

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 these, they are 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."

Leah Litman:

Welcome to an emergency episode of Strict Scrutiny that we are recording late on Saturday night. I am Leah Litman, coming at you from Northwestern Michigan, where I am supposed to be on vacation from this utter hellscape.

Melissa Murray:

I'm Melissa Murray.

Kate Shaw:

I'm Kate Shaw.

Melissa Murray:

Last week, we put together an episode that discussed the life and legacy of Justice Ruth Bader Ginsburg, after she passed away on Friday, September 18th, from complications due to pancreatic cancer. This week, because we are truly living in a hellscape, we are putting together another emergency episode, but this time about the process that is already underway to replace justice Ginsburg. The President announced that his nominee to replace justice Ginsburg will be Amy Coney Barrett. And he made that announcement on Saturday, September 26th, a mere week after Justice Ginsburg passed away and before she was even buried.

Kate Shaw:

And so we wanted to bring you an episode that included some information about President Trump's nominee, but was also about this insane slapdash process that is underway to select a lifetime appointee to the Supreme Court at the same time that an election is already very much underway.

Leah Litman:

So first about the process. After the President announced his nomination, the Republicans released their announced schedule for the confirmation process. Again, the President nominated Judge Coney Barrett on September 26, it is scheduled for hearings to begin on October 12th. Those hearings, the Republicans announced will last four days. Two of the hearings with the nominee, two with witnesses. Just by way of a comparison, since 1990, justices have waited on average 50 days from their nomination to the beginning of their confirmation hearings. Typically, during that time is when nominees will be meeting with senators and having other such appearances. In this case, it would be 16 days between nomination and a confirmation hearing. Also by way of contrast, President Obama waited a month after Justice Scalia's passing to nominate Merrick Garland to succeed him.

Leah Litman:

Here by contrast, President Trump waited a mere eight days and is, of course, after he told the public that he was saving Amy Coney Barrett to replace Justice Ginsburg, when she would pass away back, when he replaced Justice Kennedy with then judge Brett Kavanaugh, instead of Judge Amy Coney Barrett. Also, as Melissa noted in the opening Justice Ginsburg is of course not even buried. And the Senate has somehow been able to sprung into action, even though over 200,000 people have died from the coronavirus and the Senate has not managed to pass extended relief or do anything besides hold hearings on-

Melissa Murray:

Well-

Leah Litman:

Sorry.

Melissa Murray:

Well, I was going to say they have been able to do some of their work as senators like they have been... despite their disinterest in passing the heroes act or any kind of COVID relief, they have been very good about continuing to roll through judicial nominees.

Leah Litman:

That is the one thing that they apparently care about. Because of course the pro-life victory is declaring a win today with Senator Josh Hawley of Missouri saying, this is the greatest moment for the conservative legal movement that he can remember. And of course, today is also the day in which the United States reported 55,000 new cases of the coronavirus, the deadly pandemic that has put the country in a virtual shutdown. But congratulations.

Kate Shaw:

So, and as we said, the election is very much underway. Voting has begun, absentee ballots have been mailed out. If the vote follows, if it proceeds the timeline that has been laid out, after four days of hearings, we will be at 18 days before an election. So she could be actually confirmed within less than two weeks of the election, November 3rd itself. That is actually the possibility of this happening at the eve of an election and of election related litigation is actually at the core of the case that President Trump and the Vice President and Ted Cruz and Lindsey Graham and others have been making about the necessity of rushing this process through, right? They have basically said the country needs a nine member court in order to resolve the inevitable election disputes that will arise. And it's hard to know where to start with what's wrong, I think with that argument.

Kate Shaw:

I mean, one as a threshold matter, it is not inevitable that the Supreme Court will resolve the identity of the winner of the election. The American people casting their votes and those votes being counted should resolve the identity of the winner of the next election. But if it is the case that there's a dispute and the dispute gets resolved by a Supreme court after the President and the Republican Senate have pushed through this accelerated process to install a third Trump justice, who then turns around and as one of her first acts on the court, votes in a way that essentially hands the victory in a second term to president Trump, it would seem to me to be a fatal move for the legitimacy of the Supreme Court, let

alone for American democracy. And yet that is the predicate of the argument that president Trump and his Senate allies seem to be making. That's why they need a ninth member on the court and why they need one so quickly.

Melissa Murray:

Well, I mean, it's saying the quiet part out loud, right? I mean, you could imagine 10 years ago, even if you thought this and you were going to do it for this reason, you wouldn't actually articulate it publicly, but he's being incredibly naked about why he wants his nominee seated at this particular time. I mean, he's been just incredibly clear about it. There was going to be a contest, there are all these mail in ballots, they're all fraudulent. There's going to be some kind of election related litigation, and I want my guys in there, basically.

Leah Litman:

It's also such transparent BS because of course this was also true during the 2016 election where Republicans were more than happy to keep the Supreme Court at eight members.

