

Melissa Murray:

Well, I mean, we're changing our name from strict scrutiny to Amanda, Gorman, stan podcast, yeah?

Kate Shaw:

My God there already nine as the problem.

Speaker 3:

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

Kate Shaw:

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

Leah Litman:

I'm Leah Litman.

Melissa Murray:

And I'm Melissa Murray.

Kate Shaw:

Today. We're going to start as always with some breaking news, and then we're going to do some recaps of the January sitting and end with some court culture, including inauguration buzz speculation about appointments and a few other tidbits. So Melissa, you want to start us off.

Melissa Murray:

So one of the big pieces of breaking news from last week is that the impeachment articles were transmitted from the house of representatives to the Senate on Monday, January 25th, ending speculation about whether Speaker Pelosi would send those articles over and in what timeline. So Schumer and McConnell at this moment are working through the details on the timing of a trial, but also they are organizing a resolution that will govern power sharing between the two parties in this 50, 50 evenly split Senate.

Leah Litman:

So this isn't exactly news anymore, but we did want to cover it. And that's the final executions that the Trump administration carried out. The Supreme court vacated a stay of execution entered for Dustin Higgs and granted a petition for certiorari before judgment reversing a district court decision that had stayed the execution. Just to underscore how strange this is, this is not the court merely granting a stay and putting on pause, a lower court opinion. They granted a petition for cert before judgment reversing a district court decision, but didn't issue an opinion doing so, even though that opinion allowed the federal government to execute a prisoner with coronavirus in the waning days of an administration before Joe Biden was about to take office and re suspend the federal death penalty. It was kind of gross to me.

Kate Shaw:

Yeah. I found it really shocking. It is so inconsistent with our basic conceptions of reasoned decision-making right? If an administrative agency made a decision this consequential, it would have to explain itself, right? The idea that a court, that the United States Supreme Court no less, can basically decide this federal prisoner must die tonight. That's what it decided. We're going to reverse a reasoned to lower court opinion holding otherwise but we're not going to tell you why. Right? I just think this is shocking and actually should be quite scandalous for people who follow the Supreme court and care about its institutional integrity. Under the court's rules cert before judgment is typically warranted if the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination.

Kate Shaw:

So what is the plausible reason justifying deviating and requiring immediate determination here? It's the change in administrations, right? Which was looming. And I think pretty clearly the Justices hostility to death penalty litigation.

Leah Litman:

Yeah, no, I think one of those two has to be the reasons, but I don't think either of them are legitimate reasons warranting this kind of expedited consideration. Because surely a change in administration isn't a legitimate consideration for the courts to alter its normal disposition of the case. Nor do I think that the Justice is general hostility or skepticism of death penalty litigation is sufficient to resolve this particular case. You can't use any particular case as an occasion to kind of stick one to the death penalty bar, particularly here, given that there was a very good reason why these claims were late arising. The prisoner contracted coronavirus. So he couldn't have brought these claims before.

Melissa Murray:

Justice Kagan noted that she would deny the application and petition for certiorari before judgment. But she didn't actually write separately in this case, Justice Breyer dissented and he highlighted the many questions that the federal government's resumption of executions would raise and questions that can't be answered within the span of a month or two. He said he would have stuck to the normal process and would not have decided this issue before the court of appeals had an opportunity to do so.

Melissa Murray:

But the real fire in this case came from none other than Justice Sonia Sotomayor, who also dissented and did so forcefully. So if you recall, the last time we talked about her dissenting, we noted that she said she was for now respectfully dissenting. Well, it seems for now is over and it didn't last that long. So in her dissent, she spoke to her colleagues, I think to the people, and she said, "This is not Justice. After waiting almost two decades to resume federal executions, the government should have proceeded with some measure of restraint to ensure it did so lawfully. When it did not this court should have. It has not. Because the court continues this pattern today I dissent." No respectfully, no for now. Sotomayor out.

Leah Litman:

And in her opening passage to the descent, she listed all of the persons that the Trump administration had executed since resuming the death penalty in July, I thought it was an exceptionally powerful and

well done descend. And I am glad that we are past the for now, because I think this case of any really warranted it.

Melissa Murray:

So can I, you guys, what do you make of her going it alone? As I guess the conscience of the court in some way, why didn't the other two join her on this? This doesn't seem super far out.

Leah Litman:

I certainly don't think it seems super far out. The note of caution she was sounding was in large part in institutional one. That the court was departing from the ordinary norms of recent decision-making that Kate noted in addition to leapfrogging the court of appeals. So I'm a little, I guess, surprised that Justice Breyer and Justice Kagan, who I think self identify and are publicly identified as more of the institutionalist wing of the liberal Justices didn't join the dissent. But I think that this harkens back to something we kind of wondered about once Justice Ginsburg passed away. Which is what were Justice Breyer and Justice Kagan going to do. And I don't know that either of them are really ready to live in this new world with Justice Sotomayor.

Kate Shaw:

I guess I don't know really where Kagan is on the death penalty broadly in a way that I feel pretty comfortable. Sotomayor and Breyer, maybe for different sets of reasons I think would jettison the entire enterprise pretty clearly. And I don't know if that's true about Kagan, not that Sotomayor was saying that here, but I think that is generally true. So it just may be that she wants to stake out a different position and use a different voice when criticizing the courts procedures in death penalty cases.

Melissa Murray:

Maybe you read this as in terms of someone who I think tilts more toward conciliation, this felt like it was sort of breaking some norms of civility within the caucus and within the court?

Leah Litman:

I mean, that could be. And just because we are in the kind of beginning stage of the Biden administration, and we'll be talking about some of the appointments that he already has on the courts at the end of the episode. But this again makes me wonder about the kind of people that the administration should be considering. Do you want to be appointing more people who have kind of held their tongue and held their fire, knowing that that might just be kind of temperamentally where they are and where they will be, even in the face of decisions that undermine again, established norms of decision-making recent decision making institutional procedure and institutional legitimacy?

