culture that surrounds it, and now we are also a project of The Appeal, but we are on summer hiatus, which means that we're not bringing you news from the Court, but we are bringing you all the things you need to know. So get set. Buckle up, buttercups. Leah, what do we have on tap today?

Leah Litman:

So this episode is going to be heavy on Court culture. As you all know, President Trump has had two Supreme Court appointments over the last four years. Technically, he really only had one vacancy to fill, but Mitch McConnell stole the second one from President Obama. We digress. That's a topic for another day. For the second appointment to replace Justice Kennedy, there were three people on what was called the shortlist. Now Justice Brett Kavanaugh who ended up getting the nomination, Judge Ray Kethledge another former Kennedy clerk who's on the US Court of Appeals for the Sixth Circuit, and Judge Amy Coney Barrett on the US Court of Appeals for the Seventh Circuit.

Leah Litman:

There has been a fair amount of attention given to who might be under consideration as a nominee to the Supreme Court, particularly if Joe Biden were to win the presidency. Biden actually following on the heels of President Ronald Reagan promised to appoint a black woman to the Supreme Court. Ronald Reagan of course, promised to appoint a woman, and he ended up nominating Justice Sandra Day O'Connor to the Supreme Court.

Melissa Murray:

So to help us appreciate the phenomenon of Supreme Court nominations, and in particular a weird notion of women being on the shortlist for Supreme Court nominations, we wanted to have on the show the authors of a recent book, Shortlisted: Women in the Shadows of the Supreme Court. So please help us welcome Renee Knake Jefferson, who is a professor at the University of Houston, and Hannah Brenner Johnson, who is a professor at California Western University's law school. Welcome Renee and Hannah.

Renee Knake Jefferson:

Thanks so much for having us. It's great to be here.

Leah Litman:

So to get us started, we would like to know a little bit about the origins of this book. So this book profiles many of the women who were shortlisted for the Supreme Court over time, and it actually goes back pretty far, even further back than the O'Connor nomination. So what actually got you started in this line of inquiry? How did you get here?

Hannah Brenner Johnson:

To tell the story of how Shortlisted began, we have to take a trip back in history about a decade. 2010, you may remember, was a year that was marked by a couple of vacancies on the Supreme Court. Actually 2009 and 2010, President Obama was faced with two vacancies to the Supreme Court. Now Justices Kagan and Sotomayor, of course, occupy what were once those vacancies.

Hannah Brenner Johnson:

About the time that President Obama was considering who he would place on the shortlist and then ultimately nominate to the court, Renee and I were new colleagues at Michigan State University College of Law. I had moved to Michigan from Texas and had no friends. I was reading a lot of headlines and a lot of articles and a lot of blogs about these potential new justices on the Supreme Court and, frankly, in my own private space, I was really horrified with the focus that was being placed on really not the qualifications but the appearance and the sexuality and the parenthood status of these incredibly qualified women.

Hannah Brenner Johnson:

As it turns out, Renee was having similar thoughts and reading similar articles. We began having hallway conversations at the law school about what we were reading. We exchanged emails, we were really outraged, and, at one point, one of us said to the other, I don't know that we know exactly who it was, that we should channel our power and our privilege as academics into doing more than just complaining about the pervasive sexism that was really running rampant during the consideration of these two women to the Court.

Hannah Brenner Johnson:

So we did what a lot of academics do; we turned our complaints and our ideas and our outrage into a pretty significant research project. Renee, maybe you want to jump in and talk about our media study.

Renee Knake Jefferson:

Sure. Yeah, so we decided to see... because we couldn't really remember the similar sort of gendered commentary when President Bush, not that many years before, put Chief Justice Roberts and Justice Alito on the Court. So we decided to create an empirical study. We looked at every article written in The New York Times and The Washington Post going back to the early 1970s about a nominee to the Supreme Court. So we had thousands of articles. We coded them for over 100 factors and, perhaps not surprisingly, we were able to show empirically that, in fact, the media coverage was gendered. That, for the female nominees, it focused more on uniquely feminine attributes: their clothing-

Melissa Murray:

I'm shocked. I'm shocked by that this.

Renee Knake Jefferson:

Right?

Hannah Brenner Johnson:

We knew you would be.

Renee Knake Jefferson:

So that was not so surprising, although it turned into a graded law review article as those sorts of studies do. But what was most interesting I think out of that project was one of those newspaper articles written in 1971. So Hannah and I had a team of wonderful research assistants who helped us with a lot of the coding, but we also, each of us, read every single one of these articles. There was one that appeared in The New York Times in 1971 about Richard Nixon's shortlist where he had officially put not one but two women on the shortlist, first president to do so publicly.

Renee Knake Jefferson:

One of those women was described in The New York Times as fortunately having no children and maintaining her bathing beauty figure even in her fifties as her qualifications for being on the shortlist, of course, she was not a bathing beauty model. She was a judge in California, Mildred Lillie, and we were, well, on the one hand, the article confirmed our thesis that led us to that media study. But then, on the other hand, the article shocked us not so much about the sexist coverage, but we were like who's Mildred Lillie? Why haven't we ever heard of her before? And how were there not one but two women? Sylvia Bacon was the other woman in the article and four men on Nixon's shortlist. He had a shortlist of six.

Renee Knake Jefferson:

Who were these women? Why had we never heard of them? We hadn't heard of them in high school history class. We had not heard of them in a feminism in the law class as law students. Then we wondered, well how many women were shortlisted for the US Supreme Court before Sandra Day O'Connor became the first in 1981? Answering that question took us across the country through presidential archives and the personal papers of nine women. As it turns out, the answer is nine women were officially shortlisted by presidents going all the way back to the 1930s before Sandra Day O'Connor finally became the first to make it off the shortlist and onto the Supreme Court.

