

Speaker 1:

Mr. Chief Justice, may it please the Court. It's an old joke but, when man, argues with two beautiful ladies like this they're going to have the last word.

Speaker 2:

She spoke, not elegantly, but with unmistakable clarity. She said, I ask no favor for my sex. All I ask of our brethren is that they take their feet off our necks.

Melissa Murray:

Welcome back to Strict Scrutiny. Your podcast about the Supreme Court, we are your hosts, I'm Melissa Murray.

Leah Litman:

I'm Leah Litman in the fetal position on the bathroom floor. Not really.

Kate Shaw:

I'm Kate Shaw. We can see Leah on video and she's not but metaphorically, of course she is.

Melissa Murray:

So, today we have a special emergency episode for you because there is so much going on with the court that we wanted to update you about a few developments before we actually get to our next regular episode. And enough things have happened on the court shadow docket regarding election law that we thought it was worth a quick update on those. And that's some other things happened. We got a new Supreme Court justice. So on Monday night, the Senate voted to confirm Judge Amy Coney Barrett to the Supreme Court. Obviously we're going to be talking a lot about the now Justice Barrett going forward, but for the moment, let's maybe highlight some of the interesting aspects of both the confirmation fight as it were and the installation of now Justice Barrett to the Court. So, Leah, I know you have some thoughts.

Leah Litman:

So one is just the timing of this confirmation and its proximity to the end of this election. The election will literally end a week from today and the Senate confirmed Justice Barrett a week before that happened. And they did so after more than 60 million votes had been cast. I also think it's worth comparing and contrasting the Republican Senate and Republican President's quickness on this confirmation to vice-president Joe Biden's approach to court reform. So he's received questions about his interest in various court reforms, including court expansion. And in response to that, he announced that his intent were he elected would be to create a commission on court reform and that that commission would be bipartisan. And it would report findings back to him after 180 days. And you just, again, contrast that with the Supreme Court nomination and confirmation process, that took way less than 80 days.

Leah Litman:

And you contrast that with the fact that President Trump already announced his intent to nominate someone to Judge Barrett's seat. And he did so before she was even confirmed. And it's just clear that the parties have such different approaches to the courts. I actually think that doing a commission and

getting recommendations for more structural systemic change is good and right. But I think it's a mistake to commit to not doing anything for the first 180 days, half year of your first presidency, particularly if you're going to be considering other legislation at the same time. And again, legislation that could very well be vulnerable to the 6 week conservative court.

Kate Shaw:

I totally agree with that. I think the commission is actually a great idea. The 180 days is probably too long. If there is momentum going into January, then maybe you give the commission 60 or 90 days to come back with recommendations. And I feel like we haven't explicitly said this, but we'll serve if called right, on said commission?

Leah Litman:

Oh yeah.

Melissa Murray:

Slide into our DMs, we're here, we're here for you. And so the commission got a lot of press and a lot of... I think conservative media made quite a lot of it. But to me it seemed that the prospect of a commission was perhaps the most middle of the road approach you could get on the question of court reform, which has been, had been, I think, pretty divisive, but I think it's becoming increasingly on the wall. I mean, this is the really interesting part of it. I think this entire confirmation process has turned people who I think could rightly be called institutionalists into something more like radicals or reformers on the question of court reform. And to me that really is significant. I think the entire process has really move the needle on a conversation that many progressives thought was the third rail for a really long time.

Leah Litman:

And I mean the confirmation, as we were saying, happened basically super quickly. The announcement came something like September 25th or 26th, she's already confirmed to the court. She was confirmed on essentially a strictly partisan vote. The first time that that's happened with the Supreme court nominees since 1869, the vote was 52-48 with only Republicans voting yes. Susan Collins was the only Republican Senator to vote, no.

Melissa Murray:

So can I ask a question. Could you ever give anyone tenure on your faculty under these circumstances and with the vote like this? The tenure process-

Leah Litman:

I don't know, I'm up for tenure next year, so maybe we'll find out.

