Kate Shaw:

And then to rise, cross the room and embrace him with no masks in sight.

Melissa Murray:

She didn't really cross the room. They were seated next to each other -

Kate Shaw:

She physically moved her body.

Leah Litman:

She had to get up and move.

Kate Shaw:

To get closer.

Melissa Murray:

She did move.

Melissa Murray:

I mean you did make it sound like it was a sort of Chariots of Fire, like they ran and embraced, like she jumped into his arms.

Speaker 4:

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 5:

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. We're your hosts. I'm Kate Shaw.

Leah Litman:

I'm Leah Litman.

Melissa Murray:

I'm Melissa Murray. We have a great show for you today. We're going to start off with first, breaking news. Then we are going to recap the October sitting and we will finish off with some court culture. Leah, can you get us started with all that's breaking at 1, 1st Street?

Leah Litman:

Well, I'll start us off with some of it. So we have some news related to the Court's docket to cover cases added to the docket, matters that might be added to the docket soon, and some very strong enforcing the Voting Rights Act energy on the Court's shadow docket. First, the Court granted the federal government's petition for certiorari in Arthrex, which asks whether the appointment of judges in the US Patent and Trademark Office complies with the appointments clause. Apparently some IP people were unhappy with a fleeting remark in our discussion of Google last week. So that's all we'll say about that for the time being.

Kate Shaw:

On Friday, the Court decided to schedule for full argument the case involving a challenge to the President's memo, which purports to exclude undocumented immigrants from the census count that is used to apportion house seats and to allocate federal funds, background here is that a three-judge district court had invalidated the memo. The Court could have taken a look at that, I think clearly correct a three-judge court opinion and summarily affirmed, it did not do that.

Kate Shaw:

Instead, it scheduled the case for argument on November 30th, which is very fast. But I think it has to be because all of this has to happen before ... right now, Congress faces a deadline by the end of the year to send the President the report with a census tally, which either complies with this absurd executive order or is consistent with previous reports, which simply report population. So the consequences of this just are hugely significant. It could change the allocation of seats in Congress. It will definitely determine the allocation of billions of dollars in federal funds.

Kate Shaw:

As I just suggested, the merits are, I think we all think are extremely weak for the Trump administration. There are also some questions about ripeness and questions about remedy. It is at least possible that those complicating factors are in part the reason the court did not summarily affirm. But I am not wildly confident about this case, despite feeling wildly confident about the merits of this case, and I'm sure we'll talk more about it when it actually is up for argument.

Melissa Murray:

There's also another interesting petition that was relisted. This was in the case of McKesson v. Doe. So this is a petition for certiorari that was put on the Court's docket. A relist typically occurs where the Court takes no action on a petition that was listed for a conference, thus effectively listing the petition for a subsequent conference.

Melissa Murray:

A relist can often be a precursor to a grant or it can be an indication that one of the justices is electing to write something about the petition. This particular petition is a noteworthy one though. It involves DeRay McKesson, who is a civil rights and criminal justice organizer. He allegedly helped lead a protest for Black Lives Matter near the Baton Rouge Police Department building during which an unknown assailant who was not McKesson allegedly threw a rock at a police officer, injuring the officer.

Melissa Murray:

Last April, the Fifth Circuit held that McKesson could potentially be held liable for the actions of the unknown assailant despite the Supreme Court's holding in NAACP v. Claiborne Hardware. That's a 1982 case that said, civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence.

Melissa Murray:

This is an important petition that implicates really critical First Amendment speech issues. The Fifth Circuit said that McKesson could be liable for those events that happened at his rally, even though he did not encourage any violence. But interestingly, one of the judges of that three-judge panel, Don Willette, had a change of heart after the initial panel's opinion had been published. He wrote a separate opinion explaining his change of heart and why he believed that NAACP v. Claiborne hardware should apply. Obviously that doesn't change the nature of the Fifth Circuit's ruling. There are still two judges to hold that he could be liable for this, but it makes the prospect of this cert petition even more weighty for DeRay McKesson.

Kate Shaw:

Another development, the Court denied review in a case involving the interpretation of the statute that we commonly referred to as Section 230. That's the provision of law that gives internet platforms immunity from certain lawsuits. The President has been vocally critical of the law. People might remember he issued this weird, possibly unconstitutional, possibly just empty posturing, executive order seeking a reinterpretation of Section 230 back in May. This is maybe of a piece with his calls for a defamation law to be revisited, possibly abandoned. But in any event, in this case, which was the Malwarebytes v. Enigma Software was the name of the case, Court declined to take it up. But Justice Thomas wrote a statement indicating that in a future case, he might be open to reconsidering whether the statute does in fact support the existing immunity the courts say it provides internet platforms. So we're going to keep our eye on this issue.

Melissa Murray:

Also, this was really interesting, because it's kind of a counterweight or maybe just a caveat to one of the statements that Supreme Court nominee, Amy Coney Barrett, made during her confirmations. She repeatedly said that courts don't have agendas and don't look for cases. She was talking specifically about an agenda with respect to Roe or Casey. But we've actually seen, and I think this case suggests, that there may be situations in which justices may appear to invite subsequent litigation on a particular issue.

Melissa Murray:

This is not the first time in which a justice has signaled that this isn't the case that he or she would like to decide this particular question on. But maybe there's a better case coming down the pike. So I think Justice Thomas did that in the Box concurrence where he was like, I'm fine with you denying certiorari here. But you can't put this off forever." I think we also saw this with Justice Alito in Gundy saying, this isn't the case necessarily where I want to reevaluate the entire administrative state. But maybe there's another case coming down the pike that would do that.

Melissa Murray:

They're not explicit invitations to do so. But it certainly suggests that the Court or particular persons on the Court are still open, and that a question is still open with them. So not necessarily an agenda per se,

but an invitation or an opportunity with different facts, different circumstances to rethink an issue that the Court has passed on right now, but might be more receptive to in the future.

Leah Litman:

Yeah. Obviously, any statement like that, even if it's at oral argument creates huge incentives for litigants to actually find that case and bring it. In fact, even a justice's prior writings in their academic career would also create incentives for litigants to bring them cases that they think that person might be interested in as well.

