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Kate Shaw:

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Melissa Murray:

No, we don't. No, we don't.

Kate Shaw:

Okay, I do.

Leah Litman:

Kate does. Kate is going to make some TikToks before the end of this.

Kate Shaw:

I do. I am going to start.

Recorded Audio:

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

Melissa Murray:

Welcome back to Strict Scrutiny, your podcast about the supreme court and the legal culture that surrounds it. I'm Melissa Murray.

Leah Litman:

I'm Leah Litman.

Kate Shaw:

And I'm Kate Shaw.

Melissa Murray:

And today's show, we will be covering breaking news, including recapping recently released opinions, and then we'll preview the first week of the court's February sitting. Of course, as always, we will close out with a little bit of court culture. So let's get started with the breaking news. Kate, had anything happened? What do you expect when you're impeaching?

Kate Shaw:

We had a surprise outcome in the president's second impeachment trial. No, we didn't.

Melissa Murray:

I was flummoxed by this. It was so unexpected.

Kate Shaw:

It was not an unexpected acquittal. There were more votes to convict than I think some people went in anticipating and I think that's not insignificant, but Leah and I debriefed the impeachment trial at length last week. So I think maybe the only thing that has really happened of consequence since then is that earlier this week when Trump somewhat sort of seemed to return to public life to mourn the death of Rush Limbaugh, he was still talking about a stolen election. I actually kind of couldn't believe it, but then I guess I could. So look, if you think all this is in the rear view mirror, it's not.

Melissa Murray:

Stop trying to make voter fraud happen. Stop trying to make it [crosstalk 00:01:57]-

Leah Litman:

They're never going to stop with that.

Kate Shaw:

But he's still trying. They're all going to keep trying. But for now, let's leave it in the rear view mirror.

Melissa Murray:

The court opinions though, so the court issued a number of opinions and decisions from this term including Republic of Germany v. Philipp and Hungary v. Simon. If you are movie buffs and you listen to Strict Scrutiny, you'll know that these are colloquially known by us as the Women in Gold cases. So these were challenges to the Foreign Sovereign Immunity Acts exemptions for takings of property in violation of international law. The question here was whether or not that exception would extend to claims by citizens against the state of which they are citizens.

Melissa Murray:

So the court concluded and they sided with the individual states here, Germany and Hungary, saying that the Foreign Sovereign Immunities Act exemption for takings of property did not apply to those who are making claims against the country in which they are citizens. And in making that statement, Chief Justice Roberts emphasized in the opinion that the United States' law governs domestically, but it does not rule the world, and he sounded this theme before in other cases where foreign plaintiffs have sought to recover in US courts for what might be regarded as human rights abuses by other countries. In this case, he actually went a little further to suggest that it would be particularly unwelcome if a court in Germany adjudicated claims by Americans that were entitled to hundreds of millions of dollars because of human rights violations committed by the US government a long time ago.

Melissa Murray:

So this case, for those who are following it, focused on efforts to recover the Guelph treasure, which was purchased in 1929 by a consortium of Jewish art dealers. The consortium later sold the treasure to Nazi held Prussia in 1935 for a price that was far below its market value, and the consortium's heirs argued that their case fell within the expropriation exception because the sale was coerced as part of the Nazi campaign of genocide against Jews, a practice that would clearly violate international law.

Leah Litman:

And if you follow us on TikTok, you would know that this case is related to the Woman in Gold since that was the subject of our TikTok recap.

Kate Shaw:

And if you don't follow us on TikTok, you should follow us on TikTok. So far, only Leah has forayed into making the TikToks, but Melissa and I aspire to. We're just not totally ready yet.

Melissa Murray:

No, we don't. No, we don't.

Kate Shaw:

Okay, I do.

Leah Litman:

Kate does. Kate is going to make some TikToks before the end of this.

Kate Shaw:

I do. I am going to start. I think that's right. Okay, so Melissa, no. You're not committing to doing it at any time?

Melissa Murray:

Unless we're going to be doing dancing, form dancing or something, like short TikToks that involve dance, I won't -

Kate Shaw:

If we did, you would?

Melissa Murray:

I might.

Leah Litman:

So you should do those TikToks on our TikTok because I'm certainly not dancing on TikTok. You can do the dancing. I will do the other stuff.

Melissa Murray:

Okay, my tweenage daughter just wandered in because she literally looks genuinely alarmed at the prospect of me on TikTok.

Kate Shaw:

You're going to shut it down right now.

Melissa Murray:

She's trying to shut it down. She's like, "No. No TikTok for you."

Kate Shaw:

I wanted to leave the door somewhat opened. So to be continued.

Melissa Murray:

To be continued. We'll see.

Kate Shaw:

Okay. So the next case we wanted to recap was *Salinas v. Railroad Retirement Board*, which involves a refusal to reopen a prior denial of certain railroad employees' benefits and a question of whether that refusal to reopen is subject to judicial review. So in this case, Justice Sotomayor wrote for a 5-4 opinion holding yes, it is subject to judicial review. So it was Sotomayor plus the Chief Breyer, Kagan and Kavanaugh. It was actually a pretty straightforward statutory interpretation opinion, but it also leaned fairly heavily on the presumption in favor of judicial review of final agency action which had concluded that this refusal to reopen was. The dissent was Thomas, Alito, Gorsuch, Barrett, the new four horsemen.

Leah Litman:

That's a good one. But I mean seeing this breakdown was for me a reminder of this is the court we have now and seeing that block of four together and seeing what was necessary to get a 5-4 under these conditions did not make me particularly excited about all that is to come.

Melissa Murray:

Well, I mean maybe there's a little bit of a silver lining here because it wasn't obvious from oral argument that this would be the outcome because only Justice Kavanaugh seemed especially sympathetic to the petitioners' claims here. So the petitioner did manage to come up with five. I don't know how he got those five, but it wasn't obvious at oral arguments that there were four other votes forthcoming.