Kate Shaw:

Yeah. So in election cases, and so there was no major dispute in 2016 that the Supreme Court was involved in, but the Court of course, did sit with eight members for basically a year while the Republicans in the Senate kept the seat open. And guess what? The Court functioned just fine. So they reached narrow results and avoided a lot of big decisions. And so the idea that the Court simply can't function with eight members is just undermined by our recent history. What they are saying is not that eight members is a problem, but that they don't sufficiently trust that Chief Justice Roberts will vote in a way that the President will approve of. And I think that skepticism is right. I think that it is hard to know how the Chief Justice at least would decide an election case, obviously the particulars matter.

Kate Shaw:

But they are broadcasting that they think that whatever the specifics are, that they are confident that a Justice Barrett would vote with them. And it's just really insulting to her, honestly. And the saying the quiet part loud piece, I wonder if it's even counterproductive to be sending such strong signals to a prospective future Justice Barrett, that they expect her to vote with them, knowing what that would do to her legacy, if she's confirmed and then does, as one of her first acts turn around and vote with them. Whether or not there is a big dispute that ends up before the Court in some time, say in November, there already is a request pending for expedited briefing on a decision out of a three judge court invalidating the Trump administration's memo, basically directing the exclusion of undocumented individuals from the census count and report to Congress for apportionment purposes.

Kate Shaw:

Alabama is fast-tracking a case to the court about apportionment that includes non-citizens. There were questions about the scope and constitutionality of section two of the Voting Rights Act. There's a Pennsylvania dispute that the Court could agree to take up or even summarily reverse within the next week or two. So this is not like an abstraction that the court, around this election and in the next few years is going to be resolving hugely important questions that go to the heart of how our democracy functions. And so all that is at stake.

Melissa Murray:

So let's talk a little bit about the nominee and America got its introduction to that nominee, Amy Coney Barrett this afternoon, Saturday, when the President introduced her to the public in a Rose Garden ceremony. So the first thing I want to note about the Rose Garden ceremony which I watched avidly, was how it was arranged to very precisely echo the way the Rose Garden was arranged in 1993 when Justice Ginsburg was nominated by Bill Clinton, Wolf Blitzer also noticed this. I'm old enough to have actually been around and watching things in 1993 when Justice Ginsburg was nominated. So it seemed pretty interesting to me that there was a definite effort to echo and to invoke her nomination.

Melissa Murray:

Spotted in the audience were luminaries of the conservative legal movement and certainly of the conservative press. Chris Christie, former governor of New Jersey and bridgegate participant was there as well as representative Mike Johnson. He's a Louisiana representative, who is the ranking member of the House Sec Committee on Civil Rights and Civil Liberties. That's the subcommittee that often hears hearings on reproductive rights. Bill Barr was also there as was Laura Ingraham, a former Thomas clerk, as well as Kelly Loeffler, which I thought was really interesting, given that she is in a hotly contested election with Doug Collins, who was not there to, my knowledge.

Melissa Murray:

And Kellyanne Conway who apparently has stepped down or stepped back from the administration to tend to her family, she was there in the Rose Garden this afternoon. Obviously also in the Rose Garden was Amy Coney Barrett who appeared with her husband, Jesse and their seven children. It was noted multiple times that two of Judge Barrett's children were adopted from Haiti. The President refrained from reprising his assessment of Haiti as an asshole country, as he had stated in the past. It was also noted that one of Judge Coney Barrett's children has down syndrome.

Leah Litman:

And did the president refrain from insulting people with disabilities during this display as well?

Leah Litman:

He did.

Leah Litman:

Congratulations to him. Congratulations.

Melissa Murray:

He did. I would say it was actually a really lovely tableau to see the family sort of arrayed out with her. As the President noted, she will be the first woman nominated to the Supreme Court who will have school aged children while she is on the bench. And Judge Barrett observed that she and her husband had been spending a lot of their time in the last couple of months running the quote unquote, Barrett e-learning Academy. They are teaching virtual schools since COVID-19 has shuttered the South Bend schools as well. RBG was not just present in the way this was organized, she was deliberately invoked throughout both by the President and by Judge Barrett.

Melissa Murray:

Judge Barrett connected herself to RBG and her legacy both as a woman in the legal profession and as a Scalia clerk. And she noted the specific friendship that the two Justices shared over time and said that they were individuals who could disagree without being disagreeable and despite their profound disagreements over the substance of jurisprudence and they bore no rancor toward each other. She also made clear that her household may run in much the same way the Ginsburgs's household, which is to say that her husband, Jesse, she said, is widely thought to be the better cook in the house and does more of the cooking than she does. I thought this was really interesting. It seemed very calculated to play into the kind of legacy of Justice Ginsburg.

Melissa Murray:

I don't mean calculated in a nefarious way, but again, to sort of position her as kind of an heir to Justice Ginsburg, even though they are not necessarily of the same ideological bend. And I thought it was interesting because the only other time we've had a successor nomination in this kind of way, like where someone was a first and is now being succeeded by someone who also bears some of the same identity characteristics was when Justice Thomas was nominated to fill the seat formerly occupied by Thurgood Marshall, the first African American to serve on the Court. And I went back to look at Thomas's nomination speech, and he did not spend a lot of time drawing these connections between his career and Marshalls' at all, and nor could he.