Kate Shaw:

Is it really like the bar exam where you're supposed to want to pass by the narrowest possible margin. And that means you're doing something right.

Melissa Murray:

I will just say, I mean, I wrote a lot of tenure letters this summer and it requires going into someone's record and really kind of reading everything, thinking about it, trying to put it into some kind of global perspective, thinking about it in relation to the other pieces that the person has done. And for me to write a tenure letter that takes probably at least four weeks, just to go through everything, write a letter that's useful, and then you send it in. They have to read the letter, think about all of the letters in concert

Melissa Murray:

And when I was doing someone... When I was chairing someone's tenure committee, the whole process was probably, the most short it could be was something like four months, for a lifetime appointment to a faculty. And it certainly couldn't happen on such a divided vote. I mean, most faculties I think require a super majority. So it's just, to me, it's surprising that we have come to the point where it's harder to be appointed to a faculty for life than it is to be appointed to the Supreme court.

Kate Shaw:

Interesting. So I haven't seen any super majority voting requirements proposed in all these structural reform conversations. Certainly there have been some proposals to require a super majority vote on the court to say, strike down an act of Congress. And, but maybe in terms of confirmation reform, thinking about the constitution, obviously in some places does create super-majority requirements, like conviction on impeachment in the Senate, but not here, but no, it's a nice point. And so she's 52-48 and Kavanaugh, the next most recent member I think was 50-48, he got Joe Manchin. So it wasn't a strictly a partisan line vote, but essentially it was. So we now have Republicans having appointed 15 of the 19 last justices, including the most recent by extraordinarily narrow margins. And that's despite losing the popular vote and all, but one of the last seven elections. So that is a significant fact about the current Supreme Court.

Leah Litman:

But we shouldn't worry because Lisa Murkowski, in voting to confirm Justice Barrett to the Court said, "I don't see her overturning the decision in Roe v. Wade based on the weighting of the reliance factor." So we're all good ladies.

Kate Shaw:

So what happened after the vote last night? So we're recording this on Tuesday. She was confirmed by this narrow margin last night, and then what happened?

Melissa Murray:

Well, what you do in the middle of a pandemic, you have a party, obviously you have a party at the White House, you film a video that you then later rollout as a campaign ad featuring the new Supreme Court justice as one does.

Kate Shaw:

So there was this swearing in ceremony in the South Lawn of the White House, that's because one good turn deserves another. And this was definitely better from the perspective of kind of COVID protocols. People were wearing masks, the seats were somewhat spaced. Well people not everyone, the President wasn't wearing a mask, Barrett and her husband were not wearing masks

Leah Litman:

Not a lot of face kissing without masks that I could see.

Melissa Murray:

They got the memo.

Kate Shaw:

It's possible there was, we didn't see anything, but that was part of what was so crazy about the mise-en-scene of the thing was it happened immediately following the confirmation vote and it's like, we don't usually swear in Supreme Court justices under cover of darkness. The whole thing had this elicited quality because it was happening outside as it had to be. And it was happening at night. And just like the contrast between the quick speech that Barrett gave about allegiance only to the Constitution and bearing no favor for the President or any policy preferences of her own, just sort of such, well, it was in such contrast to a few things, but first and foremost, why are we here? If it doesn't really matter, because all she's going to do is interpret the Constitution, what is the rush, right?

Kate Shaw:

So that was so hard to get your brain around. And then I think it is... She definitely did say, I'm independent and I will-

Leah Litman:

And I will prove my independence by appearing in the President's campaign video.