Leah Litman:

Or do you want someone Justice Sotomayor who will say, I think this is really inappropriate on several levels. And I get that there are different pressures and different reasons to pick one versus another. But I do think that in this new world of judicial nominations, perhaps the Biden administration will be more willing to go with the people who are okay voicing their positions in the same way that the Trump administration was willing to nominate Republican judges who were willing to do the same.

Kate Shaw:

All right. Should we head into the January recaps on that incredibly optimistic note?

Leah Litman:

Sure. So one of the cases we wanted to recap, which we previewed with is Pham versus Guzman Chavez. This is the case about what specific provisions of the Immigration and Nationality Act authorized the detention of persons who are subject to re-instated orders of removal, but also have pending a withholding of removal claim. At the argument the Chief Justice actually seized on the statistic we mentioned in our preview, namely that in many cases, granting withholding of removal, which prevents the federal government from removing an individual to a particular country actually means they won't be removed at all.

Leah Litman:

In particular, if a non-citizen is in withholding only proceedings, and there's no country other than the one as to which he claimed statutory withholding or convention against torture relief, the odds that you would be able to remove that person are pretty low. Justice Breyer brought up the same and even though we noted the concern that this was really a practical on the ground consideration, Justice Kagan synthesized his practicality with the formal eyes of the law. In her mind this meant that under the law the government can't put someone on a plane who's currently in withholding proceedings, which seems to make the case fall outside of 1231, which imagines that we're already in the time period for the government to carry out the removal period.

Melissa Murray:

Justice Thomas brought up a jurisdictional question that came up in Jennings vs Rodriguez, where he and Justice Gorsuch argued that federal courts didn't actually have jurisdiction over the case, which is a habeas petition, because the claim had to be brought up in a petition for review. And the lawyer for the government arguing the case indicated a response seeing that the government thinks that this major immigration habeas case might actually have been improperly decided and wrongly decided. So the lawyer for the government, Mr. [inaudible 00:10:38], says that this is how the court read these provisions and Zadvydas and that's the precedent we stuck with here. So this might be some stuff that we probably are not going to get out of the solicitor General's office in the Biden administration, but again, in the waning days of the Trump administration, this was in full flower once.

Leah Litman:

Yeah. Because, Zadvydas allowed petitioners spring habeas claims when their claim wasn't actually about whether they could be removed at all i.e. whether they didn't have a qualifying conviction, but went to their detention because it was prolonged or something. And it's a really foundational important case in immigration habeas proceeding so it was just odd to have the federal government lawyer kind of taking pot shots at it in the argument. And I think Justice Kagan noted that as well, because in one of her questions to the petitioner's lawyer, she said, "I guess I'm a bit confused as to what the government is saying about Zadvydas."

Leah Litman:

Paul Hughes was arguing for Guzman Chavez and I think did a really great job. He was super well versed in immigration specifics. So for example, in response to one question, he noted that the category of persons ordered removed in the statute actually includes a bunch of people who will never be removed and aren't actually subject to 1231. So he was just able to synthesize statutory provision saying that

reinstated orders of removal aren't subject challenge really well, but still I left the argument with no real clear sense about where the Justices stood.

Melissa Murray:

So what did you think of Justice Barrett here, Leah? I mean, she was really focused on the kind of intricacies of the statutory scheme and how they interacted. It wasn't clear from the way she was talking about the two relevant provisions that she had a particular position and she was really pressing both sides, I thought, equally about which view would be the one to prevail. And it really depended on sort of again, on the statutes itself.

Leah Litman:

Yeah, it might just be the telephonic format where you can't see when one Justice interrupts another or when one Justice is interjecting that I couldn't really get a sense about where she was thinking or some of the other Justices as well. But we shall see.

Melissa Murray:

Another case that we wanted to highlight from oral argument is one that we previewed earlier and that's *Uzuegbunam versus Preczewski*. This is the case about whether a claim for nominal damages means that a case is not moot even after the government changes its policies. So again, we talked about this before, this is a case that presents in a really odd posture because the petitioner is a Christian evangelical who was disciplined for passing out religious material on the campus of a public university in Georgia. But the underlying issue is one that really impacts civil rights litigation.

Melissa Murray:

So again, this is a case that really brought together a coalition of very strange bedfellows that we don't ordinarily see together. But we should know that there were a number of Justices who seemed pretty skeptical of the plaintiff's rule, that a case isn't moot if a claim for nominal damages remains after the defendant has changed the policy. So the Chief Justice for example, equated nominal damages to wanting a federal court to say, you're right, and that's not something that federal courts do. And Justice Alito put it this way, "A statement that there was a violation sounds an advisory opinion." So the idea here is that leaving these sort of nominal damages claims in there is basically a signal to make a decision on a case that otherwise would be determined, moot.

Leah Litman:

So Justice Kavanaugh, suggested that nominal damages are really all about attorney's fees. We suggested that was possible in our preview. Some of the Justices hostility to litigation was based in part on their skepticism of plaintiff's lawyers. Justice Thomas wondered about whether the fact that you're asking for a small amount of damages means that your injury isn't real or substantial. I wondered if this collapsed the standard for establishing future injury with a standard for establishing past injury. Actual or past injuries can be small and slight, they don't have to be substantial. And I think that this confusion is partially because there are two plaintiffs in the case and only one of the plaintiffs was actually told he had to leave whereas the other plaintiff heard about that wanted to pamphlet subsequently, but didn't.