Leah Litman:

So there were also some important developments on the Court's shadow docket, which includes the emergency applications that the government files to put on hold lower court decisions that enjoin government policies. So one such development occurred in Trump v. Vance, the case involving the New York Grand Jury subpoena for Trump's personal financial records to the accounting firm. The lower courts rejected the additional challenges that Trump made to the subpoena. Now, Trump is asking the Court to put on hold those rulings that's preventing the subpoenas from being carried out.

Leah Litman:

I think it's very possible that the Court won't act on this application until after the election. Though of course, we will wait to see. There was a new lawyer joining Cy Vance's team, and that lawyer was Michael Dreeben, who was the former Deputy Solicitor General, who argued I think more than 150 criminal law cases before the Court. He was formally assisting Special Counsel Robert Mueller's team and he is I think probably the lawyer with the most criminal law experience of anyone before the Supreme Court. So it was notable that he joined Cy Vance's team.

Kate Shaw:

That team is already very strong and did a great job right when the case was actually before the Court. That struck me as a pretty sort of eyebrow raising development in that I think you're right, there's basically nobody who has more credibility with the justices on criminal law matters than Michael Dreeben.

Leah Litman:

Back, back, back, back again. Also bringing some very strong enforcing the Voting Rights Act energy to the table, the Court granted the federal government's request to put on hold a lower court decision that prevented the government from prematurely stopping the census count. The lower court had found that the administration's sudden change about the counting deadline was unlawful and the Supreme Court's stay allows the administration to stop the census count immediately, as the kids say, or the Supreme Court justices hear prematurely stopping the census count is necessary to enforce the Voting Rights Act. Only Justice Sotomayor noted her dissent from that ruling.

Kate Shaw:

Wasn't this one of the many moments the last few weeks when you've been like, "Oh, Justice Ginsburg would have ..." It wouldn't have obviously been enough, but she would have been with Justice Sotomayor.

Leah Litman:

Yes.

Kate Shaw:

In that dissent, it seemed really clear to me.

Leah Litman:

Yeah.

Kate Shaw:

Just the first of probably many such lonely dissents that Justice Sotomayor is going to be writing. All right, moving on. So the Court is still sitting on a request from the Pennsylvania Republican Party seeking to put on hold a lower court, actually a decision by the Pennsylvania Supreme Court that would have extended the ballot return deadline in the State of Pennsylvania. It is just weird the Court has now been sitting for several weeks on this stay application. The election is really close, and the court typically tries to expedite consideration of these things. This could really matter in a state like Pennsylvania, if there are three additional days for permissible receipt of absentee ballots. There is all kinds of speculation happening in election law world about what kind of compromise might be in the works behind the scenes, what kind of dissent or dissents might be in the offing, but there is something out of the ordinary happening that is leading to this really surprising delay. I don't really know what, but I'm sure that there is something significant.

Melissa Murray:

All right, well, that certainly is comforting, Kate. So while all of this was going on in the conference room, there were actually real things happening in the courtroom or at least the virtual courtroom. So let's turn to the actual October sitting and recap some of the oral arguments that the Court heard in this first sitting of the new term. Kate, do you want to get us started?

Kate Shaw:

I'm happy to. I'll talk about the first of the cases, which is Torres v. Madrid, a Fourth Amendment case that we previewed a few episodes ago. The question here is essentially, "What constitutes a seizure under the Fourth Amendment?" That matters because if something is a seizure, then the actions of police officers have to satisfy the Fourth Amendment's reasonableness requirements.

Kate Shaw:

If the whatever the police did is not a seizure at all, then the Fourth Amendment isn't even implicated. So that analysis doesn't even have to happen. So the facts in the case which again, we previewed previously, but bear repeating because they're so striking, really capture what is at stake. So police officers here went to an apartment complex, they approached a car. They were not in police uniform, and the driver believed she was the victim of an attempted carjacking and drove off. Officers fired weapons into her car, they hit her multiple, bullets hit her, she did not stop. So she was injured but able to keep driving, she drove through a parking lot. She picked up another car, she drove away. So if the officers shooting her did constitute a seizure for Fourth Amendment purposes, then the Fourth Amendment is implicated. We asked about whether the seizure was unreasonable. But if the shootings didn't constitute a seizure, again, the Fourth Amendment completely silent on this shooting.

Kate Shaw:

So the legal test that's at the center of this case, there are a couple of big cases, one United States v. Mendenhall, which announced the test in which a person has been seized if in the view of all the circumstances surrounding the incident, a reasonable person would have believed that she was not free to leave. In a later case, California v. Hodari D. a majority of the court in a Scalia opinion said there is no seizure when a person continues to flee even if a reasonable person wouldn't feel free to leave.

Kate Shaw:

So Kelsey Corcoran of Orrick, who's a terrific appellate lawyer, represented the petitioner, basically articulated a legal rule that says a seizure occurs whenever there is physical force applied to the body. So there are lots of hypos at the oral argument. I thought it was really striking that from the first beat of the argument, what an originalist note Kelsey struck in attempting to persuade the justices that this was a seizure within the meaning of the Fourth Amendment.

Kate Shaw:

I mean, her facility with pre-constitutional history, common law cases, including some from the 17th century and the specifics that grew out of them was remarkable in its depth and comfort. But the limitations of the method seemed on such stark display to me during this argument. There are all these questions about whether certain kinds of interactions would or would not constitute a seizure. It's just so difficult to figure out what lessons to draw from founding era practice in which there were no befit police officers to speak of, right?

Kate Shaw:

These are civil actions instituted by other civilians, these encounters that we are trying to derive lessons from regarding the meaning of the Fourth Amendment and encounters with police officers today, like so very early on, since there aren't really police verses until the 1840s or 1850s. How much these common law cases that predate organized police forces should matter seemed like a very open question to me. Yet I think strategically she is right to pitch to an originalist and an increasingly originalist court. I mean, obviously, Judge Barrett hasn't been confirmed. But if she is, I think any smart litigant is going to really focus on, in a constitutional case, on this kind of founding era material and really emphasize.

