

Speaker 1:

Mr. Chief Justice, and 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.

Speaker 2:

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.

Kate Shaw:

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

Leah Litman:

I'm Leah Litman.

Melissa Murray:

I'm Melissa Murray.

Kate Shaw:

We're thrilled to be joined today by Dale Ho, director of the Voting Rights Project at the ACLU, friend of the show, someone who spends his time enforcing the Voting Rights Act, defeating those who make spurious claims that they are enforcing the Voting Rights Act. For those of you who don't know, Dale argued and won the census citizenship litigation in the Supreme Court. He is also one of the stars of the new documentary *The Fight*, which all of our listeners should check out. We're going to be talking a lot more about the film on the show today. So Dale, welcome to Strict Scrutiny.

Dale Ho:

Thanks so much for having me on. I'm really excited to be here.

Leah Litman:

Dale is one of the few people that I just gratuitously send enforcing the Voting Rights Act merchandise to, even though I've actually never met him in person. I think the first thing I sent you Dale was a dog bandana that had a little sheriff star that said, Wilbur Ross lied on it. So this is an extremely normal thing to do but I felt the need to disclose on the podcast.

Dale Ho:

It is a very treasured item in this household amongst my family. So we're very grateful for it.

Kate Shaw:

So we wanted to start by talking about the film, which I just mentioned. So this film was just released, and we're going to talk about it and then I think we will pivot to talking more about the census case. So the decision itself, probably the case we have talked about, not just in the context of our merch, but sort of generally in the context of the themes that it surfaced, maybe more than any other case in the short history of the show. So we'll talk about both the decision, some of the post Supreme Court

developments that people might not have followed, and then the latest announcement by the White House on the census front. Let's start by talking about The Fight. Melissa, you want to kick us off on this?

Melissa Murray:

Sure. So The Fight is a film made by the team that also made the probing documentary Weiner, which was about Anthony Weiner, stop, the New York congressman who ran into some Carlos Danger, danger, if you will. It's a really good film and it's almost too traumatic to actually think about that documentary right now, because as we know, a lot of the information that was recovered from Anthony Weiner's laptop actually fueled the investigation of Hillary Clinton's emails which in turn, gave us the last four years. So I'm leaving that to the side for the minute. Instead, this is just to say that this is a terrific documentary made by very experienced team that has done a lot of these sort of political legal documentaries over time and The Fight is no exception. It is really fantastic. Really great and Leah, how did they follow up their amazing work in Weiner? Do you want to kick that off?

Leah Litman:

Well, Jim Comey posted a picture of himself wearing a t-shirt that said elect more women in the epitome of irony, but the documentary filmmakers behind The Fight, followed up the film with The Fight, which is perfect because The Fight is basically about dealing with the aftermath of the 2016 election and the onslaught of the Trump administration.

Kate Shaw:

So the movie basically chronicles the ACLU's efforts to challenge Trump Administration policies in court across a few different fronts. I should say full disclosure, I have a consultant credit on the film, but I had a truly minimal role in it. So I think I can say without being unduly immodest that it's like a really excellent film, and many people who are not involved agree. So basically the four cases the film follows are actually interestingly all cases that we have spent quite a bit of time talking about on this podcast.

Melissa Murray:

So let me jump in one of the cases that's chronicled on the film is Hargan v. Garza, which was a case challenging the federal government's efforts to block a pregnant teenager, Jane Doe, who was being held in immigration detention from obtaining an abortion. It was litigated by attorney Brigitte Amiri from the ACLU and it really got a lot of coverage in 2018 during the confirmation hearings of then Judge Brett Kavanaugh. Brett Kavanaugh was one of the judges on the DC Circuit panel that heard that appeal and then went en banc.

Melissa Murray:

Again, this was one of the cases that really formed the core of the criticism around then Judge Kavanaugh when his confirmation was first being aired and ventilated. Obviously other things happened thereafter, but this was a case that occurred when Brett Kavanaugh was merely a twinkle in Donald Trump's eye.

Leah Litman:

This was before he was even on the President's shortlist for the nominee. That case kind of got him on the President's list of nominees.

Kate Shaw:

Right. Yeah, he conspicuously was not on the publicly released list, which actually raised some eyebrows and this case sort of been intervened, and lo and behold, the next iteration of the list had him prominently displayed on it and of course, he then did get the nomination. Coincidence?

Leah Litman:

I think not.

Kate Shaw:

Not sure. Probably not. So the second case that the film follows features Strict Scrutiny guest and friend, Chase Strangio and also Josh Block, two ACLU attorneys in their challenges to the Trump Administration's transgender military ban.

Leah Litman:

The third case that the documentary features is Lee Gelernt's, of the ACLU, challenge to the Administration's monstrous family separation policies. Lee also argued *DHS v. Thuraissigiam*, which we have talked about on the show.

Kate Shaw:

The last of these cases was a challenge to the Trump Administration's efforts to add a citizenship question to the 2020 census. The administration announced that it was doing so in order to better enforce the Voting Rights Act or to assist DOJ in its enforcement of the Voting Rights Act. A fairly facially questionable assertion, but one that fell apart very quickly in the litigation that was brought by Dale on behalf of the ACLU representing a number of community organizations.

Kate Shaw:

The state of New York and a number of other states initially litigated in the Southern District of New York before Judge Jesse Furman and then of course before the Supreme Court. Okay, so let us start by playing a clip from the film. So this is a terrific clip. It's actually in the preview, and it features Dale's preparations the night before his argument before the Supreme Court.

Dale Ho:

Hopefully I don't, my first sentence. Mr. Chief Justice and may it please the court, the Secretary's decision rested on a single assertion that it was *** Mr. Chief Justice, and may it please the court, the Secretary's decision rested on a single assertion that, *** don't do this tomorrow.

