Speaker 1:

Mr. Chief Justice and may it please the Court. It's no joke, but when a man argues against two beautiful ladies like this, they're going to have the last word.

RBG:

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 to a very special episode of Strict Scrutiny, a podcast about the Supreme Court and the legal culture that surrounds it. We are your hosts. I'm Kate Shaw.

Leah Litman:

And I'm Leah Litman.

Kate Shaw:

And we have a very special guest with us today, Professor Marin Levy of Duke Law School.

Leah Litman:

That's right, today we are recording live from Four Seasons Total Landscaping. No wait, that's wrong. We're live from Duke Law School, joined by Marin. Marin, thanks so much for joining us and thank you to Duke for having us.

Marin Levy:

Thank you so much for being here. We are so excited to be chatting with you today.

Leah Litman:

So we have quite a show for you all. This week the court heard its much anticipated argument in Brownback versus King about whether a judgment in favor of the United States and the Federal Tort Claims Act case bars a Bivens suit for similar conduct.

Leah Litman:

I kid, I kid, that's a big case, but the case that people were watching the most this past week, was of course, the argument about the fate of the Affordable Care Act, which we'll break down for you and more.

Kate Shaw:

Okay, here's what we have in store for you today. We will start by breaking down some Court news. We'll then recap the November arguments, focused on the Affordable Care Act, but also talk about a couple of other cases. Then we'll do a court culture segment, focused on some exciting new scholarship that Marin has in the works.

Kate Shaw:

We're also going to spend some time talking about what is happening inside the law firms that are continuing to bring frivolous election-related lawsuits on behalf of President Trump's campaign. Suits that seem designed to delay the inevitable. To advance disinformation and to generally undermine democracy.

Leah Litman:

Yay legal profession.

Kate Shaw:

We'll get there. But first, let's start with the order list, which was from the first conference in which the newest member of the Court, Justice Amy Coney Barrett participated. This was actually a pretty quiet orders list, compared to recent weeks. We did get one new grant in a pair of consolidated cases. And in those cases, the court will consider whether a Social Security claimant has to administratively preserve an objection to whether a Social Security Administrative Law Judge has been constitutionally appointed.

Kate Shaw:

The Court actually previously granted a case to decide whether ALJs in the U.S. Patent and Trademark Office are constitutionally appointed. This is a line of cases following on from the Court's decision in Lucia, holding that SEC ALJs needed to be appointed consistent with the Constitution's Appointments clause.

Kate Shaw:

We should flag here that there was a great student note on the appointment of Social Security Administration's ALJs. The case comment was on the Lucia case, but it essentially predicted that this question would arise and that was authored by now Georgetown Law Fellow in the Appellate Court's Immersion Clinic and friend of the pod, Hannah Mullen.

Leah Litman:

We also got a rare take-back of a grant. The Justices removed from the docket FTC v. Credit Bureau Center, which had been granted together with another case to decide whether a provision of the Federal Trade Commission Act gives the FTC the power to require defendants to return money when they obtain from illegal activities. The Court removed Credit Bureau from the docket and kept the other case. Justice Barrett had voted on Credit Bureau as a Judge on the U.S. Court of Appeals for the 7th Circuit. So, if the Court had kept both cases, which are consolidated, she couldn't have participated in the argument or the Court would've had to have two separate arguments, so she could participate in one of them.

Kate Shaw:

One other thing to flag at the outset, and we have mentioned the Pennsylvania litigation around absentee ballot arrival deadlines on a number of different shows at this point, but there is more to say here. Just to recap, this is the case where the Pennsylvania Supreme Court said that as a matter of state constitutional law, ballots received after election day were timely as long as they arrived by Friday.

Kate Shaw:

Pennsylvania Republicans challenged that ruling twice in the U.S. Supreme Court with Justice Alito writing at the second pass, suggesting that the Court could take action in the future and thus these ballots needed to be, as they already were being, segregated and kept separate from ballots that arrived by Election Day.

Kate Shaw:

The Trump campaign has asked the Court to weigh in yet again, even though those later received ballots are so small in number they could not possibly change the outcome in Pennsylvania, where Biden leads by over 40,000 votes and there are something in the neighborhood of 10,000 late arriving ballots. We should also say, that those ballots, if counted, would very likely favor Biden anyway, so there is really nothing to gain from the Trump campaign in continuing to press this argument that those ballots should not be counted.

Kate Shaw:

But, that didn't stop a bunch of states from jumping on the posturing bandwagon to file Amicus Briefs in support of the Trump campaign's request. Evidently, Missouri and Ohio and other states have an interest in the proper interpretation of Pennsylvania's law.

Leah Litman:

This is like the opposite of virtue signaling, I guess it's vice signaling, where literally it's not going to make any difference, but you still feel the need to take those positions anyways. I wanted to highlight one of the Amicus Briefs in particular that contains some interesting analogies.

Leah Litman:

In an Amicus Brief filed by the Solicitor General of Ohio, the Ohio SG invoked the dissenting opinion in Dred Scott v. Sandford with the apparent implication being that the Pennsylvania Supreme Court decision allowing mail-in ballots to be received two days after the election because of a postal delay is, I guess, in their view, similar to the Dred Scott case.

Leah Litman:

Dred Scott, is of course, the decision that held that Black Americans could never be citizens of the United States and it also purported to invalidate a federal statute prohibiting slavery in the territories. I am not making that up, that is actually the analogy that the Ohio Solicitor General drew. Again, yay legal profession.

Kate Shaw:

I should say, that as Leah is describing this, her Zoom background, which is of the Four Seasons Total Landscaping Company, feels like it's starting to overtake you Leah, like it's pulling you into its vortex. It's pretty amazing. We need a still shot of this for those who are listening on the pod.

Kate Shaw:

In any event, that's Pennsylvania. That's what's happening in Pennsylvania. That's where Leah's background is currently, set in Pennsylvania. The Court hasn't weighed in yet on this third request. As far as I'm concerned, it would be better if the Court stayed out of it completely, since there's no way it matters and any Supreme Court signal of interest or potential even support for the outlandish

arguments being made for the Trump campaign. I worry would further fan the flames around somehow courts in some fantasy world changing the outcome of the election.

Kate Shaw:

I do think it connects to a larger point, which is that in our last episode, Leah and I talked about Pennsylvania. We talked about this case and we talked some of the other then pending election related challenges brought by the Trump campaign. We mostly took a pretty light tone with them. We were sort of making fun of them. I stand by our general assessment that they are a mix of trivial and frivolous and they should be, are being, thrown out of court swiftly.

Kate Shaw:

Remember when we recorded that last episode, the election hadn't yet been called. I do think things look pretty different today. The election is over. The Trump campaign's continued insistence on pursuing these claims, most of them frivolous, all of them irrelevant to the ultimate outcome of the election, begins to look a lot less funny and a lot more dangerous, right. Not again, because I think these lawsuits have any succeeding or changing the outcome of the election, but because the suits themselves are central to a narrative that this is not over and because the Trump campaign is using these suits to actively undermine faith in our democracy and to prevent a proper transition from getting started.

Kate Shaw:

So, I said too much about this at the outset. We're going to talk about this at the end of the show, but this all seems really important and again, since we're talking about the Pennsylvania case, I don't think we can responsibly talk about in isolation from the rest of the litigation that is ongoing. But, stay tuned, we will come back to this topic.

Leah Litman:

Two other pieces of news, just to note briefly, that we will probably return to in future episodes. One is that the U.S. Court of Appeals for the First Circuit, ruled that under governing Supreme Court Law, The Harvard Race Conscious Admissions Program does not violate Title VI. This decision seems correct under current case law, which means that I expect the Court will grant cert in order to change that current case law.

