Kate Shaw:

Lisa what... Leah, what did you think of those kinds of lines of questioning?

Leah Litman:

Are you confusing me with Lisa Blatt? I know we're very similar to each other.

Kate Shaw:

This is us, for you listening, and watching in person, is sometimes we just say weird say stuff and then Melody-

Leah Litman:

Cuts it out.

Kate Shaw:

Just cleans us up. So Leah, my cohost whose name I definitely know, what did you think about this?

Kate Shaw:

(silence)

Leah Litman:

Welcome to a very special episode of Strict Scrutiny. We are your hosts. I'm Leah Litman.

Kate Shaw:

And I'm Kate Shaw. And today we're coming to you live, or as live as we can today, from Yale Law School at a taping hosted by the American Constitution Society. So thanks so much to Jake and to the chapter for inviting us to do the show with you all.

Leah Litman:

So today we have a pretty jam-packed episode. As always, we will cover some Supreme Court related news. We have a few grants, as well as opinions, to cover. Then we will do the recaps from the last week of arguments in the March session. And finally, we have some court culture, and it's a good one because spoiler, we finally have some judicial nominations, and we are very excited about them. So we will make sure to leave enough time for all of our thoughts there.

Leah Litman:

First the news, though. The court decided another case on the death penalty shadow docket. Here it was a summary reversal, reinstating the death penalty in a Tennessee murder case. Justice Sotomayor noted her dissent, but she didn't actually write a dissent. The case was Mays v. Hines, in which the Supreme Court said the Sixth Circuit wrongfully concluded the defendant received ineffective assistance of council, when the defendant's lawyer did bring out at trial that the state's witness, who had found the body, lied about his reason for being at the motel. The witness was having an affair, although not with the victim.

Kate Shaw:

We also wanted to flag a note that appeared on the order list in another death penalty case. So this is in a case called Johnson v. Precythe, which is a case in which a Missouri death row inmate is represented by Ginger Anders, who was a special guest on last week's episode with Melissa. We should Melissa was unable to be here today, and we always miss her and we will do our best in her absence. So in the Johnson case, so the Supreme Court hasn't decided yet whether to take the case, although it is relisted something like seven times. The background here is that part of the court's eighth amendment jurisprudence requires a death row inmate who is challenging a state's execution protocol as cruel and unusual to identify a specific way that the state could carry out the death penalty that would not be cruel and unusual.

Kate Shaw:

So in this case, death row inmate Earnest Johnson is challenging Missouri's lethal injection protocol. He initially requested nitrogen gas. He was unsuccessful, and he's now seeking to offer up the alternative of execution via firing squad. And it sounds ghastly, and it is, but there is an argument that some justices have alluded to that firing squads may actually be more humane methods of execution than the lethal injection protocols that many states use, that firing squad executions would be near instant, less likely to result in horribly botched executions. And I guess some of the justices want to know whether, in light of the district court's resolution here, this particular inmate and death row inmates in general, could still request to be executed by firing squad. So the court has basically asked the party's to file supplemental briefs addressing the question that, given the district court dismissed without prejudice this nitrogen gas request, would the petitioner be barred from filing a new complain that proposes the firing squad? So we will keep an eye on that.

Leah Litman:

And one thing that execution by firing squad does is it exposes, in a very public and transparent way, the ghastly nature of capital punishment. Whereas I think execution by drug protocol can make the entire affair seem a little bit less troublesome and more seamless than perhaps it actually is.

Kate Shaw:

Yeah. And in Baze v. Rees in 2008, that was one of the claims brought by the individual challenging the protocol and issue there, which was that using these three drugs, in particular the first of these, the paralytic agent, really is about trying to create this illusion of calm, serene death that in fact may mask profound agony that is just not visible, and that somehow bringing to the surface the nature of what is being done in the name and the hands of the state. Maybe there would be some social value in that. So I actually think, although it sounds totally insane that the court would even be entertaining this, you sort of dig down a little bit and actually there is some logic to it. So I will be curious to see both what the filings say, and what the court does with the supplemental briefs.

Leah Litman:

So there was what I think is a troubling grant in Cameron v. EMW Women's Health Center. So this will be the first abortion case that the Supreme Court hears for argument since Justice Ginsberg's passing and Justice Barrett's confirmation. And it involves what seems like a wonky procedural issue about the right to intervene on appeal in litigation, but I think the facts, or the procedural history, of the case, when juxtaposed against some recent signals from the court's abortion jurisprudence, raised some red flags, at least for me. So the case involves a challenge to a Kentucky law that prohibited a particular abortion procedure, and the plaintiffs say, given how the law is worded, that it actually prohibits the most

common method of second-trimester abortions, D&Es. The plaintiff sued and named several defendants when they sought to enjoin the law, including the Kentucky Secretary of Health and the Kentucky Attorney General. But the Attorney General agreed to be dismissed from the case and to be bound by the court's ruling in the litigation.

Leah Litman:

So now fast-forward a few months, the case is in the court of appeals after the district court concluded that the law was indeed unconstitutional. And there is an election in Kentucky. The former Kentucky Attorney General is elected governor. Governor Beshear has said he is pro-choice. And the new Attorney General, Daniel Cameron, is decidedly not pro-choice. So a few more months pass. The court of appeals now issues its decision saying that this Kentucky law is indeed unconstitutional, and the new Kentucky Attorney General, Cameron, now files a motion to intervene in the case, again, after the court of appeals has concluded that the law is unconstitutional. And he wants to intervene in the case to press an argument that the Kentucky Secretary of State had noted, but elected to forego on appeal, namely that the abortion providers did not have standing to challenge the abortion restriction. If that argument sounds familiar, it should.

Leah Litman:

This is the same argument that the state of Louisiana had made in June Medical Services v. Russo, and that a majority of the Supreme Court, an actual majority with the Chief Justice joining the then four liberal justices in Justice Breyer's opinion, that they rejected. So the court of appeals, looking at all the facts, denies this motion to intervene as untimely. In general, interventions on appeal are de-favored. This case had already been decided. The state elected not to pursue this argument with zeal. It could have prejudiced the other party to re-litigate the case after it had been decided. The Attorney General could have decided to intervene before the case was decided. The Attorney General had agreed to be dismissed and bound by the ruling, so on and so forth. Right? So this doesn't look like the kind of case in which the Supreme Court would ordinarily intervene. T

Leah Litman:

here's also no circuit split, there's no question about what the law or legal standard is on interventions on appeal. It's a multi-factor analysis under the federal rules of appellate procedure. So the denial of a pretty clearly untimely intervention is not usually something the Supreme Court would review. And so to me this kind of signals that the court is going to expand state's ability to defend abortion restrictions under the guise of this nominally, facially neutral rule about interventions on appeal at the same time that there might be renewed interest in restricting abortion providers' ability to challenge abortion restrictions. Again, back in June Medical, Justices Thomas, Gorsuch and Alito all would have said that abortion providers can't challenge abortion restrictions that apply to them, and could send them to jail. Justice Kavanaugh didn't take a position. Justice Ginsberg's no longer on the court, and Justice Barrett is. So this just has all the makings of a wonky procedural ruling that could be quite significant in how it affects abortion litigation going forward.