Dale Ho:

Mr. Chief Justice, and may it please the Court, Mr. Chief Justice, and may it please the Court, Mr. Chief Justice, and may it please the Court, the Secretary's decision rested on a single assertion that it would provide more accurate citizenship data to the Department of Justice but the administrative record revealed precisely the opposite, that it would result in less accurate data for the Department of Justice. And the Secretary's explanation for his decision ran counter to the evidence and was thus arbitrary and capricious.

Melissa Murray:

So that's a really terrific scene Dale and I love the way you sort of explained your preparation for oral argument. I think you had your sort of first 12 minutes ready to go and then you would actually interrupt yourself with these stack of flashcards that you would have a question on it. So it was sort of like you were simulating a hot bench jumping in and is that how you typically prepare for oral argument?

Dale Ho:

It was something that I had tried for the oral argument that I had preceding that one. So the most recent one I had had just a couple of months before in the 10th Circuit. I had read that, actually the Chief when he was a lawyer preparing for argument of the Supreme Court, something that he had done, he would kind of write down his key points, and then shuffle them up so that they'd be in random order to try to figure out how he could draw connections and mix eggs in between the sort of key issues that he had to hit.

Dale Ho:

So I had maybe half a dozen moots during the preceding three weeks, but I wanted to keep drilling myself. So I tried it. It worked well in my previous oral arguments, so I just figured I'd try it again.

Melissa Murray:

What would Chief Justice Roberts do? WWCJJD.

Leah Litman:

Please no, listeners live your life according to that.

Kate Shaw:

Well, I will say, whatever we think of his jurisprudence, he was a hell of an oral advocate. He really was.

Leah Litman:

So before we get to the Supreme Court, can you take us back to the trial? You litigated a lot of cases. What was this process like as far as framing challenge that you had to have at least sort of expected was going to make its way to the Supreme Court eventually, throughout discovery and the trial?

Dale Ho:

Yeah, it was a crazy, I mean, the whole case was kind of a crazy experience. The trial, certainly so. We filed the case, I think, in June, of 2018. And we got to trial in November. So that's a pretty fast process, much faster than I think our average case and it was a really, really complicated case. Really, really big factual questions about standing, what would be the effect of putting a citizenship question on the census, tremendous amounts of experts. Discovery on just that question separate and apart from the process, the shady process by which they went about adding the citizenship question, whether or not it was in fact justified by the rationale that they put forward and the legality of the question under a host of other federal statutory and constitutional requirements.

Dale Ho:

So it was a really, really complicated case. Very, very rapid discovery. We were fortunate to co counsel with a terrific law firm in the case Arnold & Porter, who helped us manage the thousands and thousands of pages of discovery and the really fast deposition schedule that we were under. Then the trial itself

was about two weeks. It was this very bizarre procedure in which a lot of the testimony was taken on paper and then we would start with cross examination with certain live witnesses, made it really hard to kind of tell a narrative.

Dale Ho:

Normally you're using the direct examination to do that. You were jumping straight into cross. The people in the audience and the press hadn't had the benefit of these people's direct testimony when they were seeing the cross. So they were kind of confused as to what was going on. It was unlike any other case that I'd ever taken to trial, I'd say.

Kate Shaw:

How atypical was the experience, not just in the speed with which you proceeded from complaint to trial to opinion to the Supreme Court, which was pretty crazy, but the qualitative experience of litigating this case. How different was it from other cases, including in terms of the conduct of the Department of Justice, your adversary in the case?

Dale Ho:

Yeah, it was very unusual in that regard. I'll say that I've been up against some pretty shady adversaries before. So the case that I had immediately preceding the census case, was a case in Kansas that I'd taken to trial earlier that year against then Secretary of State, Kris Kobach, who I think needs no introduction for your audience. He did not conduct-

Melissa Murray:

Does he have friends who own a boat?

Dale Ho:

No comment.

Melissa Murray:

I think he might.

Dale Ho:

Oh my god I can't even. I did see a tweet from 2018, which I think Kris tweeted that this whole enterprise will end with some people in jail. I don't think he used the word people, but it's pretty remarkable. He's a General Counsel of We Build the Wall and I've sort of figured over time out that he's kind of a grifter. He would go to cities and towns and hawk these anti-immigrant ordinances, say they're perfectly constitutional. Trust me. I'm a constitutional law professor. They'd get sued by the ACLU, and he'd say, well, for a low, low rate, I can represent you in those proceedings. He'd collect his full frame, lose the case, and then the town would also be stuck not only with his legal fees, but also the ACLU's attorney's fees.

Kate Shaw:

I didn't know about this hustle. This is a thing he's done in multiple places?

Dale Ho:

Oh, yeah. Samantha Bee did an amazing bit on it. You really should check out the Samantha Bee sketch on it. It's amazing and yeah it was a racket. So we just litigated against him because he represents himself in cases as the chief election official of the state. He got fined \$1,000 for concealing documents. He got fined \$26,000 for being held in contempt of court. He was ordered to take CLEs. This was not your actual question.

Leah Litman:

It does provide a useful comparator to the kind of litigation conduct you have experienced.

Dale Ho:

I've dealt with crazy stuff before and I'll say the DOJ attorneys who were litigating the case from federal programs, they never did anything that was shady or not above board, but they were clearly not in the loop. They would make representations about what the case was about or what documents there were or weren't there and then stuff would just kind of tumble out from their clients. The Department of Commerce, the Department of Justice, outside consultants, to the Secretary of Commerce. It was just kind of bad faith piled on top of bad faith piled on top of bad faith in this case.