Melissa Murray:

Wow. Well that's amazing. We're in this moment now where Joe Biden has famously announced that he will nominate an African-American woman to the US Supreme Court. So given your-

Leah Litman:

And promptly, Newsweek magazine and Reason and Bullock will debate whether in fact, she is black. So I really look forward to-

Melissa Murray:

Or a citizen, or a citizen.

Renee Knake Jefferson:

Or a citizen.

Leah Litman:

So yeah, my bad. My bad. Put a pin in that. I called it Cassandra right here.

Melissa Murray:

So Leah has preempted my question, but what kind of coverage might we expect of the women who are going to be shortlisted for this likely spot that Joe Biden, if he is elected, will be nominating someone for?

Hannah Brenner Johnson:

Unfortunately, I think that we are in for, again, a rather sexist coverage of the women who are shortlisted and, ultimately, nominated. We were, of course, shocked when we read about Mildred Lillie in the 1970s, but of course it was the seventies. So perhaps, that could be chalked up to the pervasive sexism that existed at that time. But I guess we wouldn't have expected that in 2009 and 2010, with these most recent nominations to the court, that the media would still be focusing on whether the women had children. Who would they bring to fancy dinners at the White House if they were single?

Renee Knake Jefferson:

Who wore it better when they both wore similar blue blazers to their Senate Confirmation hearings, yeah.

Leah Litman:

Characterize this as a bachelor competition and ask who Joe Biden is going to give his rose to as it derives the vice presidential election.

Melissa Murray:

Well, to be fair, I think the nomination of Neil Gorsuch did play out in bachelor-esque fashion. So it doesn't have to be gendered.

Leah Litman:

You're right. But I don't think that the media really did a lot to characterize it that way. The President had the other possible nominee drive down to Washington DC to throw off the media trail. So a little more agency on that side.

Melissa Murray:

Could you say a little bit, and I think maybe the nomination of Justice Sotomayor is probably the best analog, but what will the intersection of race and gender look like in the coverage of whoever this nominee is in the event that Joe Biden is elected?

Renee Knake Jefferson:

Well, I have to think the coverage we're seeing right now of Kamala Harris is sort of a preview of how that will play out. One thing I really hope is that you rightly recognize that Biden is not the first president

to campaign on shortlists, and of course after Reagan campaigned on the promise of putting a woman on the Supreme Court, one thing that we were in some ways reminded of, then also sort of uncovered for the first time as we were doing a lot of archival research, is that Reagan then went on to appoint hardly any women to the federal judiciary.

Renee Knake Jefferson:

So he really let that prominent role become a token. I sure hope that if Biden becomes president, he doesn't just check the box with these two significant roles, but that he thinks very deeply and broadly about every appointment in not just his cabinet but in who he charges within the administration to do these selection processes. That they should not just be thinking about diversity and the pool, but also making a commitment to diversity part of one's qualifications.

Leah Litman:

So I want to come back to this phenomenon of using the shortlist or a nominee as a way out of doing harder, more systemic work to address gender or racial equity, but one thing that I noticed in the lead up to the vice presidential selection were a group of commentators and other women politicians watch a campaign that kind of became known as we have her back or I have her back.

Leah Litman:

So I guess what tips might you have to law students, professors, commentators as they are thinking about discussing potential nominees to the Supreme Court and evaluating them in order to avoid some of the very gendered and racialized language that you identified for previous shortlisters?

Hannah Brenner Johnson:

We have to tread cautiously when we're talking about these candidates. I think that focusing on qualifications is really important. There's a lot of backlash, of course, that comes from any assertion that presidential candidates or other person in position of leadership or power is going to prioritize race or gender when they ultimately make a selection. So I think it's really important that the qualifications are the focus.

Hannah Brenner Johnson:

Certainly, when you look at the women who we profile in the book who have been shortlisted, it's almost impossible to argue with what they've done. They went to excellent law schools. They have impeccable legal careers. They engaged in exemplary public service. I mean, they embodied really, I think, in terms of the quality of their professional lives, what you would see in a candidate for the Court. So I think by keeping the conversation focused on those issues, I think perhaps we're more likely to avoid some of the pitfalls. I mean we are so long past the point of the comment that "Well, we'd appoint a woman or we'd appoint a person of color if only they were qualified," and, yet, that sentiment does seem to still be purveyed. Maybe it's, perhaps, not as explicit as it once was. That would be my advice. Renee, what do you think?

Renee Knake Jefferson:

Well one of the, to give an anecdote from the book, so the first half of the book is very much this untold history. I mean, these women's stories, they deserve to be told in their own right. Everybody should know who Mildred Lillie is and the other eight women in our study. But the second half of the book tries

to distill what we can learn from how they navigated their own professional trajectory. Of course, they weren't selected for the Supreme Court, but to get on the President's radar, they were selected over and over again in a world that was outwardly hostile to women. Where there were not even physical structures that would accommodate women like appropriate bathroom facilities.

Renee Knake Jefferson:

A lot of what they went through, for better or for worse, offers insight into how we can navigate the modern challenges that still remain. One anecdote that we like to share that relates to this question I think comes from a woman who was shortlisted alongside O'Connor. So not surprisingly, Reagan puts together this shortlist of all women, and on it was a judge also from California, Joan Dempsey Klein. She's not selected for the seat, and I have to imagine that came with such a mix of emotions, to have to put yourself through that vetting process and then to learn that it's not you. Whatever she was feeling, she channeled that energy into becoming a champion for Sandra Day O'Connor and she went and testified on her behalf before the Senate Judiciary Committee, both about her qualifications, but also about the unique concerns that she had for the woman who would be the first to sit on the Supreme Court.