Kate Shaw:

At the very end of the argument, she started talking about workability and pragmatic considerations that also argued in favor of the test that she was advancing before the justices. But I was just really struck by how originalist the entire debate was. But what did you guys think of that dimension of the case or the argument in general?

Melissa Murray:

From one justice at least, there wasn't so much big originalist energy, but some big dog energy. Leah, what was going on with Justice Breyer? This is not the first time he's introduced dog hypos into oral argument.

Leah Litman:

No. So it was recent I talked about Justice Breyer's dog hypos in McGirt v. Oklahoma, and he did it again here. He says ...

Justice Breyer:

Morning. Suppose that a policeman, without a warrant, wants to search a private person's house, enters in the middle of the night, before he can do anything, he doesn't look for a single thing, no chance to look for or search for anything, a big dog drives him out. Is that a search?

Leah Litman:

Justice Alito, who's a baseball fan, wanted to know if a pitcher intentionally beans the batter, is that a seizure? There was just really a wide range of hypos to test the petitioner and the federal government's rules. Kate, I think you're completely right that the argument also highlighted the limitations of the originalist practice given that the cases that they were looking at were all common law actions for unlawful arrest.

Leah Litman:

How did that happen? It was when one private person would arrest another. Then if that person was free, then there could be an action for unlawful arrest. Then they had to go through the common law elements of unlawful arrest, and they don't perfectly match our Fourth Amendment doctrine. It also predates organized police force, as you were noting. Justice Gorsuch wanted to know about the prevalence of guns at the time, because he was like, "I don't see guns in these cases. So what do I do about this? What does that tell me?" Because there are all these questions about, "Well, if you don't personally touch the person, but you use like a baton or an instrument or fire a gun from far away is that also a seizure?" So it was just obvious that you have to do a lot of extrapolation and inference in order to translate those cases to the modern police force that we have today.

Melissa Murray:

There also seem to be I think some skepticism of the accuracy of the history, or at least some suggestion that history, all history can be indeterminate in some way. So there was an interesting dynamic between the justices about Hodari D. Which was, as Kate said, a Scalia opinion. You had a couple of justices, including Justice Sotomayor saying things like, Justice Scalia was an originalist. How could he get the history wrong? So I wonder if this was a strategic effort to poke holes in the kind of originalist armor and suggest like, "A lot of this can actually be indeterminate." We can't really vouch for the veracity of some of this history.

Kate Shaw:

On Hodari D., There was also some interesting discussion about what parts of the opinion were entitled to what kind of weight. So Kagan at one point suggested the reasoning that Hodari D was entitled to respect, and there are all these questions about whether the application of physical touch were dicta or not dicta. Gorsuch seemed to disagree with some of what Justice Kagan suggested about how significant this, the discussion of the centrality of physical touch between a police officer and a suspect would be.

Kate Shaw:

I can't extrapolate much from that discussion, except that in terms of their future treatment of prior cases. But I think that a lot of the action is going to lie there in terms of how these big debates about the Court's approach to stare decisis and precedent are not likely to come to some immediate fruition in terms of their discarding explicitly in wholesale a lot of cases in the very near future, but how they

decide to approach, what parts to retain and what parts to discard of prior cases seems really important. So I will read very closely whatever the court does with Hodari D. I think in this opinion.

Leah Litman:

Yeah. Even if it doesn't come to fruition immediately, it's clearly on the justices' minds, given that Justice Kagan wanted to lay out a case about why you need to give stare decisis benefits and effects to the reasoning in prior cases, even if it's not necessary to the outcome, where lower courts have relied on it. Then when Justice Gorsuch questioned it, Justice Sotomayor immediately came back to it on the second round of questioning, was like, "No, no, no, no, no, reasoning and decisions gets respect."

Melissa Murray:

Well, I mean, when you think about what else is on the docket for this term, maybe they're already planting some signposts. I mean, you have that big case Fulton v. City of Philadelphia, where the whole question is, "How much respect is Smith entitled to? So there are lots of big questions about stare decisis coming down the pike.

Kate Shaw:

Yeah.

Kate Shaw:

So bottom line on this case, any predictions?

Leah Litman:

I think that petitioner is going to win. Justice Alito was unsurprisingly very hostile to someone who is seeking to hold a police officer accountable. I don't know, I think the petitioner is going to win just both based on the force of the reasoning in Hodari D., the fact that the more conservative justices did not seem inclined to question Justice Scalia's assessment of the history, the fact that Justice Kagan, Justice Sotomayor, and Justice Breyer were all sympathetic to the petitioner. So that's kind of where I come up.

Kate Shaw:

The fact that you do have, we should flag, we said this obliquely, but that the federal government is in the rare posture here of actually siding with the petitioner and finding. However, I'm not sure the federal government would ultimately want this petitioner to prevail, but certainly that there was a seizure for Fourth Amendment purposes is a proposition that the federal government was advancing here, and so that's worth at least flagging.

Leah Litman:

Yeah.

Kate Shaw:

That probably helps too. Right.

Leah Litman:

There was one little odd fumble in the argument as the Court was trying to transition from Torres arguing to the federal government arguing in support of her. The Chief Justice accidentally called on the federal government after Justice Kavanaugh had concluded his questioning instead of allowing the petitioner to wrap up.

Justice Kavanaugh:

Ms. Tableson? I'm sorry. Excuse me. Ms. Corcoran, you can take a minute to wrap up, if you'd like.

Corcoran:

Thank you, Your Honor.

Melissa Murray:

Blooper.

Leah Litman:

Supreme Court bloopers. One last concern maybe, listening to the arguments this week I had some initial concerns about Justice Breyer, and whether he was feeling okay. He asked petitioner only one question in this case. He passed on asking any questions to the federal government. Then he also passed in the later argument of the day, Pereida. Part of me wonders if he's a little depressed maybe with Justice Ginsburg's passing, a part of me wonders if he's feeling okay. But then I looked at the arguments, and I think maybe, maybe what he was doing was some self-aware policing about his inability to constrain himself to the apparent three-minute limit on questioning. He was skipping questioning periods, knowing that he would have more than 180 seconds of questioning for someone else. So it would balance out where he wasn't speaking too much relative to the other justices or at least I hope that is part of what is going on.