Dale Ho:

Everything from documents that weren't originally disclosed to us as part of the administrative record appropriately, documents that we had to get in discovery, which they said were not relevant ended up being very, very highly relevant to documents that actually were discovered and produced after the Supreme Court issued its ruling in the case. It's pretty crazy stuff and then there was that withdrawal issue with the DOJ attorneys after the Supreme Court decided which was, I've never seen anything like that before.

Leah Litman:

Even before that, before there was a decision in the case you had DOJ seeking to stay the district court from actually issuing a ruling in the case, insisting that the district court issuing an opinion after the trial would somehow irreparably harm the government even though the proceedings had completely finished by that point, and there was nothing for the government to do. All that was left was for the Court to rule. I remember reading Judge Furman's opinion on that order, which just the TLDR was like, are you fucking kidding me? This is the worst motion I've read in years.

Dale Ho:

They tried to stay some aspect of the proceedings, I think at least half a dozen times during, and then once we got the trial decision, cert before judgment, turbocharging us to the Supreme Court as quickly as possible. It did, I think get to the cross of threshold of frivolity by the number of times that they filed motions that had been refiled motions that had been denied. If it had been a party other than the federal government, it probably would have invited a sanctions motion. I don't blame the line attorneys from federal programs. Again, I think they were just carrying out their instructions.

Melissa Murray:

Suppose that taking this up to the Supreme Court, and if you could explain to those listeners who aren't quite as familiar with the procedural posture, you went from the District Court to the Supreme Court,

which isn't typical. So do you want to explain the circumvention of the Court of Appeals and what happened at the Supreme Court?

Dale Ho:

Yeah. So after we got a trial ruling in January of 2019, the Government filed what's called a petition for cert before judgment, which essentially allows a case to skip the normal course, which is review in the intermediate appellate courts, the Courts of Appeals, the Circuit Courts and go straight to the Supreme Court. It's not granted very frequently, but it was here. So we went from trial judgment in January to oral argument in April, a span of just three months, which is, just really, really, really fast.

Melissa Murray:

And difficult for you as a lawyer, because it's really different to be a trial lawyer trying to assemble a record and then you sort of pivot on a dime to being the appellate lawyer.

Dale Ho:

Yeah, and I'll be honest, my comfort zone really is in the trial court. That's sort of where I've spent the majority of my practice and where I just really feel in my comfort zone, putting witnesses on the stand. It's sort of where I live as a lawyer. Appellate arguments not something that comes as naturally to me, and to have so little time to prepare and to not have the opportunity to sort of try things out in the Court of Appeals first before having to do it in the Supreme Court. That was pretty nerve-wracking.

Leah Litman:

It's also like a rather long period of time, even though it's short for the lifecycle of a case, it's a long period of time to basically be going full throttle on such an important case. When everything is moving that quickly from Complaint to trial to the Supreme Court, you're basically going at it nonstop for that entire period of time.

Dale Ho:

Yes, and I had rolled almost directly into this trial that I referenced earlier in Kansas into the census case. I had sort of planned on taking a little bit of a slow down after that Kansas trial and assured my family that I wouldn't be on the road as much and fortunately, I wasn't on the road. The trial was in New York, but I didn't get that slow down.

Melissa Murray:

You talked about this in the documentary. You mentioned, the toll that it took all of you actually. Brigitte, Chase, all of you talked about the toll that this kind of high profile work really does take on your families, but you said, and I thought it was so inspiring, if you're not going to be a public interest lawyer in this moment when the stakes are so high, what is the point of it at all?

Dale Ho:

Yeah, that's sort of how I felt after. I mean, there's been periodic moments where I felt kind of exhausted and I don't want to hold myself out as some kind of tireless warrior or something like that. There are a lot of people, a lot of people listening to this, I'm sure work extremely hard, do not get to spend as much time with their families as they would like, but I just knew that I, myself in 2016, was

starting to hit a wall a little bit after having done this kind of work for, at that point, about eight years. It's kind of nonstop.

Dale Ho:

Election-related litigation goes pretty quickly compared to other kinds of civil litigation, because we're always trying to get judgments before the next election. I was sort of thinking maybe I'll, I didn't have anything specific in mind, but maybe I'll think about other things that might be out there that I could do that might not be either as fast paced or not require as much travel and then after the results of the presidential election, that just became inconceivable for me. I went to law school to do this kind of work. It was sort of what I saw as a calling and I felt like this is kind of our moment.

Dale Ho:

Hopefully, hopefully we're not going to have more moments like this. For God's sake, the last three and a half years ends up being aberrational. We won't know for a long time, but-

Melissa Murray:

The documentary kind of makes that point, too. These are four cases, that by themselves, each could have been worthy of a documentary, and they're all part of this enormous documentary. So, they're just sort of spliced into quarters of this documentary and that's still only a fraction of litigation that is currently pending both by the ACLU and other public interest organizations against the administration. Say what you will about the Trump Administration. They've been great for lawyers and constitutional law professors. We really have gotten a workout.

Melissa Murray:

I don't know if it's been great for the rule of law or democracy, but they have just not stopped providing fodder to just either bring cases or to talk about cases that should be brought.

Dale Ho:

It's definitely been the most interesting period of my career, I would say, but at this point, I would take boring.

Melissa Murray:

A low key administration where you can sleep and not worry about, yes, children in cages. Agreed. Agreed.

Kate Shaw:

So Dale, we played the clip of you prepping for your argument before the Supreme Court. Will you tell us a little bit about the experience of the actual argument today?

Dale Ho:

Yeah.

Kate Shaw:

How do you think it went? How did you feel about it? What surprised you?

Dale Ho:

Well, I've worked on a few cases in the Supreme Court before and I had periodically gotten closer to the front of the room, like the first time I had written part of a brief but wasn't important enough to get a ticket. So I stood in line from 4AM to get in. Second time I got to sit at the counsel table and hold Paul Smith's briefcase. So then I saw how, but I'd been in this room before. I'd seen the procedure, watched a bunch of arguments before. I'll never sort of get over how close the lectern is to the bench.