Kate Shaw:

Yeah. No, I think it's an accomplishment if Sotomayor was able to pull that sort of five member majority together and to keep it together. Yeah, and I think it's not insignificant that the first 5-4 opinion by this newly constituted court has this particular breakdown, although I don't think we can all expect to see a lot of 5-4 opinions to break this way, but hope springs eternal. You never know.

Leah Litman:

So also in Supreme Court opinion news, there was some activity on the shadow docket that we wanted to cover. One of those opinions was in *Dunn v. Smith*, or I guess there were several opinions and no actual opinion of the court. So in this case the Supreme Court denied Alabama's request to vacate an injunction that had been entered by the famously liberal 11th Circuit to prevent the state from executing Willie Smith unless he was permitted to have his pastor in the execution chamber with him. This opinion was notable because it was unclear where the fifth vote to deny Alabama's request to vacate the injunction came from.

Leah Litman:

Justice Thomas, the chief justice and Justice Kavanaugh would have granted the request to vacate the injunction with Justice Kavanaugh writing a dissent in which the chief justice joined. Then Justice Kagan wrote an opinion explaining the denial, but that opinion was joined only by Justices Breyer, Sotomayor and Barrett. That leaves Justices Gorsuch and Alito unaccounted for. We know both of them didn't want

to grant the application to vacate or there would have only been four to deny. So one or both of them agreed with Justice Kagan perhaps for some reasons not state in the Kagan opinion, and it's just weird that we don't know where the fifth vote came from. Oftentimes, the court will leave us wondering why they did what they did in the order we'll talk about in a second, but we aren't always left wondering who provided the necessary or outcome determinative vote.

Leah Litman:

Of course, the precise issue in this case calls to mind the court's previous decisions on similar claims, in particular *Dunn v. Ray* where the court denied a stay of execution on similar grounds in a case involving a Black Muslim man in *Murphy v. Collier* where the court granted a stay request for a prisoner who was Buddhist.

Kate Shaw:

There was a lot of activity on the shadow docket actually in this last week. Another development on the shadow docket, what I happen to come to think of as the COVID shadow docket. In this case, the court granted a stay of California's COVID restrictions on in person gatherings in what are known in that state as tier one areas. So this was, as a number of these COVID cases have been, another extremely fractured decision. Okay, so the court granted the stay as to the in person gathering prohibition, but denied the stay as to percentage limits, which include a limit to 25% capacity on gatherings in T1 areas. Also denied as to the prohibition on singing and chanting during in person gatherings.

Kate Shaw:

So, sorry there's a lot of negatives there. What that means is California can't enforce its prohibition on in person gatherings, but it can continue to enforce a 25% capacity limitations and its prohibition on singing and chanting.

Kate Shaw:

So the Chief wrote for himself alone to explain granting, I guess so much for deference to state officials, although he did kind of nod to his previous opinions in some of these COVID cases saying the deference, though broad, has its limits. The chief justice wrote separately to say he saw no basis in the record for overriding some state public health determinations, in particular regarding the singing and chanting prohibition, but found the state's present determination that the maximum number of adherent to and safely worship is zero appears to reflect insufficient appreciation or consideration of the interests at stake. So he's perfectly happy to second guess some public health determinations; just not all of them.

Kate Shaw:

Kavanaugh and Barrett concurred in the partial grant of the stay. They did seem open down the road potentially to also enjoining the singing and chanting ban, but said that on the record here it was unclear whether it was neutral and generally applicable or singled out religion. Alito would have stayed the 25% capacity limits and bans on singing but would have given the state 30 days to produce evidence that it needed those requirements and Gorsuch and Thomas would have burned the whole thing down, which may just be the theme of the day and of the present era. They would have enjoined 25% capacity limitation, the singing ban and the in person gathering ban. Kagan joined by Breyer and Sotomayor dissented with extremely powerful dissent that included really memorable language like, "If this decision causes suffering, we will not pay. Our marble halls are now closed to the public and our life tenure

forever insulates us from responsibility for our errors." I mean she's worked up about this and I think correctly so.

Melissa Murray:

Part of me is wondering about this opinion. There are a number of different variants which are supposed to be more virulent than the original strain of the virus and can be more problematic. Is the court suffering from pandemic fatigue? They're just tired of this and... We're all tired of it obviously, but it just seems like a curious time to second guess science and legislators making decisions based on... or state officials, not just legislators, making decisions that are ostensibly based on science.

Leah Litman:

I mean also the passage that Kate read noted the possible hypocrisy of the courts closing its doors to the public while requiring California to allow in person gatherings. Do we also know whether all of the justices are completely vaccinated? I mean, that is just an additional detail that just makes-

Melissa Murray:

I'm sure they are. I'm sure they are.

Kate Shaw:

Got to. I hope so. They really -

Melissa Murray:

Details. You know who's not vaccinated? This girl right here.

Leah Litman:

Or this girl.

Kate Shaw:

No, me either, although my parents are both vaccinated now. So they drove in from-

Melissa Murray:

Well that's good.

Leah Litman:

That is wonderful.

Kate Shaw:

Michigan for the week having got their second vaccine about a week and a half ago-

Leah Litman:

That's great.

Kate Shaw:

Which is wonderful.

Melissa Murray:

It just feels like they're tired of all of this too, just like having to mediate all of these disputes. But it's just like this isn't going to go away.

Kate Shaw:

I agree. I think they have a sense that emergencies sometimes do require extra deference to politically accountable decision-makers but that they don't want to remain hands off when constitutional liberties are at stake, and we're talking about an emergency that has a duration that's as long as this does. In the abstract, I think that proposition is actually correct. The problem is this is not an emergency that is shortlived the way a lot of emergencies are. It's going to take time, and it's going to have peaks and valleys, and if we're in the middle of... We are coming down in lots of ways, but you're right obviously about these new variants, Melissa. So for the court now to say, "Okay, we have been deferential for long enough. Now we need to reassert ourselves," just at the moment in which public officials seem to be getting this under control in a lot of places just seems so crazy.

