Melissa Murray:

Welcome back to Strict Scrutiny. Your podcast about the Supreme Court and the legal culture that surrounds it. Today we've got a lighter episode given that it was a lighter week at the court with the court releasing only two short and unanimous opinions. But don't worry, we've also got some important orders, docket news, and a longer court culture segment at the end.

Kate Shaw:

Okay, so let's start with some order news. First thing up is a cert denial in Johnson vs. Precise. This is a case filed by former guests, Ginger Anders. We previously profiled the cert petition. So this was actually that rare cert denial in which you know the votes. So there were three noted dissents from the denial of cert.

Kate Shaw:

And since it only takes four votes to grant cert, we know the other six justices did not want to take up the case. So three votes to Grant, six votes not to Grant. The case was denied. This was a case in which the court had requested briefing on whether the petitioner could request execution by firing squad given that the district court dismissed the case without prejudice.

Kate Shaw:

The three justices who wanted to take the case up were Justices Sotomayor, Breyer, and Kagan. The quick background here is that Johnson argued that he suffers from epilepsy as a result of a brain tumor and damage from brain surgery, and that he would experience excruciating seizures if Missouri were to use pentobarbital to carry out his execution.

Kate Shaw:

He had initially asked that the state use nitrogen gas but then in a case called Bucklew, the Supreme Court held the state could decline to use nitrogen gas. Johnson then sought to amend his complaint to ask to be executed by firing squad. Under the court's precedence defendants have to identify an alternative method of execution with a track record of success, whatever that McCobb formulation means. And the eighth circuit denied his request for leave to amend.

Melissa Murray:

So Justice Sotomayor filed a dissent in this case. And basically she was sort of focused on what the eighth circuit, which was the court below had done in the interest of moving things along more quickly. Mr. Johnson had plausibly pleaded that if he was executed using pentobarbital, he would experience pain akin to torture because of those pre-existing conditions.

Melissa Murray:

Those factual allegations Justice Sotomayor said must be accepted as true at this stage of litigation, yet despite the risk of that severe pain rising to the level of cruel and unusual punishment, the eighth circuit has ensured that no court will ever review the evidence in support of Johnson's eighth amendment claim.

Melissa Murray:

Even if Johnson had full notice that he would have pleaded the firing squad before Bucklew, which he plainly did not, his decision to choose a different method of execution that was also authorized by state law is no reason to deny him an opportunity to be heard and subject him to the serious pain he alleges. And then she goes on, there are higher values than ensuring that executions run on time.

Melissa Murray:

So again, she added that she respectfully descended here, but I don't know that she's really in a respectful mood. I mean, she is calling her colleagues on the carpet over and over again in these death penalty cases. And again, I think this sort of sounds in the register of demo's prudence. She knows that this descent is not going to have any impact on her colleagues, but I think she's speaking to the public outside of the court.

Kate Shaw:

So Breyer and Kagan both joined Sotomayor, and then Briar actually wrote a very short, separate concurrence that seems worth just briefly noting. So he basically says, I agree with everything my colleague Justice Sotomayor has written.

Kate Shaw:

I simply add that the difficulty of resolving this claim 27 years after the murders, provides one more example of a special difficulties that the death penalty has currently administered creates for the just application of the law. And it kind of made me wonder, I'm not sure why he felt the need to write this one paragraph separate concurrence, other than maybe he's gearing up for some big statement on the death penalty.

Kate Shaw:

Maybe he's categorical unconstitutionality, right? So he's come close to saying that before. Remember Glossop in 2015 and 2019 in a case called Evans, he sort of reiterated some of the points he made in Glossop, but he has not done it fully, I would say. And it made me wonder whether that's one of the things he is still working on, maybe in whatever time remains for him on the court.

Leah Litman:

So this was not the only significant development on the courts death penalty docket. There was also a significant development in the case of Ledell Lee. Mr. Lee was convicted and executed for murder. He was executed in April, 2017 after the Supreme Court denied several of his requests to stay his execution so he could pursue certain claims.