Kate Shaw:

I totally agree with all that. Just wanted to flag two more things. One is that the court did not grant cert on the second question that the petition presented, and that was whether the position below should be reconsidered in light of June Medical. That, I think together with the court's continued inaction on a petition that we'd mentioned before, which was a petition regarding Mississippi's 15-week abortion ban,

seems to me like further evidence that the court is going to take its time and proceed incrementally in changing the constitutional law of abortion. And I think, as you say Leah, maybe it comes first... In this case, if they do decide that there should be a second look at the intervention question, I presume they wouldn't reach the subsequent question of whether abortion providers can challenge these laws at all. But certainly, it would set in motion such a challenge below that they could then review and there are other cases in which the same question will surely come back to the court.

Kate Shaw:

But I think that trying to nibble away the edges, just to mix metaphors, we've called abortion jurisprudence and then your term, something like likely to suffer death by 1000 cuts. I guess pick your metaphor. But I do think that I can well see the court being enthusiastic about a bunch of procedural rulings that make abortion litigation exceedingly difficult, or asymmetrically difficult, rather than going in a full bore attack on the substantive right protected in their own casing. So I think that this is further evidence that that's likely the road we are on. And then the second thing I wanted to say about Kentucky specifically is that the law at issue was defended by state officials. So lawyers from the governor's office and the health department represented the health secretary after the AG bowed out of the case. And this new Attorney General did actually participate in the sixth circuit, just didn't seek to intervene until after the court had ruled. So I actually think this is something that I've written about.

Kate Shaw:

I do think that state officials should be able to decline to defend laws under some circumstances that they think are unconstitutional. It obviously depends on the statuary provisions creating the office of attorney general. In some states it's a constitutional office. I mean, state law really differs on this. But as a general matter, I think that a lot of states do and should permit these constitutional officers to make their own decisions about laws being unconstitutional. We saw that in the Prop 8 case in California when the Attorney General declined to defend the constitutionality under federal constitution of Prop 8. But also that states should provide a way to ensure some kind of judicial review so that there's not a musical chairs problem where just the law is frozen wherever a district court, if it's a district court, has decided it if there's not a proper party to continue litigation.

Kate Shaw:

And sometimes I'm going to like and sometimes I'm not going to like the decisions made not to defend, but I actually do think it's a good principal, and I think that state law just needs to find a way to provide for vigorous representation of positions. Anyway, the point is if that happened here it is not as though Kentucky was deprived of zealous advocacy. It's just that the Attorney General didn't participate. So I don't think that vindicating the interests that I had just described is something the court needs to do here. The position was defended below.

Leah Litman:

That being said, I'm sure I can write the court's opinion that's about to issue, which is going to be intervening to defend abortion restrictions under any circumstances is in fact necessary to enforce the Voting Rights Act. We can just end there.

Kate Shaw:

Fast forward. Right. Okay. So we got some opinions this week, and then we've got a bunch of arguments to debrief. So let's maybe try to tick relatively quickly through the opinions. The first was in Florida v.

Georgia. So this is an original jurisdiction case involving the court's second encounter with a dispute between Florida and Georgia over the Apalachicola, Chattahoochee Flint River Basin. Basically, Florida is arguing that Georgia is over-consuming water, which is hurting Florida, and in particular hurting certain oyster fisheries in Florida. The court referred Florida's complaint to a special master, which it typically does in these original jurisdiction cases. The special master wrote a report siding with Georgia. The court here agreed with the special master, dismissed the case.

Kate Shaw:

This was unanimous opinion by Barrett, on the sort that probably should have been her first opinion on the court, but for some reason the non-unanimous FOIA opinion came first. But this was short, straight forward. I didn't count the days, but a month or so after argument. It was a remarkably quick opinion, so it made me think that once she really hits her stride she's going to churn out opinions at a pretty quick pace.

Leah Litman:

So the second opinion that we got was Facebook v. Duguid, and in this opinion the court held that Facebook does not count as an automatic telephone dialing system under the Telephone Consumer Protection Act, which prohibits certain abusive telemarketing practices. Basically, the question in the case is whether Facebook texts notifying users of a new account access attempt from an unknown device count as robocalls. Justice Sotomayor for a unanimous court concluded that because Facebook's notification system did not store or produce telephone numbers to be called using a random, or sequential, number generator, it is not an autodialer under the statute. The case kind of involved something of a conflict between two canons of statutory interpretation. On one hand, you had the series qualifier rule. On the other, you had the rule of the last antecedent. And Justice Sotomayor decided that here, the series qualifier rule means that in order to fall within the statute the dialer must use a random or sequential number generator to store or dial.

Leah Litman:

So the series qualifier rule basically says that a modifying clause applies to all of the preceding nouns or verbs, here the verbs, whereas the rule of the last antecedent says that the last modifying clause sometimes just modifies the word preceding it. Anyways. So between the battle of the canons, the series qualifier rule won out here. Justice Alito concurred, making a surprisingly reasonable point, and the concurrence said something like, appellate judges spend virtually every working hour speaking, listening to, reading, or writing English prose. Canons can help figuring out the meaning of troublesome statutory language, but if they are treated like rigid rules they can lead us astray. He says basically no reasonable reader interprets text using these rules without making judgements or considering context. And when I read this, I was thinking, "Has Justice Alito turned over a new leaf in his 71st year on this Earth? Is this an Aprils Fool Joke?" His birthday falls on April 1, which is when the court released this opinion. So yeah.

Kate Shaw:

We have to acknowledge when Sam Alito occasionally strikes an exceedingly reasonable note, and here he did.

Leah Litman:

And he's going to do it again on this episode, so stay tuned.

Kate Shaw:

That's right. I was going to say, maybe next year, maybe every year on his birthday he'll give us a one paragraph we can-

Leah Litman:

Once a year on April Fools, right? Just to needle us.

Kate Shaw:

Yes. But of course we can't not criticize an opinion that... Not just, actually, Justice Alito, but Justice Sotomayor wrote. And one thing that was pretty conspicuous, we thought, in the opinion was that it actually relies pretty heavily on treatises and law argue articles. And I couldn't help but notice something unifying in the identity of the authors of these written works. Did you notice anything Leah?

Leah Litman:

Were several of them named Paul?

Kate Shaw:

Good guess. Not in this case. But they were all men. There were just so many men cited. So you had Justice Scalia and Bryan Garner Reading Law cited repeatedly, Yale law professor Bill Eskridge, obviously a giant in the field of statutory interpretation and legislation broadly, a piece by Lee and Morrison, possible in the Yale Law Journal actually, now that I think about it.

Leah Litman:

So it's a statutory interpretation sausage fest?