Kate Shaw:

Well, so, but even appearing on the South Lawn at all, it was, she absolutely post-confirmation had every ability to say no to that ceremony. If she thought it was improper and she didn't. She seemed to enthusiastically participate. She showed up, she stood side by side with the President maskless. Justice Thomas was there also maskless to swear her in. And I think a lot of people, including the three of us found the whole thing, just wildly, improper and political, even before it was converted into a campaign video a few hours later, but even while it was happening in real time. And we all noted that the Chief Justice, John Roberts didn't participate in this ceremony. And I am just desperately curious to know whether he declined to participate either because he thought the thing looked problematic politically on the eve of an election with the President, a party to these high stakes cases before the court. And the question of judicial independence sort of front of mind, and maybe because he was worried about COVID or whether the White House didn't even ask him because they preferred to have Justice Thomas there.

Melissa Murray:

Well, I wondered about this, Donald Trump has said that Clarence Thomas is his favorite justice as it were. So it didn't surprise me that Clarence Thomas was the one to swear her in at the White House ceremony. It should be noted that she was also again, installed formally to the court today at the court itself by Chief Justice Roberts who administered the oath there. But for this sort of, I don't know, kind of performative ceremony, it was Justice Thomas. Part of me wondered if that was purposeful, not only because Justice Thomas is the president's favorite justice, but perhaps also, because it was kind of a giant F you, I think, to liberals, to Democrats, to have the person who replaced one of the liberal lions of

the Court, where in someone who was replacing yet another liberal lion on the Court and the optics of Clarence Thomas swearing in Amy Coney Barrett was sort of, this is not the Warren Court anymore. I mean, not that it ever was, but it was definitely not the Warren Court anymore.

Kate Shaw:

I mean, there's another possible reading here, which is that Justice Thomas and Joe Biden also obviously have some pretty significant history. It is arguably Biden's failure to do more, to investigate Anita Hill's allegation during Thomas's own confirmation hearings, that prevented a further development of those allegations that might have resulted in a different outcome in his confirmation. But I mean, I doubt anybody in the White House was thinking of that level of detail about it, but there is deep history here with all of these players.

Melissa Murray:

That's a really good point.

Leah Litman:

Not to miss out on the celebration, the House GOP made sure to tweet out a congratulations on the confirmation of Justice Amy Coney Barrett, who did they congratulate? Melissa?

Melissa Murray:

Well, it wasn't really a congratulations. They noted the confirmation of now Justice Barrett. And then they also wished Hillary Clinton, a happy birthday. And this to me was just... this was petty and I'm kind of sometimes here for the petty, but this was just sort of, wow, she's living rent-free in your heads 24/7. She is not thinking about you. Why would you even bring her into this? That to me was just wild.

Leah Litman:

You know what it called to my mind was the last Supreme Court confirmation hearing when now Justice Brett Kavanaugh in response to the allegations from Dr. Ford announced, what goes around, comes around and described Dr. Ford's allegations as part of a conspiracy to get back because of the wrongs done to the Clintons. I mean, this is a vibe on certain people.

Melissa Murray:

I mean, again, I was just sort of like, Mariah Carey, why are you so obsessed with me? I mean, it was definitely a vibe.

Kate Shaw:

It was staffers, I'm sure. And it was just, it was staffers being petty, but it was revealing. Also on the staffers point, and maybe this is also a petty observation on my part, but I thought it was strange that now Justice Barrett went out of her way to thank the White House and DOJ staffers who helped her with her confirmation process. She's, I'm sure, just being gracious and appreciative, but combined with her thank you to the President, the fact that I think there are no Democrats present at the ceremony that she thanked only McConnell and Graham and not the Democrats, who we think were extremely nice to her during the course of the confirmation hearing. But then to thank these staffers.

Kate Shaw:

I mean, I have been one, so I can say they're just political, young political lawyers helping run her around from one meeting to another. She actually doesn't need apart from if the purpose is to signal some sort of party allegiance to call out specifically those staffers for assisting her. It just, in the context of the other thank you's and the conspicuous lack of thank you's to anybody on this other side of the aisle, it just felt like all of that spoke more loudly than some of the rhetoric about the kind of justice that she intended to be.