Melissa Murray:

It can be both.

Kate Shaw:

I love that he's adapting to the format, potentially. I like that.

Melissa Murray:

Yeah.

Kate Shaw:

Go, Justice Breyer.

Melissa Murray:

Well, also I mean, he said a different role than he probably has been. Justice Ginsburg was the leader of that wing of the Court. Now the wing is much smaller, and he's the big dog on it.

Melissa Murray:

Maybe that explains the dog hypo, and also a little more muted energy from him. Maybe he's trying to figure out how he's going to do this.

Leah Litman:

Yeah, that might be. Another case we wanted to briefly highlight was Chicago v. Fulton. This case involves bankruptcy proceedings, it might be easier to summarize the facts a little before we describe the legal issue. Basically, the City of Chicago, as well as other jurisdictions levy a bunch of fines and fees. When people can't pay the fines and fees, Chicago seizes their cars. In this case, two drivers have their car seized for failing to pay tickets.

Leah Litman:

Chicago also charges several thousands of dollars to get cars back. So when people aren't able to pay, they file for Chapter 13 bankruptcy. The question in the case is, Can a driver get their car back from a creditor, here Chicago, when they file for bankruptcy? If they can't, they may find it harder to go to work, earn money, care for their families and really recover from the bankruptcy proceeding.

Leah Litman:

That brings us to the legal question, which is whether under the Bankruptcy Codes' automatic stay and turnover provisions, a creditor can keep a debtor's property after the debtor files for bankruptcy and requests return of the property. Section 362(a)(3) of the Bankruptcy Code, the automatic state provision, prevents creditors from any collection activity during bankruptcy proceedings. It prohibits, quote, "Any act to exercise control over property in the bankruptcy estate." There was in the Justices' and advocates' words, a metaphysical question about whether refusing to return property when someone requested it was, quote, "an act" and whether there was any meaningful distinction between an action and an omission or inaction.

Leah Litman:

Section 542, the Turnover Provision, provides that an entity in possession, custody or control of property that the trustee can use shall deliver it to the trustee. But the city and the federal government argue that this provision, the turnover provision controls, and that it does not require the return of property until the trustee files a formal legal proceeding seeking the property. They worry that an automatic return interpretation of 362 would make section 542 irrelevant.

Leah Litman:

The debtor who's represented by esteemed retired bankruptcy judge, Eugene Wedoff, argues that Section 362 is a way of enforcing Section 542 without actually leading to the delay or requiring an adverse proceeding. I think it's hard to tell from the oral argument where the Justices were leaning. Although if I had to guess, I would say maybe they will embrace a very formalistic textualism and rule for the City and say, "In order to not make the turnover provisions superfluous, we will say that no return is required under the automatic stay provision."

Leah Litman:

Even though I think that maybe from bankruptcy policy, it might be better to rule for the debtor just because again, if you don't return their car, they're going to find it so much harder to do things that will help themselves recover from a bankruptcy and also requiring debtors to do things before you return

their property is in some ways, like a violation of an automatic stay provision which is supposed to allow the debtor to recover things like before the actual culmination of the bankruptcy proceeding.

Melissa Murray:

All right, another case on the docket for oral arguments this session was the United States v. Briggs. So this is actually a series of consolidated cases, all of which involve male military personnel who have been convicted of raping female military personnel. The defendants argue that the statute of limitations should have barred their prosecution. The government argues that there is no statute of limitations for military rape because Congress exempted all military crimes punishable by death from limitations, and that would include rape.

Melissa Murray:

The defendants counter that the cruel and unusual punishments clause of the Eighth Amendment prohibits the death penalty for all rapes not involving fatalities, including those that occur in the context of the military. That in turn means that there's a statute of limitations for military rape, and that it expired before any of these three men were prosecuted. The US Court of Appeals for the Armed Forces agreed with the defendants here. The entire case turns on this question of what does it mean to be quote-unquote, "punishable by death?" Does it mean that the offense is punishable by death under a statute like the Uniform Code of Military Justice or does it mean that it is punishable by death under the Constitution under the Court's decisions in Coker v. Georgia and Kennedy v. Louisiana?

Melissa Murray:

The government, which was represented by Jeffrey Wall from the Solicitor General's Office, argued that punishable by death means punishable by death under the UCMJ. As the government explained, the UCMJ makes rape and offense punishable by death, specifically under Section 920(a), which states, that "any person subject to this chapter who commits an act of sexual intercourse by force and without consent is guilty of rape and shall be punished by death or other such punishment as a court martial may direct."

Melissa Murray:

The government made a statutory interpretation argument here that Congress did not intend the military rape limitations period to be subject to the Court's Eighth Amendment jurisprudence, it rather intended military rape to have no statute of limitations, irrespective of what punishment is ultimately available because the statute authorizes capital punishment for rape, rape is quote-unquote, "punishable by death," whether or not that punishment may actually be carried out. This relates to a second argument that the government made, which is really a policy argument.

Melissa Murray:

The government said that Coker and Kennedy which impose limits on the availability of death for the crime of rape that doesn't involve a fatality, those precedents don't apply in the context of the military because of Congress's authority over the military and specific policy arguments that apply only in the military context. So it's a kind of military exceptionalism argument about the need to maintain morale within the military, the need to maintain standing with other countries in terms of international disputes and whatnot. The Supreme Court has never actually decided whether the Eighth Amendment applies to courts martial. The government argues that it should not apply here because of the deference that the

Court owes to Congress in determining the regulations, procedures and remedies related to military discipline.

Melissa Murray:

The defendants who were represented by Steve Vladeck of the University of Texas, offered a statutory argument that avoided having the Court decide the constitutional question of whether Coker and Kennedy apply in the context of the military. They specifically argued that Section 855 of the Uniform Code of Military Justice allowed Congress to enact its own statutory prohibition against cruel and unusual punishment, which the defendants claim prohibits capital punishment for military rape without reference to the Eighth Amendment. So Section 855 states in part, "Punishment by flogging or by branding, maring or tattooing on the body, or any other cruel and unusual punishment may not be adjudged by any court martial are inflicted upon any person subject to this chapter." So they are offering the court an off ramp to get away from the constitutional question by providing their own statutory argument for deciding this case narrowly.