Melissa Murray:

Marshall had spent his career as a lawyer litigating on behalf of the NAACP Legal Defense Fund, and then briefly as the solicitor general and a judge on the Second Circuit. Justice Thomas had a very different career. But this I thought was really interesting, despite the differences in their careers, Judge Barrett was really at pains to link herself in a kind of unbroken chain with justice Ginsburg.

Leah Litman:

So now let's maybe examine how much of an unbroken chain it is because we did want to provide our listeners with some background about Judge Coney Barrett as a judge and as a scholar and as a lawyer, so they can get to know her a little bit. So as we've discussed, one of the major cases that the Supreme Court is going to hear this upcoming term in November, the week after the election, which could again, potentially be after Judge Coney Barrett is confirmed, is a challenge to the Affordable Care Act, where the Trump administration together with some Republican-led States is arguing that the 2017 amendments to the act made the minimum coverage requirement unconstitutional, and that as a result, the entire act must fall. In a 2017 law review article then Professor Coney Barrett quoted Justice Scalia as calling the Affordable Care Act, SCOTUS care in light of the Supreme Court decision upholding the act, but modifying it in some respects.

Leah Litman:

She has also criticized at same Supreme Court opinion that upheld the Affordable Care Act saying that it pushed the statute beyond its possible meaning to save the statute, that's significant because it reflects her conclusion Of course, that Congress lacked the power under the commerce clause to enact the minimum coverage provision, and that the minimum coverage provision in her view could not be read as a tax. That of course is the entire theory behind the Republican led challenge to the Affordable Care Act, this go around, and that's part of why her nomination and possible confirmation is raising very real concerns about the future of healthcare and the Affordable Care Act. I think that those concerns were

underscored when she said Scalia's judicial philosophy is mine and Justice Scalia of course, voted to invalidate the entire Affordable Care Act back in 2012.

Kate Shaw:

And I haven't found anything in her scholarly writing specifically about her views on severability, because that actually really is where the action lies in this particular Obamacare challenge, whether or not the zero penalty mandate is unconstitutional. The big question is, does the rest of the act have to fall if it is. And I do think that she has sent a strong signal with her praise of justice Scalia. I mean, I just, I remember his repeated suggestion that the oral argument in the NFIB case that clearly, the whole thing had to fall, clearly it was not severable. And I think that traditional severability analysis makes this actually a pretty easy case, clearly the rest of the law should stand. And a couple of decisions from last term that the bar First Amendment robocall case, the CFPB Seila Law case, those both seem to say you can strike down part of a statute and save the rest of it. And that is typically what courts should do when they have... unless there's really clear evidence pointing in a different direction.

Kate Shaw:

But I think that she, without having written much about severability per se, I think that she certainly seems far more likely to be receptive to the argument than like Justice Ginsburg would be that the Trump administration should prevail and his efforts to have the entire law thrown out. Okay. So let's maybe shift gears with other categories of cases. Reproductive rights and justice cases. She has joined some opinions on the Seventh Circuit asking the court to rehear challenges to an Indiana law requiring fetal remains be cremated and also a parental notification requirement that did not have a judicial bypass provision, suggesting that at the very least she would be much more comfortable with pretty serious restrictions on abortion than even the currently constituted Supreme Court has permitted. She has been critical in speeches and statements of Roe suggested was erroneous.

Kate Shaw:

She has not said the words that Roe v. Wade should be overturned when she was questioned about this on the Seventh Circuit. She sort of retreated to the obviously true proposition that as a Court of Appeals judge, she would not be in a position to revisit Roe v. Wade, and that of course is not something that she could say. We're talking about an appointment to the Supreme Court. One more thing about abortion, specifically is that I am sure that in her hearing, she will deflect and decline to answer specific questions about her view of overturning Roe. But I think it's pretty clear that she doesn't have a super robust view of stare decisis, I think that's clear from her scholarly writings. And I also think we should take seriously statements by folks like Josh Hawley, who have said there should be a litmus test for Supreme Court nominees.

Kate Shaw:

The litmus test should be, would they vote to overturn Roe? And Amy Coney Barrett passes that litmus test. That seems much more revealing to me than anything she will say or decline to say about Roe during this hearing. One more thing I should say, obviously reproductive rights and justice does not just mean abortion. On the Affordable Care Act's contraceptive mandate, she has described it as an assault on religious liberty and the rights of conscience. So suggesting she would be very open to broad religious liberty exemptions from things like the contraceptive mandate, maybe could even question the power of Congress to pass those sorts of laws at or requirements at all.

Leah Litman:

I think that those abortion decisions are really important because those are decisions that she joined as a Court of Appeals nominee. And I think that any fair reading of the Supreme Court precedent would suggest that those decisions are in pretty severe tension with the existing Supreme Court case law, which have invalidated state laws that did not contain judicial bypass revisions for parental notification requirements. So the fact that she was willing to push those decisions to such an extreme as a Court of Appeals judge, that is part of why supporters of reproductive rights and justice are so concerned about her nomination to the Supreme Court, where she would not even have to feel bound to the same degree or act bound to the same degree to prior Supreme court precedent as she would as a Court of Appeals judge.