Renee Knake Jefferson:

So I think that it's important to be championing the qualifications, but it's also important to be reminding everyone that when someone is a first that it comes with a lot of additional burdens and challenges and hurdles. We should be supportive of that rather than adding to them.

Melissa Murray:

So with that in mind, you profile some really fantastic women who, regrettably, have been consigned to the backwater of history. So Florence Allen is absolutely amazing and stupendous. She's a judge on the Sixth Circuit, rises through the ranks of the judiciary in Ohio and is shortlisted by Hoover, FDR and Truman. So her name surfaces over and over again. You profile Mildred Lillie. What's really striking in all of these cases, not only are these women eminently qualified and they are shortlisted, but they also get gatekept in a way that's really, really troubling.

Melissa Murray:

So Florence Allen is as qualified as any of the men who eventually get the seat-

Renee Knake Jefferson:

If not more so.

Melissa Murray:

If not more so, to the seat to which she aspired, but she's sort of kept out likely because she is a woman. At one point, the President goes to the Chief Justice of the Supreme Court to suss him out about whether or not he'd be willing to have a lady on the Court, and Fred Vincent is like, "Ooh that's a step too far." So we actually have the court itself functioning as a gatekeeper keeping women out. We see the ABA functioning as a gatekeeper, listing Cordelia Kennedy, for example, as qualified even though a man with comparable qualifications is rated as very qualified. They said that Mildred Lillie was not qualified.

Leah Litman:

And Nixon didn't even submit his other shortlisted candidates to the ABA after they returned her as unqualified.

Melissa Murray:

We see shades of this today. I mean there's lots of discussion about the role of the ABA in judicial nominations more generally, but to this question of men gatekeeping, is that something that you can expect to see today or going forward as more and more women knock on the glass ceiling and ask to be admitted?

Renee Knake Jefferson:

Yeah, I think we see it not just on the Supreme Court either. I mean, that happens to be the lens that we are exposing this through, but I don't think that it's an unfamiliar situation for any woman moving through a professional life in law or beyond. The shortlist itself has that same kind of gatekeeping effect you're talking about where the creator of the shortlist can hold themselves out as being a champion of diversity and equality by showing this beautiful shortlist of women and minorities on it. Yes, we gave them thorough consideration, but we know that the selection process is compromised along the way because women, minority women are not reflected in numbers that they should be in terms of how they're entering the profession at this point.

Renee Knake Jefferson:

So the shortlist itself is used that way. Nixon was the worst offender, by the way. I mean, we've listened back to all of his Oval Office tapes and he would say things like "I don't even think women should be allowed to vote," but he wanted their vote. So he very strategically and deliberately says I'm going to put these women's names on my shortlist. We're going to release it to media, and behind closed doors, he was hoping that exactly what happened would happen. In his words, "that the ABA would let them off the hook of the whole damn thing," and that he wouldn't have to actually appoint a woman to the court. He could just claim to have advanced equality by even considering them.

Renee Knake Jefferson:

After it's all said and done, it ends up being Rehnquist and Powell who go on the court. Rehnquist, by the way, was vetting Mildred Lillie and carried her suitcase as part of the interviewing process, and then ends up getting the appointment. That's not the first time that happens, too. That happens quite a bit as it turns out. But very much the idea that the shortlist is used in this political calculating way, so much so that at the end of all that, after the two men get confirmed, Nixon goes and delivers a speech to a group of women at a ladies' luncheon, and he wants to be praised and lauded for the very fact that at least this time we considered women. And ladies, at some point, there will be a female justice someday, he says.

Hannah Brenner Johnson:

So I want to build on that real quickly because we get a question really frequently, especially from our male colleagues and male lawyers like what can they do? So to the extent that men do still sit in the position of being gatekeepers, I think that recognizing that power and perhaps taking a page out of the playbook of Judge Klein who recalled an epiphany that she had when she was working in the Attorney General's Office in California. She was just observing all of this rampant sexism, and she made a

commitment to herself that she would devote time every single day of her life to eliminate discrimination against women.

Hannah Brenner Johnson:

So I think that making a commitment like that, I mean that's a commitment we can all make, but certainly those people who occupy the positions of power in our world would do us an incredible favor by working toward that end.

Leah Litman:

And just to expand on that really quickly because part of what I loved about the historical half of the book, the first half was some of the anecdotes that they provided that really exemplified this phenomenon of both positive gatekeeping and negative gatekeeping. So for example, one of John F. Kennedy's shortlisted Supreme Court nominees, Soia Mentschikoff, she made her way onto the shortlist because she was a classmate of the person who happened to be the Assistant Attorney General in the Office of Legal Counsel while she was at University of Chicago.

Renee Knake Jefferson:

Actually, they were both faculty together. They were both law professors there, which is a sort of interesting foreshadowing, right, because Justice Kagan and President Obama both were on faculty together at the University of Chicago. So very interesting how that gatekeeping role works.