Kate Shaw:

Exactly. And I found this especially frustration because statutory interpretation is a field with a number of incredible women scholars in it. So Yale Law School's own, although I guess now at the White House, but normally Yale Law School's own Abbe Gluck, Victoria Nurse, and Anita Krishnakumar. Anita has actually gone to Georgetown, or will be going to Georgetown in the fall. She is doing some of the most important work in statutory interpretation and is the foremost expert on the canons of right now, and I just found it galling that in the entire opinion about dueling canons, which is the title of an article that Anita wrote a couple of years ago, didn't cite any of her work. And unfortunately, that criticism goes not just for Justice Alito, but for Justice Sotomayor, the author of the majority opinion.

Leah Litman:

Yeah. So stayed tuned for, actually, a future writing by us that will touch on this issue, citation disparities. But I find this stuff so extremely annoying. I think some of it is a result of a very skewed elite perspective among clerks and justices about who counts as an expert, and that has some gender dimension to it as well. But it irks me to no end.

Kate Shaw:

So the next case we got, FCC v. Prometheus, was a Kavanaugh opinion for a unanimous court. This was a weirdly unanimous batch of opinions. So Justice Kavanaugh writing for the court finds that the Trump

FCC's relaxation of local ownership rules, which had been challenged on the grounds that the FCC had failed to adequately consider the effect of this change on women and minority ownership, was not arbitrary and capricious. So as we discussed when we debriefed the arguments, Ruthanne Deutsch argued the hell out of this case in her first oral argument at the court. And although she took a loss on behalf of the broadcasters who were challenging the rule change, I do think this is a pretty narrow win for the government, for the FCC, that basically restates what courts have said in other arbitrary and capricious review cases, namely that agency decisions have to be reasonable, they have to be based on evidence, they must be reasonably explained.

Kate Shaw:

And it simply finds here there was enough evidence for the FCC to have concluded that changing the rules would not harm minority and women ownership. The court acknowledges there just wasn't much evidence about the likely impact, and says the FCC invited the submission of other evidence. It just didn't get any. It wasn't required to commission new studies, but could rely on the existing studies that it had, and that in any event this was all a reasonable conclusion that it reached. And the court did acknowledge that the FCC had historically considered ownership diversity as a goal to pursue, and nothing in the court's opinion casts doubt on the permissibility of the FCC doing that despite Justice Thomas raising questions in his concurrence, and that being an undercurrent in the case. Although it wasn't explicitly argued before the court.

Kate Shaw:

One thing I did notice, I wanted to ask you about Leah, which is a conspicuous lack of citation to New York v. Commerce, the Voting Rights Act case. So that case went uncited in the DACA rescission case. Justice Sotomayor did cite it, but the majority didn't. And uncited here. So these are the two big arbitrary and capricious review cases that follow on to the VRA case. I don't know. Do you think the court is approaching this as a ticket for one ride only kind of case? I mean on the one hand, presumably the government conduct there was egregious enough that we're not going to see a lot of recurrence of it. On the other hand, it should be a meaningful constraint on government action and government explanation. And I just worry about it becoming this decision that was a bare majority of a soon-to-change court issued that shall never be spoken of again except of course by us all the time.

Leah Litman:

I mean, citing Department of Commerce v. New York is necessary to enforce the Voting Rights Act.

Kate Shaw:

Right.

Leah Litman:

But more seriously, I think that the lack of citation in the DACA case was more surprising to me than the lack of citation in this case. This opinion was written by Justice Kavanaugh, who joined the dissenting opinion basically accusing the majority of adopting a cock-eyed conspiracy theory that no sane person would adopt. So not totally surprising to me that he wouldn't cite that opinion. But I also think more generally, even the majority in Department of Commerce itself viewed that case as pretty narrow and unique to the circumstances, saying that "Look, on this record, it was just impossible slash insane to believe that the only reason that the Department of Commerce added this question was because DOJ

really wanted to enforce the Voting Rights Act." And that was their justification, and it just absolutely defied any logical sense about what was happening. This is why it is a running joke.

Leah Litman:

And here, even though I think most people might think that perhaps what was happening is the agency was adopting a change in priorities, and what they valued and what they didn't, that isn't that far a field from their explanation, which is they just didn't think the evidence of ownership diversity was that significant. Which, in some ways they're saying, "We basically just don't value it that much, and in light of this small evidence we're not considering it that important." And I don't think that that is as substantial a departure from what the agency's stated explanation was versus its actual explanation, than in Department of Commerce. So I guess that's kind of what I see as happening here.

Kate Shaw:

I think that's a great point, and as you were talking I was thinking, "Well yeah, maybe there's some value in silence as opposed to Kavanaugh doing some minimizing discussion of it that really does suggest it's just such an outlier case. It's not relevant." So actually, upon reflection I think the less the better. So I think maybe this is one of those instances. Okay. So should we move on to some of the recaps from the most recent week of arguments?

Leah Litman:

Yes. So speaking of the less said the better, the first case we wanted to recap the argument in is Goldman Sachs v. Arkansas Retirement Fund. Melissa and Ginger previewed this case, which is about securities law class actions, and specifically when can a securities law about a company's alleged misstatements proceed as a class action? So for those listeners who might not be law school and class action aficionados, a class action is a case that you are allowed to bring on behalf of yourself and other people like you. But in order to bring a class action suit, you have to show a bunch of requirements, like your claim is typical of others in the class, and your claim is sufficiently similar to those of other people in the class, and so on. The requirements are numerosity, typicality, common questions, predominate, and that the class representative will fairly and adequately represent the interests of the class. Since we're talking about class actions this week, I think it is worth noting that the Roberts court has been quite hostile to class litigation.

Leah Litman:

In Wal-Mart v. Dukes, it held a big case alleging sex discrimination at Walmart could proceed as a class action. In Jennings v. Rodriguez, even though the class certification wasn't presented, the court went out of its way to suggest the court of appeals should revisit whether the case should proceed as a class. All the arbitration cases held that arbitration agreements can't be invalidated on the grounds that they conclude class-wide arbitration, so on and so forth. Anyways. In a case decided from another era, Basic v. Levinson, the court addressed the requirement that common issues predominant in a class action in the context of securities law class actions.

Leah Litman:

In securities law, a plaintiff can sue a company in which they invest for a company misstatement, if the misstatement is something that the plaintiff relied on. Now a plaintiff who is trying to bring the class action case will find it very difficult to prove that every single plaintiff stock holder individually relied on a particular statement. And so Basic adopted a presumption that plaintiffs rely on a misstatement where

the misstatement was public, the stock was traded in an efficient market, and plaintiffs traded in the stock between the date of the misrepresentation and the date that the misrepresentation became public.

Leah Litman:

Now on the merits, a plaintiff will have to prove the statement was also material, but in a case called Amgen, the court said, "To get a class certified, you don't have to establish materiality at that stage." Okay. So Basic was a presumption of class-wide reliance on statements. And defendants can rebut presumptions. And so here the question is: Well how can a defendant rebut the presumption? And what happens if they do? So the defendant, Goldman Sachs, is arguing that you can rebut the presumption of reliance if the alleged misstatement was generic, that is they're arguing that a court can consider the generic-ness of the statement and concluding that the statement did not lead to reliance.