Melissa Murray:

It's also, again, back to the Josh Hawley point, the more she tries to satisfy whatever litmus tests the Republicans put in place for her, she really does have to break with stare decisis, or at least with certain precedents in order to do that, which is worth talking about. I mean, so I will say a little bit about her views on stare decisis, they actually form a pretty big core of her work as an academic. Before she was a judge on the Seventh Circuit, she was a law professor at Notre Dame's law school. And a lot of her work was on stare decisis and specifically the connection between stare decisis values and originalism. And she is a Scalia clerk, she, like her mentor Justice Scalia, professes to be an originalist. But I will say that Justice Scalia's brand of originalism actually embraced to a certain extent, stare decisis, even if the precedent may have conflicted with his preferred view on a particular issue.

Melissa Murray:

And he famously contrasted himself with Justice Thomas, who is both an originalist, but also has a very different approach to stare decisis and Justice Scalia once said, "I'm a textualist, I'm an originalist, but I am not a nut." Right? So he very much understood Justice Thomas's vision of stare decisis to be really out of the mainstream. Justice Thomas of course has said, and we've talked about it on this podcast, most recently in 2019's *Gamble v. United States* where he wrote a concurrence in which he said that Article III judges have a duty and indeed an obligation to overturn precedents where those precedents are demonstrably erroneous. And so the question we raised when we talked about it was, what makes a precedent demonstrably erroneous, and according to Justice Thomas, one that is demonstrably erroneous is certainly one that would be untethered from constitutional text or not stated in constitutional text, which of course implicates the entire line of substantive due process jurisprudence.

Melissa Murray:

And although Judge Barrett is an originalist like Justice Scalia, in terms of her views of stare decisis as she's explained them in her writing, she is more aligned with Clarence Thomas than she is with her former boss. So in a 2017 article called *Originalism in Stare Decisis*, which was published by the Notre Dame Law Review, she wrote that originalism can be understood as a quintessentially precedent based theory, albeit one that does not look primarily to judicial decisions as to its guide, which is puzzling, I think. So I think we've talked about Justice Thomas's views of stare decisis being kind of off the wall. Now he has, or is likely to get a colleague who will help him, I think, to make them more on the wall than they have been.

Leah Litman:

And I think he already has one of those colleagues, Justice Gorsuch. And so now we might have a very core group of three Justices on the Supreme Court who really do not believe in any strong form of stare decisis whatsoever.

Leah Litman:

So one other area that we wanted to discuss Judge Barrett's views on was policing and criminal justice. So she's as a Court of Appeals judge, sat on several important decisions involving criminal justice. She rejected a Brady claim. A Brady claim is the argument that a prosecutor failed to disclose exculpatory evidence that could benefit the defendant. The majority in that case held that the prosecutor violated their Brady obligations because they failed to disclose that the witness underwent hypnosis before identifying the defendant. Judge Barrett said that did not violate the state's obligations under Brady, or at least a state court decision rejecting the Brady claim was not unreasonable.

Leah Litman:

Finally, she also concluded that it did not violate the eighth amendment when prison officials fired shotgun shells in response to a dining hall altercation. And the closing to her dissent in that case was in the context of prison discipline, deliberate indifference to prisoners is not enough. So I think it's safe to say that the President's two nominees to the Supreme court thus far, Justice Gorsuch and Justice Kavanaugh had pretty different views on criminal justice. In at least some areas, justice Gorsuch tends to be a little bit more libertarian than Justice Kavanaugh. And at least from her Court of Appeals decisions, judge Barrett appears to be more like Justice Kavanaugh than Justice Gorsuch, which could really alter the fate of important criminal justice decisions, given that Justice Ginsburg was often the fifth vote for pro criminal defendant rulings on the previous court.

Kate Shaw:

I will say that the... I do think that she has a somewhat mixed record or at least there are counterexamples in her time on the Seventh Circuit. So I can't remember if she wrote or joined an opinion finding that for purposes of a Terry stop, like the simple possession of a gun isn't sufficient. Now that intersects with, I think a pretty expansive view of the Second Amendment. And so that there's a conservative strain too, but I have spoken to folks who practiced before her who have said that she does seem at times to demonstrate a degree at least of skepticism about government overreach, at least under some circumstances in the criminal context. So I do think there is at least some strain of a kind of more Gorsuch than Kavanaugh approach to some criminal cases that could potentially develop in her if she sits on the court for an extended period of time.

Leah Litman:

I think may be, but I think it's definitely less than Justice Gorsuch. And I think it's also probably less than Justice Scalia, at least from what I see, given that Justice Scalia again, kind of famously embraced the sixth amendment Apprendi style rulings, as well as confrontation clause rulings. And I think she might be more on the Justice Kavanaugh side, but maybe not as far as him, but it is a little bit hard to tell at least from a Court of Appeals judge perspective.

Kate Shaw:

Yeah, no, I think that's definitely right. And I mean, back to Melissa's point, it is interesting, I think there are a number of different areas of law in which she may be, looks more like Justice Thomas than Justice Scalia. And this might be another one of them.