Melissa Murray:

It would be worth noting for a student note or even a longer law review article like what had been the temporality of the court's understanding of emergencies in past cases? Have we ever had an emergency that was a whole year? The Spanish flu from the 1900s maybe, but even that seemed to have been on its way to resolution where this seems I think slightly to be still a little bit not quite under control because of the different variants.

Leah Litman:

Well about like the Great Depression or war time? Those are also considered exigencies and here, again, part of what makes this difficult for me is there is an end in sight in that we do have the vaccine. So staying safe in this ending period is just so important.

Kate Shaw:

And so irresponsible of the court to thwart the efforts to do that in this home stretch. Completely agree. And I think that's what Kagan is saying basically.

Melissa Murray:

Can I talk to you about something insane and irresponsible?

Kate Shaw:

Of course.

Melissa Murray:

I was on Facebook for the first time in months a couple of nights ago. I guess it was Valentine's Day, and a high school friend who lives in Florida, I went to high school in Florida, is posting a picture of her and her partner at dinner. I literally thought this was one of those Facebook memories from 150 years ago because everyone in this restaurant, it was a packed restaurant, a normal sized restaurant. Totally

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packed, not one person wearing a mask including the servers. I was like, oh, this must be from 2017. No, it was from 2021 in Florida. I'm like what is happening down there? Insane.

Kate Shaw:

Oh my god.

Leah Litman:

Oh my gosh.

Melissa Murray:

Insane.

Kate Shaw:

This is never going to end you guys.

Melissa Murray:

I couldn't even believe it.

Kate Shaw:

We're never getting out of this.

Melissa Murray:

It's never going to end.

Leah Litman:

Right.

Kate Shaw:

All right, should we go back to the shadow docket for a minute?

Melissa Murray:

Yes.

Kate Shaw:

Okay. So-

Melissa Murray:

Sorry. Sorry.

Kate Shaw:

So we've gone rather far afield.

Melissa Murray:

Sorry.

Kate Shaw:

But no, it's good. It's good. So we're noticing, obviously, this intense uptick on the court's disposition of really important matters on the shadow docket including but not limited to these COVID cases. Evidently people in congress are taking notice as well. So the House Judiciary Committee held a hearing on Thursday. We're recording Friday, so yesterday on the shadow docket and the potential for shadow docket reform. It featured Amir Ali of MacArthur Justice Center, Loren AliKhan, who's the DC Solicitor General, our friend Steve Vladeck at University of Texas Austin, who somehow found enough working power to Zoom into this hearing from Texas where there's still huge power outages, and then Michael Morley at Florida State.

Kate Shaw:

I read a little bit somewhere, so right up to the hearing, it seemed as though it were actually really substantive. I haven't had a chance to listen to it. Any thoughts on whether there's any possibility of shadow docket reform that might be on the horizon?

Melissa Murray:

I didn't take this necessarily as being a necessary precursor to reform. I think one of the first things that has to happen is people actually have to understand what the shadow docket is and why it is potentially problematic. So I think this was a consciousness raising hearing as much as anything.

Leah Litman:

Yeah. It was interesting. So I did watch it, and some of the congressional representatives thought the term shadow docket was pejorative, but on the other hand, a lot of them did seem to get behind the idea that it is disturbing for these decisions to be made, they kept using the phrase in the dark; not knowing who made the decisions, not having the decisions explained. That actually seemed to attract attention from both Democrats and Republicans. No clear idea about what exactly the solutions were, but there were several ideas they talked about as far as addressing the timeline to take cases to the Supreme Court or establishing some kind of mandatory jurisdiction over a certain subset of cases that would require them to note votes and create opinions.

Leah Litman:

So I don't know, but I think this is a promising first step.

Kate Shaw:

Yeah. And sunlight has to help, right? Part of the point here is that the court is not particularly worried about blow back from what it does in the shadow docket because it rightly believes people don't pay that much attention to what's in the shadow docket. So this could be a step in the direction of changing that. So that's productive in and of itself I think. I did an event this week, and we've talked before about ACOG, this important shadow docket case about access to medication abortion. It was like, right... you wrote about this case, Leah. They smuggled in potentially some pretty important law in this shadow docket order, and I was rereading the order and I was just like, oh my god, they're going to overrule Roe in the shadow docket. They're just going to fly over and think no one notices

Leah Litman:

I mean South Carolina just... We were recording on Friday, just yesterday passed the law that's effectively a heartbeat bill effectively prohibiting abortions. That was enjoined immediately by a district court judge. I mean what if the Supreme Court just stays that injunction and-

Kate Shaw:

Oh my god. No opinion, just stays it.

Leah Litman:

Right. Nothing prevents them from doing that.

Kate Shaw:

Right. Not with a bang but a whimper. I mean, I don't think they're really going to do that, but right now there's nothing stopping them but potentially public opinion and blow back. So anyway. Anything we can do to call attention to shadow docket I think is actually productive.

Kate Shaw:

Okay, before we move on to previewing, just a couple of other things we wanted to flag. Some changes in positions by the Biden Justice Department, specifically the Solicitor General's office. So first the Affordable Care Act case; the Solicitor General's office sent a letter to the Supreme Court advising it of the change in position. The SG is obviously now taking a position at zeroing out the mandate did not render did not render the law unconstitutional, and also that if the court concludes otherwise, then in fact, that provision is severable. Noting in the letter I thought kind of interesting that SG's office didn't ask for any extra briefing on the issue; basically said arguments and briefing concluded months ago. So there's no need for supplemental briefing. I think California did an extremely effective job in arguing the position that the SG's office is now arguing. So I think it was probably right not to seek any additional briefing on that.

Kate Shaw:

They didn't talk about standing, which I thought was interesting because standing was weirdly central in the argument, but I think they just wanted to make clear that their position on the merits of the case was different from the Trump Justice Department's.