Leah Litman:

Yeah. So just recognizing that when you happen to be in a position of choosing to elevate someone, and yes you can only elevate one or two people, but if you're only elevating the one or two guys who are part of your guys poker club, that's going to be a problem. Then second, is the degree to which superficially facially neutral rules can be used as gatekeeping mechanisms to keep women out. So in the case of Florence Allen, Melissa already mentioned that Vincent and the other brethren voiced some discomfort with having her on the Court, and they did so in part based on openly sexist tropes but in part based on, well, we don't know what that would do for collegiality at the Court or just how the Court would work.

Leah Litman:

So that was I think a good indication about some of these malleable concepts that can just be used to keep out people who don't traditionally occupy roles of power. Then the other example that really struck me was you mentioned Nixon being one of the worst offenders. One of the conversations that you mentioned Nixon having with his attorney general, Mitchell, on an interview was a discussion about Mildred Lillie where Mitchell said something like "People will see that she's not one of these frigid bitches," and then Nixon is like "Yeah, I know the terrible ones."

Leah Litman:

So just the different standards that women have to hold themselves to in order to appear sufficiently pleasing and non-threatening, but also sufficiently qualified. Again, there is just a lot of rich historical examples of that in the book.

Melissa Murray:

The book is literally filled with amazing examples of casual sexism and racism, which seems like a world away, but it probably isn't that far away. But to the point of gatekeeping, Leah mentioned the example of Nick Katzenbach recommending Soia Mentschikoff as the potential nominee, and that was an example of positive gatekeeping. But it's also negative in a way, too, because that's also a kind of form of network affiliation that brings in certain people, but also excludes in a lot of ways.

Melissa Murray:

To that point, of the nine women who are shortlisted and profiled in the book, only one is a minority, and that's Amalya Kearse of the Second Circuit who is ridiculously well qualified, winds up being considered multiple times. Once even as the candidate who would replace Clarence Thomas, if his nomination actually tanked, which it did not. So much so, that one of her colleagues on the Second Circuit actually writes a letter to The New York Times big-upping her chances and actually dooming his own later, but she never makes it on. We don't hear her name talked about in the same way.

Melissa Murray:

So can you say a little bit about who is in these networks this time, and is it really different today? I mean, if we weren't having a presidential nominee say that he is explicitly considering a woman of color, would women of color be on the shortlist going forward?

Renee Knake Jefferson:

I feel the answer to that is no. We had no idea what we would find when we set out to see who before O'Connor was shortlisted, what women. But when we realized of our nine that only one was a minority woman, it felt very representative to us of the additional burdens and challenges that minority women still face today in pursuing positions of leadership and power. So then, that led us to think about well, how does Judge Kearse, and of course she's eminently qualified, but how does she get through those... yes, of course.

Melissa Murray:

Of course.

Renee Knake Jefferson:

Just how does she get through, what's her gatekeeping mechanism? You know what it is? It was not one of those private pathways, personal connections. It was a structural change that President Carter, who never had the opportunity to put a woman or anyone on the Supreme Court or he would have, and it likely would have been Shirley Hufstедler, who was his Secretary of Education, but what he did do when he came into his presidency, pretty quickly he realized how much lack of diversity there was in the federal judiciary and he set to remedy it.

Renee Knake Jefferson:

He issued an executive order. He created judicial commissions, a dozen around the country. Each of the commissions had to be diverse in makeup, include women and minorities. The commissions were charged with vetting judicial applicants for district courts and courts of appeals that were themselves diverse, so women and minorities, and importantly, I think this might be the most important thing, among the qualifications, interview questions went to the candidates' commitment to diversity. So it's

not just that you are diverse so we can check the statistical box, but what is your commitment to diversity.

Renee Knake Jefferson:

Judge Kearse initially sat on one of those commissions, and then she's ultimately selected by one of those commissions to go to the Second Circuit. That's how she ends up there. But for that structural change, I don't know that she would have ended up in the judgeship and absent that kind of structural change going forward, we will continue to rely on what we're seeing now which is someone who's in the position of being able to make the selection committing, at least in that moment. I mean one way to make sure a woman or a woman of color makes it off the shortlist is to have a slate that's only women or only women of color. But that's not what we're advocating for at all in the book, and it's not what we think brings sustainable change.

Renee Knake Jefferson:

I think sustainable change requires structural improvements like the example from the Carter administration.

Leah Litman:

Yeah, and just to build off of that, something that we've seen recently is reports on commissions that have been used in present-day. So the Democrats are, in part, facing criticism because they've relied on commissions that are overwhelmingly prosecutors and big corporate lawyers. So the Center for American Progress released a report that, perhaps unsurprisingly, when you have commissions made up primarily of those kinds of lawyers, who is getting selected as federal judges? Well, it is big firm lawyers and federal prosecutors. This is not surprising.

Leah Litman:

So having that kind of structural change that empowers decision-making at every level, not just when you have one person who happens to be in the room to be able to say well I want that person to be a judge. You need to diffuse decision-making authority, but ensure that that decision-making authority is exercised in equitable ways and reforming the commission is maybe one way to do that.

Hannah Brenner Johnson:

I think it's also worth noting that although the Carter Commissions yielded really positive results, I mean Kearse is just but one example of the women who were put onto the federal courts under his presidency, sometimes commissions and organizations like that can actually, they can function like a shortlist. Again, they can be a place where the appearance of diversity is put forth, but women and minorities never move off of or out of that commission.

Hannah Brenner Johnson:

I think about an example when the American Bar Association, for example, first created its commission on women in the profession. There was a lot of excitement and fanfare about that, but there was also a lot of critique that that's not real leadership, right. That's almost like a distraction. We need to see women in positions of leadership at the American Bar Association, for example, as its president, which didn't actually happen until 1995 when Roberta Cooper Ramo was the first woman who led the ABA, and we didn't see the first woman of color, Paulette Brown, until 2015.