Leah Litman:

So one other notable decision, she would have upheld the Trump administration's public charge rule, which allowed immigration officers to exclude persons they determined might be likely to accept public benefits either in kind public benefits or otherwise at some point in the future.

Kate Shaw:

Yeah. And I mean to return to the second amendment, I think it's pretty clear she has... and here again, she may look more like Thomas than Scalia, really expansive views of the second amendment. So she has suggested as unconstitutional to exclude individuals with felony convictions from purchasing firearms without some sort of individualized determination of dangerousness. Laws prohibiting felons from possessing firearms were one of the specific categories of regulations that Justice Scalia in the Heller opinion singled out as presumptively acceptable. And so I think that that suggests that she has a broader view of the second amendment and its coverage and a more skeptical view of gun regulations even than Justice Scalia, which is really saying something.

Melissa Murray:

Can I play devil's advocate? I mean, I know it's-

Kate Shaw:

Yeah.

Melissa Murray:

... maybe it's an unpopular view, but in that opinion that she wrote, so this is *Kanter v. Barr*, it's a dissenting opinion in which she sort of lays out her view that those who have been convicted of a felony should not be limited in their ability to possess a firearm. There are some among even the gun control community who argue that that's not really beyond the pale, especially if you think about all of the different kinds of felonies that might be counted and would preclude someone from being able to possess a firearm. So think about Martha Stewart, who is clearly not a violent felon, but would under a law that prohibited convicted felons from having a firearm, would be barred from doing so. I mean, is there a way in which her views of the second amendment might read in a more progressive direction?

Kate Shaw:

I think it's possible. And I also think it's right that the laws that categorically disqualify individuals with criminal convictions from possessing firearms are problematic. I think my only point is that it is even on a Court of Appeals that is bound by what the Supreme Court has said. And the Supreme Court has said that these felon in possession statutes are presumptively constitutionally permissible. She saw sort of fit to question that, and so I do think that it raises questions about her general views about gun regulations, but I don't disagree with the point that you're making. And also that there is a connection maybe between these firearm disqualification statutes and like felon disenfranchisement statutes. Obviously-

Leah Litman:

Except she completely cut it off. That's why I don't think it's not like this opinion represents some particularly progressive view about re-entry or persons with prior convictions, because she went out of her way to say that, of course, this right for persons with felony convictions to possess firearms does not

allow them to vote because she said voting is a civic right, not an individual right, and that voting belongs only to virtuous citizens. And so I think her unwillingness to push that principle to all rights, rather than just the second amendment makes me think it's not really the kind of like generally applicable principle that might lead her to some not conservative positions that it could otherwise be.

Leah Litman:

While we're on the subject of voting, Judge Barrett also worked for the Bush legal team on Bush v. Gore.

Kate Shaw:

We all know how that ended.

Melissa Murray:

Well, she was not alone on that team. There are a lot of people who are currently on the court or in court adjacent positions who worked on Bush v. Gore for George W. Bush. So Ted Olson who became the Solicitor General, Brett Kavanaugh, I think also worked on that.

Melissa Murray:

And did Justice Alito? No.

Leah Litman:

No, I think it was Chief Justice Roberts.

Melissa Murray:

Roberts was the one, yeah. It's going to be like old home week.

Leah Litman:

Great times America.

Melissa Murray:

It's like just like being in Tallahassee again.

Leah Litman:

Speaking of small elite legal circles, we wanted to move on to the next topic around the nomination, which is the discourse surrounding the nomination and the nominee. News kind of got out before the president made the announcement official that he was selecting Judge Barrett, and so before the President made the official announcement, there were numerous commentators offering their views on Judge Barrett as the nominee. And one category we wanted to explore was a category that I will just describe as white men embarrassing themselves. So first entry in this category, we have O. Carter Snead who took to the Washington Post to write a piece titled I've Known Amy Coney Barrett for 15 years, Liberals Have Nothing to Fear.

Leah Litman:

What professor Snead failed to mention is that he runs a center that gives out a lifetime achievement in the pro-life movement and has advocating for the defunding of Planned Parenthood. So liberals, take his

word for it. But I think the real winner to date might be Noah Feldman, who wrote his Bloomberg column on the topic of quote, Amy Coney Barrett Deserves to be on the Supreme Court. The gist of this seem to be that Noah says, "I disagree with much of her judicial philosophy and expect to disagree with many, maybe even most of her future votes and opinions, yet I know her to be brilliant and conscientious and nice. I got to know her when we clerked 20 years ago at the Supreme Court together." Where to start on that one?

Melissa Murray:

I'm going to say that this was not unprecedented, we have seen these kinds of takes before. So in that regard, this is just sort of becoming part of the common parlance around a nomination. So maybe this is just what we are to expect, these sort of opposition takes from the liberals about why this particular nominee is kind of the best you can hope for when someone who is not of your political persuasion is actually making the nomination.

Leah Litman:

On one level I get it, right? Judge Barrett is better than nominating Jared Kushner just on the metric of, will this person write opinions that sound in the register.

Melissa Murray:

He is bringing peace to the Middle East, and I really want you to stop. Like give him credit for what he is doing.