Leah Litman:

And the plaintiff's lawyer from ADF, Kristen Waggoner, started responding to questions by referencing past chilling effects and future intentions. So she said, "for a 12 B motion, which this case is on the general allegations are sufficient," yada yada, yada. " But Joseph had a specific intent here. And that seemed to be about future injury."

Kate Shaw:

Hashim Moopan, arguing as advocates for the solicitor general also seem to do this in response to a question from Justice Thomas about standing to pursue nominal damages. He said, "I think it would turn on whether there was a credible threat of enforcement." The skeptical Justices also wanted to know, well then when, if ever could cases be moved under the plaintiff's theory nominal damages aren't available against the federal government, an offer of judgment might allow entry of judgment and make a nominal damages claim disappear.

Leah Litman:

So the defendants seemed to argue that any damages below \$20 would mean that the plaintiff's injury wasn't an injury at all, and it wasn't compensable. But I think that idea is a little bit strange. The idea that damages under those circumstances wouldn't be tied to an actual provable injury would mess up things like statutory damages where a statute designates a particular amount for certain conduct or punitive damages which also aren't necessarily tied to actual damages. And so the theory that the defendant was arguing, I think just has the potential to mess up a fair amount of law.

Melissa Murray:

But Leah one Justice came in with some big damages energy into all of this.

Leah Litman:

And that would be our boy, Steve. Our fellow Cassandra, who understands the threat to mootness and federal courts theory that this case poses. He actually refused to let the Chief Justice cut him off.

Speaker 5:

So if the plaintiff says he's entitled to a dollar and the defendant says, "Great, I'm willing to pay a dollar." That's the end of the case.

Speaker 6:

[crosstalk 00:16:46] that we really have left, or we have two diehards and they really won't give in and they're fighting over a dollar.

Speaker 5:

That's exactly right. Just like you have two neighbors who are inconstant on fighting over a [inaudible 00:16:59] over a dollar.

Speaker 7:

Justice Alito.

Leah Litman:

Is this revenge for the wrongful interruption, several arguments ago?

Melissa Murray:

I just love the image of Justice, Breyer wearing a cashmere lingua franca sweater that has embroidered across the front. I'm speaking. And he's just like, no, I'm not done yet. You'll wait. You'll wait. See, no one is shushing me today. We're talking about damages and you're going to listen.

Leah Litman:

We said on our last episode when the Chief cut Justice Breyer off, no one puts Steve Breyer in a corner. And today or I guess in this argument Justice Breyer made that clear. Another possible theory, maybe Justice Breyer is on the verge of retiring and so he feels the need to get in all of his questions now. Again, I'm just floating possibilities.

Melissa Murray:

I just see maybe Justice Kagan coming up and Steven Breyer running into her arms and being lifted up like in dirty dancing. It's like that moment. And I'm here for it. I like it. I like where you're headed with this.

Leah Litman:

Perhaps one of our astute or Intrepid listeners could Photoshop this so we can all see that image and not just in our minds.

Melissa Murray:

Dirty damages. I love it.

Leah Litman:

There we go. So this argument was wonderful for all sorts of reasons. It included the moment I have been dying to talk about on this podcast forever. And that is of course when Taylor Swift came up at oral argument by Justice Kagan in a case about federal courts and remedies. Literally all of my interests.

Melissa Murray:

These are all of your things. These all of your thing.

Leah Litman:

All of my favorite things, all of my favorite things. So.

Melissa Murray:

Do you think she knows these are all of your favorite things and she's just dropping these Easter eggs for you?

Leah Litman:

I'm willing to indulge many different theories, but I do want to put out there in the universe, Justice Kagan, come on the podcast and we'll talk Taylor Swift or Taylor Swift come on the podcast and we'll talk Justice Kagan.

Melissa Murray:

We have so many invitations out right now. We have Leslie Jones with an outstanding invitation Justice Kagan, Taylor Swift. Anytime please.

Leah Litman:

We'll probably going to extend one to Amanda Gorman as well. So, but look-

Melissa Murray:

Your previewing, your previewing-

Leah Litman:

we'll make room. But back to Taylor Swift let's play the Justice Kagan clips here.

Justice kagan:

Let me give you a case. I don't know who this cuts in favor of you or the petitioners, but I thought I'd ask it because it's the most famous nominal damages case I know of in recent times, which is a Taylor Swift sexual assault case. Do you know that one?

Speaker 9:

Vaguely, your honor.

Justice kagan:

It was a few years ago and she brought a suit against a radio host for sexually assaulting her. And she said, "I'm not really interested in your money. I just want a dollar. And that dollar is going to represent something both to me and to the world of women who have experienced what I've experienced." That's what happened. The jury gave her a dollar. And it was [inaudible 00:20:09] unquestionable physical harm, but she just asked for this \$1 to say that she had been harmed. Why not? Nobody thinks that being sexual assaulted is really only worth a dollar. Nobody thinks that. It's worth a lot more than that. But that's all she wanted, she wanted to prove a point.

Melissa Murray:

I think Taylor Swift should sample this in her next record.

Leah Litman:

Oh my gosh. Talk about all of my interests. This would be the third quarantine album about federal courts and nominal damages. I cannot wait. Cannot wait. The hypo itself was really good. And Justice Gorsuch and Justice Barrett picked up on the hypothetical after Justice Kagan, finished questioning Justice Kavanaugh, who was the other Justice who followed, Justice Kagan did not. But it is a really great hypothetical.

Kate Shaw:

I also just love that I sort of felt like I heard in Kagan's voice, both appreciation for the sometimes difficult to quantify or monetize harm that Swift was described experiencing in that lawsuit, but also just real respect. I felt she was probably a Taylor Swift fan. I felt like I could hear that in the question.

Melissa Murray:

There's a flannel under that rope.