Kate Shaw:

Okay, so that was one change in position that was significant. Another one is in Cedar Point Nursery v. Hassid, which is a case set to be argued in the March sitting, we discussed this case when the court granted cert. This is another constitutional attack on unions. This time the constitutional vehicle is the Takings Clause rather than the 1st Amendment as was the case in the line of cases that led up to Janus. So the Trump administration had sided with the employers that were challenging the California regulation that gives unions some access to certain agricultural sites to do union organizing or to inform individuals of their union rights under California law. Anyway, the Trump administration had sided with the employers challenging that regulation and the Biden administration has switched sides. We will do a full preview of the case, which I think is actually a really important one, prior to the argument in March.

Kate Shaw:

Then the last of these was this Arizona voting case that is going to be argued in the second week of the February sitting. So we'll talk about it next week, and I don't know that I totally know what to make of this letter. So the Biden administration sent a letter suggesting that they adhere to the Trump DOJ's view that the challenged Arizona law which involves both a throwing out of certain provisional ballots that are cast out of precinct and also a ban on so called ballot harvesting are permissible. So they actually don't disagree with the bottom line that these laws do not violate section two of the Voting Rights Act, but that they disagree with the specific test that the Trump Department of Justice advocated. I was surprised that they agree with the bottom line that these laws are fine, and I don't really know how any of this is going to play out at oral argument since they haven't told us exactly what they do think the test should be.

Leah Litman:

No, it's super curious, and these changes in administrative positions have oftentimes garnered questions at oral argument. The phrase that the Solicitor General's office used to use in the brief was, "Upon further reflection, we've changed our position," and then people started joking that actually that meant "Upon election, you changed your position," and this is something that came up during the Obama administration with the court skeptically asking the Obama administration why they changed positions and pressing them, whether the reasons were legitimate. Here in the voting rights case, I was a little surprised, and I don't know exactly how the justices might know what the federal government's position is. They're not participating as an amicus. So it was just a little bit strange to me that this happened.

Kate Shaw:

Speaking of the Solicitor General, when do we think we're going to have an SG nominee?

Leah Litman:

I mean who knows, but if and when there is a nominee, apparently they can't be anyone who tweeted since tweets are, we learned, disqualifying for democratic nominees in the current senate.

Melissa Murray:

But you could be president and tweet. That's what I heard. That's what I heard.

Leah Litman:

Well sometimes some presidents can be.

Melissa Murray:

Yeah. You can definitely do that. They let you do it when you're a star.

Melissa Murray:

So the February hearing list is out, and there are 18 advocates arguing. Five of these advocates are women, including two from the Solicitor General's office and two of the advocates we think are lawyers of color. So that's some progress. So yay.

Leah Litman:

Yay. Makes me feel so great.

Melissa Murray:

Yay.

Kate Shaw:

I can't believe we have to celebrate these numbers.

Leah Litman:

I know. I was jokingly celebrating, to be clear.

Kate Shaw:

But it's better. It's actually better than the last list.

Melissa Murray:

It is better than the last one.

Leah Litman:

It is. That's progress-

Melissa Murray:

I mean it's baby steps. I'm training a puppy. So just little baby steps. They peed on the pad. I love it.

Leah Litman:

I guess this counts as the legal profession/Supreme Court bar peeing on the pad. The dab.

Kate Shaw:

Good boy.

Leah Litman:

They didn't take a dump on the couch.

Melissa Murray:

Oh Leah, are you okay?

Kate Shaw:

Oh my god. Joe Manchin is never going to vote to confirm us now. We are just so crass you guys.

Leah Litman:

That's so funny though and charming though. Also, because we've talked about qualified immunity on the show, I wanted to note a recent 5th Circuit opinion, Ramirez v. Gadarrama which held that police officers were entitled to qualified immunity after they tased a man who was soaked in gasoline, igniting the gasoline and engulfing the man in flames which in turn burned down his family's home. The 5th Circuit said the officers were entitled to qualified immunity because it was not clearly established in the case law that you couldn't tase someone when you had reason to believe that tasing them would light

them on fire. One of the officers allegedly said before they tased him, "If we tase this guy, we will light him on fire." Qualified immunity gone wild, who knows.

Kate Shaw:

I mean this one was so egregious that I couldn't help but wonder whether a summary reversal might be possible, right? There was that 5th Circuit opinion last fall, Taylor v. Riojas which we talked about, which involved the shockingly unsanitary and unsafe confinement conditions, and the court did something it rarely does in these cases, right? It summarily reversed the grant, and that was a 5th Circuit case. Do you think there's any reason to hope that this case might meet a similar fate?

Melissa Murray:

Perhaps, but I'm just not optimistic.

Kate Shaw:

Yeah.

Melissa Murray:

The Taylor case also, I mean the 8th Amendment concerns, Fred Smith raised this on the earlier episode that he did with you guys about qualified immunity. I don't know. Maybe that's a distinguishing factor, I don't know. But I mean the facts of this case are bananas.

Leah Litman:

Yes. Truly.

Kate Shaw:

Yeah, yeah. I think if I recall correctly the conversation with Fred, I think that that's a reason to think that this, despite how bananas the facts are-

Leah Litman:

Right. Will not be -

Kate Shaw:

Would not be a candidate for summary reversal.

Leah Litman:

Right, because of the 4th Amendment. Right.

Kate Shaw:

Yeah. The court is even more searching in its demand that there be factual, perfect identity with a prior case.

Leah Litman:

It's like I'm sorry there's not a prior case involving lighting a man on fire and I'm sure that had there been one, then police officers might know not to do that.

Kate Shaw:

Totally. My god. Okay, so let's shift gears and preview the February sitting. So this sitting is especially light because several cases on the court's docket were mooted by Biden administration policy changes. So that includes the case that challenged the president's construction of the border wall with reallocated and reappropriated funds. Also, the case challenging the Remain in Mexico policy under which certain people who applied for asylum in the United States were made to wait in Mexico after being returned there.