Leah Litman:

I'm not really sure where the justices were leaning. I think Justice Gorsuch maybe was sympathetic to Briggs' statutory interpretation argument, and maybe Justice Sotomayor was as well. But perhaps even for the justices who agree with the government on the statutory interpretation argument, I can imagine some of them writing separately to argue in favor of narrowing the Court's decisions in Coker and Kennedy and maybe revisiting them. So even if there is this constitutional avoidance off ramp, we still might get some clues about where the future of the Eighth Amendment is.

Melissa Murray:

So I thought the whole discussion was really interesting just because of the military context, which some Justices seemed amenable to this idea that the military is different, and things that we might allow for in a civilian context just cannot fly in the context of military justice. So there was this really interesting colloquy between Justice Alito and Steve Vladeck who argued on behalf of the defendants about the use of rape as a weapon or tactic of war as opposed to the use of rape in a civilian context. So here's a little clip from that.

Speaker 9:

Throughout history, there has unfortunately been many instances in which occupying armies have gone on rape sprees and have raped many, many women in the territory that they're occupying. Suppose that were to happen again, do you think it's settled under our case law that the death penalty could not be imposed on members of the military who engaged in that sort of practice?

Melissa Murray:

I thought this was a really important context to raise. You may be surprised to hear it come up in a Supreme Court case. But it is the case that rape is frequently used as an article of wars in conflict zones. It recalled a book that just came out a couple of weeks ago by Christina Lamb, who is a foreign affairs correspondent for The Times of London and the book is called Our Bodies, Their Battlefields: War Through the Lives of Women. She basically traces all of these different conflict zones from Russia and Leipzig in World War Two, all the way to the current moment, Bosnia, Herzegovina, where rape against women, and sometimes men, is used by an invading force in order to tame and to subordinate a particular group of people.

Melissa Murray:

You could hear and see shades of that kind of context coming through in Justice Alito's argument. What does this mean for the conflicts between nations? What does it mean for just the military force, if you take the question of death punishable acts off the table with regard to rape?

Kate Shaw:

That colloquy was interesting, and it certainly was the case that the Solicitor General returned a few times to a World War Two era example involving a US service member raping a civilian child in order to underscore the potential foreign relations harm to I guess allowing to go unpunished or to operate outside the orbit of the ultimate punishment, raped by members of the military. Because those aren't the facts of these cases. I'm not sure how much traction that argument got. I now can't remember whether it was Kagan or Sotomayor who posed this sort of challenge, but there's the international relations component, but there's also the sort of unit cohesion, military readiness that SG is making all these pragmatic arguments about why it's important to have this penalty available.

Kate Shaw:

But it is not at all evident to me why those arguments are limited to or even specific to the context of rape. You could imagine that there's all kinds of offenses by members of the military attacking, physically attacking, right, not with sexual violence, but just violence, civilians in a war zone. It seems to me that leaving those sorts of crimes under deterring or under punishing, if that's the theory, those kinds of crimes could well be damaging to relations with foreign nations and to internal unit cohesion and readiness in a similar way, it's just not clear to me that there are very strong bases for distinguishing between rape and other kinds of crimes committed by members of the military.

Melissa Murray:

Steve Vladeck I think, did try to draw a distinction between what he called rape simpliciter, which I assume is rape in the civilian context or rape that is not undertaken in the context of a theater of war, as opposed to rape in these conflict zones as a means of subordinating another group. But I'm not sure he had as robust an answer for the limiting principle that you are suggesting. What distinguishes rape from any other kind of crime that might happen in the context of the military that could also go to the question of unit cohesion, as you say, or just the general standing of the military in the eyes of other nations. I think that was a harder distinction to have drawn.

Melissa Murray:

This is focused primarily on rape, but you can imagine the question of how other constitutional precedents apply in the context of the military continues to be a really live and important question. So I'm just recalling from a couple of years ago, there were a number of cases in the military courts martial about whether or not the standard prohibition in the UCMJ against adultery could still stand in the face of Lawrence v. Texas, which invalidated prohibitions on sodomy, but also suggested that there was constitutional protection for any kind of consensual adult sex that took place outside of marriage.

Melissa Murray:

The military again, citing the military exceptionalism trope, talks about how the need to punish adultery in the context of military was important because marriage was really important for the military, that it was the bedrock of the family. Service personnel needed to know that they could go off and be shipped

off, secure in the fact that the integrity of their families would be protected by the military and the military system of justice. So there are lots of places in which that limiting principle is not just about homicide or something broad and heinous, but about things that we might think are not even really a proper subject of government regulation in the civilian context, but might be something that the military thinks is very much subject to and within their purview.

Leah Litman:

This was another case where Justice Ginsburg's absence was really felt because of course, she was the person who filed the brief in Coker that challenged this idea of rape exceptionalism, which she argued represented and rested on this notion of female purity. Of course, it's also important to acknowledge that the military has obviously dramatically under-enforced prohibitions on rape. That too is based on the diminishment and devaluation of women in the military and perpetuates that as well. But I just think it's sad not to have Justice Ginsburg's perspective on the Court as we grapple through what those issues and how those issues play out in this case.

Kate Shaw:

Yeah. Those kinds of pragmatic dynamics too Wall did try to invoke, right, suggested that we have delayed reporting and under reporting. So it is important that there be no statute of limitations, so that there will be an encouragement of people coming forward to report when they are ready, even if not immediately following an offense, just given the deficiency within the military I think when it comes to actually taking seriously both responding to and preventing rape from occurring. It made it a little hard to swallow these arguments that somehow just leaving open a limitations period so that the death penalty is on the table for a very small subset of rape offenders in the military, while potentially taking the pressure off the military to take other kinds of more systemic steps to address the problem of sexual violence, I just found a little hollow. But that seemed to be the argument that he was making. It's important that the death penalty be out there in order to prevent, deter and adequately punish rape in military.