Hannah Brenner Johnson:

So having a commission can be an important step, but it's also not the same thing always as attaining positions of leadership and power.

Melissa Murray:

That speaks to this question of the leaky pipeline which you talk about in the book, and when Leah and I were discussing what we wanted to talk about with you, Leah made a really great point that I hope she will elaborate about this idea of compounded disadvantage and how that affects the leaky pipeline. So Leah, do you want to just explain what you meant by this?

Leah Litman:

Sure. So just that the idea is by the time you get to Supreme Court nominations, you are basically asking people to make their way through a bunch of different gatekeepers. So women are shortlisted, but out of clerkships, and they're shortlisted out of partnerships, and they're shortlisted out of judgeships. So that just makes for a smaller and smaller pool that allows politicians to say, well, like Nixon, the pool of talented women candidates is just too small. But by relying on those proxies, we are, again, just relying on compounded disadvantages given that we know these gatekeeping paths essentially allow us to whittle away women and women of color at multiple facets. So, that just makes the pool even harder.

Renee Knake Jefferson:

I think we see this throughout the profession more generally. I mean, how many times out of law school faculty have you talked about diversity and been told that the pool is too thin or there just aren't good candidates, when in fact, maybe the metrics are the problem. These aren't inevitable. They're socially constructed.

Hannah Brenner Johnson:

I think it's important for us to focus on our law students because they are at a place where they are just beginning to ascend through the pipeline, and while the pipeline does leak and it does foreclose opportunities to a lot of people, I think having access to information, having the opportunity to learn about what it takes to get to that position, I mean not everybody wants to be a Justice on the Supreme Court. Leadership and power looks really different for all of us, but it shouldn't be the case that women and minorities can't get there because they haven't had access or the doors have been closed.

Hannah Brenner Johnson:

So Renee and I do some work in our seminars with our law students. We each teach a class called Gender, Power, Law and Leadership and just actually released a casebook with that same name. One of the shortcomings of the class that we feel, and is reflected by our students, though is that we only reach that small cohort of students who self-select into that course. A lot of the material that we cover I think would be of incredible benefit to the entire law school student body.

Renee Knake Jefferson:

I'll say something also about law students. A little bit of a diversion here, but a point of inspiration. So we've been talking about the challenges that remain, but I will tell you that in writing about these nine women, all of them sought out law degrees. So they couldn't be more different in terms of their political backgrounds. Some were avowed racists. Some were suffragists. Some campaigned for the equal rights

of women, some did not. They had a really diverse array of viewpoints, which that's super refreshing, too. Can you imagine a whole court of women with all kinds of viewpoints? I mean, men have had that for centuries, why not women?

Renee Knake Jefferson:

But one thing that was so inspiring to me is that every single one of these women, one thing they shared in common... and it's, in some ways, so obvious, and yet it's also really profound. They all looked ahead as they were growing up and going to college, which for them was a pretty radical thing. At the time they were even going to college, a lot of women were not doing that. And they wanted to have a vibrant professional life. They wanted to have rights for themselves that they currently didn't have. They wanted to change the world. They wanted to make the world a better place. They wanted to pursue justice.

Renee Knake Jefferson:

Many of them were advised if they wanted to have a professional life to become school teachers or to pick a very traditionally female occupation, but they didn't. They pursued law degrees, and by pursuing their law degrees, they fundamentally altered their own personal trajectory. They also changed literally the face of professional life for women in this country. I mean, more than one of the women were responsible for getting bathrooms in courthouses. So physical, literal change like that, but also just in terms of what we can envision for ourselves, what my daughter, what Hannah's daughter can envision that they want to be when they grow up.

Renee Knake Jefferson:

All of these women did that by obtaining law degrees and, at a time where... Sometimes I'm asked what's the value of a law degree. I'm like, "You know what? If you're a woman in this country, go get your law degree" because it, I think, continues to be a really valuable way not only to navigate your own professional trajectory, but also to have profound impact.

Melissa Murray:

That's great.

Leah Litman:

Just because my role on the show is consistently the pessimist, I just want to note two small things... Melissa, I didn't mean to unfairly seize that role from you. We oftentimes play it in tandem with one another, but Hannah, just since you were talking about law students, two things popped into my mind. One is I am honestly concerned about, just getting back to earlier this problem of compounded disadvantage, when we look at for example the changing composition of the federal courts, and, given the number of nominees from this administration who select for ideology, in ideology that overwhelmingly disfavors women and people of color, I worry about that becoming a gatekeeping mechanism that keeps out women and candidates of color from future jobs, be it US attorney positions, prosecutors, judgeships, professorships, whatever the case is.

Leah Litman:

Then second is we are, right now, facing a global pandemic that is making it really hard for women who have caretaking responsibilities and other people with caretaking responsibilities to focus on their

professional careers and advance themselves at a time that could be really important to their professional development. I just, again, worry that whenever we throw up these obstacles, they overwhelmingly operate to the detriment of some groups relative to others. So even if I want to believe that law students, that's the group to focus on, but that's part of it.

Melissa Murray:

But it is actually really concerning to have watched such a dramatic change in the federal courts over the last three years. Carter, I think, did a yeoman's job of diversifying the judiciary, for which I think he does not get the kind of credit he deserves, commission or no. And you saw advances in the Obama administration, the Clinton administration. Maybe not as much as Carter, but certainly advances. Then we've really done a complete 180. Very few women nominated over the last four years. Very few people of color. I think only Asian-Americans is the one minority group that's actually seen advances in the judiciary under the Trump administration.