Dale Ho:

It's so bizarre. It's so much closer than in any other courtroom. So to be that close to all nine Justices, that was kind of a surreal experience. I had kind of a little out of body moment, like 45 seconds into it where I was sort of like, ah, they're all here and all looking at me right now. Don't fuck up. Keep going. So snapped back into it and kept going. Look, I actually thought it went pretty well.

Dale Ho:

Some of the press coverage afterwards kind of uniformly predicted that we were going to lose and at first I was kind of scratching my head about that. I was like, but I thought we're doing a pretty good job. I don't know. I think I understood why that was the assessment. You go in assuming we're the underdog. I assumed we were the underdog, and you look to see if something happened during the argument that would change that assessment and no, there wasn't anything.

Dale Ho:

No obvious sign from one of the maybe gettable votes for us or the votes that we're treating as gettable. No comment from the Chief or from Justice Kavanaugh, perhaps, that they're sympathetic to our position, that they don't buy what the Administration's selling. We think, the only comment was on standing so we knew we had standing at least. So I understood why people thought we were likely to lose after the argument and then after the next two months, I think that kind of uniform drumbeat of the coverage seeped in and you probably see it in the film that the morning of the last decision day of the Court when we know we're getting the opinion, I'm sort of feeling I'm walking to the firing squad or something like that.

Melissa Murray:

Can I ask a question just about the timing of things. So the Hofeller cache of documents was reported in the media after oral argument. Did you think that that would be determinative or would play a role in how the Court thought about this?

Kate Shaw:

Will you explain for our listeners what those documents were and how they emerged for folks who don't know.

Melissa Murray:

I like calling it the Hofeller cache.

Dale Ho:

So about a month after the oral argument, our co-counsel from Arnold & Porter, in completely unrelated litigation challenging the North Carolina congressional districts as unconstitutional partisan

gerrymanders under the state constitution, found a cache of documents from this man, Thomas Hofeller, who had died recently. He was known as the, I didn't coin this. He was known as the Michelangelo of gerrymandering. He was this Republican operative. That's just so, I can't even-

Melissa Murray:

If your kids like the Ninja Turtles, that's such an image.

Dale Ho:

Yes, yes. You have the staff or the footage, you have the staff for the nunchucks. don't know.

Melissa Murray:

He had one of them?

Dale Ho:

Yeah.

Leah Litman:

He was using them against democracy.

Dale Ho:

Right. So he was like this longtime Republican operative. Any map that had been challenged as a gerrymander, racial, partisan, Or otherwise over the past few decades in like a high profile case, he had a finger in that. There were these documents on his hard drive that his daughter, his estranged daughter had come into possession of and had turned them over to our co-counsel, where he had mused about the possibility of just not counting non citizens at all in the redistricting process. Right now this is sorry it's so long, districts and redistricting have to be drawn with equal numbers of people.

Dale Ho:

Hofeller was hypothesizing a scenario in which you didn't do that. Instead, you drew districts with equal numbers of citizens, you just excluded non citizens from redistricting entirely and what he concluded was that it would be "advantageous to non-Hispanic whites and Republicans and disadvantageous to Hispanics to do that, and that if they wanted to do it, they needed a citizenship question on the census." That was document number one. Document number two was a draft letter from the Department of Justice requesting a citizenship question on the census, supposedly to help them enforce the Voting Rights Act, which almost verbatim, appeared in the files of Secretary Ross' chief advisor on census issues which we discovered, in the course of litigating the case at the trial level.

Dale Ho:

So, here now we finally have this smoking gun that connected, what we all along thought was the case. That this was a scheme to dilute the representation of communities of color, but spelled it out in black and white, directly connecting it to the citizenship question effort. We filed a motion with the Supreme Court that this required some new fact finding, they should kick it back down to the District Court to allow for some fact finding on that.

Dale Ho:

I don't know if we believed they would do that or not, but we felt like these documents were explosive. We needed to surface them, we needed to make the Court aware of them. We simultaneously filed the sanctions motion in the District Court because these documents hadn't been produced to us in the course of discovery, and clearly someone from whom we were seeking discovery during the case had them in their possession. So we were just taking every shot we could to try to bring these documents to light and explore the significance of them.

Melissa Murray:

So it's Hofeller, you say as opposed to Ho-feller

Dale Ho:

Hofeller. Sometimes he's called Hof-ler or Ho-feller, Hofelller. I don't know. I'm not-

Leah Litman:

I'm going to stick with Michelangelo or Michelangelo, whatever.

Melissa Murray:

I appreciate the background story. One of the things we mentioned on, I guess it was one of our first episodes when we covered the decision in the census case, as well as the decision in Rucho v. Common Cause is that the Hofeller documents actually really nicely connect them in ways that I don't know were fully appreciated, either by the media or by the public when both cases were being litigated, but without that question on the census, you don't get the information that you need in order to redistrict in the way that would be advantageous to a particular political party. So they're sort of interconnected, even though they seem like completely disconnected cases.

Dale Ho:

This man's mission for his entire life, was to stave off the burgeoning political power of voters of color, to try to forestall the electoral consequences of the demographic changes that the country is undergoing. That's I think, the direct connection between the gerrymandering efforts after the 2010 census and the citizenship question, which was designed, I think, to try to preserve and expand upon those efforts post 2020.

Leah Litman:

Just to spell out some of the connections between partisan gerrymandering and disenfranchising communities of color, which might not be as readily apparent to listeners, one of the problems with the Court saying that partisan gerrymander is perfectly constitutional is often times legislators will defend against an accusation that they gerrymandered on the basis of race by saying, no, no, no, no, no, we actually gerrymandered on the basis of partisanship. After Rucho said, well, that's a legitimate consideration and those claims are not justiciable.