Leah Litman:

And a second related question is: If Goldman rebutted the presumption, does the burden of persuasion proving that the plaintiffs didn't rely on the statements remain with the defendant? Or does is it shift back to the plaintiff? And in a prior case, Halliburton too, the court had said that plaintiffs don't have to prove price impact. So that would mean the defendants still bear the burden of persuasion. Okay, that was a lot of windup, but I feel the need to explain this, because otherwise it's hard.

Kate Shaw:

I totally agree. And actually let me just say one think on generic, I found this a little bit abstract. But in the argument, I think this was an Alito example, the kind of generic statement that he had in mind. He's like, "What if a company literally just says, 'We're a nice company'? That kind of statement? Is that generic enough to rebut this presumption that something they have said might have had some impact on the price?" And that's not the kind of statement that was issued here, but that was an example that I found actually quite helpful.

Leah Litman:

Yeah. So at the argument, Justice Breyer came out pretty hot out of the gate wanting to know why the court was even hearing this case. And as I alluded to, he also suggested that maybe the court would do better to write less.

Justice Breyer:

I'm not sure what you think, and maybe on rebuttal the others, I mean this seems like an area, the more that I read about, the less that we write, the better.

Leah Litman:

Part of the difficulty, I think, with this case is that the by the time got to the Supreme Court, both sides agree in the abstract that a court can consider the generic nature of statements when deciding if there has been reliance. And now it's more of a case specific dispute about whether the second circuit actually did consider the generic nature of the statements, and how generic this statement was, and what kind of evidence can it consider in concluding the statement was generic or didn't lead to reliance interest. Does it require expert evidence? Can they rely on common sense? So on and so forth. Again, this issue

just seems kind of weird, and that okay the Supreme Court is going to write an opinion, and what is going to happen?

Leah Litman:

But I think Justice Kavanaugh also made, what I think is an important observation in this case about how the adjectives that the court uses in whatever opinion it writes will prove to be quite significant in future litigation. And in part because I think that is right in this kind of case, and also because this is something I emphasize in my constitutional law class, I also wanted to play that clip here.

Justice Kavanaugh:

Following up with the Chief Justice's questions on the difference between you and the other side, and other of my colleagues have also asked about this, it seems like the adjectives are going to be different, and the adjectives will probably matter in future litigation. So I want to make sure I have crisply, exactly, what you think it should be.

Kate Shaw:

That was funny. And I feel like a lot of the time the justices are asking the advocates for help crafting an opinion or a rule, but not usually this explicitly. He's like, "Tell us what to say." And I actually think it's kind of helpful. If you're struggling with... They're navigating between the basic and Amgen, and like at least as Shanmugam suggesting on behalf of Goldman Sachs, courts are really struggling with how to reconcile.[inaudible 00:27:41]. "Just give me a sentence. I'm not promising you I'm going to put it in the opinion, but I just want to know what the sentence would say if you got to write it."

Leah Litman:

Yeah, like "Maybe I want to change the law a little, but I don't want to blow up the entire enterprise."

Kate Shaw:

Yeah. Yeah. So, speaking of Kannon Shanmugam for Goldman Sachs, he made a pretty bold ask, I thought, which was interesting because he had made a similarly bold ask of the court in the climate case we talked about a month or two ago, and he basically asked the court not just to vacate under the new standard about when a class action can proceed, but that it should also use the new, or newly articulated, standard to decide in this case, whether this class could proceed. And presumably, he thinks this is an easy case and that it should not be permitted to proceed. Unclear if that was encompassed within the question presented, and for what it's worth I didn't get the sense that anyone was interested in that. But I guess props on the boldness of the ask.

Leah Litman:

Right.

Kate Shaw:

Go big.

Leah Litman:

Yeah. It takes a certain swagger to just walk up to the Supreme Court and be like, "And you should decide this question of first impression that no lower court has, your honors."

Kate Shaw:

Just save everyone the trouble.

Leah Litman:

"Because you are a court for first review." I mean like, what?

Kate Shaw:

Yeah. I thought that Tom Goldstein was very effective in trying to distinguish what's relevant at what stage of the proceedings, which the justices were trying to tease apart throughout the argument. And he, I thought, I think twice, managed to get Justice Alito to describe his answers as helpful, which Justice Alito does not dole out those compliments very often.

Leah Litman:

No.

Kate Shaw:

Particularly to the person representing some class action plaintiffs. And so again, I guess on the other side of the case, props to Goldstein for eliciting those compliments. And I should say, since we're talking about the other two attorneys, I thought that Sopan Joshi for the government also did a really nice job. Melissa and Ginger, when they previewed the case last week, Melissa's feeling was that it's hard to get that worked up about this case, and I definitely felt that way going into it. But I found the argument actually quite entertaining. Okay, engaging. Maybe not quite entertaining. But quite engaging. Almost entertaining. I thought that Sopan was quite good.

Leah Litman:

There actually was at least one entertaining moment in the argument, which is-

Kate Shaw:

Okay. That's right. That's right.

Leah Litman:

That Justice Breyer used a word that, to the untrained ear, might seem like gibberish.

Justice Breyer:

When I read what they said it seemed to me that what the judge was saying is, "Wait a minute. Suppose what the guy had said at the company was ishkabibbel, total nonsense. My God. How did that move prices? Why is that material?" Well, 12 v. Six denied. Okay. Now we have to assume it's material. Now every member of the class is using the word ishkabibbel. So whether ishkabibbel is or is not material, was a matter for the judge to decide under the heading materiality. He may have made a mistake. You don't get an appeal until later. But the issue here is are they using the word ishkabibbel? Yeah, they all are. And therefore there's a common issue for the class.

Leah Litman:

So, this was actually not Justice Breyer's first time using the word ishkabibbel in a Supreme Court argument. In Herbert Markman Positek v. Westview Instruments, Justice Breyer said:

Justice Breyer:

I do think jury, and the aging theists out there talking about dioxin SO4, ishkabibbel, whatever, something very, very hard to understand. And the agency interpretation is relevant, and the parties say to the judge, "Judge, will you instruct the jury as to what that agency rule means?" I don't think you'd have to have the jury decide it, even though you might take evidence on it.

Kate Shaw:

Did you remember that he had done this once before? Or did you dig it up?

Leah Litman:

Yeah, I went looking. Because I was like, "What is ishkabibbel?" And so I went searching in Supreme Court briefs and transcripts and whatnot for ishkabibbel and... Anyways.

Kate Shaw:

Lo and behold.

Leah Litman:

Right, lo and behold. And some of our listeners also helped in on this because they wrote in to say, "Ishkabibbel is apparently a thing." For a second I was wondering, is this a code word for "I retire"? Or, "I'm retiring in May."

Kate Shaw:

Yeah, you rearrange the word's letters and that's what it spells.

Leah Litman:

Right. I mean, like Taylor Swift has been unleashing all sorts of codes and clues about her Fearless from the vault. And I was like, "Is Justice Breyer doing the same?" I didn't know. But anyways. Our listeners informed us that apparently ishkabibbel is a dessert. It's a brownie with vanilla ice cream and chocolate sauce.