Leah Litman:

It's also important to note that the implications of this case are not quite so dramatic as maybe some of our discussion and the Court's discussion made clear, given that Congress amended the UCMJ by enacting Section 843(a), which includes rape among military crimes for which there is no statute of limitations, whether or not it is punishable by death under this provision. So no matter what the Court says in this case, rape in the military does not have a statute of limitations for offenses committed after that amendment, but the defendants in this case.

Melissa Murray:

Which is in 2006.

Leah Litman:

Yes. But the defendants in this case were tried for actions that occurred before the amendments, though one of the trials occurred after the amendment.

Melissa Murray:

So does that suggest then that given that this may not be an issue going forward for that many cases, that maybe they just tried to decide this on statutory grounds and avoid the entire question of the application of Coker and Kennedy?

Leah Litman:

I think it's possible, but again, I just don't think some justices are going to be able to resist writing their thoughts about the Eighth Amendment's application in this context.

Kate Shaw:

Inviting reconsideration of Kennedy maybe, which is a 5-4 decision. You could well see that happening, but they're not a self-starting body, right? They just take the cases that come to them.

Leah Litman:

Exactly, exactly, just passing instruments. The last case is Pereida v. Barr. In this case, it's about eligibility for humanitarian relief from immigration proceedings, and specifically, what kinds of criminal convictions prevent an immigration judge from considering the hardship that deportation would create for an individual's children. Mr. Pereida allegedly presented a false social security card to obtain employment at a cleaning company. He had entered the United States without legal authorization, and he was convicted for the misdemeanor criminal impersonation offense and sentenced to $100 fine and no jail time.

Leah Litman:

But the statute he was convicted of actually contains a bunch of different offenses, some of them including identity theft and carrying on a business without a license, and some of those offenses include the intent to deceive others, while others do not. Mr. Pereda was later placed in removal proceedings because of his lack of legal authorization. He applied for a form of relief called cancellation of removal. That's a discretionary form of relief that's based on a number of factors. One of those factors is hardship on family members who are United States citizens.

Leah Litman:

Mr. Pereida has citizen children and a child who is also a DACA recipient. But under the Immigration and Nationality Act, you cannot get cancellation of removal if you're convicted of a crime of moral turpitude. The government is arguing that under the statute, an immigrant has the burden of showing their eligibility for relief and that an immigrant cannot carry that burden if they are unable to prove what provision they were convicted under.

Leah Litman:

Mr. Pereida, argues that this turns the so-called categorical approach on its head. The categorical approach is basically the method that courts use to determine if a prior state conviction qualifies as one of the federal offenses listed in the INA or the Armed Career Criminal Act. Under the categorical approach, courts are supposed to look at the elements of the state offense, not the facts of a defendant's offense. If you ask if those elements correspond to those listed in the federal statute. Under the categorical approach, when a statute prescribes multiple offenses, you presume the defendant was convicted of the narrowest offense. That is, if any state offense under the statute would not qualify

under the federal definition, here of a crime involving moral turpitude, then the defendant does not have a qualifying conviction.

Leah Litman:

Now, you can look at state charging documents or jury instructions in order to figure out which particular offense the defendant was convicted of. But that's basically it. Here, there aren't documents that specify which precise crime Mr. Pereida was convicted of. So under a traditional categorical approach, Mr. Pereida would win. The question here is, does the INA alter or displace that categorical approach because it places the burden on an immigrant to establish their eligibility for this kind of relief?

Leah Litman:

This case generated a debate among the Justices about where the categorical approach comes from and why it exists. One idea that was floating around is that the categorical approach exists by virtue of the fact that the government has the burden of proof in criminal cases, like those involving the Armed Career Criminal Act, but that rationale would not necessarily apply to eligibility for discretionary forms of relief from civil immigration proceedings.

Leah Litman:

There was also a question about whether determining what a conviction is for is a factual or a legal question. If it's a legal question, then the burden of proof wouldn't really matter since if it's a legal question, then who bears the burden of proof isn't particularly significant. Justice Kagan seemed to express dissatisfaction that Mr. Pereida, who was represented by Brian Goldman of Orrick, hadn't focused as much on arguing that this was a legal question.

Leah Litman:

But I also couldn't tell from her exchange with him and then later with the federal government if she actually thought it was a legal question versus a factual one. With the government, Justice Kagan seemed to say maybe this is a factual question only in the sense that what did I agree to is a factual question and contract interpretation, which is to say it's not really a factual question at all. It's important to note that the legal issue in the case is about categorical eligibility or ineligibility, that is even if Mr. Pereda wins, the government could ultimately deny him cancellation of removal, which is a discretionary form of relief. Okay. That was a lot of information about the categorical approach and state offenses.

Leah Litman:

Initial impressions? I think this case in particular highlighted that it's harder to tell or at least it's harder for me to tell in this format where the justices might be leaning. It seemed like Justice Thomas and Justice Alito, were leaning toward the government. Justice Sotomayor even asked a question that seemed to be predicated on the view that Mr. Pereida was going to lose. She basically asked him, assume you're going to lose, should we vacate rather than affirm? Are there any arguments left under which you might prevail?

Leah Litman:

The Chief Justice brought up the prevalence of plea deals, this is something he has brought up in several criminal cases. I guess I kind of think Mr. Pereida might lose, in part because Justice Gorsuch didn't seem

sympathetic to the way that Pereida had constructed the argument. Justice Gorsuch seemed to say or want to think that Mr. Pereida should be arguing that just on the facts, this wasn't a crime involving moral turpitude, and that we should just get rid of the categorical approach full stop. As I was noting, it wasn't clear whether Justice Kagan was sympathetic to the immigrant. Without those two, it's hard to see, Mr. Pereida winning. On the other hand, Justice Breyer seemed to bring that big dog energy in favor of the immigrant.

Kate Shaw:

But he's just one big dog. He can't do that much but bark on his own.