Leah Litman:

The other piece of news is that Justice Alito gave the keynote speech at the Federalist Society Convention and that speech requires its own segment, if not its own episode. We'll cover that on our next episode or a future episode. Melissa, I don't think we can in good conscious do this topic without you.

Kate Shaw:

But don't worry, listeners, we are going to give this topic the attention it deserves.

Marin Levy:

Amazing. With that, I think we can start to recap the cases from the week. First up, we have California v. Texas. Of course, this is the Affordable Care Act case, that's gotten so much attention of late. We're going to go through the three parts to that case, which are first, whether any of the plaintiffs have

standing to challenge the law. Second, whether the 2017 amendments to the Affordable Care Act made the provision in the law unconstitutional and finally whether if one provision is now unconstitutional, the rest of the ACA or at least some parts of it must fall as well.

Kate Shaw:

So the background here is that a group of Republican led states with the support of the Trump Administration, are arguing that the 2017 Republican Congress' amendments to the Affordable Care Act rendered the so-called minimum coverage requirement of the Act unconstitutional and that provision in the Act for the most part, was previously upheld in NFIB v. Sebelius.

Kate Shaw:

Here the challengers are arguing that since this minimum coverage provision is now unconstitutional, the rest of the Affordable Care Act has to fall because the minimum coverage provision, which no longer carries attached to it, a penalty is not severable from the rest of the Act.

Leah Litman:

Before we get into the actual case though, I wanted to highlight an exchange that should live on in infamy. And that is the Chief Justices' attempts to wrongfully silence Stephen Breyer.

Kate Shaw:

It's so wrong.

Leah Litman:

Our beloved fellow Cassandra. Let me set the scene. After Justice Thomas finished questioning Don Verrilli, who was representing the House.

Don Verilli:

Thank you.

Leah Litman:

There was some silence on the audio line. And then all of a sudden, you hear a voice call out of the darkness.

Justice Breyer:

Uh...I...Justice Breyer?

Leah Litman:

Like he hadn't heard the Chief Justice call on him. I didn't hear the Chief Justice call on him.

Kate Shaw:

So, he tried to call himself.

Leah Litman:

Right, exactly.

Leah Litman:

After he called on himself, the Chief Justice called on him.

Chief Justice:

Justice Breyer?

Justice Breyer:

Yep.

Chief Justice:

Thank you Justice Breyer.

Leah Litman:

And he starts to ask a question.

Justice Breyer:

All right, why isn't that fact.

Chief Justice:

I'm sorry, Justice Alito?

Leah Litman:

Before anyone even answers his question, before he finishes the question, the Chief Justice cuts him off. And it just gets sadder from there. First the Chief Justice cut him off after only a minute. All the other Justices were getting two minutes to question Don Verrilli and it's like the Chief Justice was somehow mad at him for the technological mishap and then Justice Breyer is just devastated. He says-

Justice Breyer:

Something happened. I'm sorry, my machine didn't work.

Leah Litman:

And then even Justice Alito says-

Justice Alito:

I thought Justice Breyer was still on his time.

Leah Litman:

And then the Chief says-

Chief Justice:

No, Justice Alito.

Leah Litman:

Sam, being Sam is like-

Justice Alito:

Well, thank you.

Leah Litman:

I don't even know how to describe how enraged I felt listening to this. One, Justice Breyer was so sad. Second, he gets no respect, no respect when he tries so hard. He has been giving up his questioning periods in a lot of these telephonic arguments in order to ensure he doesn't go over the total allotted questioning time each Justice receives because he knows he has a hard time fitting in all of his questions to that time period. When he gave up some of those questioning periods, the Chief Justice gave that to Justice Alito and allowed Justice Alito more questioning time in Texas v. New Mexico. He's just trying so hard to police himself and be nice, but he wants to ask his questions because he's thought about these cases and it just crushed me to hear him so deflated and rejected and I just want to say put some respect on his name, Chief Justice.

Kate Shaw:

It really was sad. It also didn't make sense because it seemed as though the technical difficulties had been solved and Justice Breyer was able to begin asking his questions and that's when the Chief cut in and handed the mic to Justice Alito. The whole thing was perplexing and I wasn't as angered as I was saddened. It just saddened me.

Leah Litman:

There's something particularly sad about this happening to Justice Breyer, who as we've talked about before, is just this eternal optimist, who goes to work every day and goes about his job thinking that everyone around him is full of good faith and just trying their best and today is going to be the day that I convince them that actually I'm right about the scope of Congress' powers under Article I. I genuinely think he wakes up every day thinking that. Obviously, that's not my perspective, but to see someone like that just crushed and deflated, pains me.

Kate Shaw:

Yeah, yeah. The Chief seemed to sort of have a little bit of remorse after the fact and to at least realize what he had done. He attempted to return the time to Justice Breyer.

Chief Justice:

Justice Breyer, we apologize for the audio difficulties, and we'll go back to you.

Kate Shaw:

And Justice Breyer, ever the menschiest of mensches, says-

Justice Breyer:

That's alright, it's not a problem, go ahead.

Kate Shaw:

And that also I found really sad. I genuinely wanted to know what he was gearing up to ask when he was so unceremoniously cut off by the Chief, but we never got to find out.

Marin Levy:

I couldn't tell really what that okay was, like how we should read that. If that really was a genuine, no I'm good or if it was like what my mother says right in like her martyr way, oh, I'm good, but still like crushed and you should feel terrible about it. I don't mean to foreshadow too much, but I did wonder subsequently if Justice Breyer getting passed over here contributed to his spiciness in the exchange that he had with General Hawkins, but don't want to give that away too much.

Kate Shaw:

Yeah, no. He definitely came back strong when he did get back into the mix. Let's pivot to standing, at least to begin. A lot of the Justices spent a fair amount of time, I was actually surprised at how much time, they spent questioning the lawyers for the House of Representatives, Don Verrilli and for California, Mike Mongan. Both Verrilli and Mongan are arguing that these Republican led states and individual plaintiffs lack standing to challenge the minimum coverage provision.

Kate Shaw:

Obviously, in order to challenge a law, you have to be able to show that the law injures you. The plaintiffs here have offered a few different theories for why they are injured. Individual plaintiffs are arguing that the mandate, which again, has no penalty attached to it, still in some way manages to make them buy insurance when they don't want to. And, as to the states, they are arguing that, this again, no penalty mandate, forces some people to purchase insurance who would not otherwise and who presumably, and this is like where I think this argument gets extremely strange, presumably would not buy insurance if a penalty remained attached, but would move to buy insurance now that there is no penalty. If that sounds puzzling, it is.

Kate Shaw:

But, in any event, that this somehow, sort of sequence of events, increases cost to them as states, via Medicaid and CHIP. Also, there's an argument that the states are making that other provisions in the Affordable Care Act, which again, are not severable from the mandate, also injure them. So, the existence of these exchanges, Medicaid and certification requirements, so other parts of the law also injure them. That's the basic constellation of standing arguments that the plaintiffs have made.

Leah Litman:

I was a little bit surprised at the amount of sympathy for the idea that the challengers have standing from standing hocs, like the Conservative Justices. I think they were probably most sympathetic to the state's standing arguments and honestly I think Justice Kagan also seemed sympathetic to that argument, but that wasn't as odd to me since she's not a standing hoc. But the Chief and Justice Thomas wanted to know about hypothetical mandates like mow your lawn or wear a mask and whether, even without penalties, people would have standing to challenge those mandates because other people would know they were in violation of the law.

Leah Litman:

Of course, one key difference is that people don't go around wearing insurance cards on their faces, so it's not like people don't know you wouldn't purchase health insurance. You wouldn't face any social opprobrium for failing to do so.