Kate Shaw:

Maybe in the Breyer family, customarily consumed at moments of important life transitional celebration.

Leah Litman:

Right. Right. Exactly.

Kate Shaw:

Could still be a signal of some sort.

Leah Litman:

It's like, look if you want more treat time Justice Breyer, there is a way.

Kate Shaw:

Churning ice cream at home, learning to do that, yeah you could do all these things.

Leah Litman:

Making your own ishkabibbels.

Kate Shaw:

Exactly. But, moving on. Okay so the next case we wanted to talk about TransUnion v. Ramirez. This is another class action case. This time the relevant doctrines of the justices might potentially use as cudgels against class actions are Standing and also the Typicality Requirement of Rule 23 at the Federal Rules of Civil Procedure. Okay, so the case involves a class action lawsuit against TransUnion, a credit reporting agency, people are probably familiar with, for violations of a fair credit reporting act. So the FCRA requires credit reporting agencies to use reasonable procedures to ensure that reported information is accurate. Okay. So TransUnion offers a product known as OFAC Name Screen to notify businesses about whether a person appears on the treasury department's Office of Foreign Assets Control, or OFAC, a list of specially designated nationals. And this is people who are believed to pose some sort of threat to the country's national security or economy. And inclusion on that list disqualifies you from engaging in certain commercial transactions.

Kate Shaw:

So TransUnion informed a car dealer where Sergio Ramirez went to purchase a car with his wife, that Ramirez's name potentially matched names on that list, which led to him not being able to buy a car, canceling a trip to Mexico, being apparently really embarrassed in front of his family. He then requested his credit file from TransUnion and got two separate mailings, one that contained a credit report and one about this OFAC alert. It was pretty clear that this two mailing notification was a violation of the FCRA. Okay. So he then files a class action on behalf of people who also received these two separate mailings about their credit report, and then their OFAC status. And in the class were about 8000 people. The lawsuit alleges that TransUnion's practices violate the FCRA, and seek statutory damages.

Kate Shaw:

Okay, so the question is: Can this case proceed as a class action? So TransUnion's arguments that the people in this class who received separate letters, again about the OFAC alert, so separate from their credit report, may not have experienced an injury in fact. Because the mere fact that there may be information about them that is incorrect in TransUnion's files, and the fact that TransUnion might have violated the FCRA by sending these two separate notifications about that, does not in fact injure them as required by Article Three of the Constitution. As to standing, a little bit of background about the court's cases. The court, I think, has really struggled to answer the question of what happens in standing cases, or maybe put differently, how the standing analysis changes if Congress has authorized an individual to sue.

Kate Shaw:

So in those cases the question is whether Congress has simply identified an injury that would satisfy Article Three's standing requirements, and has just given plaintiffs a way to go to court to challenge that

violation. Or has somehow tried to create a new injury, or right, where one didn't exist before. And so in cases ranging from Lujan First American, Spokeo, Frank vs. Gaos, the court just never managed to explain an opinion commanding a majority of the court, the specific standing limits that are applicable in those kinds of cases. So as I read it, the plaintiffs are basically arguing here that this is an injury for Article Three purposes, and that Congress has simply provided that vehicle for private enforcement of that injury.

Kate Shaw:

But I think the court knows that its doctrine here is pretty unclear, and I thought that was really on display in this Justice Alito question. So, let's play that quote here from the oral argument.

Justice Alito:

Yeah, Spokeo's discussion of harm is quite clipped, and it's potentially subject to different interpretations.

Kate Shaw:

Justice Alito wrote the opinion in Spokeo, so it's a little odd. Because when he started to say, "Spokeo's discussion of harm is..." And I was like, "Oh my God. What is he going to say?" And "Is quite clipped and it's hard to know what it means." And it's like, "Yeah I guess you're right. You can't tell us in this oral argument what it means." But it was a little rich to hear him say it. Like, "We're all going to have to just try to figure it out together." And it's like, "Well maybe you could've done it a little differently. If we just wind the clock back a little bit we can fix this."

Kate Shaw:

So the argument, I thought in terms of the question of what this injury was to the class members not like Ramirez, whose names were included incorrectly on these lists but who didn't have the kind of experience that Ramirez described of going someplace and being denied access to a commercial transaction because of it, it got a little metaphysical at points in terms of the way the court was trying to probe whether there was real injury here. There are these variations of, if a tree falls in the forest kinds of hypotheticals. Leah, what did you think of those kinds of lines of questioning?

Leah Litman:

These cases, by which I mean cases involving questions of standing, in which Congress has provided for a right of action, just drive me nuts. The search for: Is this a real world injury? And injury in fact, it's a fool's errand, right? I think it's ahistorical. I think it is inconsistent with the traditional of what the judicial power. It is inconsistent with traditions of equity. If Congress has said, "This person is injured and they can sue," that should be the end of the matter. That being said, clearly a majority of the court doesn't agree with me and will continue to try and figure out what it thinks the limits are in these cases.

Leah Litman:

Justice Thomas, to his credit, continued saying there is a distinction between so-called private rights cases in which one private party is suing another where he thinks that there basically shouldn't be a limit on the kinds of suits that Congress can authorize, and public rights cases in which a plaintiff is suing the government where he thinks there could me. There was also sometimes... And I think this is related to the point you saw in the transcript about, if you don't know you were injured, were you injured? There

was also an effort to figure out whether this case was about a past harm that had happened for which you could sue, versus a risk of harm that hadn't actually materialized, i.e. your name was on this list, it now isn't. Can you still get damages for when you were wrongfully on the list? Or is the harm only that you were at risk of being subjected to the kind of injury that Mr. Ramirez experienced?

Leah Litman:

So, Justice Kagan drew this out, I think, quite well, asking: If you were exposed to a carcinogen that could cause cancer within five years, could you sue within the five years? Paul Clement conceded that the answer was yes. And then she wanted to know: Well could you sue in year six? Since at that point, you wouldn't have gotten cancer but you were at risk to that previously. The Chief Justice asked a similar variation of these themes of questions saying, "Well, a statute allows you to sue if you're driving within range of a drunk driver you later find out. You were driving within range. Can you sue after the fact?" It's not at all clear to me what, I think, the court is going to do, although I continue to firmly believe that if they insist there are some Article Three limits in these cases, they are setting themselves up for future problems down the road. Paul Clement got in a few law school puns in response to a question from Justice Kagan about the risk of harm. So let's play that clip here.

Paul Clement:

In your hypo it might be, but that's in part because it's 50% and it's cancer. And I think... And I don't want to go all Learned Hand on you, but I think you think about both the risk and the consequences.

Kate Shaw:

I mean, it's a little pandering. But God, he's just so good in those moments, right?

Leah Litman:

Yeah.