Melissa Murray:

So I think it would have been nice if she just, even if it was completely pro forma to say, a thank you to Ranking Member Feinstein or whoever else for the warm welcome in the committee, maybe it was just being kind to the staffers, but you're right in the context of the other thank you's and the absence of thanks to the other side, it might have looked a little more partisan than maybe she even intended it to.

Kate Shaw:

So she's in chambers. She was sworn in-

Melissa Murray:

Which chambers? Do we know?

Leah Litman:

Well..

Kate Shaw:

I think we know they're in Justice Ginsburg's old chambers.

Melissa Murray:

That was fast.

Leah Litman:

Indeed.

Kate Shaw:

That was really fast.

Melissa Murray:

Aren't there other chambers? I mean, do they have to do that? Aren't there other places that people could go?

Kate Shaw:

When we were there, Leah, there were more than nine chambers, there were other options I think available.

Leah Litman:

As the Senate was confirming Justice Barrett, the Court released an important order on a shadow docket regarding election rules and procedures in Wisconsin. But before we get to that order, we wanted to cover an earlier order that the Court released that addressed election rules in Pennsylvania. Because the Wisconsin order actually filled in some of the reasoning that the Court apparently had in mind when it decided the Pennsylvania decision. So, the US Supreme court in the Pennsylvania case issued an order on a stay application regarding a Pennsylvania Supreme Court decision that concluded absentee mail-in votes that were received after election day could be counted. I think it's worth it to explain the arguments in the case before we explain the vote. So the Pennsylvania Supreme Court had said that under the state's election law mail-in ballots that are received two days after election day will be counted. So that's the State Supreme Court interpreting state election law. The Pennsylvania GOP then runs off to the Supreme Court and seeks a stay on two grounds.

Leah Litman:

The first is that the Pennsylvania State Supreme Court decision violates the federal statute that declares November 3rd election day. Here, the argument is that by allowing ballots received after election day to be counted, Pennsylvania has altered or contravened the federal statute declaring November 3rd election day.

Melissa Murray:

The second argument is kind of a Bush v. Gore redux. So the Pennsylvania Republicans made an argument that was outlined in a concurring opinion from Bush v. Gore, that the Pennsylvania Supreme Court messed up in its interpretation of Pennsylvania state laws so badly that the Pennsylvania Supreme Court had actually made election law rather than the Pennsylvania legislature. And that in so doing, the Pennsylvania Supreme Court had violated the federal constitution, which requires state legislatures rather than state courts to make election law.

Melissa Murray:

That was not the majority's rationale in Bush v. Gore, but there was a concurring opinion by Justices Rehnquist, Scalia and Thomas that service this. And obviously the argument is pretty inconsistent with the idea that federalism gives state courts the final say over the interpretation of state law and that state courts are more expert and familiar with state law than federal courts are. But the Pennsylvania Republicans were saying that the state courts got the state law so wrong that it actually violated the federal constitution. And they are asking the federal court to second guess what the state court said about the state law because of this gross mistake that the state court had made.

Kate Shaw:

The implications of this argument are also pretty shocking because they could call into question state constitutional protections for the right to vote because state constitutions are products of state lawmaking processes involving players other than just the legislature. So they would basically elevate the legislature's role in regulating elections to the extent that even if a legislature in a state decided to pass an election law, that clearly violated the state constitutional provision that would stand and the state court would be powerless to override it because state courts on this vision are essentially powerless to regulate state elections. And so what the court did here, this was a case decided just over a week ago. And the Court tied 4-4 with Justices Thomas, Alito, Gorsuch and Kavanaugh noting that they would have granted the Pennsylvania GOP's stay application, but the other four members of the court

voting to deny the stay application and that tie 4-4 left intact the Pennsylvania Supreme Court ruling that extended the receipt deadline for absentee ballots.