Leah Litman:

Look, he's got so much in his portfolio, the President has so much faith in him, there was a chance he was going to get this nod to. Look, she's going to write opinions that sounded the register of legal reasoning, but it doesn't mean that you should write a piece that basically says, I know this person, I'm not going to bear any of the negative consequences from the legal rules that this person is going to decide for the entire country, and so you should feel great about it. I just think that not being willing to engage with the consequences of this person exercising power is just comes from a false sense of privilege.

Kate Shaw:

It is also he's obviously a prominent law professor. I think for many people, probably the first they heard of him was when he testified against President Trump in his impeachment hearings in the House. And that means, I think, that his endorsement actually will be pretty significant in that it gives real cover that this liberal who is a liberal thinker on the Constitution and who testified that the President's conduct satisfied the Constitution standard and warranted conviction and removal from office, that even he believes that Judge Barrett should be confirmed. I wonder whether they ask him to testify and I wonder if he agrees to do it. I don't think these things are meaningless. I actually think it could.

Kate Shaw:

Is it going to change the dynamic around her confirmation? Probably not fundamentally, but could it give cover to Senators who are wavering? I think absolutely. And it gives a degree of credibility to this process that we think is just fatally flawed, and none of that is even acknowledged. I mean, obviously the sense of loss of the death of Justice Ginsburg starts the piece, but the context really in which this

nomination has occurred and the rhetoric the President has been using to explain the necessity of fast tracking it, is just absent, and it's so relevant to me.

Melissa Murray:

I think it's incredibly telling, and this goes to Leah's point that there is no woman, there is no person of color who is issued one of these takes. And again, to the point of who bears the consequences of this nomination, I don't know if it's Noah Feldman.

Kate Shaw:

Yeah. I mean, look, and I will say having said all that, it was a perfect... I mean, I am glad to know that she sounds like a genuinely lovely person and she was a hard worker and a fair mind. And I mean, I wasn't crazy about the revelation that Noah Feldman had an ordinal ranking of the relative intelligence of the job that clerks, the term that he was a clerk and that she's in the top two. But she sounded lovely in his telling, but that's actually not the question.

Leah Litman:

Yeah.

Melissa Murray:

So another kind of discourse that has been circulating around Judge Barrett is what I think is a red herring about feminism. And I think this sort of plays into the very orchestrated theatrics of the Rose Garden ceremony, the final rose, if you will, where the President bachelor-style nominated judge Barrett. What is feminism? And so Ross Douthat of the New York Times had a piece this morning, Saturday, in which he talked about feminism or a vision of feminism in which feminism meant empowering people like Amy Coney Barrett to live her vision of the good life. And that could be a more traditional vision that encompassed having more than two children, having seven children, living a life of faith, but also combining it with the kind of work and professional success that Justice Ginsburg touted in her career.

Kate Shaw:

And so he sort of framed this as a triumph of feminism, if you will. Sort of the opportunity for a more traditional vision of womanhood to be married, no pun intended, to the kind of progressive 1970s feminism that he sort of saw Justice Ginsburg embodying. And again, I think this is deliberate, I think it is calculated, I think it is done for the purpose of linking Justice Ginsburg and Judge Barrett in this kind of invisible thread of feminism, like she is somehow the rightful heir to justice Ginsburg. When in fact, I think her vision of feminism, if you can call it feminism really is very, very different from the kind of feminism that Justice Ginsburg espoused, and certainly the kind of feminism that those who saw justice Ginsburg as a hero would invoke today. And so there's a way in which this is being set up.

Melissa Murray:

If you oppose her, if you oppose Judge Barrett, then you're anti-feminist, you're anti-woman, you're a sexist. And it also, I think, sets up this idea where these women are somehow fungible for each other, that Amy Coney Barrett is just like having Ruth Bader Ginsburg on the Court when we know that that is just not true. And it may be the case that some women are going to be really excited about Amy Coney Barrett, but to say that she is now a Justice for all women is just not, I think, a correct statement to me.

Leah Litman:

And it's just such a cheap, superficial vision of feminism that it just means literally having a woman there when for some of us feminism means empowering women and allowing women to improve the material condition of women's lives. And if you don't see that in Judge Barrett's judicial philosophy, then it doesn't mean not supporting her isn't feminist. And it's also just annoying to me that we are now at a point where feminists are being asked to defend the project of feminism merely because they are questioning the appointment of someone who has views that are opposed to the Affordable Care Act and reproductive rights and justice.

Melissa Murray:

And that it's Ross Douthat who's asking them to defend it, like feminist Ross Douthat, like what, bye, boy, bye.

Kate Shaw:

So another theme, kind of red herring that we want to raise has to do with religion, right? There has been this suggestion that is mostly unfounded. I will explain the mostly in a moment, that somehow that Democrats criticism of her is somehow rooted in an anti-Catholic bias. And I do think that democratic Senator Dianne Feinstein, during Judge Barrett's Seventh Circuit confirmation hearing planted the seeds of this argument.

Melissa Murray:

Did she just plant a seed? She made her an icon on this point.