Leah Litman:

Right. But he kept going at the government. So let's-

Kate Shaw:

Leah, can I ask a question about Gorsuch? I wasn't sure what to make of that. Maybe we should just throw out the categorical approach all together and just fight this out in the facts of each of these cases. Goldman early on said something like, well, this is a pretty unusual case, because these issues, these proceedings were happening in tandem

Kate Shaw:

But a lot of the time you have somebody in some deportation proceeding where there's like a 30-year-old conviction at issue and mentioned a case that the Court is holding right now whose facts look like that. So it's a lot harder to see how you fight about the facts under those kinds of circumstances. So it would seem to me that it would be bad in general. Now, if we're just sort of focusing on the INA as opposed to the ACCA context, it would be bad to jettison the categorical approach, but maybe not. Do you have an instinct, this is like a world you know very well, about whether it would be better or worse to have these cases evaluated in a more fact-driven way?

Leah Litman:

I think for the reasons you give, it would be really hard because while the definition of the offense goes to eligibility for discretionary forms of relief, in other INA type cases, the question is, does that offense make you eligible for deportation at all and forcing someone to litigate the facts behind a 30-year-old conviction, that odds are was resolved by a plea deal, and so there just isn't going to be anything really at all that they could obtain, I think would just be pretty hard, and I worry would just devolve into these loosey goosey credibility determinations that by and large, are resolved against immigrants.

Leah Litman:

Whereas the categorical approach imposes some formality. Yes, it sometimes leads to really odd results, but at least asks the court to focus on things that are readily available, like the text of the statute-

Kate Shaw:

Right, what's in statute.

Leah Litman:

Judicial decisions, interpreting it and charging documents. Whereas if the question is just like what happened 30 years ago, I think that that would be pretty hard to bring up in all these cases.

Kate Shaw:

Yeah, pretty much, yeah.

Melissa Murray:

All right, so having discussed the October sitting, which seemed pretty jam packed for a court that is still operating in a shutdown mode, they managed to get through quite a lot of big ticket items in this particular sitting. So we will wait and see what happens with the cert petitions. We obviously have cases that are already slated for argument in November, but things are moving on at a pretty brisk clip for this eight-person court. With that in mind, this eight-person court is likely not going to be an eight-person court for long. So shifting to court culture, let's talk a little bit about the conclusion of the Barrett confirmation hearing. Kate, Leah, I know you had something to say about the hug and thank you heard round the world.

Kate Shaw:

Right. We should say we did, and we you you were not able to join us, Melissa, but Leah and I did a recap or we did like a mid three quarters of the way through the confirmation hearings emergency episode in which we talked about the first couple of days of substantive exchange, I mean such as it was, between the senators and Judge Barrett. But we recorded before the last day of the hearing, which was like outside witnesses. I confess, I didn't really watch it, I don't know if you guys did. But I did take note of what happened at the actual close of the hearing, which is after four days of confirmation hearing. Just two and a half weeks out from an election, Senator Dianne Feinstein, the ranking members of the most senior democrat on the committee was moved to thank Chairman Lindsey Graham, to describe the hearing as one of the best she had participated in to basically suggest, gave her hope about the possibilities of bipartisan cooperation going forward. So she rose, moved to Lindsey Graham and embraced him in a maskless hug. People were rightly scandalized.

Leah Litman:

Look, she didn't kiss him on the face, Melissa. So this is all good right?

Melissa Murray:

I'm glad that you're all listening. Just keep your face kissing within the home for now, for now.

Leah Litman:

This was so embarrassing and just perfectly encapsulated so much of the Democratic senators' failure on judges. I mean, a part of me pities Dianne Feinstein, who is obviously getting up there, and maybe a sympathetic reconstruction is she literally forgot about everything that's happened over the last four years, much less four days, and was therefore doing this. But even that, if that's true, she should not be on the Senate Judiciary Committee. She shouldn't be on the Senate. In any case, it was just a ridiculous and silly thing to do. I mean, she is hugging her opponent who is jamming through this nomination, breaking the promises that he himself made, who is in a tight race with a Democratic challenger. Where Graham-

Kate Shaw:

She needs to go back like epidemiological piece of this. As Graham steadfastly refused to get tested himself that week, even though he was presiding over the hearing in a room filled with people, he participated in a debate against his opponent, Jamie Harrison with Harrison having constructed a plexiglass divide because Graham would not agree to be tested prior to the debate. It was just unbelievably poor judgment, politics aside, just from the perspective of her own health and everyone else's health.

Melissa Murray:

It also I think, undermined the message that I have to say the Democrats were very disciplined about like Amy Klobuchar, Mazie Hirono, Richard Blumenthal all stated over and over again, that we should not be here. This is unorthodox. It think to her credit, I will say, she may have been responding to what Lindsey Graham said because Lindsey Graham, in concluding the hearing said, "I've been surprised by how pleasant this has been, there haven't been moments of rancor between the two sides. It's been very civil." This goes back to the discourse of civility and collegiality that pervades a lot of these spaces. I think she very well have been responding to that, like, yes, it actually was incredibly civil. But I think it is fair to say that it did give a veneer of legitimacy to it that the Democrats had been working really assiduously to disrupt throughout much of the hearings.

Leah Litman:

Also like Senator Hirono after Senator Graham said he was glad that her cancer treatments were successful, still thanked him. But she immediately followed it up with, "Thank you, do the right thing. Get a COVID test and don't do this hearing."

Melissa Murray:

It was a, "Thank you, next."

Leah Litman:

Right.

Melissa Murray:

She was like, "Thank you, next."

Leah Litman:

Right, right. So in the aftermath of that, there was immediately outcry from several groups, Demand Justice, called for Senator Feinstein to step down. NARAL, which is an abortion rights group, called for Senator Feinstein to step down, even though they have supported her in the past and given her like 100% favorability rating. They said the Committee needs new leadership and that she offered an appearance of credibility to the proceedings that is widely out of step with the American people.

Leah Litman:

Representative Katie Porter, personal icon of mine, said, "I strongly disagree with Senator Feinstein that that set of hearings was one of the best or was even acceptable." So she's getting challenged by members of her own party and groups that have really been strongholds of support for her and I don't know what is going to happen from this.