Kate Shaw:

The part of what was so distressing about the Court's deciding this case on the shadow docket and giving us not one word of its reasoning was that we didn't know whether the conservatives who would have granted this stay accepted this really aggressive, constitutional argument, or maybe the statutory argument, or maybe some other argument or both of them, we just don't know because that's how they typically do business on the shadow docket. But we learned a little bit more based on what the Court said in the Wisconsin decision about what was driving at least some of the Justices in the Pennsylvania case.

Leah Litman:

And before we get to the Wisconsin decision, I just want to note that the Pennsylvania Republican Party is already back at the US Supreme Court. So they have filed another stay application seeking to stay the same Pennsylvania State Supreme court decision that said mail-in ballots received two days after the election will be counted. And so it's possible that we will see some decision on the stay application now that there are nine members on the Court at some point this week.

Kate Shaw:

One thing we should say, though, that Pennsylvania GOP is back in the Supreme Court, there are now nine. And yet there are very strong arguments that Justice Barrett should not participate in resolving this latest request, right to take a second bite at the apple. And I think at least one Pennsylvania County has already filed a recusal request with the Supreme Court seeking to have Justice Barrett recuse herself. So I don't think we... I don't want to leave the impression that it is a foregone conclusion that she will participate, but nor do I think actually it would be proper for her to do so. So what happened last night in Wisconsin, but also shedding some additional light on Pennsylvania.

Melissa Murray:

Alright. So fast forward to Monday night as the Senate is confirming Justice Barrett along party lines, the Supreme Court issued an order with several justices writing opinions declining to stay a Seventh Circuit decision. The Seventh Circuit decision had stayed a Wisconsin District Court decision that had effectively extended the receipt deadline for absentee ballots until after election day. So the District Court said in light of the pandemic and the burden on the postal service, you have to count ballots received shortly after election day. And the Seventh Circuit said, no, you don't. And now the Supreme Court has also said, no, you don't. So several Justices wrote separately to explain their decisions, to deny the stay. The Chief Justice used the opinion to explain his votes in this case and the Pennsylvania case as did several other Justices. Recall that the Chief chose not to stay the Pennsylvania decision that allowed ballots received after election day to be counted.

Melissa Murray:

But here he chose to stay the Wisconsin decision that allowed ballots received after election day to be counted. He said, the distinction was that the Wisconsin trial court decision deserve to be stayed, but not the Pennsylvania Supreme Court decision because Wisconsin was a federal court decision about federal law. By contrast Justice Gorsuch joined by Justice Kavanaugh said that COVID is not enough to extend the deadline, especially in light of states's other accommodations like providing absentee ballot

applications over the summer. And in one very striking passage, Justice Gorsuch explained that this is so because legislatures can be held accountable.

Melissa Murray:

Legislators can be held accountable by the people for the rules they write or failed to write and applying this to Wisconsin, however, that's not really true. Wisconsin is an extremely gerrymandered state. And that gerrymandering led to the challenge that made its way to the Supreme Court before being dismissed on standing grounds *Gill v. Whitford*. And to give you some sense about how bad that particular gerrymander is in 2012, Republicans won 60 assembly seats with 48% of the vote. And in 2014, 63 of the seats went to Republicans with just 52% of the vote. This is out of a total of 99 seats.

Leah Litman:

Justice Kavanaugh wrote a concurrence and here, the concurrence first embraced a very muscular interpretation under the so-called Purcell principle, which is the idea that federal courts should not alter the rules in an election close to the election. I can't help, but note, however, that Justice Kavanaugh appears to believe that this principle doesn't apply, or it doesn't apply to the same degree in the US Supreme Court. Since of course he would have voted to stay the Pennsylvania State Supreme Court decision and alter the rules of the election two weeks before the election.