Kate Shaw:

He just pulls them out. But did he plan that? I doubt it. Maybe he did. But he's just so agile and quick on his feet in those exchanges. Maybe one more exchange I thought was worth playing, just because every case this term has featured extensive discussion of the founding era common law, and to the point it kind of makes my head explode. I mean literally not every single case, but it's close. So here, despite the fact that we're talking about a statute, the Fair Credit Reporting Act, all of a sudden it's important... and I think Sam Issacharoff representing the plaintiffs, was right to have made the argument in the briefs, and before the court, about...

Kate Shaw:

He basically was making the argument that inclusion on these lists, which he basically says these are like terrorist watch lists, or at least closely analogous to that and that they really disable you from commercial transactions. So this is a serious matter to be included on these lists in error. He says there's a close analogy to the common law tort of defamation. You have to make arguments in that register right now before this court given its composition. I actually thought this Alito exchange with Issacharoff, who's a professor at NYU for folks who don't know, was pretty interesting.

Justice Alito:

One of the things we look for in determining whether there is Article Three standing is whether there's any common law analog, whether this was the kind of case that would have been recognized as an appropriate case in court at the time of the adoption of the Constitution. What is the closest case you can think of where a suit could be brought to recover for having been subjected to a risk in the past, even though the person had no knowledge that the person had been subjected to that risk?

Sam Issacharoff:

I think that a defamation per se in common law, there was no requirement that the actual party testified to his knowledge of the risk. The question was whether there was dissemination of information of sort that would cause damage. And here, under the facts presented, there are people like landlords who routinely check your credit files. Most Americans have no idea when their credit files are being accessed. And so this is an imposition that would not have been recognized in common law.

Kate Shaw:

So we've mostly focused on the standing question in this argument. There also was the question of the typicality of Ramirez's injuries as compared to other class members. And I think in light of the trajectory of the court's class action jurisprudence and some of the cases that you mentioned Leah, there's an instinct that every time the court takes a class action case it's going to be bad for plaintiffs or consumers. And I guess I just wasn't totally sure of that here, that maybe they might want to find a way to narrow the class. But for the reasons that Issacharoff gave in the exchange that we just played, I just think that would be pretty hard to do. So I don't know. I think that like Goldman Sachs, I had a little bit of a difficult time coming out of this argument with any strong sense of where the court was going.

Leah Litman:

It's possible we'll get another opinion like Spokeo, in which the discussion of harm is quite clipped, and potentially subject to different interpretations.

Kate Shaw:

And then they can wistfully invoke it like five years from now. Impossible to know what the court meant in that case. But yeah, I actually think in Spokeos, I mean this is not an area in which I consider myself a deep expert, but I do find that a really tough opinion to parse, and I feel like it's possible we're going to get something similar here.

Leah Litman:

Yeah. So the last argument we wanted to recap is NCAA v. Alston. This case, too, is a class action against the NCAA arguing that the NCAA's restrictions of eligibility based on student athlete compensation violated federal antitrust laws because the restrictions forbid athletes from receiving fair market compensation for their labor. The courts below said the NCAA couldn't limit education-related benefits, like free laptops or paid postgraduate internships, but that it could restrict benefits unrelated to education, like cash salaries.

Kate Shaw:

And maybe one little piece of background to throw in here, so we should say that in antitrust cases, there are certain kinds of anticompetitive conduct, like price fixing, competitors getting together and setting the price of a good that they are selling, or here you could think of it as salary fixing. Competitors

getting together, like different universities getting together, and saying they're going to fix the salaries of student athletes at zero. It's a kind of price fixing. And those, in ordinary contexts, under the antitrust law, are viewed as per se unlawful. You just can't reach certain kinds of agreements with your competitors. But actually, the NCAA has been successful in arguing here that these restrictions are not per se unlawful. They need to be evaluated using something called the rule of reason, which the court uses in most antitrust cases that don't involve these fecial agreements among competitors, again on things like prices or salaries.

Kate Shaw:

So, if a court is using the rule of reason analysis it looks to the anticompetitive effects of a particular restraint, and it asks about whether those are outweighed by the pro-consumer benefits that the restraint might confer.

Leah Litman:

So the dispute in this case has often centered around whether the restrictions are justified in order to preserve the amateur nature of the NCAA, that is because athletes "aren't working," or aren't laborers, and it's just all games for the sake of games, the antitrust framework does not apply. And the NCAA says it's important to consumers that athletes be amateurs and their working for free is central to the amateurism. If this sounds silly... This thing is just so obviously illegal to me, and the Supreme Court seems to agree and seems to think that this argument is pretty silly, too, in that it just does not capture the facts or reality of how college sports, or at least major college sports like basketball or football, operate today.

Leah Litman:

So for example, the Chief Justice noted that schools can pay up to $50,000 for a $10 million insurance policy to protect student athletes for future earnings. And again, this looks like they are paying the athlete to play in college. Another part of what makes this thing just so wild is, even though they insist on saying college sports are amateurs, college coaches are paid insane salaries. And Justice Thomas noted this at argument.

Justice Thomas:

But is there a similar focus on the compensation to coaches, to maintain that distinction between amateur coaches, coaches in the amateur ranks, as opposed to coaches in the pro ranks? Well it just strikes me as odd that the coaches salaries have ballooned, and they're in the amateur ranks as are the players.

Leah Litman:

Coaches in several states were actually the highest paid state employees in the entire state, for several states. They're making more than like two million a year, and it's just really hard to say, "Well that's all amateur hour." Then we had our boy Sam, as in his concurrence in Duguid, he really was onto something here. And I hesitate to call this Woke Lito, because Woke Lito is where he votes for a criminal defendant and then limits a ruling, or feigns concern about progressive causes as part of a Troll Lito shtick. Whereas here he was actually filled what I think is real an righteous rage about how these universities treat athletes.

Justice Alito:

But the athletes themselves have a pretty hard life. They face training requirements that leave little time or energy for study, constant pressure to put sports above study, pressure to drop out of hard majors and hard classes. Really, shockingly low graduation rates, only a tiny percentage ever go on to make any money in professional sports. So the argument is they are recruited, they're used up, and then they're case aside without even a college degree. So they say, "How can this be defended in the name of amateurism?"

Leah Litman:

So, you go Sam, Comrade Alito. Welcome to the proletariat. I mean, I did not even know what to think here.

Kate Shaw:

And it was one these that sort of shaped of the argument. Kagan and Barrett both referred back to it, and it seemed genuine. So it is the selective experience and then deployment of concern and empathy I find a little hard to swallow. I'm sure you do as well. But it did seem, such as it was, totally sincere actually.

Leah Litman:

Yeah. I do not think this case is going to go well for the NCAA in relation to this thing being obviously illegal. The justices seem to be leaning that way as well. At one point Justice Breyer referred to what the NCAA was doing as "murder." Like they're getting away with murder. And anyways, so I just don't really see this one turning out well for them.

Kate Shaw:

Although, it was Breyer, right, who later in the argument said this was a hard case for him because it involves a unique product that has brought joy and all kinds of things to people. And I had not pegged him as a college sports fan. But it seemed like he was maybe telling us he was, or at least understood that for many people it was important and a source of joy.