Leah Litman:

She's wearing a Betty's Garden t-shirt under a cardigan. Me to Justice Kagan. But yeah, I mean, it's really great because it just perfectly captures the idea that people get all kinds of things out of litigation that can't perfectly be captured by damages to your wallet or monetary damages.

Melissa Murray:

Is this what counts as sorority banter by middle-aged women?

Leah Litman:

This was a critique that was leveled against us, that Melissa is referring to our sorority girl, collegiality.

Melissa Murray:

Whatever.

Leah Litman:

I guess we should just be meaner bitches.

Melissa Murray:

Sigma Sigma till I die.

Leah Litman:

Sigma Sigma strict scrutiny.

Melissa Murray:

Yeah. The sorority for middle-aged women and their banter.

Leah Litman:

Okay. What's that next Kate?

Kate Shaw:

FCC versus Prometheus radio. We preview this case at some length. So we won't talk about it for too long, but at issue in this case as a challenge to an FCC decision to relax certain cross ownership restrictions and the challenge which was successful below was that this decision was arbitrary and capricious. There was a lot of interesting discussion about what the agency was required to do and say if it wished to change positions, in addition to this issue that Leah and I talked about so much, how much evidence it needed to have and how good or strong the evidence needed to be.

Leah Litman:

There seemed to be some disagreement about almost a step zero question about arbitrary and capricious review, which is how much deference or explanation is warranted when an agency changes

priorities. Here, for example, changing to prioritizing competition more than valuing diversity, along lines of race or gender in media ownership. The Justices also kind of struggled to clarify what exactly the FCC did and why. They also struggled to clarify the party's positions. Were they arguing that the FCC had to consider race and gender? Were they arguing that it could? Did they think that the FCC considered race and gender.

Leah Litman:

And Justice Kagan wanted to know of the government lawyer, are you arguing that they didn't think that the changes would affect female and minority ownership? Or were they saying something more like, well we just don't have evidence of this and we aren't going to let no speculative or imperfect evidence get in the way of what we were going to do anyways. And another question that came up was whether the commission had its own obligation to collect a data or whether it could rely on the data that was submitted in the notice and comment process.

Kate Shaw:

I thought that there was some sort of maybe shifting in the argument and actually even the description of the history of the agency that you sort of saw on display in the government's argument. We should say that Ruthann Deutsch was spectacular. As we mentioned, I think in our last episode, this was her first argument, although she's a very experienced appellate lawyer, but her first SCOTUS argument and her opening really channeled what we talked about when we preview the case, which is that actually, even though it's a slightly distinct set of questions from some of these big admin law cases that arose before the court, involving Trump policies, it was actually pretty thematically linked in particular, I'd say to the census case and what she was sort of underscoring was what the commission cannot do under time honored administrative law principles is masked important policy changes behind this kind of unreasoned analysis.

Kate Shaw:

So if the FCC wants to say, we don't believe that pursuing diversity on the basis of race and gender is an important priority, all we care about is competition, then they need to say that forthrightly and allow for public debate of that change in position. But instead they sort of tried to do it in this kind of sneaky way. And that I think was the point she was making. She seemed to get some traction. She was also just masterful in her command of the record in a way that I thought was particularly on display in a clip of the argument we'll play in a minute.

Kate Shaw:

So basically both Helgi Walker for the broadcasters and Malcolm Stewart for the government seem to be taking the position that the FCC had actually never considered women and minority ownership, at least in the specific context of a sort of deregulatory decision at issue here which seemed to mark a change from its briefs and Kagan gives Ruthanne a chance to address this. And what she does offer is just seemed pretty fatal to the government. So let's play that clip here.

Justice Kagan:

I just wanted to make sure that you had the opportunity to respond to that assertion of the governments, that it had a historically not taken female and minority ownership into account in the 2021 context specifically.

Ruthanne Deutsch:

It's a better question for Mr. Stewart. I agree that it hasn't been the only factor or a primary factor, but could the extent that Mr. Stewart was saying that it had never been considered as a factor, I think that's just not consistent with history. And then-

Justice kagan:

Well, I guess I'm really giving you an opportunity to tell me what to look to to decide whether you are Mr. Stewart is right on that question.

Ruthanne Deutsch:

Thank you. So again, I would look to the earlier orders cited at page six in and 10 on our brief that are predate 202H and then the first 202 review, 2002 review under 202H defines the policy goals and says we will first define our goals, we can then assess whether our current broadcast ownership rules are necessary to achieve these goals. Then talks about the five types of diversity, which include minority and female ownership is one goal. And says, and this is at 18 SCCR at 13 634, encouraging minority and female ownership historically has been an important commission objective and we affirm that goal here.

Ruthanne Deutsch:

And then again J8335 talks about how the commissions broadcast ownership rules help further this purpose of promoting minority and female ownership.

Kate Shaw:

Coming out of the case, bottom line, what do we think is going to happen?

Leah Litman:

I agree Ruthanne was fantastic and I think many of her responses were quite devastating to the government's position. That it had never considered recent gender ownership in the past. But nonetheless, there did seem to be a majority of Justices on the court who were inclined to reverse the third circuit and uphold the FCCs modification of its rules.

Kate Shaw:

I think that's probably right. Although I did think the Chief might have been on board with affirming. He said a few things that made me think that because the FCC hadn't explicitly disavowed this interest, even if the argument before the Supreme court was that it had never really taken it seriously, but not having disavowed it having previously pursued it, had to give some kind of explanation if it was going to change course and it hadn't done that. So I had read the Chief as being pretty sympathetic, but of course that's not enough. It's not enough-

Melissa Murray:

So to that point, Kate, because I think it might lead to administrative law doctrine and good or bad, I think that's the reason why the Chief will not peel off. I mean, if he stays with the conservative wing of the court, he can dictate who writes that opinion and maybe even keep it for himself and craft a narrower decision than some of the other more skeptical administrative law folks on that block would be willing to do.