Leah Litman:

I also think Justice Kagan who wrote the dissent for the three liberals had a really nice response to this, just explaining that Purcell just tells courts to apply the usual rules of equity, including all relevant factors, not just the calendar. So it doesn't create some sort of hard and fast rule that States get violate the Constitution in September or October, but that they can't in April or May. He also expanded on earlier writings arguing that federal courts owe a lot of deference to state legislatures about how to balance health and voting. I've complained about this previously. I think deference is appropriate where there is uncertainty about, for example, the size of gatherings that pose a risk to public health, but there's just no uncertainty about whether there's a serious risk of voter fraud, which is the recent States are given for restricting voting and uncertainty. It doesn't mean simply, people disagree or people are making arguments on both sides.

Kate Shaw:

So one of the parts of the opinion that got the most attention was this extensive footnote citing *Bush v. Gore* and arguing that state courts are limited in extending voting rights, even during a pandemic and even in reliance on a State Constitution, if a state legislature objects. We should say, this is only the second time a Supreme court justice has cited *Bush v. Gore* in the last 20 years, the other was Justice Thomas in *Arizona v. Arizona Tribal Council*, lower courts have cited it plenty of times, but the Supreme Court has conspicuously not. And again, it may portend the dramatic expansion of federal oversight of state election rules that people weren't about after *Bush v. Gore*. But the majority in that case did not want to embrace, it's essentially just this concurring opinion by Chief Justice Rehnquist. I will say the fact that no one joined Justice Kavanaugh's opinion seemed potentially significant to me. I'm probably reading too much into it. It's my internal optimism.

Leah Litman:

Justice Thomas and Justice Alito did not explain their votes at all. And Justice Thomas of course, had joined that concurrence from *Bush v. Gore*. So I assume now there are at least two for that position.

Kate Shaw:

I am sure there were two or three and probably four. I guess I just think that the fact that, obviously Roberts doesn't agree, we know that from his separate writing, but then all the action is sort of, I think with Gorsuch and the fact that although Kavanaugh joined Gorsuch, Gorsuch didn't join Kavanaugh. I don't want to over read it but I also want to flag as potentially meaning something.

Melissa Murray:

Can I say just something maybe sort of connect some dots to some other things that we flagged on the podcast before. But I thought the entire veneration of state legislatures was really interesting, just sort of the elevation of state legislatures as the sort of sine qua non of legitimacy and accountability in terms of their responsiveness to the electorate. And if you think about what Justice Kavanaugh is doing in that opinion with the veneration of state legislatures, it's perhaps not surprising that you have Justice Kagan coming back with this dissent in part, because I read her dissent as kind of a follow on to her dissent in *Rucho v. Common Cause* from the October term 2019, which was a case about gerrymandering. The reason why I think state legislatures loom so large here is because of all of the gerrymandering that has happened, that doesn't just affect the drawing of congressional districts.

Melissa Murray:

It also affects the way that state legislative districts are drawn too. And so when you have many of these state legislatures that are essentially captured by a particular party, it's often because of the way the gerrymander has worked and allowed them to sort of take over these seats. We draw maps and continue doing that. Sometimes the gerrymander can actually even affect the way the state courts are composed because of the interaction between the legislature and the state judiciary. So they're all sort of connected together. And it is part of, I think this whole question of minority rule through what ostensibly are supposed to be majoritarian institutions.

Kate Shaw:

I was happy to see her flexing her dissenting muscles here. Honestly, it was a really powerful dissent. One thing to flag is that something we learned yesterday is that social media platforms may, in some instances be better at policing misinformation about the election than the Supreme court, or at least than the particular justices. So earlier on Monday, the president made a claim on Twitter about how ballots received after an election are illegitimate or throw an election into chaos. Twitter flagged that as misinformation, but honestly, justice Kavanaugh was making kind of the same claim and explaining why the Wisconsin district court could not extend the deadline for receipt of absentee ballots. And then Kagan had an incredibly, I thought effective response to this. She basically says, look, Justice Kavanaugh alleges that suspicions of impropriety will result if absentee ballots flow in after election day and potentially flip the results of an election.