Leah Litman:

You've basically given legislatures is extremely powerful defense to claims that they have gerrymandered districts on the basis of race. Because voting and partisan affiliation is so strongly racially polarized and racially correlated. That happened in the North Carolina litigation, and it's happened in other litigation as well. Anyways, brief side note.

Leah Litman:

Decision day because this is, as Kate was alluding to, I think, earlier in the episode, one of the best parts of the film because you knew you were going to get the decision on this particular day. You said as you mentioned that you thought you were walking up to the firing squad and when you first click on it, you think the firing shot actually went off, right?

Leah Litman:

Then it turns out, they did not so let's play that clip.

Dale Ho:

Yeah. Yeah, we lost. Wait a minute, what? Did I? Did I read that too fast? The fuck. I can't understand what's happening. Wait, wait, wait, wait, wait, wait. We won on establishing that it was pretextual.

Speaker 7:

Hey.

Dale Ho:

Hey, hey, hey. So, it's confusing. They're agreeing with us that the Agency wasn't truthful about why they added the citizenship question, the pretext point. They can't print the forms on Monday with the question on it.

Speaker 7:

Okay. So, is it a Voter's Rights victory?

Dale Ho:

It's like a win.

Speaker 7:

Do you want me to send the win version?

Dale Ho:

We're still winning right now. Yeah, I got to get the...

Dale Ho:

When I saw like a dissent from the four liberals and I just assumed that then it's over, and every first part of the opinion was, it's not substantively invalid. I just feel like, an idiot, I forgot to send it to the printer.

Speaker 7:

To who?

Dale Ho:

Oh, Inga, hey, sorry, you're there. I forgot to send the opinion to the printer. I actually have to read the damn thing. Holy shit. Holy shit. What the? Look, it's not over. I mean, they're going to come back and try again.

Kate Shaw:

It made me feel so much better to watch this clip because this same exact thing was happening in the press room on that decision day. Because I have a contributor contract with ABC, I am sometimes in non-pandemic times, in the press room in the Supreme Court on decision days when the opinions come down and usually there's like, tweets are firing out within 10 or 30 seconds or something of actually getting the physical, the slip opinions. So you get those first and they upload a couple minutes later on the Court's website, but the press that's physically there has a very slight advantage in terms of breaking the news first, but everyone was completely blocked for a few minutes.

Kate Shaw:

I think it's so interesting, because you say in the clip, I saw the dissents and I assumed we lost and it took me back, I remember when I was sort of at the beginning of doing this kind of media commentary. The Obergefell decision came down, and it was like you opened it, it was like, okay, it's Kennedy, of course. Then you see, there are separate dissents from each of the conservatives and you're like, okay, okay, and then you're like, and there's no separate concurrence from any of the liberals. It's sort of like you actually don't even need to read a word of the opinion at least to get the bottom line.

Kate Shaw:

It's something so reductive about the ordinary voting breakdown of this really polarized Supreme Court, obviously with some important exceptions as the last couple of terms have taught us. It is the case that sometimes you just scan votes and sort of understand how the case has come down but of course, this is a case in which the devil is in the details, you actually have to read the somewhat internally inconsistent sections of the opinion to understand that there is, so we should just say for people who haven't spent all this time wrestling with the opinion, that the court sort of in this kind of gratuitous, I think finding, does hold that Congress and by extension, maybe the executive branch of it, if Congress delegated the authority, would have the constitutional ability to include a citizenship question on a census, even though it's not at all required to resolve the case.

Kate Shaw:

The Court does say that, and then does reject a couple of statutory challenges to the addition of the question, and then seems to find that it actually, in theory, was not arbitrary and capricious under the Administrative Procedure Act, to have included the question, but that on this maybe somewhat novel, maybe sort of with deep roots and Administrative Law sort of theory that the existence of that the pretextual explanation offered by the Commerce Secretary was fatal to the decision invalidates it and sends it back to the lower court or sets aside the agency action and sends it back to Commerce to potentially take another look at it.

Kate Shaw:

It is this sort of the fact that simultaneously the Court says, it is not arbitrary and capricious to add a question, but here it was, the pretextual explanation offered doomed it. Even just describing these holdings I think illustrates that they're just really difficult to reconcile and they're not written in a clear

and accessible way and I'm still not totally sure how they work in tandem, and yet the bottom line was you won. You won the case.

Melissa Murray:

So can I jump in here? Dale, I have a conspiracy theory that I would like you to either discredit or validate. You ready? Okay. Do you think that you actually, when they were in conference, and they're voting you actually might have lost and then this opinion was being drafted and then the Hofeller cache of documents comes to light and the majority realizes, or at least one person in the majority realizes that this looks like a bag of dicks and they have to do something about it. Then the majority sort of changes and becomes a different majority. Is that possible?

Dale Ho:

I think it's possible. I think you read it, and it is written as if, we're going to lose, that the Chief's opinion is written as if to sort of justify why it might be okay to put a citizenship question on the census, notwithstanding the enormous damage that it would do to the accuracy of the count. Remember, we don't have standing unless we prove that putting the question on there damages the count of the population. And unanimous, the Court's 9-0 for that. So they're all agreeing that this is going to wreck the count. It's going to result in a change in how political power is allocated, it's going to misallocate federal resources, but notwithstanding that, the opinion starts to go on for pages about how that's okay.

Dale Ho:

So I think it is reasonable to assume it's drafted initially with the idea in mind that we're going to lose. Something at some point along the way changes the Chief's mind. Was it the Hofeller documents? That I don't know, right. It's the only kind of major intervening event that happened. It's also not mentioned in the opinion anywhere, not that it really could or should be since we didn't have any further proceedings on it, but it's ultimately hard to know, I think.