Kate Shaw:

I think I would take that. Yeah. As long as it doesn't really walk back anything in the census case, which I don't think it would. But yeah, I think that's an interesting possibility.

Leah Litman:

So the other case we wanted to recap which we previewed is BP PLC versus Mayor and City Council of Baltimore. This is the case about the scope of appellate review for remand orders--orders sending a case back to state court after a federal district court concluded the case was wrongfully removed. Specifically the question is whether an appellate court can review other grounds for removal, aside from whether the defendant is a federal officer. One concern that came up in the case was about gamesmanship. Whether defendants would include additional grounds of removal, like the allegation that they're a federal officer, in order to secure a potential appellate review of other grounds for removal, which wouldn't ordinarily be available.

Leah Litman:

And in any case that would delay resolution of the case, even if they don't successfully keep the case in federal court. Kannon Shanmugam, the lawyer arguing on behalf of the oil companies suggested that the possibility of sanctions would prevent this. I get that, I'm just not so sure that's a real deterrent given what we saw, for example, in the election lawsuits. I think judges are really quite reluctant to oppose sanctions. And they're reluctant in part for reasons that Justice Breyer alluded to, which is it's called uncertainty. And we just don't know. Justice Kagan countered that perhaps the solution would be in a case involving a frivolous ground for removal, that itself would allow the courts to say they don't have jurisdiction over the issue and the case, but it was just hard to read and I just don't think the possibility of sanctions is meaningful deterrent here.

Melissa Murray:

So Justice Alito was recused in this case. Do we know why?

Leah Litman:

I assume it's because of stock ownership, but I don't actually know.

Melissa Murray:

There were some groups who wanted Justice Barrett to recuse herself because her father is an employee at Shell Oil and Shell Oil and British Petroleum have a joint marketing venture that sort of unites them for purposes of their work in the oil industry. And she's also recused herself on Shell Oil cases that came up at the seventh circuit. So unclear why she was included in this particular case, but Justice Alito was not.

Leah Litman:

Yeah. I mean, it's possible they were concerned about if two recusals would lead to an evenly divided court, although there would still be seven Justices left. So I really don't know what might have motivated the change in recusal policies from the seventh circuit to the Supreme court.

Melissa Murray:

Interesting. Do you have a particular read on this? Do you have any ideas?

Leah Litman:

I think that the oil companies will probably prevail. I read both Justice Gorsuch and the Chief Justice to favor the oil companies. I think Justice Kavanaugh does as well. He said that the text of the statute favored them and he was skeptical of the theory that Congress had ratified court decisions that had said other grounds for removal weren't reviewable when Congress kind of amended the statute, but didn't alter that key language. I thought Justice Kagan asked a hypothetical that pressed clearly on whether the word order was really doing all of the work that the Justices claimed that it was and her question was, if the defendant on appeal abandoned the argument that they were a federal officer, but pursue the other grounds for removal, would you still say there is jurisdiction to review that question?

Leah Litman:

And the federal government as an Amicus clearly wanted to say no, but if you're resting solely on the word order in the statute, well that's still reviewing the order itself rather than a particular claim, but the idea that that would be improper might tell us whether, again, the word order is really doing the work or other considerations that the court might have in mind when it's thinking about this case. I was not sure where she was leaning in particular. I think Justice Sotomayor was sympathetic to the idea that Congress had ratified the earlier court of appeals decision saying these additional grounds were not reviewable. Justice Barrett was not sympathetic to that and she was suggesting that one reason to think Congress hadn't ratified those decisions was because they had been criticized.

Leah Litman:

And that line of questioning or arguments really made me think back to some of the debates about stare decisis, where Justice Gorsuch and other Justices suggested that if a prior decision had been criticized, that meant it was entitled to less respect and deference under the stare decisis doctrine. So hard to say, although if I had to guess, I think the oil companies will probably prevail.

Kate Shaw:

Question though, there's some very audacious request for the court to reach the merits of this? Not just answer the remand question. Really think the Supreme court could appropriately do that here at this posture.

Leah Litman:

Well, the specific question they want the court to decide is not just that the court can review the additional ground for removal, namely whether it's a federal question and arises under federal common law. But they also want the court to say-

Kate Shaw:

Answer the federal common law question, right?

Leah Litman:

Exactly. And that seems bonkers to me given that the courts below haven't passed on that question, they were saying, well, it's encompassed in the issue. No it's not, it's related, but you don't have to answer that question if you're resolving whether a court can review that additional ground for removal.

Kate Shaw:

I found that ask pretty surprising and audacious. And even if they win on the remand issue, it seems really unlikely to me that they actually get merits ruling in their favor. And the only other thing I wanted to flag was there was also this moment when the federal government's lawyer, it seemed just like the sort of mask of legalistic arguments seem to slip. And he was just like, "Cases like this should just be resolved in the federal courts, cases about climate policy." Well, that's not a legal argument. I don't think.

Leah Litman:

Well not only is it not a legal argument, but it is exactly the line of argument that Senator Sheldon whiteboard white house said was driving this case, which is that the oil companies, with the support of the federal government here, as Amicus with the Trump administration want these cases in federal court because they think, right, that's going to be a friendlier audience.

Kate Shaw:

That was a real tell that moment. Yeah.

Melissa Murray:

I wonder what you would make of the absence of Justice Ginsburg in this case, because she was sort of the leading proceduralist on the court. What would she have done with this? And were the oral arguments, I think, impoverished for her absence and sort of keen acumen on some of these questions?

Kate Shaw:

Oh, definitely. Always.