Melissa Murray:

One of the points that made this hit home for me in your book was I think you noted that Burnita Shelton, who was a district court judge in Washington DC, she actually selected women as clerks. This was enormous because we all know the story about Ruth Bader Ginsburg not being able to get a clerkship until Gerry Gunther goes to bat for her and promises that he will never send another Columbia clerk to her judge if he doesn't pick her as a clerk. But she's actually picking, Burnita Shelton Matthews, is actually picking women to be her clerks, and some of these clerks go on to become high powered lawyers and judges. They in turn, likely pick women. So-

Leah Litman:

Including Sylvia Bacon, one of the women on the shortlist.

Melissa Murray:

Yes. So I mean it just feels like we're losing... in losing this diversity on the federal bench, we're losing these opportunities for women to get into the pipeline. We're actually not just creating a leakier pipeline, but I mean it's almost like there's a deluge in the pipeline because of the way we've completely transformed the courts.

Hannah Brenner Johnson:

I share your pessimism and concern. I think that this isn't just a problem we're experiencing in 2020. We're going to see the fallout from this in the decades that follow. So yeah. I mean I agree with Renee, and I do think that the law degree is powerful, but I also think we are facing some pretty significant systemic challenges. I won't say they're unprecedented, but I mean who knew we were going to have a pandemic and what the impact of that was going to be.

Melissa Murray:

Yeah. So can I point to another part of the book that I thought was really awesome? You do such a great job of bringing these women to life, and one of the things that was really striking was these women have very colorful lives outside of the office.

Renee Knake Jefferson:

Yes, they do

Hannah Brenner Johnson:

They do.

Renee Knake Jefferson:

And the media likes to report on it. Soia Mentschikoff, her penchant for lace lingerie and how much money she would spend on alcohol and cigarettes in the life of a young lawyer in New York. Yes.

Melissa Murray:

I mean Soia Mentschikoff was living her best life and-

Leah Litman:

For sure. After this book, just to be clear.

Melissa Murray:

Soia Mentschikoff eventually became the Dean of the University of Miami Law School, but before she did that, she was a student at the University of Chicago. She eventually dated and married her professor, who at the time was married to another woman. There are a lot of stories like that. So Susie Sharp of the North Carolina Supreme Court was not only an admitted racist, but also had relationships with men who were married to other people at the time.

Melissa Murray:

There's a way in which being this limited pool gives them license to be nonconforming in really profound ways. Admittedly racist views... It doesn't play out in their jurisprudence, but they're explicit about it in their private lives, and then these private lives that are super racy in a way. That's sort of not typical for what we see today. They had a lot of license.

Renee Knake Jefferson:

Yeah, or maybe it's also just not typical in what we... One of the challenges of writing this book is that on the one hand, we could have just done all the juicy stuff and it would have just been this salacious airport read, I don't know. And how do we also give it the historical treatment we wanted to? We were two academics writing in a very new way for us. So we tried to insert a little bit of everything, even our own stories too. But one thing that was really important to us was that we did not want to tell these women's stories without telling the whole story about them.

Renee Knake Jefferson:

It's impossible to speculate what's happening behind anyone else's closed doors, but what's really incredible about this project is that we can see how these women were portrayed and perceived in their professional life, but we've also been able to go back into their archives. Some are definitely more rich and have a lot more juicy details than others, but through oral histories and archival research, we've been able to learn a lot about them. Part of the beauty I had discovered, quite frankly, in researching women who haven't gotten the attention they deserve is that their archives are not nearly as cleaned up and organized.

Renee Knake Jefferson:

So Soia Mentschikoff, yes, marries her former law professor, Karl Llewellyn at Harvard and she becomes the first law professor at Harvard. They eventually go to the University of Chicago together. She becomes the first female law professor at Chicago after being the first female at Harvard. Both of their papers are held in the Regenstein Library at the University of Chicago. So when I went to go through them Soia's were kind of not a mess, but just filled with all sorts of news clippings and articles and love letters and just all kinds of little personal notes between her and Karl. Karl's were very neatly organized. Nothing juicy was in there, and I think it's because more resources had been devoted to preserving his papers.

Renee Knake Jefferson:

The upshot to that is that we were able to draw out these pieces and tell it. I think telling the whole story is a really important part of this project for us that we wanted to bring these women to life in a very vibrant way. Not just that they were here and achieved a list of professional accomplishments, but they did it while navigating very complex, whether it was love lives or raising children or caregiving for other extended family members or many other challenges that they were navigating.

Hannah Brenner Johnson:

Well maybe there's a lesson here, too, to extract because while it is true that all nine of these women were shortlisted for the ultimate position in the legal profession, they really did make some pretty significant accomplishments, right? So they were not shortlisted in all of these other ways. I mean then maybe down to federal circuit courts. They were in government positions. They were super, super successful. Yet, their lives were incredibly complex, and I think that that complexity really resonated with Renee and I who have our own complex stories to share.

Hannah Brenner Johnson:

Whatever the model that was and probably still is in place about the sort of white, heterosexual, married woman who's done all of the right things and checked all of the right boxes, I mean she wasn't in our study. I'm not even sure she exists. So I'm not sure why we're all held to that standard. But to the extent that we can look at their stories and understand that their representative of all of us, and that we can, in fact, be successful whatever our pursuits might be even with those complexities.