Leah Litman:

Yeah. Maybe Justice Breyer actually is capable of empathizing with most people even when he himself does not share their views.

Kate Shaw:

I think he is. Yeah. Okay, so I agree with that bottom line. This is a rough argument, I thought, for the NCAA. And obviously Seth Waxman's a terrific lawyer, but I didn't get the sense that his arguments were faring particularly well with most of the court, actually.

Leah Litman:

No.

Kate Shaw:

But you know who was doing really well with the court?

Leah Litman:

I have an idea.

Kate Shaw:

You have an idea. So this was the first performance as Acting Solicitor General of now Acting Solicitor General Elizabeth Prelogar, had her first argument as Acting Solicitor General, and spoiler I thought she was amazing. What did you think?

Leah Litman:

Yeah. As I think Lindsay Harrison of Jenner and Block said on Twitter, other people need not apply for the position of Solicitor General, since Joe Biden has found his Solicitor General. She was really great identifying what the justices' concerns were, addressing them really specifically and efficiently. It's almost like women do have the stature and skills to be Solicitor General. So, there's that.

Leah Litman:

The Chief Justice had a rare slip up.

Justice Thomas:

Thank you counsel. Or thank you general.

Leah Litman:

There were a few other titler slip ups in this argument. So, Seth Waxman made a mistake that I've made before, promoting Justice Thomas to Chief Justice.

Seth Waxman:

Well, Mr. Chief Justice, the amateurism rules-

Justice Thomas:

Thank you for the promotion by the way.

Seth Waxman:

I'm sorry. But I'm sure you would be terrific at that. Let me just say-

Justice Roberts:

There's no opening, Mr. Waxman.

Seth Waxman:

There's nothing more I can say that will not get me into trouble, so let me answer Justice Thomas's question.

Kate Shaw:

Wait have you made that mistake before and have we not edited it out?

Leah Litman:

Yeah.

Kate Shaw:

But I think we must have-

Leah Litman:

No I think we kept it in.

Kate Shaw:

We didn't edit it out? Okay.

Leah Litman:

Yeah. I think it-

Kate Shaw:

I remember you making it, but I didn't remember if it made air.

Leah Litman:

Yeah. I guess I don't remember whether it made air, but I think it was in our very first episode in which I called Justice Thomas Chief Justice or something.

Kate Shaw:

Yeah. Yeah.

Leah Litman:

Melissa was like, "No, don't do that."

Kate Shaw:

Yes. It was a cute moment, and the dander on the Chief Justice's neck go up when he interjected to say the position is not available, or there's no opening, I thought was actually... It was a cute moment.

Leah Litman:

Maybe one other note about how the argument wasn't going well for the NCAA, a sign to me that it wasn't going well was when, in Seth Waxman's closing, he maybe tried to throw the Little League under the bus, and/or equate the Little League with the NCAA.

Seth Waxman:

Justice Gorsuch, monopsony power does not take away the producer's right to define the product any more for the NCAA than, for example, for the Little League, which eight years ago for $80 million for its television contract.

Leah Litman:

It was just very strange, to me, to be suggesting that the nature and function and markets and Little League were the same as NCAA. But what do I know?

Kate Shaw:

The whole closing, I thought, even though I didn't think he was really getting traction for most of the argument, I thought he was still very good. But he just seemed kind of off kilter in his closing and I actually thought it's because Prelogar was just so superb that he was a little bit flailing to figure out how to end. One thing, though, I think we should say is that if the court, and I think we both believe is likely to happen, does affirm the ninth circuit, that's not the end of the NCAA or college athletics as we know them. What the judicial court here actually was largely hand a win to the NCAA. It got to keep, as you said at the outset, a lot of its restrictions in place.

Kate Shaw:

The district court just said, I think after a full trial, that these total prohibitions on cash incentives and awards were unlawful, but said the NCAA or schools could impose limits. The limits that this injunction, I think, contained are pretty modest limits. And there could be further litigation over the exact size of those awards. But again, I think just affirming the approach taken below just means that some compensation, not complete out of control competition with salaries like in the hundreds of thousands or millions of dollars, is going to ensue immediately. This is just about changing a regime in which you cannot compensate student athletes at all for their labor.

Kate Shaw:

Okay. So we've been so patient, both basically since January, but we finally have some nominees. Okay, so we finally have some judicial nominees. Week after week we've sadly ended the show... We've had some culture stuff to talk about, but we've really been eager to talk about the judicial nominees, have had none. On March 30, the Biden administration dropped a whopping 11 nominees to the federal courts. 10 court of appeals and district court judges, one DC superior court judge. We talked about Chris Kang from Demand Justice had basically been saying not to worry. We weren't sure if we should listen to him or not, I think as we said about two weeks ago. But maybe it seems like he was actually right. By this point in their terms, Obama had nominated one judge, Trump two, George H.W. Bush five, George W. Bush none, and starting out with 11 out of the gate is a good, big number, right? So not just rolling out one or two or three, but again, 11. And obviously even more important than quantity is quality of these nominees.

Kate Shaw:

So we got three court of appeals nominees. First for the court of appeals for DC, pod favorite Judge Ketanji Brown Jackson of the district court of DC. For the seventh circuit, Candace Jackson-Akiwumi. For the court of appeals for the federal circuit, Tiffany Cunningham. And then seven district court nominees. Two for the district of Maryland, Judge Lydia Griggsby, and Judge Deborah Boardman. Two for New Jersey, Julien Neals and Zahid Quraishi. For DC, Florence Pan. For District of Colorado, Regina Rodriguez. For New Mexico, Mark Strickland. And for the DC superior court, Judge Rupa Ranga Puttagunta.

Kate Shaw:

So, that's the list of names. Leah, you have shared some reactions on Twitter but we have the luxury of many more characters here on the podcast than Twitter. So what do you think of these nominees?

Leah Litman:

Bottom line, extremely happy. But because I'm greedy, I want more for reasons I'll explain. I think it's helpful to think about the court of appeals nominees separately from the district court nominees, and I'm also more excited about the court of appeals nominees. On the whole, just very good, A-plus, amazing first batch of nominees. The professional diversity is really great. Two of the three court of appeals nominees and two of the seven district court nominees are former public defenders. This is really good, given that fewer than 3% of all district court judges are public defenders, fewer than 8% of court of appeals judges are former public defenders. Judge Neals has experience as a local government lawyer, so just really great. The demographic diversity also really great. All three court of appeals nominees are Black women. This is important because there have only ever been eight Black women to serve on the court of appeals. So in this batch alone, President Biden increased the total number of Black women who have ever served on the court of appeals by almost 50%. Nine of the 11 nominees are women. Women make up roughly only 30% of the federal judiciary.

Leah Litman:

Two of the nominees will literally integrate the courts of appeals on which they will serve. The seventh circuit, which includes Wisconsin and Illinois, currently has no Black judges. The federal circuit has never had a Black woman on that court. Judge Florence Pan would be the first Asian-American woman on the DC federal district court. Judge Griggsby would be the first Black woman. And I think first BIPOC woman on the Maryland district court. Judge Quraishi would be the first Muslim-American district judge anywhere. So on the whole, inject this into my veins.