Leah Litman:

Yeah. I think that her presence was missed. But in this telephonic situation, I think the opportunity she would have had to clear up some of the confusion are probably less than if we were live. Some of the Justices were invoking an opinion that she had written as extensively supporting the oil companies and I have no idea whether she would have agreed with that reading.

Melissa Murray:

That was the Yamaha opinion.

Leah Litman:

Right. And so certainly her presence there was missed. court culture.

Melissa Murray:

Well. I mean, we're, we're changing our name from strict scrutiny to Amanda, Gorman, stan podcast. Yes?

Kate Shaw:

Oh my God, They're already nine is the problem. There will be a tenth Amanda Gorman stan podcast.

Melissa Murray:

So first of all, let's just roll our sleeves up and talk about this. This was actually way better than I thought it was going to be. I thought-

Kate Shaw:

You're thinking Inauguration broadly. So the experience of inauguration on Wednesday, January 20th.

Melissa Murray:

I mean, I worried about the threat of violence. I worried about all kinds of stuff. It seemed sad. The field of flags was moving and poignant, but it just looks such a change from past inaugurations where there were crowds of various sizes. But there were people there celebrating. So there was sort of a kind of weird modeling quality, I thought, that would be there. But it actually seemed incredibly joyful and it was just really nice to see everyone together, everyone wearing masks. Although I will say, can someone please help Bill Clinton keep his mask on his face? He just had so many problems with that. And I was-

Kate Shaw:

We saw a lot of actual nose, which you shouldn't see.

Melissa Murray:

You should not see. I appreciate it that Mike Pence was there although I have to say this whole, we need to give Mike Pence a medal of honor because he showed up at the inauguration. I still remember what happened before January six. So I'm not here for the medal giving, the trophies for participation. He was supposed to be there, he showed up, good for him.

Kate Shaw:

I don't know if you listened to Trump's weird goodbye speech at Andrew's a little bit earlier.

Leah Litman:

We will be back in some form.

Melissa Murray:

which makes it sound like he's going to literally be wound up in a turbin that Melania wears and just stuck to the back of her head-

Kate Shaw:

There's a lot of Harry Potter references that I feel like it naturally inspired. So that was really weird. But another thing I thought so weird was that he, I think, correctly managed to avoid, repeating any baseless voter fraud, stolen election kinds of claims. But the effect of doing that just made him look like a petty baby for not attending the inauguration. It's like, well, if it's just a normal goodbye, why are you not going to the Capitol?

Kate Shaw:

So it was in some ways it made it all the more absurd that he chose not to attend, although I'm really, really glad that he did. I don't think that the joyfulness that you are describing could possibly have occurred had he been there with his glowering presence on the stage.

Leah Litman:

Would it have made it more joyful?

Kate Shaw:

I mean, I can't imagine he would have worn a mask. So you would have had to actually look at his whole face. Yeah. No, I'm really glad he wasn't there.

Melissa Murray:

So I loved when they deplaned in Palm beach and Melania is wearing this amazing Gucci kaftan. I know there's a lot of debate on the internet about whether this was terrible. I think her shoe choice was terrible. She wore these Navy blue roused flats, totally wrong for this dress. Call me Melania.

Kate Shaw:

We have no idea what words Melissa is saying right now. Do you?

Melissa Murray:

Just word salad, word salad. But she had this Gucci caftan and it was so perfect for Florida. I mean, it's like a zillion dollars. I hope the gap will make a version of it and maybe I'll buy it. But she came down the stairs and he of course stops to talk to the press Corps. And she's literally like, "I'll wait in the car, later. I don't have to do this anymore." The energy was amazing. She's like, "I'm going to the limo. Bye."

Leah Litman:

But the energy of the actual inauguration was amazing. It was fun, lady Gaga, Jennifer Lopez.

Melissa Murray:

Okay, with a whole ass bird on her.

Kate Shaw:

Extremely cute military escort who just was the whole time, you saw in his face like, "I can't believe this is my life, what is this?"

Melissa Murray:

First of all, she was wearing tires as a skirt. I don't even know what that was, It was amazing. That was fantastic. And then she had this ginormous Brooklyn pigeon stapled to her blouse.

Kate Shaw:

Gold plated pigeon.

Melissa Murray:

Gold plated pigeon. That was amazing. And Jennifer Lopez pest sounded better than she's ever sounded before. And the whole let's get loud reference in the middle. I was dead. Yeah, amazing.

Kate Shaw:

It was a great reference. She slipped in part of her own song, patriotic tunes. It was incredible.

Leah Litman:

It's a boss move. I was here for it. And I loved the jewel tones that so many of the fierce women were wearing. Melissa, why don't you just go? Because I'm not going to be able to accurately describe what was actually happening besides jewel tones. Although I would like to describe what I and Cody Rigsby thought the color of Amy Klobuchar's peacoat was.

Melissa Murray:

What was Amy Klobuchar wearing?

Leah Litman:

It was hot dish casserole.

Melissa Murray:

Corn casserole is what he said. I think this is very unfair to Amy Klobuchar. I felt it was a beautiful color, It was a beautiful yellow, It looked great on her.

Leah Litman:

If you're not from Minnesota, you don't understand how awesome hot dish, tater tot, corn casserole is. That is itself joyful and joyous.

Melissa Murray:

But Cody Rigsby is from North Carolina and not Minnesota. So I think he was shading her and I don't think-

Leah Litman:

I think he meant it as a compliment. It's a Jewel tone. It's got to go on the rainbow.