Kate Shaw:

The Chief also wanted to know whether these plaintiffs would have to answer in the affirmative on say, a job application, that asked whether you had ever violated the law. Mongan said, maybe on their theory, but and if so, you might have a viable theory of standing, if somebody was actually facing that kind of injury, but we have nothing like that here.

Marin Levy:

There seemed to be some disagreement about whether the standing through inseverability theory works. So specifically, some Justices wondered if plaintiffs had standing to challenge the mandate because the mandate is not severable from other provisions that injure them. Wouldn't that open up many other statutes? Some that are quite long. We can think about all those omnibus laws out there, as Justice Kagan pointed out. And then the challenge if plaintiffs were just able to find a single provision that injured them.

Kate Shaw:

The Solicitor General's answer to that is it's hard to establish inseverability, but of course, the plaintiff's arguments here for inseverability are really bad, if not borderline insane, so clearly that doesn't stop plaintiffs from asserting it. I guess, my bottom line is I think they're going say standing, though it's possible this becomes an off ramp, but during the first round of questioning to Solicitor General Mongan, the first Justice to ask about the merits was Kavanaugh, other than Sotomayor offering him a friendly question. It just seemed like the Justices were skeptical of the idea that the challengers lacked standing.

Kate Shaw:

And I have to say, in this first round of questioning, I really felt for Mongan, who kept trying, just like so valiantly to pivot from standing to merits because he has a very good merits argument and I thought he did an amazing job in actually responding to the standing questions, but attempting to ... No, if you disagree, I still think we win. But they kind of kept coming back to it. I think is an especially difficult position for him to be in, which actualy the Chief sort of acknowledged at one point, which is that he represents the State of California. At least as to the state standing, there's some tension between an argument that these challengers lack standing and his general interest in the State of California being able to access federal courts to challenge federal government statutes or executive action on a variety of bases. I though he managed to thread that needle beautifully in the argument.

Leah Litman:

Justice Kagan at one point issued a one Justice CVSG to Solicitor General Wall asking him if he thought the individual plaintiffs had standing.

Marin Levy:

I thought this was super awkward. This, to me, felt like one of the classic cold call moments that I talk to my students about. The professor asks you a question, you don't really feel prepared to answer, you

don't really want to answer it, so you essentially just try to answer a different question. My shorthand for this is they're asking you for a cupcake and you give them a cookie instead and you hope they don't notice.

Marin Levy:

In this case, what happened was General Wall said, yeah, well, Justice Barrett was asking some really tough questions about traceability, like dot, dot, dot. Maybe Texas has standing, dot, dot, dot. And did I mention I really do not want to be answering this question right now. Justice Kagan, I thought for her part, was like I am just not buying that cookie.

Kate Shaw:

Yeah, didn't he say at the outset, well we haven't taken a position on that?

Marin Levy:

Yes.

Kate Shaw:

She was like, I know, I know.

Marin Levy:

This is the time for that.

Kate Shaw:

How did he think that would fly? He knows that she knows that the United States is very careful in formulating the position that it's going to take. You don't just get to say, no, I'm not answering that question, which it sort of seemed like he initially tried to do.

Kate Shaw:

I think let's leave standing there and so lets move on the merits. So the merits of the case are really about whether these 2017 amendments to the minimum coverage provision, again which zeroed out the penalty attached to that, failing to comply with the requirement that one obtains minimum coverage rendered that provision unconstitutional. These amendments, this was after a very protracted legislative effort to appeal in its entirety the Affordable Care Act, that people will remember was an unsuccessful legislative effort, but what Congress did do, again, was to zero out the tax penalty, no dollars and the rest of the statute remains intact.

Leah Litman:

So, I counted to five and perhaps six votes that the minimum coverage requirement as amended is now unconstitutional. Justice Kavanaugh repeatedly said, this couldn't be a tax and he said that NFIB foreclosed reliance on the commerce and necessary and proper clauses. Justice Barrett said Congress didn't repeal the provision and that Congress is free to force a Constitutional question on the Court. Justice Gorsuch similarly said the commerce and necessary and proper clauses and taxing clause weren't available, so I'm not optimistic.

Kate Shaw:

Yeah, if you count the new members of the Court and their skepticism there, I think we know from NFIB, the case is different but I feel very confident that Justice Alito and Justice Thomas thought the statute was unconstitutional in NFIB under all the theories. You can see the theory that could be brought. I guess, when you say, I'm curious Leah, what we think about the Chief. Who obviously, famously wrote the opinion upholding the early iteration of the ACA, which obviously did have a penalty attached to the minimum coverage requirement. Did you get a read on where he was likely to come down in this case.

Leah Litman:

You know, he was my maybe sixth and I put him in that bucket in part because the premise of all his questions about standing seemed to be that this is in fact a mandate or a command. But, that being said, sometimes he does a pretty good job of hiding where is at argument, like in the Bostock Title VII case and in the DACA case and so I'm not confident where he is, but I think there are at least five to say that the amended minimum coverage provision is unconstitutional.

Leah Litman:

There was an extended back and forth between Justice Breyer and Justice Kavanaugh that Marin alluded to, that is important and it was extended because in this new format, the Justices can't respond to one another in the moment. They can only bring up another Justice during subsequent rounds of questioning.

Marin Levy:

Yeah, and as a quick side note here. I thought this exchange highlighted a major drawback to this kind of seriatim questioning that we're getting with the telephonic arguments. It just felt so awkward to stretch this tension out of over an entire round of questions as opposed to just getting it all out there at once. It was so long and protracted it felt like they were almost like sending messages in bottles back and forth to each other, where you have to wait for some kind of response. I was like get it all out. Get it all out there.

Leah Litman:

Yeah, it began when Justice Breyer and, what might be the most heated I've ever heard him, was questioning Texas Solicitor General Kyle Hawkins.

Justice Breyer:

Turning to the merits of, is your point...What do you say about many, many statutes, I suspect, that do have or could have statements: do this, or don't do that or do this and they do not have any enforcement. They do not have any effect. World War I Defense statutes, buy war bonds. Environmental Statute, plant a tree. A one of a thousand statutes commemorating something. Beautiful Cities Day, clean up the yard. I mean, I can recall, or I believe, there's dozens and dozens of statutes where Congress says something where normally we would say it's precatory. Now, are all those statutes suddenly open to challenge? I mean, are none of them? If so, you lose. And, if it's in between, which ones are and which ones aren't?

Solicitor General Klye Hawkins:

So, Justice Breyer, you asked whether they were open to challenge, I guess I'd want to know the-

Justice Breyer:

On the merits, on the merits. If you have a merits claim. Can you suddenly say, this is no good because people will do it. They'll buy war bonds, they will plant a tree. At least one of them will clean up the front yard. Okay? And thereby, I don't know. You see the point, it's a merits point.

Leah Litman:

So the Texas Solicitor General was evasive. Justice Breyer was extremely not amused and so he clarified-

Justice Breyer:

You're missing the point. On each of them, there is some constitutional argument that if there were a penalty attached, it would be unconstitutional. They take the penalty out from all my examples, now no penalty. Do you say that they are, nonetheless, unconstitutional for whatever reason? If so, I think, there will be an awful lot of language in an awful lot of statutes that will suddenly be the subject of court constitutional challenge.

Leah Litman:

That was how this line of questioning got off between Justice Breyer and the Texas Solicitor General.

Leah Litman:

Fast forward to the next round of questioning when-

Marin Levy:

Years later.

Leah Litman:

Right exactly. When Justice Kavanaugh's turn is to question Texas SG Hawkins-

Justice Kavanaugh:

On the merits of the mandate before we get to severability, I want to follow-up briefly on Justice Breyer's questions because my understanding might be a little different from his about the existence of other laws. I think when I asked General Mongan, he agreed with me that there are no examples in the U.S. Code that he's aware of where Congress has enacted a true mandate to do something, to purchase a good or service, not something hortatory, but a true mandate, with no penalties. Is that right?