Kate Shaw:

I like Jelani Cobb, who's a brilliant writer for The New Yorker, I loved he tweeted something like, "We're not even talking about bringing a knife to a gunfight. We're talking about showing up with a bottle of wine because you think it's a dinner party," but really, it's a gunfight. That's kind of what she was doing at the end there.

Leah Litman:

Yes, yes.

Melissa Murray:

I brought a casserole.

Kate Shaw:

Go ahead, cookies, I baked.

Leah Litman:

Right.

Melissa Murray:

Speaking of baking, one of the things I thought was really noteworthy, Senator Feinstein actually was I think one of the first to really make hay of it. But at one point in the first day, the introductory day of questioning, Senator Feinstein invited Judge Barrett to introduce her family, which she then did. But that really set off what I thought was a lot of discussion of Judge Barrett's family, about her motherhood, about how their household ran. It was just so striking because I've watched a lot of confirmation hearings. There have been nominees with young school aged children, they just haven't happened to be mothers, but they have had school aged children. I don't know that we had nearly the amount of discussion of how households run, like how laundry gets done, and this idea that all of this household work and child raising is exclusively the province of mothers.

Kate Shaw:

So we didn't talk about all the stuff when John Roberts was before this committee, with his two young children?

Leah Litman:

The prior nominee from Indiana with adopted children.

Kate Shaw:

Exactly.

Melissa Murray:

I just thought it was very interesting, revealing, it dovetails with a conversation, Leah, that you and I had with the authors of shortlisted about how maternity and motherhood can be both a burden and a boon to women as they are considered for these leadership positions. Again, this sort of sharp contrast. I

wonder if it was purposeful to the two justices, the two female justices who were first nominated, who were done raising their children at the time of their nomination.

Leah Litman:

Well, that time, we weren't nominating people in their 40s.

Kate Shaw:

Right.

Melissa Murray:

How does this play out going forward? Right? Will we have the same kind of discussion about family obligations if Joe Biden selects, if he is elected, if he selects a male nominee, if President Trump is reelected, if there's a male nominee, will we see the same sort of thing? I expect that we won't.

Kate Shaw:

No chance.

Melissa Murray:

That I think is both peculiar and maybe a little sad. All of us, I think, recognize that these kinds of norms about family life are changing in particular ways, and that these aren't the exclusive provinces of women anymore, that fathers are taking care of kids or helping out with this household work because most families have two working parents because you have to right now. That has certainly I think been the case in a lot of minority families, certainly in mine. This whole idea that women did not work, that was not my experience growing up as a child. So I just wonder what the message is and how it's being received on the other side, outside of the Senate Judiciary Chamber and how the public is receiving this.

Kate Shaw:

What's also happening at this moment in which like, we are in the midst of what may be an extinction event professionally for many women. People are leaving the workforce if they can, and even those who can't, in droves, because the lack of childcare is just an unbelievable burden.

Melissa Murray:

Crushing, crushing.

Kate Shaw:

Places where the transmission rates are low, people are obviously back using some sorts of childcare arrangements, but they're spotty. Anyone gets sick, and you're yanking people out of them, caregivers or kids. So two parents, stable employment is very difficult to sustain. I mean, we're law professors, and we have an unbelievable luxury of control over our schedules. It's really hard for us too. It is so much harder for people who don't. Barrett is a law professor too, right? That is I think noteworthy. She was able to, in many ways, sustain I think the career and the family that she was, in part, at least because she had a degree of control over her schedule, and that flexibility that that kind of employment confers.

Melissa Murray:

I think employment and things to this. She did call out her husband in the Rose Garden ceremony as someone who helped make this possible because he was a very engaged father. I think someone else also reported that her husband's aunt was also living with the family and helped to take care of the children, but that really was not a part of this narrative. I mean, the idea that there was help and support that was not as much-

Kate Shaw:

Yeah, she obliquely referred to a number of babysitters. I felt like it would have been a service to everyone to have said a little more about what that meant, right? She clearly has a community that has participated in assisting her and caring for this large family that she has. But these yeah, sort of oblique smiling references to babysitters and their assistants doesn't really give us a lot of information about what that means and what it looks like. To your point, Melissa, about what people will take away from this. I mean, one possibility, she is Superwoman. She has managed to do all of these things, raise these seven extremely well-behaved and well-adjusted children, churn out law review articles, and now obtain a nomination to the Supreme Court, pinnacle of our profession at the age of 47. Right, 48.

Kate Shaw:

But of course, behind that story is much more. She could have shed a little bit more. She could have shed a lot more light on her substantive views on some of these things. But she could have shed more light if she wanted this, I think to be a constructive moment. I mean, I don't want to undervalue the privacy of her family. But if she's going to reference babysitters, and she's going to engage in banter with members of the committee about who does laundry in the household, it might be useful to say, "Look, this is it takes a village situation. Many people have helped us. That's the only way to make something like this work." I would have appreciated that.

Melissa Murray:

Or to be fair to her, don't make this a subject of the confirmation, right? I mean, like, it could just be like, "Yes, I have seven children. I am a mother. That doesn't have to be the substance of what we're talking about." But it was repeatedly broached over and over again. I get that how this is a humanizing element. It makes people feel like she is perhaps more relatable or accessible to them. But as you say, Kate, when you talk about it in the partial way, you don't tell the whole story and to Leah's point, maybe the story doesn't necessarily have to be told here.

Kate Shaw:

All right, should we leave it there?

Leah Litman:

Okay.

Melissa Murray:

Thank you so much for listening. We are very grateful to our Glow subscribers who make this show possible. If you would like to be among this particular group of important and amazing people who make Strict Scrutiny possible, you can sign up to be a Glow subscriber at Glow.fm/StrictScrutiny. If you like the show, please consider rating us on iTunes, that helps more people find us. As always, we are grateful to our terrific producer Melody Rowell, who makes us sound so great. We are also thankful for Eddie

Cooper, who makes our music, and of course to all of you for listening. So stay safe, be well. We will see you soon.

Leah Litman:

Bye.

Kate Shaw:

Bye, everyone.