Melissa Murray:

I thought that coat was actually really adorable. I loved Ella Emhoff's Miu Miu sparkly tweed coat. That was lovely. But my favorite, favorite look of the day... Oh, Jill Biden also looked amazing and had a little bling. She had a built-in necklace. That's always festive. But the best dress of the day had to be forever FLOTUS Michelle Obama. Who literally was like, "I'm not wearing skirts to this. I'm going to wear pants. They're going to be fabulous. I'm going to wear the same color that I wore four years ago only you're going to see what I would have done if I actually gave a crap about this inauguration."

Melissa Murray:

So 2016, she wore some schoolmarm sweater set dress. It was sad. She put her hair in a low bun. She was giving side-eye. She was not feeling it. But this time she just walked in like she got off a plane from Wakanda. She was wearing those pants, she had this ginormous belt buckle. Her hair was flowing. I didn't even notice Barack Obama. I was Michelle Obama and escort. She looked amazing. I was on a Peloton ride and we had the TV on mute and I literally just got off. I'm like, "I'm not going to get

anything done today. I might as well just stop and just talk about this." She looked fantastic. It was amazing.

Kate Shaw:

She was exquisite. The other thing that was weird is her outfit, her hair, all that was gorgeous, but also whose face looks that good with a mask covering half of it? She's stunning even in her face, it made no sense. Yeah. She stole the show.

Melissa Murray:

Her and Kamala, there's like, "girl, you look fly." "No, you look fly." "No, you look fly." That whole thing was great.

Leah Litman:

That was amazing. So I was also going to bring up our new second gentlemen and the excitement he brought walking out the white house with the vice-president. He is so stoked to be the second gentlemen. I just love it. I'm here for it.

Kate Shaw:

I did not have strong feelings about him before this week and I now have such respect and affection for the way he is just jumping into this role. He is so thrilled for her and for the country and his kids seem awesome. And yeah, I'm here for the Harris Emhoff clan.

Melissa Murray:

That was awesome.

Kate Shaw:

There's a law connection, right? So he's teaching at Georgetown, right? I don't know if it's the spring. So I think that's very cool that some law students will get to take a seminar with him.

Leah Litman:

Yeah. Doug, if you want to come on the pod, feel free to join.

Melissa Murray:

Now we have four invitations out. I hope someone comes through. Leslie Jones, Doug Emhoff, Elena Kagan, any of them.

Leah Litman:

And Taylor Swift. Anyone of you four. Feel free.

Melissa Murray:

Who's the most likely to actually have that accepted.

Leah Litman:

Unclear. But speaking of Justice Kagan, several members of the Court were at the inauguration and Justice Kagan was clearly a fan of national poet Laureate, Amanda Gorman, as we all were because after she walked off the stage Justice Kagan fist bumped her.

Melissa Murray:

Was it wasn't an elbow bump or it was a fist bump? I couldn't tell.

Kate Shaw:

I watched it three times, I couldn't quite tell, but there was some contact made.

Melissa Murray:

She's definitely expressing affection and interest. The court actually had a really great moment. I felt a little bad, amidst all of these glorious Jewel tones they were there in their robes. Sad moment. Three of the Justices weren't there. So remember the last inauguration Justice Breyer had some adorable little toke he was wearing.

Melissa Murray:

Just bringing some fierce toke action to it. He wasn't there. The older Justice has stayed home. So Justice Thomas, Justice Alito and Justice Breyer stayed home. So it was actually the first time you've seen Justice Barrett with her colleagues in some sort of official function, other than when she was sworn in and she appeared with Chief Justice Roberts. But that was interesting. Justice Sotomayor swore in Kamala Harris. That was a lovely sort of poignant moment of first meeting first.

Leah Litman:

On Thurgood Marshall's Bible.

Melissa Murray:

Amazing. And the whole thing was just so sweet and familial. And then the fireworks afterwards and Ashley Biden's tuxedo. We didn't even talk about that. I was here for all of it.

Kate Shaw:

The Justice actually seemed just from their faces to be enjoying themselves too. There was that moment, was it after the inaugural address? Or after Robert's actually administer the oath? But at some point there was applause and sometimes they're a little reluctant to applaud at the state of the union. And I don't know if historically they've applauded at inaugurals, but they definitely did. I saw Kavanaugh clapping madly.

Leah Litman:

Well, I mean, imagine getting to go to a public event and hang out with a large group of people. Must be nice since I assume many of them are vaccinated, but anyways.

Melissa Murray:

Amanda Gorman. This poem was fantastic. It was beautiful. She had such poise and she later revealed to Anderson Cooper that she had suffered from a speech impediment throughout much of her early life.

And this was sort of the occasion that would lead to a relapse and she was kind of worried about that. I think she pronounces her R's like W's or she had, and so big occasions like this she worried she might lapse into it. But it was just so lovely and so moving and she was so young and luminous and it just seemed like just this really hopeful moment, turning a page.

Leah Litman:

Can I say my favorite line?

Melissa Murray:

Sure.

Kate Shaw:

Yes.

Leah Litman:

We've learned that quiet Isn't always peace and the norms and notions of what just is isn't always Justice.

Kate Shaw:

That was great.

Leah Litman:

Yeah.

Kate Shaw:

I really like this. It's because being American is more than a pride we inherit, it's the past we step into is how we repair it. There was so much Hamilton rhythm to the whole poem.

Melissa Murray:

And explicit references.

Kate Shaw:

And some actual references to, yeah. She's clearly a huge fan.

Melissa Murray:

It felt really hopeful in a way that I did not anticipate it feeling. And then just incredible relief. Not only that, it wasn't some catastrophe and just that maybe we were turning the page. And then Joe Biden immediately goes to work signing executive orders and making people wear masks in federal buildings. Here for it.

Kate Shaw:

Yeah.

Leah Litman:

One thing Joe Biden has not yet done, however, is announced a nominee to be solicitor general. At least he hasn't done that yet at the time we are recording that episode. He did name Elizabeth Prelogar as Principal Deputy Solicitor General, which means she will be acting solicitor general at least until a solicitor general is confirmed. There has been some reporting about who's under consideration.