Kate Shaw:

But this totally, this is me editorializing now this isn't Kagan, but that totally buys in to the president's framing that the legitimate results are the election day results. And that's never true, but it's especially not true when we have a significant percentage of the population in a pandemic of voting by mail. So she responds by saying, there are no results to flip until all valid votes are counted. Nothing could be more suspicious or improper than refusing to tally votes once the clock strikes 12 on election night. To suggest otherwise, especially in these fractious times, is to disserve the electoral process. So that is

pretty strong language for Supreme court opinion. And she's suggesting that it's dangerous, what he is saying.

Leah Litman:

I mean, it is, it's kind of saying, in order to avoid allegations that the election is rigged, we should rig the election by just modifying the rules again, to ensure that people who voted during a pandemic by mail, some number of those posts are not going to be counted. His claim is wildly out of step with what the actual law is. So 18 States and the District of Columbia allow election officials to count ballots after they arrive after election day and state electrodes, of course, don't meet until December, 41 days after state elections. If elections are close, States provide for automatic or requested recounts. Federal law creates a safe harbor provision that allows the state to certify its results. And those results are presumed conclusive if the state certifies them within five weeks of election day. So there's just nothing to this idea that all results have to be announced election day, all votes counted by then. That has never been the case. That simply can't be the case because a lot of States forbid beginning to count votes until election day itself.

Kate Shaw:

Including a few critical States, like Wisconsin and Pennsylvania-

Leah Litman:

and Michigan.

Kate Shaw:

... Although a little pre canvassing now.

Leah Litman:

We can do processing

Kate Shaw:

So, that'd be, you can't even, I think, do that in Pennsylvania and Wisconsin. But it's also the case that in 2018, not obviously a presidential cycle, but remember there were a number of California congressional races we didn't know the outcome of until--

Melissa Murray:

Katie Porter's race

Kate Shaw:

Days or in some instances weeks after the election, the Arizona senate election was also not clear on election night and you know what, the world went on. It's not that big a deal. We can all wait a few days or weeks.

Melissa Murray:

I think people have been trying to manage expectations in the media by simply saying that we aren't going to have election night. It's election week. I mean, I've heard plenty of commentators on most of

the channels talking about this idea that this is going to be a process. We may not know the winner of the election, unless it is so decisive that it's a landslide. Otherwise it'll be election week. And you're waiting for things to come in just because of the unusual circumstances that we find ourselves in. So I thought this was just given all of the ways people have been trying to manage expectations about the election, this was really interesting. So I also wanted to note that the Kavanaugh opinion also cited my NYU colleague, Rick Pildes, for the proposition that late arriving ballots can destabilize election results. But in fact, in the piece that was cited, Rick Pildes recommends that ballots received after election day be counted on the ground, that they may actually help enhance democracy by ensuring that every voter has a say in the election.

Melissa Murray:

So that was a bit of an inconsistency and sort of sloppy. And then there's another passage in which Justice Kavanaugh notes that other States such as Vermont by contrast have decided not to make changes to their ordinary election rules. And this was kind of wrong because the Vermont legislature has actually authorized the Secretary of State to automatically mail a ballot to all registered voters in response to the circumstances created by COVID. And in fact, when this opinion was released, the Vermont Secretary of State tweeted out that they had made this change. So that's probably not going to go well in chambers.

Leah Litman:

We've talked about the problem of these shadow docket rulings, where the Court doesn't issue reasoned explanations for its decisions, but part of the problem is it's also doing so without full briefing, without argument in a very harried fashion. And this concurrence really put that on display. Those mistakes, there were others conflating receipt and acceptance or counting deadlines in a few different places. And he strings cites, a bunch of the courts, state decisions, treating them as precedential, even though they're not explained they're unsigned and they're not usually treated as precedent. So it was just kind of a hot mess.

Kate Shaw:

Ladies, I got to hop off to go teach, but see you soon.