Leah Litman:

As a side note, one reason this line of questioning, and perhaps this format of questioning was frustrating to me, as you were suggesting Marin, is that this assumes the answer to the question about whether this is in fact a mandate. When Justice Breyer's point is that Congress enacts statutes that read like commands, but we don't interpret them as actual mandates. I think, honestly, if this had been happening in the more free-for-all format, Justice Kagan probably would have said, but of course. The entire question here is whether this is a mandate at all, but maybe that's just in my mind.

Leah Litman:

Anyways, after that exchange with Texas Solicitor General Hawkins and Justice Kavanaugh, Justice Breyer then comes back and at this point we're questioning Acting Solicitor General Wall, so it's an entirely different advocate and then Justice Breyer announces-

Justice Breyer:

I do have a very different understanding than Justice Kavanaugh. What I thought I heard said, was that someone in the Solicitor General's office read through the entire United States Code, which must be quite a job, and discovered that there's no precatory language in the Code. There is nothing in the Code. It says something like buy war bonds or something like plant a tree or something like clean your yard. Is that right?

Leah Litman:

They're talking to one another, but two different advocates and minutes apart because of this new format. And again, the premise of Justice Breyer's question is well, look, there's potentially this mandatory language, but we read it as mandatory. And the Solicitor General responds-

Solicitor General Klye Hawkins:

Just for the pure precatory language in the Code-

Justice Breyer:

If you say there is precatory language

Leah Litman:

And then Steve Breyer, being the best, pulls out some big dictionary energy and reads him the definition of precatory.

Justice Breyer:

Precatory means in the dictionary, pertaining to entreaty or supplication. Now how is that you know that this mandate just by itself, without any penalty, is something more than a supplication or an entreaty?

Leah Litman:

Justice Breyer then points out that all of the language in the other statutes and the Affordable Care Act is precatory under that definition, so why is this one provision any different? And the Solicitor General says, it's because the ACA has the word shall rather than should.

Marin Levy:

As a side note, I think we were all grateful for that dictionary moment. We were all like precatory what? Can we have a little humpf there? Thank you Stevie B.

Marin Levy:

At this beautiful moment, we begin to learn a little bit about Justice Breyer's family. I think it's fair to say that this is where the argument started to get a little bit weird. Breyer actually asks Acting Solicitor General Wall-

Justice Breyer:

Well, as you say that, it reminds me in English, have I ever said or have you ever said to someone in your family. You shall do it, but that an entreaty. An entreaty or a supplication rather than threatening a punishment. Have you ever heard that word use shall in respect to a supplication or an entreaty?

Solicitor General Klye Hawkins:

No Justice Breyer, in my family, when I tell my kids that they shall do things, that's a command backed by a penalty.

Justice Breyer:

Well, that's a much more organized family than mine.

Leah Litman:

It seemed like maybe by the end of these exchanges, Breyer's point was getting through to Justice Kavanaugh who said, yes, Breyer points out there is a lot of precatory language so why not construe this language as precatory.

Kate Shaw:

We should flag that last line of Acting Solicitor General Wall in which he says, that's a command backed by a penalty, like, okay, well, that's actually the point here is that ... Either that it assumes that there's a penalty or it concedes that shall, when paired with a penalty means one thing, and here, in fact, there clearly is no actual penalty. It doesn't answer the question of whether it's a command or not, but because there's no penalty, it seems like that was actually kind of an important concession potentially.

Kate Shaw:

But in any event, I totally loved that whole exchange. I totally agree with you guys that it was an argument that actually had a lot of clear themes and through lines. There's something so disjointed about some of these arguments. This one actually did have a lot of narrative coherence, but with these weird gaps of time in between these unified conversations ... And it made me wonder, they're clearing making some changes as they go.

Kate Shaw:

So the Justices are now getting some kind of stop sign that is popping up in front of them when their time is up because they're responding. I almost wonder whether they're getting little electro-shocks or something because it's so abrupt when they say, oh, my time is up. So it's not just a Zoom notification. There's something more happening.

Kate Shaw:

I do wonder when they're coming out of this argument, the Chief and other, think about whether there is some way to allow follow-up when ... In some faculty workshops, there are ways you can signal either a question or a directly related question and it would be nice to see them adopt something along those lines because I do think it would've improved the quality of the exchange in this case and going forward it would be a really good addition.

Kate Shaw:

One more thing to flag about that exchange that I really liked was that Justice Breyer was not only talking about war bonds and his family, he also reminded us that he was a Congressional Staffer as a young lawyer and he said, when I used to work there, we passed lots of things like National Park Week and all kinds of stuff that was precatory or said let's have a celebration or the nation shall plant a tree, etc.

Kate Shaw:

I think all time about how limited the Justices' experiences are. He's the only one there who has spent any time drafting legislation and I always appreciate it when he gives us a reminder of that because they talk so much about how Congress works and how Congress thinks.

Marin Levy:

I think that's such a great point. In fact, part of the argument, as we've been saying, was like an empirical question. Do we see other examples like this in the Code? We have this kind of funny line of questioning. Have you actually sat down and really read through the code? Has anyone in your office sat down and read through the entire thing and this kind of back and forth.

Marin Levy:

I should say, a tip of the hat to Mike Dorf, who posted on social media soon after that. It took him all of five seconds to find in the U.S. Code, some language in 26 USC 7611, this is a little provision having to do with church tax inquiries and examinations but found the language, "the secretary shall", which was later interpreted to be purely precatory. So, thanks for that, Mike Dorf. We wish you'd just been able to pop into argument. Wouldn't that have been helpful?

Kate Shaw:

Let's talk about Justice Kagan. She showed, with her typical devastating flair, some of the problems with the merits argument in this case. She asked the Texas Solicitor General, look so in NFIB, we held that the ACA isn't a non-constitutional command. So then Congress comes along, and makes a change, reduces the penalty to zero, which makes the law less coercive, so how does it make sense to say that something that wasn't an unconstitutional command before is now an unconstitutional command because of a revision that makes it less coercive.

Kate Shaw:

The Texas SG disputes the premise and she is again, not amused that he appears to refusing to accept the holding of NFIB, which I think is right. He does refuse the holding. I think there's almost kind of like smirking subtext to that exchange, in which he sort of seems to be saying, well I'm stuck with NFIB, but you know what, today's Court, would not have reached that conclusion in this part of NFIB. He doesn't say it explicitly but that is essentially what he's arguing. He can't make that argument, so he doesn't really have a good argument at all, it seems to me.

Marin Levy:

Yeah, I totally agree with that. This felt like a Scylla and Charybdis to me for General Hawkins, which I think underscores the weakness of his position. Because either he had to answer the question that was asked and somehow come up with a reason for how something that wasn't an unconstitutional command could somehow now turn into one, given that it's less coercive or in the alternative, he has to

fight the hypothetical, even though that hypothetical, as we just said, is actually a real court case in which Justice Kagan took part. This was definitely a cringe-worthy moment for me.

Leah Litman:

I think another equally devastating moment was another Justice Kagan question about the original exemptions to the minimum coverage requirement. Under the statute as originally enacted, certain people were exempt from the tax penalty. Those people included people who were unable to pay the tax penalty as well as Native Americans. She said, are the people who were exempt from the tax penalty, as originally enacted, in violation of the law. And the Texas Solicitor General said yes. I think Justice Kagan was pretty taken aback because it is a startling position. In her words, this amounts to the people who never had to pay a penalty were subject to a command, but the people who did have to pay a penalty were not, which doesn't make much sense at all.

Kate Shaw:

It just comes back to Hawkins actually just wanting a different answer to what the Court held in NFIB and thinking he'd get a different answer from this Court.