Leah Litman:

Justice Leandra Kruger of the California Supreme Court reportedly turned down an invitation to be the solicitor general. I guess she doesn't want to be the 10th Justice, she just wants to be the ninth.

Melissa Murray:

Boom.

Leah Litman:

Boom.

Melissa Murray:

Boom lawyered.

Leah Litman:

I'm sure she has very good reasons for wanting to turn that down. But in one of the reports, there was this extremely interesting and I think problematic statement by a member of the transition team who suggested that the transition team is still interested in filling the position with a woman, preferably someone with litigation experience and stature, but then immediately noted that there were several men under consideration.

Leah Litman:

And it almost seemed to be an implication that there weren't women with sufficient stature or litigation experience to be named solicitor general.

Melissa Murray:

Have We talked about this before?

Leah Litman:

I don't think we have.

Melissa Murray:

Do we have views about this?

Leah Litman:

We rattled off many different women with more than enough stature and litigation experience to be solicitor general, whether it's Ginger Anders, Sarah Harrington, Nicole Saharsky, Melissa Sherry, Loren AliKhan. I mean the list goes on. Right, Pam Karlan. The list could go on and on and on. But more to the point, several men who have been nominated as solicitor general have not had very many Supreme court arguments when they were nominated.

Leah Litman:

Seth Waxman had six Supreme court arguments, Noah Francisco three, Drew Days five, at the time they were nominated. So there are many women with many more Supreme court arguments than that and experienced in the solicitor General's office, you just have to pick one.

Kate Shaw:

We should also probably say how many Supreme court arguments Elena Kagan had when she was named solicitor general.

Leah Litman:

But did, did she have the stature, Kate?

Kate Shaw:

The number of arguments is zero. She definitely had the stature. But yeah, it's ridiculous to point to that as this sticking point if that's the suggestion.

Melissa Murray:

Some of the reporting that I read kind of noted that one of the reasons more men seem to be populating the list even though there was this explicit charge to look for a woman, is that women haven't argued as much before the court. And that is certainly true, but I mean, that is also a problem of your own making.

Melissa Murray:

If you want to have women with sort of glittering record that would them obviously available and appropriate as picks, then give them the opportunities. We've been saying that for forever. But to the extent that other men have been named with fewer than 10. You don't have to be Paul Clement to get this job. There are lots of women who've had this experience and could do this properly and should have the chance.

Leah Litman:

Yeah. Some other news that I wanted to flag that we had kind of previewed earlier, Judge Robert Katzmann on the second circuit went senior status effective, January 21st. And Melissa, what are his plans after that?

Melissa Murray:

He's going to hang out in the faculty lounge with me at NYU. When we can do that in person again. But I am so delighted that Judge Katzmann is coming to NYU as a professor of practice. He has taught for us in other capacities but it will really be fantastic to have him formally as a member of the faculty in a more robust way. So I'm really excited about this.

Leah Litman:

I just wanted to put some real respect on the fact that he announced he was going senior status effective January 21st, Inauguration, at noon on that day. That's a real vibe and it left me wondering, is he trying to signal to other Judges, "okay, this is how we do it." This also means of course, that Joe Biden

has a vacancy to fill on the second circuit. I am wondering if he will do what is necessary to enforce the voting rights act and appoint Dale Ho to the second circuit.

Melissa Murray:

Say his real name, Leah.

Leah Litman:

Dale F them up Ho. And that is how advocates will have to address them.

Melissa Murray:

Justice. This is actually a really interesting move because when you become a senior judge or you take senior status, you don't necessarily stop hearing cases. You can still be part of the court and it's work. You just free up your seat to be filled with an active judge that the president at the time gets to appoint.

Kate Shaw:

You would hope you see more like this. And I do think that Judge Katzmann is a relatively young guy, he's in his sixties. There's no reason that he had to take senior status now. And I expect just as Melissa says, you have a lot of control over what kind of caseload you continue to carry as a senior judge. I think he'll hear a lot of cases. You lose certain kinds of seniority in the decisional process within your court but I just think a lot of other judges who are eligible should follow suit.

Kate Shaw:

And I hope that our former guest, Marin Levy's, suggestions about ways that circuits can basically implement rule changes to sweeten the deal for senior judges or to create incentives for judges to take senior status. Lots of that can be done without legislation. I think maybe all of her proposals can. But I hope that the Biden folks are thinking seriously about how to implement all of that because Trump was incredibly successful at filling vacancies on the lower courts and you can only really fill vacancies if you have vacancies, unless you're going to create new ones. Which is of course something else they might want to look at. But I hope that Judge Katzmann is just sort of a trendsetter in this regard.

Melissa Murray:

So heard that president Trump is getting ready to Mount his impeachment defense, but he's having difficulty finding counsel for the impeachment trial. I've also heard the pay is not great. Sorry.

Leah Litman:

And perhaps this is where we should end.

Melissa Murray:

Thanks so much to all of our listeners, if you are listening and you like what you hear, please consider being a subscriber and supporting the pod in a robust way. You can subscribe at [glow.fm Forward slash Strict Scrutiny](https://www.glow.fm/Forward/Strict-Scrutiny). We also want to say thank you to our producer, Melody Rowell and to Eddie Cooper, who does our music. And if you are a Con law student this semester or a Con Law professor, we hope you'll check out our latest venture Irrational Basis Review, which takes 12 minute intervals and explains all of the most important Con Law concepts again in 12 minutes or less. Sometimes 17, if we have a lot of cases, but you get the idea. So check it out.

This transcript was exported on Feb 04, 2021 - view latest version [here](#).