Hannah Brenner Johnson:

I think about Susie Sharp. We love to talk about her, and we have a lot of information about her because her family agreed to release all of her very personal information to her biographer, and those records included love letters and journals. I mean some of the juicy details even include her jotting down the number of the hotel room where she would meet the men that she was seeing. Right? Right?

Renee Knake Jefferson:

Well her archives are overwhelming. They're held in North Carolina and she saved everything. Every receipt to every hotel room, how much tip she would pay. Her diet for if she was trying to lose weight, her makeup tips, everything, her exercise routines...

Hannah Brenner Johnson:

Yes.

Renee Knake Jefferson:

Yeah. That was a hard one for us because we liked her so much. Then when we realized, because we didn't know initially at first glance, but then it became very apparent that she was very much an avowed racist and also lobbied against the ERA, and that was a really hard one for us.

Renee Knake Jefferson:

For me, the fact that at least when she got on the bench, she could set aside her abhorrent views. She was the judge who authored the opinion desegregating a private golf course in North Carolina. So again, men have had every perspective under the sun represented in positions of leadership and power, and women should too. To the extent they are views like that and they are in positions like that, I hope that they can at least follow the Susie Sharp model of not acting on them in that role.

Renee Knake Jefferson:

So, that was a tough one. I mean there were times when we were inspired by these women and there were times where they made us sad. They broke our hearts a little bit, and discovering that about Susie Sharp definitely did.

Melissa Murray:

Another one of the women profiled is Carla Hills, who was I think if anyone was going to sort of have the model life that you expect to find, it was Carla Hills. I mean she's part of a DC power couple. Her husband is Roderick Hills Sr. He's the commissioner of the SEC while she occupies various cabinet level positions. I think she's in the Ford Administration. She's described as a willowy brunette, but she also has four children, which seems to mitigate and moderate the sort of high powered-ness of her life.

Melissa Murray:

There's a way in which motherhood becomes a means of making her palatable, but it also serves, I think, to keep her out because they still talk about the fact like how could she be on the Supreme Court with four children, and it's an interesting contrast because, as you mentioned, there's so much discussion later of Justice Sotomayor and Justice Kagan not having children, but we actually really haven't talked about how motherhood is both a penalty and maybe also a boon in thinking about some of these different considerations.

Renee Knake Jefferson:

Well, and this goes to the tokenism phenomenon, too, right? So Sandra Day O'Connor who absolutely deserved to be the first female Supreme Court Justice, eminently qualified and was a phenomenal justice. So I don't want to diminish her legacy in any way, but she becomes the model of this must be what a female Supreme Court Justice is and does and looks like. She should have two children. She should serve a salmon mousse casserole when she's being interviewed for the position days after having a hysterectomy. She should be the consummate housewife and entertainer while interviewing for the most elite legal position in the country.

Renee Knake Jefferson:

Then of course, RBG follows, also has children and suddenly-

Hannah Brenner Johnson:

She couldn't cook, Renee, remember. She's the one with the tuna casserole-

Renee Knake Jefferson:

That's true. So there was maybe less speculation on Justice Kagan and Justice Sotomayor's culinary skills, but because we only knew in this country women who have children on the Supreme Court that that suddenly becomes a factor, that both of them had repeated media, not just attention to it, but headlines devoted to.

Melissa Murray:

Well it's interesting that you say that RBG because if you've watched the kind of media that surfaced in the later part of her time on the court, you get the very definite picture that she is not as involved a parent in her children's lives in the way that you might have expected. I mean I think her daughter, Jane, describes her in the documentary as being exigent as a parent. So she's around when things are bad, but she's very devoted to her work. She definitely has a co-parent in her husband, Marty.

Melissa Murray:

This, I think, goes to the question of it being a boon. She got a pass on a lot of that because the assumption was that if you were a woman with children, you were kind of an uber mother when, in fact, she was very definitely a co-parent and not the primary parent for her children. So can we talk a little bit about that? What kind of work is motherhood doing to make women palatable in these moments when they're being considered for these high profile roles, and, also, how does motherhood harm them?

Hannah Brenner Johnson:

I mean it absolutely does both, right? I mean it's this sort of classic double bind. We go back to Susie Sharp, she didn't believe that a woman could both be a professional and a mother. So she was very emblematic of the separate spheres and never married. I mean, had relationships with men, but never committed to one of them. I think that is one model, but then women are viewed as suspicious if they don't have children.

Hannah Brenner Johnson:

When Kagan and Sotomayor were being considered for the court, the Supreme Court literally wrote a headline the Supreme Court needs more mothers. Yet, when it has more mothers, then the commitment of those women is sometimes called into question.

Renee Knake Jefferson:

I think that the difference, for men, parenting, to the extent it's mentioned, is typically a plus. At least what we found in our media study I can say, to the extent it was mentioned, it was like describing a male nominee being the debate coach for his son's debate team. So talking about parenting, but under the umbrella of what would be typical qualifications for a judge, like someone who's an excellent debater, not how holding them back in a negative way in any sort of way.

Leah Litman:

We've talked a little bit about race and also motherhood, something that also factors into some of these shortlists and consideration of women as issues of sex. So we mentioned how some of the shortlisted nominees had relationships with different married men or senior colleagues and how that oddly didn't

really work against their consideration in some instances. You also suggest that one of the women on the shortlist, Florence Allen, was a lesbian and lived relatively openly with two female companions. So I was wondering if you could also just talk more explicitly about how issues of sex and sexual orientation and gender identity are factored into the women on the shortlist.