Leah Litman:

I think that's right. So that leaves us with severability. I think the good news coming out of the argument is, it's clear there's a majority to say no and save the rest of the Affordable Care Act. The Court is not going to say that the rest of the Affordable Care Act is invalid. The Chief Justice's opening to Texas Solicitor General Hawkins was something like, I think frankly they, you challengers, wanted the Court to repeal the rest of the Act, but that's not our job. He's right about that.

Kate Shaw:

Yeah, it was, I thought a refreshing moment, in that in made a reference to what we have now talked about a couple of times, which is the actual legislative and political context in which the 2017 amendment was passed. The GOP Congress wanted to repeal the whole ACA. They tried hard. They failed. They managed to make just this one change and are now before the Court asking it to do the kind of hard legislative work for them. It reminded me of the Chief Justice's kind of similarly realist note in King v. Burwell, like what was this law trying to do as opposed to reading a little snippet of text in isolation. He seemed to be approaching this question, at least this part of the case, in the same spirit. We all know what this was about. And I appreciated it.

Leah Litman:

And Justice Kavanaugh said something similar in his opening line of questioning too, where he said, I tend to agree with you that it's a very straight-forward case for severability under our precedents, meaning that we would excise the mandate and leave the rest of the Act in place, reading our severability precedents.

Kate Shaw:

Yeah, it's very rare that a single short question in the course of an argument seems to be the whole ball game, but this was one of those questions that seemed sort of surprising in how revealing it was of where Kavanaugh seems to be on severability.

Leah Litman:

Yeah, and a part of me wondered why they telegraphed it so clearly at the argument.

Marin Levy:

Yeah, I was also wondering about that and I saw some chatter on social media, suggesting that Justice Kavanaugh had been so open about his views, really with an eye toward the Georgia run-offs. Wanting to be all, hey guys, it's cool, the ACA is safe, should this be front of mind for voters.

Marin Levy:

As Professor Abby Glock pointed out, right, we should remember that Justice Kavanaugh has written on severability before. He did this back in 2016. He did this in a book review of Judge Robert Katzmann's book on Statutory Interpretation. Shout out to former Chief Judge Katzmann on that one. And of course, we know that he's talked about severability before. This came up last term in American Association of Political Consultants and he's made clear in the past, he thinks it would be great if we were in a world where there was this default in favoring severability when possible. It may well be that he just felt like his cards were already on the table, no need to hide the ball here.

Leah Litman:

Yeah, maybe. Although he didn't actually say in the AAPC, here's how I'm going to rule on severability. Nor did he say that in Seila. So I am left wondering why he and the Chief did so here.

Kate Shaw:

You think the cynical political explanation is more like it?

Leah Litman:

Well no, I don't actually know that that is the explanation because I think that they would look around at the 2020 election and think that the Democrats messaging on the Affordable Care Act didn't help them in Senate races, so I don't think that they would think, well, if we allow them this message, that's going to help them in the Georgia Senate run-offs. But I also don't think that it's because of the prior writings that he necessarily did this. I honestly don't know what the explanation is, despite the fact that these Justices recognize the insanity of the severability argument, it is possible that this severability theory has some adherence on the Court. In particular, Justice Alito embraced the so-called Silver Bullet Theory, which gets it's name from a question that Judge Elrod on the Fifth Circuit asked at oral argument. The idea here is that some Republican Representatives voted for the amendment to the Affordable Care Act in order to make the Affordable Care Act minimum coverage requirement unconstitutional, which they then expected would make the entire law invalid.

Kate Shaw:

Right. And setting aside that, when convenient, Justice Alito says that it doesn't matter at all, but even a majority of members of Congress have voted for a thing we're thinking. We're supposed to look at what the text says. We were talking about a subset. The theory of what the subset was actually trying to do is as follows: so imagine, Congress takes a constitutional statute, amends it to make in unconstitutional, quite deliberatively, at least some of them acting in a quite deliberate fashion. The President then signs it into law and everyone or at least some significant portion of these players are doing this in order to

have the Court strike the whole thing down as unconstitutional because you lack the political will to do that through the ordinary legislative process, but I think that is actually the theory.

Leah Litman:

Boys and girls, we call that taking care that the law be faithfully executed.

Marin Levy:

That's so good. It's worth noting that one of the key arguments that the whole law should fall, was that there was a finding in the 2010 law that the mandate was essential to creating effective health insurance markets and that the 2017 Congress hadn't repealed that finding and it's almost like this is a kind of alchemy argument like somehow this then became some weird kind of inseverability clause. I think it's safe to say that not a lot of folks on the Court were buying that particular argument.

Leah Litman:

So, more general take-homes or assessments. As I think I've said, I think the Affordable Care Act is going to survive. I think the Court will say there's standing. Not super sure about that one, but I think so. I think they'll also say that the amended mandate is unconstitutional but that the mandate is severable.

Marin Levy:

I totally agree with all of that. And going back to that last point we were just making. I think it's pretty clear that the Justices now would say, findings within the law do not an inseverability clause make.

Kate Shaw:

I'll be curious to see if Justice Barrett writes anything in this case. I can't imagine that she'll have a big opinion in the case, but there was just so much focus on, obviously, her likely view on this case going into it. I'll be interested to see whether she'll put her own thoughts into writing. But yes, I think I agree that yes, standing. I'm not sure if just states or individual plaintiffs as well, but that someone has standing and that yes the provision, as it's currently constituted is unconstitutional but that everything else remains intact.

Leah Litman:

I'm also very glad that the Chief gave Justice Breyer his rightful argument time, because if he had not, this entire episode would have been a justice for Stephen Breyer podcast. Also extremely happy that the House had Don Verrilli arguing the case. I think he was really on his A game. He had some amazing one-liners saying this is not a game, with reference to the challengers' theory of the case. He also had some extremely efficient high word to content ratio answers. Just a super effective efficient answers to friendly questions and also pulling out, what I guess I'd describe as big Don energy in response to a question from Justice Gorsuch about the merits. Where he basically said, look, it would be helpful for us to explain how we see this, i.e, how we understand Congress having the power to do this in a way that just bought him a lot of time and allowed him to convey, I think, a very persuasive understanding about why Congress has the power to do this. Which is maybe they couldn't enact this as written but as a minimum, it's a proper exercise that they're necessary and proper powers in conjunction with their taxing power to alter the amount of a tax while preserving the underlying tax framework in place while reducing the amount of the tax penalty to zero dollars.

Kate Shaw:

Right. And providing examples that presumably everybody would be comfortable with of a tax that is phased in over a period of years or phased out over a period of years and says this is essentially analogous to one of those plainly constitutional exercises of Congress' power.

Kate Shaw:

I thought he was terrific. I thought Mongan was great too, despite unfortunately having to spend most of his time talking about standing. Wall, I thought was weirdly muted. We've all now heard Wall do a lot of arguments. He's obviously a very smart lawyer. But it was muted, not like in the Zoom meeting sense, he was muted like quiet kind of and a little bit flat and I just got this weird feeling that he was really trying hard to avoid producing any sound bites for stories that reminded the public that in this surging pandemic moment, the Trump administration is still fighting hard in the Supreme Court to end the Affordable Care Act and have 20 million plus people lose their health insurance and many tens of millions more lose the other benefits that the ACA creates, like all of it. I think he succeeded in not creating any sound bites, honestly. So if that was the goal, well done.

Leah Litman:

Another highlight for me was an off-the-cuff remark by the Chief Justice, who was questioning former Solicitor General Verrilli about the fact that when the case first came to the Court, everyone said that the minimum coverage requirement was essential to the Act, but now people are saying, actually it's not and you can uphold the rest of the Affordable Care Act without it. The Chief Justice said we spent all of this time talking about broccoli for nothing, which, I loved, because what happened in the Affordable Care Act case it devolved into this parade of horribles about whether if Congress has the power to compel people to purchase health insurance, it also has the power to compel them to purchase other goods. The hypothetical that kept getting trotted out was could Congress force you to purchase broccoli?