Kate Shaw:

Okay. So in today's episode, we're just going to preview cases from the first week of the sitting, and then next week we'll talk about the second week, which does contain several pretty interesting cases, including the Arizona case that we just talked about. Okay, so first of these will be brief. Florida v. Georgia, this is an original jurisdiction case with a special master where it's involving a challenge to a special master's report. This is a long running dispute regarding the Apalachicola-Chattahoochee-Flint River Basin-

Melissa Murray:

I'm so glad you said that right.

Kate Shaw:

Did I? I was Florida over there.

Melissa Murray:

No, it was Apalachicola. You got to say it with a little twang there. Apalachicola

Kate Shaw:

I got Apalachicola right. Okay.

Melissa Murray:

Yeah, that's good. That's good. Chattahoochee.

Kate Shaw:

Apalachicola-Chattahoochee-Flint River Basin?

Melissa Murray:

Yeah.

Kate Shaw:

Okay. All right. I got it. I nailed it. [

Leah Litman:

See now this will make up for all of our crass comments that you can say Apalachicola with a little twang, right? That'll charm them.

Kate Shaw:

So folksy. So charming. Awesome. Okay, so that is the river basin that is an issue. The case has actually been before the court before. It is now on its second special master. The first was Ralph Lancaster of Maine who is actually a four time special master in SCOTUS original jurisdiction cases, and this is a big deal I've mentioned before, this weird practice of appointment of special masters, which is this very clubby insider affair, as are amicus invitations. So Lancaster was somebody who had done this a bunch of times, and I think it was a pretty big part of his profile in Maine where he practiced. Anyway, so he passed away during the pendency of the case and a court appointed judge, Paul Kelly, because we all know that lady lawyers can't handle water rights disputes, obviously.

Melissa Murray:

Again I come back to, have there ever been any special masters who were women? Do we know? How do we find out?

Kate Shaw:

At the court there's one. So at least that I am aware of, who is a Munger lawyer, and that's of... I pulled this data together. There's like 120, 140 of these special master appointments that I've been able to identify, but I'm sure that's not an exhaustive list because they're really hard to research. But that's a big denominator and the numerator is one as far as I know. I'm not sure. I am not sure. I personally am not angling for a special master or river master appointment-

Melissa Murray:

No, but-

Kate Shaw:

But I am sure... These are a big deal. They're remunerative, and they're high profile, and they give you a lot of cache and stature in the community in which you practice to be somebody to whom the Supreme Court routinely turns, and I am sure there are plenty of women practicing law who would appreciate these invitations.

Melissa Murray:

This is the Justice Ginsburg argument in the VMI case. Does every woman want to go to VMI? Probably not, but if there's a couple of women who want to go, they should be able to go. I mean I'm sure there's some woman who wants to be a special master in a riparian rights case, and I want to make it happen for her.

Kate Shaw:

Yeah, thank you. I totally agree.

Leah Litman:

That's just the rules of feminism.

Melissa Murray:

Riverdance.

Kate Shaw:

Okay, so we're going to make a TikTok-

Melissa Murray:

Feminism for riparians.

Kate Shaw:

Video. There's a Riverdance TikTok video.

Leah Litman:

Okay, Kate, you're joking. I've already made-

Kate Shaw:

I think this is going to do huge numbers. No wait, wait, wait.

Leah Litman:

You're joking. I've already made a TikTok that is premade for the day Florida v. Georgia is argued explaining special masters, and also saying that when a case involves a river, sometimes the special master is known as the river master.

Kate Shaw:

River master, oh my god.

Leah Litman:

I use a picture of Riverdance because, as I said, I'm not dancing in TikToks. Melissa, if you want to do a Riverdance TikTok, this is your moment, girl. You can bring those spirit fingers, too.

Melissa Murray:

You guys, don't sleep on my Irish step dancing. You don't know what I can do.

Leah Litman:

I'm not. I am encouraging it.

Kate Shaw:

No, this is a very serious request. Please record a little one. Wait, Leah, can you add it to your prerecorded Florida v. Georgia TikTok or we can just do two-

Leah Litman:

No, but we can make another. There's no ceiling on the number of Florida v. Georgia TikToks we can make.

Melissa Murray:

This is the most play the Florida v. Georgia case has gotten.

Kate Shaw:

Yeah, this is true, but I feel like Melissa's looking a little skeptical about the whole thing. So I don't want to overpromise.

Leah Litman:

We are making original jurisdiction TikTok happen.

Kate Shaw:

Okay. It's going to happen.

Melissa Murray:

I can't overpromise with these moves. These moves are gold.

Leah Litman:

There you go. Okay, hard to top that case preview and that excitement, but another case that we wanted to preview is a set of consolidated cases, *Wilkinson v. Dai* and *Wilkinson v. Alcaraz-Enriquez*. The question in these cases is whether a court of appeals may presume that an applicant's testimony is credible whenever an immigration judge and the Board of Immigration Appeals adjudicates a withholding of removal application or a claim without making an explicit finding of adverse credibility.

Leah Litman:

So let me explain that a little bit. The general standard of review in immigration cases is substantial evidence; essentially, the federal court asks, "Was the immigration judge and Board of Immigration Appeal's decision supported by substantial evidence?" In immigration cases, the Real ID Act talks about something called an adverse credibility finding, which it says must be, quote, "explicitly made," and if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal. So the question here is without that explicit finding, can a court of appeals essentially presume that an applicant's testimony is credible?

Leah Litman:

Here, I thought the amicus brief from former immigration judges was quite helpful on the implications of a credibility finding, which doesn't necessarily mean the testimony is true or that an applicant's claim would succeed. Also helpful just in explicating the institutional role and job of immigration judges, and there's also a separate administrative law question in one of the cases about whether a remand is required or whether the court of appeals could conclude that the evidence compelled a finding of likelihood of persecution, entitling the applicant to relief.