Melissa Murray:

Go get it. All right. We'll see you later.

Melissa Murray:

All right. There was also another order. The Supreme Court issued a stay of a final decision issued after a trial in Alabama. And that decision partially enjoined Alabama rules restricting curbside voting. And this was one that was, I think, watched very closely by those in the disabilities community, which really is a place where curbside voting is important to ensure that those who have disabilities can participate in the electoral process. Some counties in Alabama wanted to provide for curbside voting, particularly for the elderly and the disabled and the State prohibited that. And the district court found that the state prohibitions burdened the right to vote and partially enjoined them, allowing localities to adopt curbside voting procedures if they chose to do so.

Melissa Murray:

The Court stayed that decision over a vehement dissent written by Justice Sotomayor and joined by Justices Kagan and Breyer. At the end of that dissent Justice Sotomayor, I thought this was incredibly poignant, quoted Howard Porter, who is an African-American man who was in his seventies, who suffers from both asthma and Parkinson's Disease. And the quote says, "so many of my ancestors even died to vote. And while I don't mind dying to vote, I think we're past that. We're past that time." I think that's probably right.

Leah Litman:

And I mean the facts of the case just highlight that these burdens are not exaggerated. They are very real for people. Porter's sister, and uncle were hospitalized with COVID and his uncle died days before the trial began. So we are now waiting on a few other stay applications. We mentioned the Pennsylvania GOP's, resubmission of the stay application regarding the Pennsylvania State Supreme court decision. We're also waiting on another stay application arising out of North Carolina in the Fourth Circuit there, the local election board extended the deadline for receipt of absentee ballots to nine days after the election. And the Trump campaign and GOP are seeking a stay of that ruling.

Melissa Murray:

There's also another cert petition that's been pending, and this is one Leah, I am not actually even sure of the caption for it, but it involves the Mississippi 15 week ban on abortion. And this has just sort of gone through multiple rounds of conference and it's still pending on the docket and question whether now that they have a full complement of justices, whether we'll actually see whether the Court takes that up or declines to take that case up.

Leah Litman:

Yeah. We shall see.

Melissa Murray:

How much ice cream have you had in the last 24 hours?

Leah Litman:

Well, so actually in the last 24 hours, what I've eaten primarily has been chocolate pecan brownies, creme brulee, several different flavors of Moscato and Zingerman's sandwiches.

Melissa Murray:

I had a Zingerman sandwich in Ann Arbor once. It was delicious. And they had this coffee cake, so someone sends me this coffee cake for every holiday season. And it's the sour cream coffee cake. And they must put so much sour cream in it because by the time it gets to California, it's still moist, which means it's literally made with only fat and it's delicious. That's a good way to get through.

Leah Litman:

So that's been the last 24 hours. I'm really looking forward to the next week. Speaking of the next week, election day is a week from today and it is really important that we all vote. So how are we slash how have we voted? I personally filled out my mail in ballot and dropped it off at a very convenient drop box located in the Ann Arbor city hall. Kate, who had to hop off to teach filled out her absentee ballot. And I believe mailed it in. She can correct me later if I was wrong.

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Melissa Murray:

I have not yet voted, but I am going to take my mail in ballot and take it to a drop box or alternately, just drop it off at the local County Clerk's office. But yes, definitely make a plan to vote and to take it in and do it in person. This is probably not the time to be relying on the postal service.

Leah Litman:

So that's probably all we have time for. We will, or I will try to peel myself off the bathroom floor and out of the metaphorical fetal position before the next episode that we are recording at UVA, which we're very excited about. Thanks to our producer, Melody Rowell, thanks to Eddie Cooper for making our music. Thanks to all of you for supporting the show. You can support the show by becoming a subscriber [@glo.fm/strictscrutiny](https://glo.fm/strictscrutiny). And you can also rate us if you like us on iTunes and then more people will find the show. And thank you also to American democracy, as long as we still have it.