Kate Shaw:

Yes. I mean--So that I think, I mean, I am happy to stipulate that that was a major error on Senator Feinstein's part, that it did broadcast potential bigotry or anti-Catholic skepticism in a way that was gross and offensive. But to then suggest that Democrats-

Melissa Murray:

For our listeners, when questioning Amy Coney Barrett back in 2017, Senator Dianne Feinstein who is the ranking member on the Judiciary Committee at the time and a Senator from California questioned Judge Barrett about her Catholic faith and her membership in a charismatic Catholic organization, People of Praise, and then said to Judge Barrett, "I am worried, I fear the dogma lives which-

Kate Shaw:

Lives loudly and... The dogma live lives loudly in you, which has now been emblazoned on t-shirts and mugs and hats. And you're like, we're not the only ones who do merch, I guess. But it has... that has become a phrase that you sort of hear on everyone's lips, but it is as far as I can tell, basically, just Senator Feinstein, who has said anything in that neighborhood. And in fact, most people have, as I think we would, disavowed as inappropriate that, or at least I would, I don't want to speak for you guys, that statement. And yet somehow it has-

Leah Litman:

I'll disavow it as inappropriate too.

Kate Shaw:

Yeah. Yeah.

Melissa Murray:

Lots of people disavowed as inappropriate when it was said in 2017.

Kate Shaw:

Yeah. And we'll say it again now. And so that's pretty clear. And so to sort of say that Democrats who oppose her or raise questions about her are somehow demonstrating the same sort of anti-Catholic bias is I think just a completely manufactured narrative. I mean, especially when we're talking about the context of a presidential election in which Joe Biden, the democratic nominee is Catholic, in which one of Barack Obama's two, or there were three nominees, but two nominees who are confirmed to the Court, Sonia Sotomayor also Catholic-

Melissa Murray:

Brett Kavanaugh, also Catholic. Neil Gorsuch, also raised Catholic. Justice Alito, also Catholic.

Kate Shaw:

Right So there's lots of Catholics on the Supreme Court and it is just a false claim that the Democrats' opposition to Judge Barrett is somehow a demonstration of anti-Catholic bias. And I think that it's a canard that just needs to be put to rest.

Leah Litman:

It's also just this tension between on the one hand, the jurisprudence of the religion classes and trends in the religion classes, and kind of what the Republican party is saying about conversations about Judge Barrett. Because on the one hand you have decisions like *Espinosa* and *whatnot*, where conservatives say they want religion to be more present and welcome in the public sphere. But then once in the public sphere, we can't talk about religion or at least they are saying, you can't talk about someone's views if that person is religious.

Leah Litman:

I don't think Judge Barrett's views on the public charge rule or the second amendment, or as she would say, her judicial opinions on abortion are directly flowing from her religious views. But I do think it is completely fair to question and interrogate her judicial views on those matters. Again, particularly because she is about to be making decisions for the entire country. It's just crazy to think we can't talk about her views on healthcare, immigration, because it's somehow an attack on her religious faith. And so those two things are just separate.

Melissa Murray:

It's also, I mean, she has written herself about how she thinks Catholic judges should approach the question of how to blend their faith with the task of judging, especially if you are making decisions about something that the tenants of your faith would contradict. And the famous example in the article that she co-wrote was the death penalty, which Catholics oppose. And so, I mean, when the nominee actually puts it out there, I also think it's fair game to think about how religion may play a role in those things. And I don't think it's anti-Catholic to call it into question.

Leah Litman:

So one other red hearing that we wanted to flag is just the rules that are being set for this debate on what civility or niceness means. Melissa, you mentioned that in the Rose Garden speech, Judge Barrett highlighted Justice Scalia's friendship with Justice Ginsburg. And what she said was what it showed to her is that arguments even about matters of great consequence need not destroy affection. But as we were talking about when we were discussing the op-eds endorsing Judge Barrett that view reflects a certain kind of privilege. The consequence of it is you are asking people to ignore the consequences on other people's lives of some people making decisions or exercising power.

Leah Litman:

Like let's focus on whether I'm a good conversation or I smile when we have lunch at the country club, rather than on the maternal mortality rates for black women, when we were talking about limiting access to abortion. So there's just this disconnect between insisting on civility and niceness being solely about personal interactions and not being about the consequences on people's lives. So how Republicans are proceeding and maybe some brief thoughts on what Democrats should do. So immediately after the President announced the nomination, the Senate majority tweeted out that they were asking people to show their support for the President's Supreme Court nominee with their very own "Notorious ACB" t-shirt.

Leah Litman:

It's not clear if these t-shirts are going to be made, but what they show is a picture of Amy Coney Barrett's face with the Notorious BIG crown on her head that is of course the crown and the name that was bestowed on Justice Ginsburg, the Notorious RBG, another effort to yolk Judge Barrett to Justice Ginsburg's feminist legacy. But it also just felt a little bit like dancing on Justice Ginsburg's grave and rubbing it in, to my mind, at least.

Melissa Murray:

And to your point, all women are fungible, obviously.

Leah Litman:

Right, yes.