Leah Litman:

Something that was also quite striking to me was the language that the dissent kept in about how it was only a conspiracy theorist who could think that this question, the citizenship question was added not to enforce the Voting Rights Act. So the four dissenters say, look, you majority and all of you people questioning this, you've got to like squint your eyes and like rearrange all the pieces on this total board out of A Beautiful Mind in order to get there. It was actually really surprising to me that they kept that in, in light of the Hofeller documents, even if they ultimately stuck with their bottom line conclusion, because by that point, it was at least plausible that the citizenship question was not done to enforce the Voting Rights Act.

Dale Ho:

And today, now we have the President admitting it. I couldn't put on a citizenship question, but I'm still going to collect citizenship information to affect congressional apportionment and now, I'm just going to exclude undocumented immigrants altogether from the apportionment which he announced in the memo that came out last month. So, it's just kind of amazing to me the way that Judge Furman was kind of portrayed by a few members of the Supreme Court as some molder from The X Files. With like, exactly. Literally, that's the image.

Melissa Murray:

A tin foil hat.

Dale Ho:

That they conjured that he's got a bulletin board and he's connecting push pins on it with crazy string or something like that, but again, the President's come out and admitted it. So it's kind of amazing.

Melissa Murray:

So I had a kind of unpopular take on decision day and I'm, again, always a little pessimistic about everything, always looking what's the other shoe to drop, and it was a stunning victory for you all but in some ways, the damage had already been done. I mean, the fact that this litigation was pending, sowed more distrust among communities that are already distrustful of the Government and federal intervention and this didn't help. This is also before the pandemic.

Melissa Murray:

So if the real issue is under counting on the census, for purposes of congressional representation or the allocation of federal dollars, the damage might have been done already, even though you actually pulled out this amazing victory and got the Administration on its heels. If people don't answer the census, that's the point.

Dale Ho:

Yeah. It's something that we were worried about the entire time. It's actually an argument that, believe it or not, DOJ made at trial, that our injury is not redressable.

Leah Litman:

Because we've already fucked them over enough.

Dale Ho:

Basically, I know. I mean, seriously. Their argument is if adding this question is going to deter census participation, well, where's the evidence that removing it will encourage census participation? You don't have that, do you, plaintiffs, and we're sort of like, are you fucking kidding me? This is insane.

Melissa Murray:

Well, you actually had a great rejoinder in the film where you note that they will live to fight another day, that there will be more to come and you say, and this is my favorite moment of the film you were like, and we will fuck them up.

Dale Ho:

Oh, boy.

Melissa Murray:

So maybe that's a good segue. Can we talk about more recent developments?

Dale Ho:

Well, after the decision came out, which, hell, look, you can ask this question, just don't lie about why you're going to do it. There's all this speculation that the Administration is going to now come up with some other reason to say, okay, you got us. Here's the real reason why we did it, and that we were going to have to fight this all over again on some kind of crazy expedited timeframe. The conventional wisdom was, this was just a temporary win. The administration is going to come back and put this question back on there. I sort of thought about that, and I was like, wow, that's a bummer.

Dale Ho:

We won the case, but shit, we're still going to be in this and then I started thinking about a little bit more. I was like, wait a minute. We're back in the trial court now and as I said before, that's like my comfort zone. The opinion said that discovery was proper and I was like, oh, okay, I got some of my tools now. If they tried it again, we immediately, like normally you win a case in the Supreme Court and everyone goes out drinking, you have a good time, but literally that night, we all went back to our offices in our homes and whatever, and started jotting down on legal pads or on computers, what's our next move when they try to put this question back on.

Dale Ho:

I thought we had a lot of ideas, and I felt pretty good just thinking about it for 90 minutes that we were going to be able to throw enough sand in the gears to prevent a new effort to have the question.

Kate Shaw:

Do you think DOJ lawyers successfully prevailed upon the White House that that was in fact the most likely outcome if they did try to take another run at it under this extremely expedited timeline? Because on DOJ's own representations, they really needed to start going printing the census even before the opinion came out, and they would have a very difficult time returning to court and explaining that they actually could take a couple more months while they tried to add this question again and defend it against your challenges again.

Dale Ho:

Well, they had represented about a dozen times to courts of different levels. The District Court, the Court of Appeals when they were trying to get expedited review of discovery rulings, and then the Supreme Court multiple times, that this case, this dispute, could not drag out past July 1st. We got the decision on a Thursday, July 1st was Monday. So I was like, they can't print the forms on Monday, with the question on it. They're blocked from doing that right now and if they're going to try again, well, we're going to hold their feet to the fire, we're going to use their words against them.

Dale Ho:

I think that is what triggered, when the Administration said, well, we're going to look at it, maybe come up with a new reason, which itself was sort of signaling, that's pre textual. We're going to come up with a new reason for this thing that we already decided. I think that is what triggered the en masse motion to withdraw from the case from the DOJ line lawyers who had been litigating up until then. They had, as officers of the Court made multiple representations to the court that this dispute could not go past July 1.

Dale Ho:

The court had relied on that, the Supreme Court had relied on that. How could they go back now to the same courts and say, ha-ha, just kidding. We're going to keep going now. So I think they actually tried to withdraw and sub in a whole new legal team. This was one of the moments of drama post-argument when they were still trying to re-add the question and I think one of the things that I was most proud of post-argument that we pulled on them was we opposed their motion to withdraw. Josh Block actually from The Fight, from the trans military ban case is the one who gave me the idea.

Dale Ho:

He noticed that under the local rules in the Southern District of New York, you can't withdraw from a case without providing a written sworn statement explaining why you're withdrawing from the case and the motions, unsurprisingly, were unaccompanied by any such statements. We were sort of like, nope, you can't get away. You can't get away unless you tell us why.