Hannah Brenner Johnson:

So Florence Allen was considered for the Court in the 1930s. So I mean that was a time when sexual orientation, there wasn't really a framework to talk about it. I think women often were given much more license in terms of the relationships that they had with women. So while it's true that she lived openly with these two women as roommates, I'm not so sure that she would actually have been out in the way that she might be today. In fact, some historians have suggested that that lack of a framework kind of worked for her, right? So there may have been an assumption or there may have been whisperings, but the concept wasn't-

Melissa Murray:

It's unimaginable. It's unimaginable.

Hannah Brenner Johnson:

Right. Right. Then of course we saw the way that Justices Kagan and Sotomayor were scrutinized. Again, they were single. They must be lesbians. They played softball, and so of course. So what, right? But it's used, often, I think as a weapon and we certainly have seen that play out over the course of our study.

Melissa Murray:

Yeah, that's really interesting. I remember just all of the discussion of both Justices Kagan and Sotomayor and I guess someone in Justice Sotomayor's camp being at great pains to emphasize, no, she dates. She dates, a lot, which is something you would never expect to hear from a male nominee. Yeah.

Hannah Brenner Johnson:

Talking about Florence Allen though, it always strikes me whenever we talk about her just what the world would look like if she, in fact, had been nominated to the Court in the 1930s, right? I mean, I do think that that would have changed the face of our profession or I hope it would have. It could have also just been a token-

Renee Knake Jefferson:

It would have at least gotten more bathrooms in courthouses for women faster.

Melissa Murray:

And she's got Eleanor Roosevelt singing her praises to her husband. Everyone understands that she's well respected and she's fought through so much. You talk about how she's discriminated against by her colleagues at every level of her career. She makes her way up through the state judiciary in Ohio. The Sixth Circuit is sort of perplexed by her, and then she's sort of kept out by the men on the Supreme Court, but she just keeps plugging along. I mean, it would have been very different I think going forward if we had had our first female Justice in the Roosevelt administration as opposed to in the Reagan administration.

Renee Knake Jefferson:

Oh without a doubt, and I think not just for the Supreme Court, but also the nation's imagination and then ability to accept a woman in other positions of leadership and power, including the Oval Office itself.

Melissa Murray:

We've often heard attributed to Justice Ginsburg this idea that when will there be enough women on the Court, and she has famously said when there are nine. She's not the first person to make that kind of nod to numerosity. Cornelia Kennedy who was also a judge on the Sixth Circuit apparently said when asked about whether there should be a woman on the court, she said, "I think there should be women, in plural, on the Supreme Court. Two or three would be just fine."

Melissa Murray:

So perhaps a more limited imagination, but is there a kind of numerosity? Is there some kind of number target we should be reaching for or should we be thinking beyond this question of numerosity as we think about women in these positions of authority?

Renee Knake Jefferson:

Well I think there's a couple of responses to that. So I've said it a few times, but it bears repeating, men have... hundreds of men have been Supreme Court Justices and less than a handful of women have. So I do think it's in numbers. I think more women should be in that role. It would take a very long time of an all female court to make it totally equal over history, but we could certainly do more than we have now.

Renee Knake Jefferson:

I think it's equally important to have justices or leaders who are committed to equal rights and opportunities for everyone. So I think it is about numbers, but it's also about who is in that position that will help create those structural changes that we've talked about. So not just the one-off promise, a campaign pledge. I don't mean to diminish what Joe Biden has done because I think that they are important promises and it is a step forward. But I think it's the real structural improvements, structural changes that need to take place for us to see meaningful diversity in positions of leadership and power, and a path to them that doesn't impose the kinds of additional burdens and hurdles that we saw in the lives of our shortlisted sisters, as we like to call them. Well, I'm sure all four of us have experienced in ways, and any woman listening to this I think would agree with, and anyone who has supported a woman in trying to pursue those professional pathways.

Renee Knake Jefferson:

It's not just women who are affected. All of us are, men and women alike, when the structural setup impedes equal pursuit of leadership and power.

Hannah Brenner Johnson:

Yeah, I think I'm not willing to commit to a number. I think plural is fine, but I think that we've only had four, is just-it's problematic for so many reasons. I think even with only four women serving on the Court, we fall into the trap of essentialism. We tokenize these women. I'm pleased that we are starting to move the conversation beyond just thinking about women as representative of white women, and I

think that Joe Biden's pledge to put a Black woman or a woman of color on the court is a step in the right direction.

Hannah Brenner Johnson:

We have, obviously, our ideological preferences, but that's not really what we're advocating for here. We want to see a range of perspectives. All of us bring so much to the table, and when you've only had one or two or three or four, that range is really, really limited. So I want more, and I'll leave it at that.

Melissa Murray:

That's a great place to leave it, wanting more. The book is called *Shortlisted: Women in the Shadows of the Supreme Court*, and it is written by Renee Knake Jefferson, a professor at the University of Houston, and Hannah Brenner Johnson, a professor at California Western University School of Law. Thank you so much for this rollicking conversation. There are so many lessons for all of us in this book. So thank you for sharing it with us today.

Renee Knake Jefferson:

Thanks for having us.

Hannah Brenner Johnson:

It's been so much fun to talk with you. Thanks for having us.

Leah Litman:

Thank you for joining us and thank you to our producer, Melody Rowell. Thanks to Eddie Cooper who makes our music, and thanks to all of you for listening. If you'd like to support the show, you can get some Strict Scrutiny swag at [strictscrutinypodcast.com](https://strictscrutinypodcast.com) or you can sign up to become a Glow supporter at [glow.fm/strictscrutiny](https://glow.fm/strictscrutiny). Thanks everyone.