Leah Litman:

The obsession with that prospect, I think really drove some of the results in the case and led the Justices, in my view, wrongly, to overlook the risks on the other side, namely if they don't allow Congress the powers to enact a mandate as part of a comprehensive scheme of regulation. Under that theory, they also can't enact a national vaccine requirement. The lawyer in NFIB said Congress couldn't do that under their own theory. I think, again, now that we're staring down this pandemic, we should be able to more clearly appreciate the stakes of both sides of an argument and the risks of too narrowly or miserly interpreting the scope of Congress' powers.

Kate Shaw:

I think that's a great point. Two other thoughts. One, I thought that Don was great in responding to this ... Well, we thought that this requirement with the penalty was so important back when we first encountered this statute. Verrilli just said, very, I thought, kind of forthrightly like Congress ... We all actually thought so. He certainly was arguing it when he was the Solicitor General in the Obama administration because everyone at the time really did believe that these three core features of the Affordable Care Act, one of which was the mandate were all essential to its functioning. But, you know what Congress can learn from experience and it turns out that the ACA in its original formulation had both carrots and sticks and this penalty was a stick, but it turns out, the carrots work. People do want

health insurance. So, they buy it without the stick. And that's something that Congress is entitled to learn from and respond to. And so I thought that was really an important response.

Kate Shaw:

Second, I'm not sure if the Chief Justice's broccoli question was like a self-own dig at Scalia. Don was not the one asking the Court to talk about broccoli. I think it was a waste of time then and a waste of time now. I couldn't tell exactly who the butt of the joke was, quite honestly.

Leah Litman:

Eat it guys. Eat it Sam.

Kate Shaw:

Exactly. We should probably leave that one there.

Leah Litman:

So we just wanted to briefly note other cases that the Court heard this past week. One is Brownback v. King, which we briefly made fun of at the very beginning and it concerns a statute that's made its way into the news recently, the Federal Tort Claims Act and the case involves this question: what are your options if a Federal Court concludes that in an FTCA a private person would not be liable to a plaintiff under state tort law for the injuries alleged and specifically, does the FTCA then bar a subsequent claim under Bivens for the same injuries against the same government employees whose acts gave rise to the FTCA claim?

Leah Litman:

Bivens, of course, would be a federal constitutional claim, rather than a state tort law claim and against a different defendant, the Federal Official versus the Federal Government. The case concerns a proper interpretation of a provision of the FTCA called the judgment bar, which provides that the judgment in an action under the FTCA shall constitute a complete bar to any action by the claimant.

Leah Litman:

Here the plaintiff/respondent is arguing that the judgment bar does not apply because it's not a separate action. Instead, what happened in this case is that the District Court dismissed the FTCA claim and then the plaintiff said well, I won't appeal that judgment, but I'd like to proceed also on the Bivens claim, I also brought. Because it's not a separate action, the FTCA judgment bar does not bar other claims, it just bars other actions.

Leah Litman:

The theory in this case is just really weird, because it basically amounts to if the government wins on one claim in a lawsuit, they win on all the others, even though the substantive law of all these claims might be different, federal constitutional law versus state tort law.

Kate Shaw:

This is probably an important statute from the perspective of holding government actors accountable. The FTCA is actually the vehicle that Trump has attempted to use in the lawsuit brought by author E. Jean Carroll, who had accused Trump of sexually assaulting her and then lying about it. The Justice

Department has, using FTCA, attempted, well removed the case to Federal Court and attempted to substitute the United States as a defendant in that case. So far, actually, unsuccessfully. The removal was successful, but not the attempt to substitute the United States for the President.

Kate Shaw:

How the interplay between an FTCA claim and potential other kinds of claims, including Bivens claims seems important. This case is an important one, but also has broader implications for federal official accountability.

Leah Litman:

In this particular case, I was really feeling the loss of Justice Ginsburg. She's obviously a former Civil Procedure professor and I think she would've had some good observations about the government's position and just artful ways of framing the argument. So that's Brownback v. King.

Leah Litman:

The second case we wanted to briefly note is Niz-Chavez versus Barr, which is about how the government serves people with notice for removal and what triggers the so-called Stop Time Rule. That rule is shorthand for the moment that ends the period that counts toward an individual's period of continuous presence in the United States.

Leah Litman:

How long the period is, the period of continuous presence, matters to things like an individual's eligibility for various forms of immigration relief. The question here is when a Notice to Appear at removal proceedings triggers a Stop Time Rule, specifically whether that Notice to Appear has to contain the seven pieces of information that are laid out by statute or whether a Notice to Appear can trigger the Stop Time Rule if it does not contain that information.

Leah Litman:

Previously in Pereira, the Court held that a Notice to Appear lacking date and time could not trigger the Stop Time Rule. Here, however, Mr. Niz-Chavez received a Notice to Appear that lacked date and time information but subsequently received a hearing notice with that information. So the question is, is a Stop Time Rule triggered if the required information is sent via multiple documents.

Kate Shaw:

Thoughts on how to read this argument. What did you think?

Leah Litman:

I really wasn't sure. I don't think the Chief was sympathetic to Niz-Chavez. Justice Alito and Justice Barrett were not sympathetic either and they embraced the troll-lito aspect of Justice Alito's persona, wanting to know isn't your position going to be bad for immigrants. Shout out to Justice Breyer who is this argument, gave David Zimmer of Goodwin Procter, who was representing Mr. Niz-Chavez, additional time to answer Justice Thomas' question and that was how he used his entire questioning period.

Kate Shaw:

Speaking of trolling, we should maybe flag, it sort of trolling not from Alito for once, but possibly from Justice Gorsuch, who seemed to be, I don't think, actually rethinking his skepticism of Chevron, but actually probably just purely trolling, but he asked David Zimmer, I'm curious what your response to the government's argument that it should just win under Chevron step two. No harm, no foul. Good enough for government work. I don't think he thinks that, and it's also the case that that attitude is out-of-step and actually kind of offensive, I would say, in the context of immigration law, like good enough for government work.

Kate Shaw:

Even in the ironic register that he seemed to be posing the question in. But, Zimmer sort of focused on these procedural defects in that particular agency interpretation and how that was meant, or why that was meant the interpretation was not entitled to Chevron deference. When Gorsuch questioned the government, it was pretty clear that he thought that the government invoking Chevron was basically insane. So to the extent that we thought that he had been body snatched and for a second was interested in resolving this on Chevron grounds, he cleared it up with the government. Kagan, Sotomayor, Breyer probably seemed to be leaning toward Mr. Niz-Chavez, but and who knows. I guess maybe Gorsuch. But that's probably it. Does that seem right?

Leah Litman:

Yeah, I think so.

Kate Shaw:

Okay so as we promised over the summer, we are still planning to do an episode about court reform broadly, although, with the Senate looking likely to be in GOP control next year. Although, never say never and certainly never underestimate Stacey Abrams. Likely that will end up being more of a theory episode than an as applied episode. But, Marin, we know you have a forthcoming piece in the Northwestern University Law Review, which is publishing lots of great stuff about courts. Shout out to my alma mater, both law school and law review.

Kate Shaw:

You're focusing on structural reform of the lower federal courts and also on things that could be done without having Democratic control of the Senate. Would you mind giving us a preview, as a treat for our listeners of that article and those ideas.

Marin Levy:

I would be delighted. Just as you said, I think there's a question mark right now hanging over most major court reform. At the moment, certainly, Supreme Court reform, but I don't think that that means all court reform is off the table. My article focuses on the Federal Courts of Appeals. That's my first true love, I should say.