Kate Shaw:

And Furman agreed with you. Furman said, yeah, that's right.

Leah Litman:

Read the local rules, people. You can't get away with this unless you tell us why. I want to go back to whether they could have re-added the citizenship question, even if they had an additional week or two or month to do that, which is like the Court's decision said, okay, you can't lie about your reasons for adding the citizenship question. Well, what do we know based on what has happened over the past year, including what you alluded to, namely, the President directing the Secretary of Commerce not to include undocumented citizens in a report that would form the basis of appropriations.

Leah Litman:

We know they want that in order to encourage districts to be drawn based on citizens and voters and to exclude non citizens. Why do they want to do that? Well, the Hofeller documents give one very plausible reason why which, again, is not that difficult to impute to the Administration given all of their subsequent actions and words. They want to do that in order to enhance white political power and disadvantage voters of color, and that's not something you can do. That's not a permissible reason.

Leah Litman:

So even if they had come back and said, yeah, we want the citizenship question in order to dilute the voting power and political power of voters of color. That wouldn't have flown and so what they would have had to do is come up with another pretextual reason, and that probably wouldn't slash shouldn't have worked either.

Dale Ho:

That's 100% right. That's why I thought we had, like where I was 90 minutes after the opinion when I was like, we'll fuck them up. I was this might take a long time but it's like where, I'm no chess player but what I imagine chess grandmasters are like, they look at the board and they're like, it's over. It may take another 30 moves, but it's checkmate.

Kate Shaw:

I think Leah's point is such a good one. It's a lot of the commentary right after the opinion, suggested that all the Chief was saying to commerce was come back to us and just lie better. Leah's point is that, a lie is still going to be a lie and the pretext analysis, that the Court lays out and the opinion would presumably smoke out a different kind of lie. The real reasons are just not legally or constitutionally permissible ones. So there actually isn't a way to lie better. The weakness of the justification was not just kind of a superficial or cosmetic one, like it was a deep substantive one. So lie better actually couldn't have been what the Chief Justice was saying.

Dale Ho:

That's why they lied in the first place, because they didn't have a legitimate reason to add the question, and that's why it matters that they lied.

Kate Shaw:

It connects up to sort of the more recent developments that you sort of alluded to a couple of minutes ago. So will you talk a little bit about what this executive order that the Administration issued, purported to issue. I guess they did issue it, but what does this executive order purport to do and what are you guys doing about it?

Dale Ho:

So it's like Groundhog Day. Last month, the President issued a memo that declares that it's the policy of the United States, despite never having done this one time before in any census in our nation's history, to exclude undocumented immigrants from the census count that's used to apportion the House of Representatives and it was like a Friday I was trying to get away in this horrible time that we're in right now with my family and then my phone started blowing up and I was like, this has got to be one of those bullshit trial balloons where they say crazy shit and then don't do it, because it's the most blatantly unconstitutional thing that I've ever encountered as a voting rights lawyer.

Leah Litman:

And you've litigated against Kris Kobach so.

Dale Ho:

Yeah, that's saying something. Saying something. Tuesday, after that Friday, they did it. He issued a memo. He's like, we're not going to count undocumented immigrants for the apportionment. Never happened once in the census, ever. Section 2 of the 14th amendment is, pretty frigging clear. It's like, all persons, persons in the States. That's what apportionment is based on. So unless you're willing to say that undocumented immigrants aren't people, it's really hard to defend this but we filed suit three days later, we're back in front of Judge Furman and two other judges it's a case that requires a three judge panel. Any decision they render, I almost gag saying this, any decision they render has direct appeal to the Supreme Court, which I'm like, please, God, no, I don't want to do this again. I'm really not eager to go through this crap again. Our reply brief on our motion for relief is actually due tomorrow.

Leah Litman:

Thanks for recording with us.

Dale Ho:

I know that there are a lot of interlocking schedules to coordinate here, so I didn't write you asking to move it. so we're doing it again.

Leah Litman:

So maybe just back to the film with some concluding thoughts and a quick round robin of our favorite moments. So as we noted at the outset, that film covers a bunch of legal challenges and a small fraction of the cases that the ACLU is litigating, but it also gives a really cool insider view about what it is like to work at a major public interest litigation organization. So we got a walking tour of the offices and all of your office neighbors and some funny comparisons between the ACLU and DOJ.

Melissa Murray:

You are definitely winning the body art and tattoo ratio here versus DOJ.

Leah Litman:

Some frank discussion of aspects of ACLU's caseload that might not always resonate with everyone, even those who work at the ACLU, like the litigation involving Charlottesville, as well as what we were alluding to earlier. Discussions about the toll that your professional lives can take on your personal lives as well. So, those are just some of the reasons to check out the film, which I really enjoyed. I live tweeted my watching of it, and would recommend it to everyone.

Melissa Murray:

I think my favorite moment of the film, like non-Dale moment, you definitely stole the show, Dale, and I strongly suspect that you will be nominated for Best Supporting Actor in the next go round. My favorite moment was when Rachel, they had the clip of Rachel Maddow reporting for the first time the family separation announcement and the fact that children were being separated from their parents, and this is now it just seems like it's 150 years ago.

Melissa Murray:

We've become almost anesthetized to the idea of it, which to me watching it this morning was probably the most shocking. Rachel Maddow breaks down and cries and has to go and have her producers show footage from one of the detention centers so they're not on her face crying. I didn't cry this time. I remember crying when I first saw it, but I didn't cry at all and it made me think, have we just become so anesthetized and inured to the cruelty that, it's only been three years and that policy hasn't been three years. It's been less than that, but it just feels like it's the longest three years of our lives and we've just become sort of numb to the cruelty.