Kate Shaw:

So am I right that there has been no indication that DOJ has changed its position at all in this case? So it was-

Leah Litman:

Yeah.

Kate Shaw:

Briefed. So it was briefed under the Trump administration. The opening brief was filed when Francisco was still the SG. The reply when Wall was acting SG and it was interesting to me, right. So it's a pretty harsh position that is adverse to the claims of immigrants and one that either no... I'm not sure any court of appeals has actually even endorsed this position. Anyway, it's just interesting. Like the Obama administration in cases like *Jennings v. Rodriguez* took similar positions. I mean different kinds of issues, but ones that were generally adverse to the type of or even availability of review for certain kinds of immigration related claims.

Kate Shaw:

Anyway, I just think it's interesting. This week, Biden administration is dropping this comprehensive immigration reform bill that is admirably broad, but also that they're gearing up to make these sorts of arguments. I sort of had to wonder whether there would be any distance between whatever gets argued next week and the briefing that was completed under the Trump administration, and I think the answer is maybe no.

Leah Litman:

Yeah. Maybe not, and I think the unfortunate reality is that it's oftentimes in these immigration cases where there will be a real continuity across democratic and republican administrations taking positions that are quite aggressively adverse to people raising immigration claims.

Melissa Murray:

All right, another case on the docket for the first week in February is, I guess, the first sitting week in February, not the actual first week in February is *Lange v. California*. Under the 4th Amendment, police officers are required to obtain a warrant before entering a home. However, the court has recognized an exception to this requirement in emergency conditions such as when the police are in hot pursuit of a suspect. The question in *Lange* is whether this exception applies when the police are pursuing a suspect whom they have probable cause to believe has committed a misdemeanor.

Melissa Murray:

The facts of the case are very compelling. A California highway patrol officer followed Arthur Lange home because he believed that Lange had violated state traffic laws by listening to loud music and honking his horn a few times while driving. After Lange pulled into his garage, the officer, who had turned on his overhead lights but did not use his siren, that's important, entered the garage by putting his foot under the garage door to block it from closing. Upon approaching Lange, the officer said that Lange smelled of alcohol and so he charged Lange with a DUI. Challenging his DUI conviction, Lange argues that the circumstances of his arrest did not constitute an emergency sufficient to relieve the officer of the requirement to seek and obtain a warrant. The lower state courts disagreed here and on appeal, California concedes that federal and state courts have reached different conclusions on the 4th Amendment question presented by this place, but it does not think that this case is a good one for making this determination because Lange's DUI conviction should stand regardless of the outcome of this proceeding.

Melissa Murray:

On appeal, the state argues that pursuits for misdemeanors do not always justify a warrant-less entry, but it maintains that courts should use a case by case approach to determine whether there's a genuine emergency. There's been an amicus appointed to defend the judgment below. That's Amanda Rice. This is necessary because California conceded an error and actually the Solicitor General has filed a brief in support of the California Supreme Court's position as well. But we just note that Amanda Rice's appointment is one of these circumstances where the justices have chosen to help diversify the pool of advocates before the Supreme Court bar because they have appointed someone who is an underrepresented person before the bar. What do we think about that?

Kate Shaw:

Yeah, it's good. I mean I was just looking over... I did this article a few years ago and I don't have the most recent data, but I think of the last 10, this makes her the second or maybe... There have been two women in the last nine of the amicus invitations, and that is light years better than the previous four of 55, which I think was the number that I had in my article. So it's marginally improving. But they make these a couple of times the year, and it is still the case that they rarely give them to women. So yay Justice Kagan for doing that, and I really, really hope that these future invitations go... I would love to see them go to a broader pool of individuals who aren't necessarily former clerks to the justices. But if they're going to keep to that model, at least not just to white guys who are former clerks of the justices.

Melissa Murray:

It's also a really interesting case. If you're going to be appointed to something, I mean you obviously don't have much choice about what you're appointed to. This one seems like a really interesting case to be involved in.

Leah Litman:

For sure.

Melissa Murray:

All right, so that sort of rounds out the week ahead for the court. So let's talk about a little court culture, and the court culture prospects have been so rich over the last couple of weeks. So I just want to talk a little bit about Zoom cats. Will you ladies indulge me?

Kate Shaw:

Always.

Leah Litman:

Meow.

Melissa Murray:

Okay. So all of you already know this, listeners. A lawyer literally got got by a Zoom filter in oral arguments. So he was appearing before a court and apparently one of his children had actually been using the computer that he was using for his oral argument and they had downloaded a Zoom filter that made him appear to be a cat. So he was truly flummoxed for about five or six minutes as he tried to figure out how to get the Zoom filter off. He said... this is remarkable. He told the court, "I am not a cat," which was both obvious but not obvious either. So that was hilarious, but it wasn't an isolated incident.

Melissa Murray:

So there had been a number of circumstances in which pets have been wilding out in Zoom courts all over the country. So in a recent hearing in the district of Massachusetts, a lawyer made a valiant effort to keep his dog from barking during an appearance before US District Judge, Douglas Woodlock. It was a futile effort. The dog continued to bark, eventually prompting Judge Woodlock to declare that he did not have a dog in this fight. I love it.

Melissa Murray:

Relatedly, in oral arguments at the 1st Circuit, there was an interruption when Judge O. Rogeriee Thompson said her cats were quote, unquote, "Driving her nuts," and she got up to let one of them out of the room. This seemed to perplex one of the attorneys who asked Chief Judge Jeffrey Howard whether she should wait until Judge Thompson returned. Judge Howard responded in the affirmative explaining that "Cats take precedent in this court." Well said, sir.