Marin Levy:

The starting point really is that we have wrestled, since those courts were first created in 1891, with what their optimal size should be. Over the first hundred years, we had this consistent pattern. The caseload would go up, and then Congress would step in and create additional judgeships. This is how we moved from 19 judges originally to 179 judges. Those are the authorized judgeships we have today.

Marin Levy:

Again, it was this routine pattern up until 1990 and that is the last time that Congress authorized any new judgeships, but since then the caseload really has continued to increase. If we look over the last 30 years, it's been up, it's been down, but overall, it has been up 15% from where it was in 1990. I think there's good reason to argue, we should be adding at least some more judges to the Courts of Appeals. This is where things get tricky. I would say, this is the moment to queue the dramatic music in the background.

Marin Levy:

The concern really is we've got significant obstacles to expanding the Courts of Appeals. I would say some are logistical and some are political. So, real quick, on the logistics side, there are long-standing concerns about individual circuits becoming too large to function well. A specific argument you see here a lot is that once courts become too big, they're not going to be able to hear cases en banc with the complement of active judges. We know the Ninth Circuit, for example, has that limited en banc and folks generally think that that's sub-optimal.

Marin Levy:

Another concern that we have is really, kind of switching gears now, thinking about the politics side. Certainly if we look around, take the temperature of the room, there's a concern that Congress is not going to be inclined to add judgeships or if we are in a different world politically, the concern would be that Congress might be inclined to do so, but then it's going to be cast as a purely political move.

Marin Levy:

At this point, you may be thinking to yourself, we have just painted ourselves into a corner because it would be great to expand the Courts of Appeals, at least a little bit and yet, we've just identified a number of hurdles in order to do so. This is the kind of MacGyver move of the article, if you will. Basically, we need to start paying more attention to senior judges. I'm sure all of these savvy listeners know, when we talk about senior judges, this is really ... with Federal Judges, once you reach retirement age, you can assume senior status, which is really great. It means you can continue to hear cases, but because you're no longer an active judge, and this is really the critical part, by going senior, you've just created a vacancy that then can be filled.

Marin Levy:

What I argue in the piece is that a kind of partial way out of this corner we seem to be painted into is we can focus on creating more incentives for folks to take senior status and the flip side of that is we can actually reduce some of the hurdles to taking senior status that exist right now and then we could create a whole bunch of vacancies, which would be really helpful at the moment.

Marin Levy:

You might be thinking, do we really have enough judges who could go down this road and the answer is in fact, yes. At this current moment, we have more than 60 judges on the Federal Courts of Appeal who are eligible to take senior status but who just have not done so. We're talking about a third of the Federal Bench on the Court of Appeals. That's quite a lot.

Marin Levy:

Through research that I have been conducting with Judge Jon Newman of the Second Circuit, for a book project we're working on, we've discovered a whole host of ways in which, some senior judges are not actually treated all that well in some circuits. They lose their chambers right away upon becoming senior. At big court events, they are basically demoted. They have to sit to the side of all of their now, we would think of their junior colleagues, but now they've kind of become senior colleagues. And all these other things that we can do. It's all by way of saying, we actually have some leverage here and we can think about some changes to get some more judge power to create some more vacancies.

Marin Levy:

More broadly, I think the lesson here is, we should not think about abandoning the project of court reform just yet.

Kate Shaw:

That is such a great project. Can I ask whether opinion assigning power is one of the things you thought about tweaking? I know that a lot of judges, I have heard judges who are technically eligible for senior status, talk about why they would never do it because the idea of not getting the choice opinions, which you've gotten very accustomed to getting if you're at the apex of your appellate judge career and all of a sudden you're demoted and the most senior active judge on the panel gets to make the assignment. Is that something that you could imagine tweaking?

Marin Levy:

Absolutely. And some circuits actually have a great, kind of hack for this, if you will. In the Second Circuit, there's a norm whereby senior judges are actually given their first choice of opinion assignment coming out of a sitting. It's really lovely or they can say explicitly, I'd rather not take that one over there. That's seen as part of a packaged deal. There are all these things that were going to give you to incentivize taking senior status. So absolutely, I think that's something a couple circuits do and I would encourage the ones that don't to consider it.

Kate Shaw:

All right, so, the last thing we want to talk about is to return to something that we started off talking about, which is, is Big Law helping Trump undermine democracy? That's the big question. There are a number of lawsuits in addition to the one Pennsylvania lawsuit that we talked about that have been filed related to the election. They range, in the claims they raise, some argue intimidation at the polls, malfunctioning of voting machines, non-compliance with state laws. They range in the relief they seek. Some sought and continue to seek to tweak the processes by which individuals can observe what continues to be done on a counting and re-counting front. Some are far more aggressive in the relief they seek, like asking to block certification of the votes for an entire state.

Kate Shaw:

The common theme though, I think for these suits, big or small, is that they actually are deeply de-stabilizing to our democracy and they seem designed to cast aspersions on the legitimacy and the integrity of the election. It's hard to see what other goals some of them might have because their claims are so outlandish and their basis in law, and in fact, are so unsupported that they just have no chance of succeeding.

Leah Litman:

Yeah, and in part for that reason but also because the lawsuits are just deeply undemocratic in that they are trying to throw out the results of an election or disenfranchise certain citizens and because the claims are so weak, people have raised questions and concerns about lawyers' involvement in the suits.

Leah Litman:

As we said last time when we discussed the suits, I think it is important to repeat, these lawsuits are not going to change the result of the election. The margins of victory are not going to change from recounts or from the cases seeking to ensure some small number of ballots aren't counted. The allegations of fraud are non-existent. They boil down to a Republican poll watcher finding it suspicious that members of the military would vote for Biden. That is actually the evidence they used in a Michigan case. The allegations of voter fraud in Nevada turned out to be members of the military and their families, who legally voted after being transferred to serve elsewhere. Happy belated Veteran's Day.

Leah Litman:

The legal claims are insane. The Pennsylvania lawsuit says states can't offer people different ways of voting, in-person versus mailing. I'm sorry, that would invalidate literally every single state's election. And the lawyering has, at times, been appalling. The Trump campaign filed a lawsuit challenging the counting of votes in Wayne County, Detroit in the U.S. Court of Federal Claims in D.C., which has no jurisdiction in the case.

Marin Levy:

I happen to love this moment. This is like an Article I court. This is so inappropriate. The kind of excuse that the Trump lawyers gave after the fact was like, oh yeah, Pacer made a mistake. We don't blame Pacer. That's like blaming someone's grandma. We do not do that here.

Kate Shaw:

But also like, I don't litigate cases in Federal Court, so I don't know, but people who do, seem emphatic in their certainty that that doesn't happen. Cases don't get filed in the wrong court like this. It takes some affirmative steps to do it. So, that didn't happen and yet that was the public story. I love that the Court of Federal Claims Judge who got this filing was Elaine Kaplan who is an unbelievably brilliant lawyer who was the General Counsel of OPM and the Obama administration and I just love to imagine what she made of these ... Then they attempted to, after she herself transferred it, they attempted to withdraw, but in a motion, that is actually not a real motion, that is properly filed before her. She had to respond to that one too.

Leah Litman:

Yeah so on the one hand, lawsuits dumb, unsubstantiated, not going to prevail. On the other hand, however, they are really destabilizing and corrosive given that they are feeding into this narrative that is underway to call into question the legitimacy of President-Elect Joe Biden's victory.

Leah Litman:

That has taken several forms, from Secretary of State Mike Pompeo saying there will be a smooth transition to a second Trump Administration to Attorney General Barr sending out a memo authorizing immediate investigations into election fraud, into the Texas Lieutenant Governor offering a million dollar reward for coming forward with proof of voter fraud.