Dale Ho:

I sort of feel like people have to, we have to survive. If you go around, feeling everything all the time, it might be hard but I do think it's important to resist the urge to let ourselves get hardened to this, as difficult as it is to kind of re experience the pain of what has happened over the last few years. Everyone's got to do what they have to do to get through every individual day, but I have to remind myself to kind of remain sensing to what's happening around me not let my senses get dulled. Because if that happens, then we're like that proverbial frog in the boiling water. Just slowly the heat gets turned up until it's too late.

Melissa Murray:

So I feel like I just, this was like a total Debbie Downer move on my part. So my second non-Dale moment is when you all read the vile emails that people send to you out loud and it was basically like Mean Tweets, and I thought that was hilarious.

Kate Shaw:

I will jump in and say my favorite non-Dale moment from the film is Brigitte Amiri's cross examination of Scott Lloyd, which I'm sorry Leah, that was also yours, but oh my god. She's just got an amazing, understated, but deadly sort of style. It's sort of like the drama is inherent in the exchange. So the filmmakers just are playing the deposition, but he is this official who is clearly using his authority to attempt to the fullest extent possible under and maybe even outside of the law to deny abortion access to individuals in ORR, that's the office that he headed, custody and it's a chilling exchange and she is just so fierce, deposing him.

Leah Litman:

So that exchange is definitely going to make one of my favorite lists, because it just enraged me all over again about the entire litigation, Judge Kavanaugh's participation in it and I think most egregiously, in some ways, the Department of Justice's attempt to sanction Brigitte Amiri for her participation in the case. They actually filed, I'm going to put this in air quotes, "a petition for certiorari" in the Supreme Court not actually seeking cert but seeking a vacatur of the decision and then a request to refer her to her local bar organization for sanctions because she assisted her client in obtaining an abortion after the Court of Appeals had said, we are upholding leaving in place the District Court TRO slash injunction requiring ORR to get out of this woman's way so she can get an abortion.

Leah Litman:

DOJ sought to sanction her for doing what the Court of Appeal's decision allowed her to do and in engaging in advocacy for a client. That is just not something I can forget. It makes me livid every time I think about it. Sorry to take us back to Debbie Downer mode.

Dale Ho:

I will confess that that was on my brain when I had to shake Noel Francisco's hand before the argument.

Leah Litman:

It is always on my mind, because even though I think that in public, Supreme Court commentariat was pretty united in the view that that motion and petition was out of bounds and should not have been filed. In private, you will still hear people saying, well, all of these great people and good guys who are at DOJ, and were on that brief. To my mind, I just think that that is like really problematic when you allow your assessment of someone, who they are to just be divorced from what they tried to do to someone who was again, defending the civil rights of their client in a completely permissible way.

Kate Shaw:

So I think we need to let Dale go finish his reply brief. So can we just really quickly ask you, Dale, before you go, we are very focused on voting rights litigation the way the Supreme Court may or may not intercede in some of those cases in the next couple of months. What should we be watching between

now and November 3? What can people do to help? After that, I think we want to play one final clip from the film before we actually let you go.

Dale Ho:

I imagine most of the people listening to this are lawyers, lawyers are needed to do election protection work. The Lawyers' Committee for Civil Rights runs an Election Protection program, plugs in volunteers from around the country to field calls to help voters deal with problems that they're seeing on election day. Sometimes it's just as simple as talking those voters through problems. Other times it's knowing which problems to escalate to the litigators who can try to do something on the ground in those places. They're always looking for folks. That's a big thing. There's going to be more last minute election related litigation in this presidential election than I think any in our lifetime.

Dale Ho:

It's going to be a little crazy. The pandemic has turbocharged everything because rules that under normal circumstances are maybe irksome. Maybe stop some people from voting, are now like a matter of life and death for some people. Whether or not you have to go to a crowd and stand there for hours to vote or if you can vote by mail. If you can vote by mail without having to interact with another human being to witness your ballot, things like that. It's going to be chaotic and everyone should know what the voting rules are in their state as soon as possible and monitor, up until the time that they cast their ballot, monitor for changes because the rules are going to be in flux.

Kate Shaw:

I think we'll play one more clip in the film, but at this point, maybe we'll let you go. Dale, thank you so much for taking the time to join us and for your vigorous work actually enforcing the Voting Rights Act.

Dale Ho:

Thanks a lot. It was a real pleasure.

Dale Ho:

A lot of people have been running up to us saying things like, you're our hope against the forces that have put Trump in power and you're going to be what's going to stop this thing and I think that's wrong. Like, we're not going to be able to stop this thing ourselves. I mean, we're like two and a half floors of a building in New York, right? I mean, we're not against the power of the federal government and this massive political movement.

Dale Ho:

We're not going to solve it. I think if anyone expects us to, they need to take a look in the mirror and ask themselves, what are they going to do. It's not going to be lawyers in courts, there's going to be people who turn the ship around.

Melissa Murray:

That was another fantastic clip from The Fight. The Fight is available on Amazon Prime VUDU, FandangoNOW and other streaming platforms.

Melissa Murray:

This transcript was exported on Sep 01, 2020 - view latest version [here](#).

We'd like to thank once again, Dale, let's F them up, Ho for joining us. The Fight is streaming on most platforms including Amazon Prime, VUDU And FandangoNOW. We are grateful to Catherine Fink who is subbing in for Melody this week to produce the show and as always Eddie Cooper who does our music. We are also really grateful to you dear listeners. If you'd like to support the podcast, you can do so by becoming a Strict Scrutiny subscriber at glow.fm/strictscrutiny. You can also support us and get yourself a fantastic glow up in the process by going to www.strictscrutinypodcast.com where you can find all of our terrific merchandise. Hope to see you soon. Bye.