Leah Litman:

Also, doing a little wilding out was Jenny Thomas, wife of Justice Clarence Thomas. So The Washington Post reported the following story: Virginia Thomas told her husband, Justice Clarence Thomas's former law clerks that she was sorry for a rift that had developed among them after her election advocacy of President Trump and endorsement of the January 6th rally that resulted in violence and death and the siege on the Capitol. She wrote, "I owe you all an apology. I have likely imposed on you my lifetime passions." Okay. She then went on to speculate, "My passions and beliefs are likely shared with the bulk of you, but certainly not all." And she said, "Let's pledge to not let politics divide this family." She also said "Many of us are hurting after leaving it all on the field to preserve the best of this country."

Leah Litman:

The article also reported on some exchanges between and among Thomas clerk. So after one law professor posted an article about how rioters had usurped religious symbols, another former clerk called it offensive drivel. Another former Thomas clerk is John Eastman, the person who spoke at the rally on January 6th, he wrote to the clerks, "Rest assured that those of us involved in this are working diligently to ascertain the truth," an email that brought a response from Professor Stephen Smith at Notre Dame, who accused him of spreading a false narrative.

Leah Litman:

So what to say or think about any of this?

Melissa Murray:

First of all, this listserv is wild and I want to be a part of it. I want to know what's happening.

Kate Shaw:

I know. Or at the very least if future participants in the listserv are interested in leaking to individuals, please get in touch with us. We would be so happy to help amplify whatever leaks from this listserv. You have concluded deserve to see the light of day.

Leah Litman:

Also, not to skip ahead, but if any of Heidi Cruz's friends want to leak her texts to us, too, we will also cover those. Sorry. Back to the Thomas clerk listserv.

Kate Shaw:

No, no, no. The mailbox is open for those as well.

Melissa Murray:

This is unlike any clerk listserv that I am a part of. I am on two clerk listservs and they're pretty anidine; like horseshoe tournaments, things like that, or when are we going to get together for a reunion? It's pretty low key stuff, not "So last week at the insurrection," nothing like that ever happens on the listserv. So I think that there's just a general assumption that we may share certain sensibilities, but they're not always going to be universally shared. So people just stick to topics that aren't necessarily going to be inflammatory. This seems like maybe there was, at least at the beginning, a shared sense that everyone was on the same page.

Kate Shaw:

So a couple of things. One, I mean I think that it's both really disturbing that it's... John Eastman we obviously all know was sort of onboard with that, but that other participants in this list, or at least one in the leaked materials, Wendy Stone Long, who referred to a stolen election in the leaked text. So just that, right, that there was this exchange that involved at least a couple of individuals making clear that they bought this lie that the election was stolen. So that was deeply disturbing, although we should definitely say that those claims didn't go unchallenged; that there were participants in the listserv who objected. That in fact, is what brought about Jenny Thomas's apology and probably brought about the leaking of the exchange.

Kate Shaw:

I'm of a little bit of two minds about this. I mean I generally think that she's obviously a political activist, and a lot of people have raised questions about the propriety of some of her activities in light of her husband's job, and I actually think that public officials shouldn't be on the hook for the activities of their spouses for the most part. Now I think when it comes to actually that if she actually participated in the organizing of an insurrection, I think that's different. I don't think that that's not what these messages revealed, sympathy for the stolen election narrative, absolutely. But as a general matter, her activities I think are her activities, and they're not Thomas's.

Kate Shaw:

But she's participating in this listserv as though she is on the team. Like she is a member of this intellectual community in a way that is different from just a spouse who has her own life and her own activities. That makes me think that actually it becomes more legitimate and fair to raise questions about the propriety of what she does if what she does she understands to be something that is a shared enterprise of some sort with the members of her husband's clerk classes. So I don't know. It complicated my previous, pretty strong feeling that whatever she did was sort of not really on her husband.

Melissa Murray:

Yeah, I think that's kind of the point. One, these other listservs of which I am a member, the judge's partner does not participate. So that's very different obviously, but also generally, something like the

events of January 6th, I think you could assume that there is not necessarily a unity of agreement about that among a group as numerous as the one on this listserv. So there just seemed to be a weird level of assumption that was operating. She just assumed that we're all on the same page.

Kate Shaw:

Yeah.

Leah Litman:

Something else that I had wanted to flag is we're recording on Friday, as I said, and a preview of a 60 Minutes episode has aired and that episode is with Judge Salas whose son was murdered and her husband critically injured by a misogynist gunman. In the preview, which has now been reported on by some outlets, the judge says the gunman also had a file on Justice Sonia Sotomayor. I mean this is terrifying and I think really underscores the calls for additional protection of federal judges. It's just extremely scary that they're now increasing targets and receiving, reportedly, more threats and some of these are being carried. If anyone comes for Sonia, I'm going to lose it.

Melissa Murray:

I would also lose it for lots of reasons. Again, I just come back to I said something like this in other events, and I just want to just make it clear. So much of this kind of activity, which I don't think is divorced from the insurrection, I mean all of it seems to have a weird misogynist glaze to it. The rioters going through the Capitol calling Nancy Pelosi a bitch, looking for Nancy Pelosi, looking for members of The Squad. There just seemed to be a really profound discomfort with the idea that what we understand as leadership in our country looks really different from what it used to look like.

Melissa Murray:

I remember before January 6th, one of the Trump spokespeople said that Donald Trump was the manliest president in the history of the country, the most masculine person to ever occupy the office. That's totally weird and possibly irrelevant, unless you are deeply concerned or you have profound anxiety that future leaders are not necessarily going to be masculine because they're not men. So I think the misogynist gunman, you could think of it as a one-off or anomalous, but I actually think it's part of this broader discomfort and anxiety about women sharing the stage and being leaders.

Kate Shaw:

And it's not just misogyny but racism as well. Many of the participants in the insurrection were avowed white supremacists. I doubt it as a coincidence that this gunman had a file on the one female justice of color on the Supreme Court, and that the judge whose family he targeted was also Latina. So I totally agree. I mean hearing just that clip that I guess we're going to hear the whole interview this weekend made me just feel like oh my god. It feels like we maybe are entering this moment of political violence or that just that-

Melissa Murray:

Entering?