Kate Shaw:

One shot, not two. Just all of it at once.

Leah Litman:

Or two, right? I'll take more. I'm a little greedy.

Kate Shaw:

That's right. Next week.

Leah Litman:

That being said, I think the court of appeals nominees are, to me, a little bit more exciting than the district court nominees. I do not mean to discount the importance of the firsts of the district court nominees that I just mentioned. But to me, professional diversity is just super important given the astonishingly few judges who have been civil rights lawyers, public defenders, or worked on behalf of laborers. And so the greater percentage of those professionally diverse backgrounds in the court of appeals nominees were really important to me. More of the district court nominees had more traditional backgrounds of being AUSAs, and what not. There were also no nominees who represented consumer or worker or labor interests, and I think that is super important. And equally important to me is just the age of the nominees. Professor Micah Schwartzman at the University of Virginia has done a bunch of important work about the age of Democratic nominees relative to Republic ones. President Trump nominated six appellate judges in their 30s, 20 under the age of 45, only five over 55. Almost half of President Obama's nominees were over 55.

Leah Litman:

This is important for any number of reasons. It affects how long the judges serve, whether they will be come Chief Judge, and also it affects the pool of nominees for future administrations, since you can't, or are less likely, to elevate someone if they are over 65. So the district court nominees are considerably older than the court of appeals nominees. Judge Ketanji Brown Jackson is 50. I think Judge Cunningham is around there too. Judge Jackson-Akiwumi is under 45, so she would be a Supreme Court contender for several years. And that, to me, is really important. Whereas, again, the district court nominees are all older. Judge Strickland is the youngest, and she's Judge Akiwumi's year in law school. So it was a little bit odd to me to see that.

Kate Shaw:

Yeah. I think that's a really nice point to make, and one related thought is that... I mean maybe this is a weird thing to be thinking about at the front end, but I think these nominees should be prepared for lengthy service, right? We had a lot of Clinton and Obama nominees who left, or took senior status, under either President Trump, or even in some cases the very end of the Obama Administration. We were just talking about the Seventh Circuit, and I thought about Judge Anne Williams who was a Clinton appointee, not an Obama appointee. But she took senior status in 2017 at the age of 67, which handed Trump a vacancy. And I totally get wanting to do other things if you've been a federal judge for most of your professional life, but I kind of think that for this new crop of nominees, just thinking in a perspective sense, people should go into these jobs thinking they're going to stay. I don't think this should be a stopping point for 10 or 15 years and then you go do something else.

Kate Shaw:

And so I do think that actually that could be a disincentive to young nominees. If that is part of the expectation of service is that you... and I don't know. Maybe you disagree with this. But I actually think that if you're going to take this job, you should conceive of it as something you're going to do for the rest of your professional life, especially on the court of appeals where you're handing these vacancies that are just hugely valuable off to someone else. Now I'm not saying anybody has to spend their entire natural life on the bench, but I think that these should be long-term service positions. Which I think actually could potentially weed out people who are... The idea of committing to your job for life at the age of 38, or 42 or something, might seem like a lot. But these are unbelievably valuable positions and I just think people should be in them for the long haul if they're going to take them.

Leah Litman:

Yeah, no. I completely agree that that should be the perspective that people bring to them. I guess I am slightly more confident in the ability to identify some people in their late 30s or early 40s who are willing to do that, but I agree that should be something that people are thinking about. But on the whole, my take home is: Hooray, but also Democratic Senators who have more say over district court nominees than they do over court of appeals nominees should perhaps emulate the Biden White House in who they are nominating. And again, on the note of if you give a mouse a cookie, they will want more, I want to put out in the universe some other things I'd like, which I've already screamed about on Twitter several times. But I just feel the need to say it again.

Kate Shaw:

Use the pod. Definitely.

Leah Litman:

Right. Since we need nominees who have represented workers rights and labor interests, there is a DC circuit opening on which you could put Judge Deepak Gupta, who just won a unanimous Supreme Court victory on behalf of consumer rights. I am pretty sure that is a sign from the universe about who they should be thinking about for the Supreme Court. There's also the second circuit, several second circuit vacancies, hanging out there. Given the theme of this episode slash the podcast in general is how to enforce slash what is necessary to enforce the Voting Rights Act, to say it again, appointing Dale Ho to the second circuit is indeed necessary to enforce the Voting Rights Act. And-

Kate Shaw:

In the actually necessary.

Leah Litman:

Right, in the actually necessary sense, not in the Wilbur Ross sense.

Kate Shaw:

Correct.

Leah Litman:

And then, that court is starved for women as well. And there are some really great candidates who have also litigated on behalf of women's rights, whether it's Ria Tobacco Mar, Galen Sherwin, [inaudible 01:03:25], again I could go on.

Kate Shaw:

Really strong start. Excited to see what comes next. I mean, we're almost out of time but the one last thing I wanted to ask in light of this batch of nominees is what we think about... So, obviously Judge Jackson, now on the district court, soon to be elevated to the DC circuit, is on everyone's short short list for the next Supreme Court vacancy, presumably the one created by Justice Breyer's retirement. Do we think there's anything revealed in the White House's decision to elevate Judge Jackson to the DC circuit about their sense of Justice Breyer's likely timing? I mean, I think you could read this in a couple ways.

Kate Shaw:

One, they want to get her on the DC circuit because then it's an easier, I guess perceived as an easier elevation from the DC circuit to the Supreme Court, and thus this is going to be a short interim stop. On the other hand, maybe you wouldn't bother with this interim stop if you knew for sure he was going to retire in the next couple of months, and so this is a signal that he's not going to go anywhere until, I don't know, next year, which I think is just wildly irresponsible if true. But I think it's possible to read this decision in both of those ways. Did you have an instinct?

Leah Litman:

I don't. I think it's possible they either don't know, or they might think that putting together this batch of 11 nominees doesn't necessarily invest all this capital and time in one nominee to the DC circuit, so it's more an economies of scale and efficiency such that if they then decide to nominate Judge Jackson, who recently confirmed to the DC circuit, to the Supreme Court in the event that a vacancy arises, it's not a huge deal. Maybe that's just what I want to tell myself. But I think it's maybe hard to know, and they

made this decision based on the expectation that they don't know whether Justice Breyer is going to retire, and this is a person they want on the DC circuit in the event that there is no vacancy. And even there is, it's good to have her there.

Kate Shaw:

Artisanal homemade ice cream, it is so good, and you would have so much time.

Leah Litman:

Ishkabibbel, Justice Breyer. Ishkabibbel. You know what that means.

Kate Shaw:

I think that's actually probably a good place to leave it.

Leah Litman:

Yeah. So thank you slash Ishkabibbel to Yale Law's chapter of the American Constitution Society, and Jake Mazeitis for organizing this event. Thanks to our producer Melody Rowell, and thanks to Eddy Cooper for making our music. And thanks to the Biden White House for giving us some court culture material.

Leah Litman:

(silence)