Melissa Murray:

Like photoshop her in.

Melissa Murray:

I mean, that's definitely the Republican playbook. I think the harder question is what do the Democrats do going forward? I mean, I think this nomination is in the bag. What do you do? Do you delay, do you hope that in delaying you sort of let this go for longer than it's supposed to or maybe something comes up that sort of sets it off all off kilter. Do you just roll over and just then look toward the election and focus on the election? How do you play this? What is the play? And I think that's really the question that Democrats need to be asking right now. They're not really good at strategy FYI.

Kate Shaw:

Yeah. I mean, I do think one thing that they really need to avoid is attacking her directly, which I think is a kind of sometimes go to in these confirmation battles. And I just think based on her speech today, her performance before the Senate Judiciary Committee, when she was being considered for the Seventh Circuit, she has a very winning manner and she'll be there presumably with some or all of her children behind her, and I just think it is dangerous ground politically for the Democrats to sort of go for the jugular with her. I think that the main objection that our views of course should be questioned, but I think that there's also... there are potential dangers that the Democrats, if they choose to participate, need to be really mindful of.

Kate Shaw:

And I think that's one reason that they might want to consider just not showing up if they don't think that there's anything valuable to be gained. I mean, the counter argument is it's an opportunity to surface some views potentially, or at least have a public debate about things like healthcare and abortion, which I think they think are actually quite winning issues for them. But I'm not sure, I think that there are benefits and potential real downsides to deeply engaging with her directly.

Leah Litman:

Some senators have already said they're not going to meet with her. And that of course is consistent with Republican Senators's position who were not going to meet with Judge Garland, who didn't meet with Judge Garland because they did not believe that any nominee should be selected before the election. And given that that seems to be Democrats's position, no confirmation before inauguration, that seems like one possible tack, not meeting with her, and if you believe the process is illegitimate, not attending the hearings. On the other hand, it does seem to be a missed opportunity to not communicate about the substantive implications about a 6-3 Court for the country. That being said, I don't think questioning a nominee is the way to talk about those issues.

Leah Litman:

You're not going to get anything out that's substantive. Maybe you make an opening statement and leave. Maybe you just release a statement or you organize a counter event. But I think that those are kind of the two principles to think about. If you think the process is illegitimate, what do you do? And second, how do you communicate the substantive implications? I just don't see either of those two things being implemented particularly well through questioning a nominee, given the format and the Senators's relative skills.

Melissa Murray:

I think Leah is right. I mean, to me, the play is to make some kind of statement about just the impropriety of going forward at such a breakneck pace with this nomination and the confirmation process when there is other business that the Senate could be doing and is not doing that is actually about working for the American people. I mean like the Heroes Act, passing all this legislation, I'm trying to figure out a reasonable pandemic response, but instead we're here because our counterparts across the aisle really want to preserve minority rule and want to politicize the Supreme Court in order to do it. We're here about an actual majoritarian agenda that it seems like the bulk of the country is interested in, which is dealing with this pandemic.

Kate Shaw:

Yeah. But I hope they listen to you Melissa because

Melissa Murray:

They're never going to do that.

Leah Litman:

Seriously.

Kate Shaw:

Staffers, any staffers listening, please, just clip Melissa's...

Melissa Murray:

Call us. We do this pro bono.

Leah Litman:

Just like Noah Feldman.

Melissa Murray:

Not exactly.

Leah Litman:

Okay. Any other thoughts before we wrap this up?

Kate Shaw:

I'm totally sober. I think I need to go have a drink.

Leah Litman:

I'm not.

Kate Shaw:

You guys been drinking yet?

Leah Litman:

Yes.

Kate Shaw:

No?

Melissa Murray:

I haven't.

Leah Litman:

I am two Moscow mules and buckets of cheese curds in.

Kate Shaw:

Oh my God.

Melissa Murray:

Oh yeah.

Kate Shaw:

That sounds like a good thing to do.

Leah Litman:

Welcome to Northwest Michigan.

Melissa Murray:

You're making it sound really attractive.

Kate Shaw:

I ate cheese curds all over the state of Wisconsin all the time. I did not know they did cheese curds in Northern Michigan.

Leah Litman:

They do.

Kate Shaw:

Wow.

Leah Litman:

Yeah.

Kate Shaw:

All right.

Leah Litman:

Big Gretch. Big Gretch.

Melissa Murray:

Big Gretch.

Kate Shaw:

There's like a cheese curd mandate.

Kate Shaw:

Exactly.

Leah Litman:

This transcript was exported on Sep 28, 2020 - view latest version [here](#).

So thanks for listening. Welcome to the bad place. And thank you to Melody Rowell, our producer, thanks to Eddie Cooper for making our music, thanks to The Appeal for making this podcast possible. Thank you to all of you who do the same. And remember, you can buy some merchandise to remember a feminist icon and to support a feminist project, which is actually the liberation of women. The ACLU Women's rights project at our website, strictscrutinypodcast.com. The line features RBG's quip "better bitch than mouse" when she was told that some of her classmates at Harvard law apparently called her the B word. Take care, everyone, and thanks for listening. (silence).