Kate Shaw:

So I guess yeah.

Melissa Murray:

Entering?

Kate Shaw:

When I said that, it's not that the events of January 6th are not in the rear view mirror at the beginning of the show I guess is just another way to say that, but this is, we could be facing different iterations potentially, but more of what we saw on January 6th and leading up to it.

Melissa Murray:

So, that's a downer. Leah, do you want to send us out on a high note?

Leah Litman:

Yes, and that high note is a little spring break that Senator Ted Cruz took when he went to Cancun. So some real investigative sleuthing on the internet discovered that Ted Cruz had departed for Cancun, Mexico some time Thursday after Texas had just been pummeled by extreme winter storms, millions are without power, people lack clean water, pipes have burst. The state is under severe distress. There are emergency declarations. In an initial statement when this was reported, Cruz indicated he went because his daughters had asked him and, quote, "Wanting to be a good dad, he agreed to fly them down there." This seemed to somehow imply that he was only escorting them and would have been right back. But then shortly after that, people at United Airlines snitched on him and said his original return trip was for the weekend. He then had booked a flight on Friday, early Friday morning after he started to catch flack for this.

Leah Litman:

Then bringing the real you got got energy, some of the people that Heidi Cruz, his wife, had been texting about the trip leaked the text to the press about how she had invited them to go with her and they were always going to return this weekend and they were going because it was, quote, "freezing at their home," and just underscoring the appalling nature of it all, someone went to Ted Cruz's house to report on it and photograph as he went home and discovered their poodle, Snowflake, had been stranded and left at home during this trip. It's all too much.

Melissa Murray:

Let me say this in defense. Well, no it is a kind of a defense. I totally understand the need to want to get away. My mother-in-law lives in Houston. This was horrifying. It was incredibly cold. The power grid goes out. Everyone's worrying about frozen pipes. No one is equipped to deal with this because this never really happens. So I mean all of it is incredibly unexpected and people just don't know how to deal. If there was any way that we could have gotten her on a plane to Cancun, I think we might have just because it was so uncomfortable for her. She was going to her car to charge her phone and warm up. I mean it was just terrible.

Kate Shaw:

No one would have faulted you or her for doing that-

Leah Litman:

Right, but she's not a public official who is responsible for constituent services.

Kate Shaw:

I don't know her job. Maybe, is she a mayor? Is she the mayor of a sizable city? Is she the mayor of Houston? I know she's not.

Melissa Murray:

I can understand Heidi Cruz wanting to take her children.

Leah Litman:

Sure.

Melissa Murray:

Because it was like... So I could see that. But yes-

Leah Litman:

But also, it's a pandemic. I'd like to go to Cancun.

Melissa Murray:

That too. That too. That too.

Kate Shaw:

This sort of hang dog, I'm busted look on his face throughout the duration of his first interview upon return was pretty gratifying, I have to say. He knows he screwed up badly. Will it mean anything politically, I don't know, but he gets it.

Melissa Murray:

The thing that surprised me was did they not think they would be made at airport? I mean he's very recognizable.

Leah Litman:

And yet.

Melissa Murray:

And there's so many pictures. I mean, lots of people photographed him, and not just paparazzi, but they sent paparazzi down to Cancun, but even before that there were just like-

Leah Litman:

Other people in the airport.

Melissa Murray:

Individuals on cellphones. Yeah. Well in any event, I hope the family got to enjoy some time in Cancun and got some... I mean, I'm so cold right now. I want to go to Cancun. I want to get out of this house. I'm so tired of the pandemic.

Kate Shaw:

Yeah, we all want a change of scenery desperately, desperately.

Leah Litman:

Yeah.

Kate Shaw:

Desperately.

Leah Litman:

And yet even though we're all tired of the pandemic, we're not going around invalidating public health restrictions that are designed to keep us safe or flying to Cancun on a moment's notice. So there you go.

Melissa Murray:

I will say I felt bad for Heidi Cruz that her friends sold her out like that, in the same way that I feel bad when Malia Obama is caught dancing or smoking at Coachella and her friends sell pictures to the newspapers. I'm just like, girl, get you some better friends.

Leah Litman:

The title of the chat on which Heidi Cruz was a part was Lovies, and you just know there had to be a side chat going on too before these texts were leaked and I also want to see that.

Melissa Murray:

I'm in a group chat with a bunch of women friends and we have one friend who's, she does the most. We love her but she does the most, and we do have a side chat for that.

Leah Litman:

Right.

Melissa Murray:

We love her, but we also...

Leah Litman:

Wait, are you talking about me? No, I'm just kidding.

Melissa Murray:

It's with Kate. It's with Kate and Melody.

Kate Shaw:

I swear there isn't, but that would be amazing.

Leah Litman:

I knew you were talking about TikToks.

This transcript was exported on Feb 22, 2021 - view latest version [here](#).

Melissa Murray:

Kate, you gave it away. Kate, you gave it away. Stop it.

Kate Shaw:

You gave it away.

Melissa Murray:

I was just broadly talking, but your face gave it away. Like yes, Leah, we talk [inaudible 00:52:47].

Kate Shaw:

We do not. I promise we don't.

Melissa Murray:

But you're like, "Why with all the bandanas? What's with all the Taylor Swift?"

Leah Litman:

The bandanas are awesome, and I will not hear otherwise.

Melissa Murray:

They are. They are.

Leah Litman:

And on this note, perhaps we should end.

Melissa Murray:

We should.

Leah Litman:

Thank you all for listening, as always. Thank you to our producer Melody Rowell. Thanks to Eddie Cooper for making our music, and if you'd like to support the show, you can do so by subscribing at glow.fm/strictscrutiny or by giving yourself a glow up with some of our merchandise at our website.