Kate Shaw:

We should say that we don't know this for a fact, but the GSA Administrator, Emily Murphy, has so far refused to make this legally required ascertainment that Joe Biden is the apparent winner of the election. That ascertainment has historically been what has triggered the formal recognition by the Federal Government of Biden as the President-Elect and the people around him as the transition team, which grants them access to federal agencies and almost 10 million dollars in transition funding and access to a compiled threat assessment and at least, by custom and practice, access to the President's daily intelligence briefing and just this suite of resources that a transition is entitled to by law. The Administrator hasn't told us why she is continuing to delay making this ascertainment. But, I presume it is because these lawsuits are on-going, so there is a material impact that these ... In addition to the kind of broad corrosive effects that they are having on faith in our democracy, they are materially obstructing the ability of the Biden team to get up to speed on the threats facing the country and to begin to take over pandemic response and other critical functions of government.

Leah Litman:

And more generally, what they are doing, is facilitating this narrative that is going to repeat some of the disfunction we saw during the Obama administration, which is Republicans' refusal to negotiate and work in good faith with the Obama administration. If you are fueling this narrative that the entire Biden victory and Presidency is illegitimate, you are creating a constituency and fueling the constituency who will insist that you, again, don't engage in good governance with them.

Marin Levy:

I think that's right. It's worth pointing out, we have some folks trying to argue it a little bit from the other side. Jed Shugerman had a nice op-ed in which he said, well maybe there's actually a way in which all these court cases will in fact help legitimize a Biden win. We'll actually have courts hearing these claims and saying we have no evidence here and so on and that this really will help solidify what's going on, the fact that Biden is in fact, the President-Elect.

Marin Levy:

I love this optimistic story. I hate to be the cynical one, but I just don't think I fully buy it. It supposes we have enough folks who currently think this is all illegitimate, who are really paying attention to those court cases and then who really would believe that those court cases themselves are not somehow rigged. That the judges are not somehow biased on their own. I sadly just don't think that that's true. I really don't think that we're getting very much out of these court cases for the folks who are skeptical of this in the first place and we're just doing a whole lot of harm in the meantime.

Kate Shaw:

And we should say the harm is being done by these lawsuits that are filed by actual living, breathing lawyers. I think there is a conversation happening among lawyers right now about the ethics of participating in these lawsuits and also the ethics of responding vocally and even kind of naming and shaming lawyers participating in bringing these suits.

Kate Shaw:

I would say, I'm of two minds. I do think that in sort of the age of social media, there is the possibility, when you take a private citizen and inject their identity into the public's fear of inviting harassment.

That's a real thing, that does happen. On the other hand, we all make choices about where to work and the kinds of matters that we work on. And I do think that lawyers need to understand that they have ethical obligations to decline to participate in litigation whose only goal seems to be to erode trust in democracy. I actually think whether that message is communicated privately or publicly, the message is what's most important. Where I actually think that private pressure is probably the route that I would choose, but I think both social and profession sanction, and maybe public sanction as well. I think, again, that the method of response, I think that we can quibble over, but the fact that it's an important message to send to me seems kind of beyond debate or dispute.

Kate Shaw:

I just want to plug here, if I can, two wonderful pieces by Leah, one is her UCI Commencement speech a couple of years ago that is available on the Take Care Blog, that just makes the point that sometimes doing the right thing will cost you. So, maybe declining to participate in these lawsuits or objecting vocally to your bosses will be professionally costly, but you know what, you need to do it anyway.

Kate Shaw:

And then she's got a terrific piece in the Drake Law Review, is that right Leah?

Leah Litman:

Yeah.

Kate Shaw:

Lawyers' Democratic Dysfunction about elite lawyers' willingness to participate in undermining democracy and other elite lawyers' refusal to condemn their participation in those projects. I think, for those of us who educate, and help shape the next generation of lawyers, these are really important questions and topics. So I think that again, I think it's actually reasonable to have debates about methods, but I think that we all have a responsibility to participate in the debate.

Leah Litman:

Yeah, no. Absolutely. And just because I did write about this, I want to clarify something that the Lincoln Project has started doing that I think is an inappropriate method along the lines of what you were suggesting. They have called on people to create LinkedIn profiles and just start messaging any lawyer who is at Jones Day, basically harassing them, including lawyers who are not even part of this suit. I think that is too far and wrong. In certain circumstances, privately telling someone you shouldn't be doing this is fine, but at a minimum, if you do that, you cannot simultaneously be publicly embracing that person as a wonderful lawyer and role model because then you are sending absolutely the wrong public message, even if you are trying to privately pressure them or influence them behind the scenes.

Leah Litman:

I do think lawyers need to be thinking about, well, where is the line, when is it over the line and I'm not going to go to bat for someone who has crossed the line. That is just how networks police their own norms. As we said, this is not going to change the results of the election. I'm still left feeling somewhat queasy given that we're supposed to feel okay about this because the President, his administration, his political party and all the other enablers will not be able to undo the results of the election given the margin of the Electoral College victory and popular vote, even though they're trying to overturn the

results of the election and they would if they could. I just find it difficult to come away from that feeling great. Yeah.

Kate Shaw:

Let's end on a happy note, how about that.

Leah Litman:

Yes.

Marin Levy:

Yes.

Kate Shaw:

So the terrific journalist and notorious RGB co-author Irin Carmon, posted a gem on Twitter earlier this week that we wanted to bring to everyone's attention. This is a document starring both RGB and now White House Chief of Staff designee Ron Klain. Leah, do you want to describe the memo?

Leah Litman:

It's worth explaining what the memo is before we describe its contents. The point of this memo was, Klain was working in the White House and it was his job to say, well, what were people going to say negatively about the White House's nominees for Supreme Court Justices. He wrote this memo outlining how people would criticize Justice Ginsburg. The point of this memo was not to be an overall assessment of her candidacy, it was instead to highlight their weaknesses.

Marin Levy:

I think we have to share some gems from this memo. Here are just a few choice quotes speaking about RBG. "She relishes defending the ACLU as an institution and its importance in American society." Like, look at the horror.

Marin Levy:

"She has hostility to the process of confirmation, saying Bork was punished for being too candid, that it had victimized Lani Guinier and Anita Hill."

Marin Levy:

And this I find so sweet. "Her failure to make eye contact, her halting speech-", which we all know so well. That's like, are you done speaking or do we have another clause to follow. "...her halting speech, her laconic nature." Is not helpful.

Kate Shaw:

I also loved this extremely astute assessment, which is, "Judge Ginsburg views the White House's interest and her interest as being at odds with each other." The White House wants to minimize controversy and get her confirmed, she views her interest as "being herself", "preserving her dignity", "promoting her independence".

Marin Levy:

Oh, RGB.

Kate Shaw:

It's like she's so beautifully captured there. She was not interested in trimming her sails and being any different before the committee than she was. She had so much integrity. And it's just like this little post script to the memo that is so revealing. I also I think reflects ... It sounds as though Ron is a little sheepish about this memo because I think it could be misunderstood as his own criticisms of her as a nominee, but I think it's clear in context, that's not what it is. I also think they both just come off beautifully. It's an amazing archival document.

Leah Litman:

Yes. So that's probably all we have time for today. Thank you everyone for listening. Thank you to our wonderful hosts at Duke Law, particularly Marin.

Marin Levy:

Oh, it was so much fun.

Leah Litman:

As well as the Duke administrators who made this possible, like Isabelle Fox and Marlen Iraheta.Thank you so much for organizing this. Thanks to our producer, Melody Rowell. Melissa, we missed you this week and last, but listeners, fear not, she will be back. And thanks to Eddie Cooper for making our music. And thanks, as always to all of you for listening.