Leah Litman:

One of Lee's stay requests was denied 5-4 and that was actually one of Justice Gorsuch's first decisions. And first votes he cast as a newly confirmed justice. Now, four years later, there has been new DNA testing on the murder weapon, the club that was used to bludgeon Debra Reese to death. The innocence project and Lee's family sought the testing last year. And the new testing revealed DNA from an unknown man, not Mr. Lee.

Leah Litman:

We don't know of course, if this necessarily means Mr. Lee was innocent. DNA evidence had linked him to other crimes. So not the murder of Reese, but it is important evidence to consider as this court appears committed to moving quickly forward in clearing the path for executions to proceed in a somewhat hasty manner.

Leah Litman:

So that's one case. The other development is to highlight in a case that the court had made reference to, or at least one justice had made reference to in some writings. And this is the case of Henry McCollum and Leon Brown. So two weeks ago, a North Carolina jury awarded Henry McCollum and Leon Brown $75 million for the time the two of them spent wrongfully incarcerated for crimes they did not commit.

Leah Litman:

The brothers spent 31 years in prison with McCollum on death row based on false confessions they gave as intellectually disabled teens. If McCollum's name sounds familiar to SCOTUS Watchers, it should. It came up in a famous Supreme Court case Talons versus Colin's the 1994 case in which Justice Harry Blackmun famously announced that he believed the death penalty was unconstitutional and said that from this day forward, I no longer shall tinker with the machinery of death.

Leah Litman:

In a concurring opinion, Justice Scalia mocked Justice Blackmun, and actually invoked Henry McCollum to do so. So Justice Scalia wrote that Justice Blackmun begins his statement by describing the poignancy of the death of a convicted murderer by lethal injection. He chooses as the case in which to make that statement, one of the less brutal of the murders that regularly comes before us.

Leah Litman:

He noted that Justice Blackmun did not select as the vehicle for his announcement, that the death penalty is always unconstitutional. The case of the 11 year old girl raped by four men, and then noted McCollum versus North Carolina. Of course, in other writings as well, Justice Scalia had noted that there was virtually no case in which innocent people were subjected to the death penalty, but as the McCollum and Lee cases make clear, perhaps that statement was a bit overconfident.

Melissa Murray:

All right, let's move on to some of the opinions we got this week. So we were waiting for a lot of big opinions and we continue to wait for a lot of big opinions, but there were some opinions issued this Monday. And so we're going to cover them now. The first is US versus Palomar-Santiago.

Melissa Murray:

And this was a brief unanimous eight page opinion in which Justice Sotomayor held for the court, that there are requirements of Section 1326 (d) the provision that establishes when an individual can challenge an underlying deportation order and a prosecution for unlawful re-entry are mandatory.

Melissa Murray:

Section 1326 A, makes it a crime for a non-citizen to enter the United States after having been deported or removed and Section 1326 (d) enacted as part of the antiterrorism and effective death penalty act

limits when you can challenge the underlying deportation removal order, when you were prosecuted under that statute.

Melissa Murray:

Section 1326D says you "may not challenge the validity of a deportation order", unless you have A, exhausted any administrative remedies that may have been available. Two, the deportation proceedings deprived you the opportunity for judicial review and three, the order was fundamentally unfair. Mr. Palomar-Santiago, a lawful permanent resident was removed from the United States on the basis of a conviction for felony driving under the influence.

Melissa Murray:

Foreign nationals can be removed if they are convicted of what is known as an aggravated felony, which includes crimes of violence for which the term of imprisonment is at least one year. And crime and violence includes an offense that has an element of use attempted use or threatened use of physical force against the person or property of another.

Melissa Murray:

After Mr. Palomar-Santiago was removed under this provision, the Supreme Court held in Leocal versus Ashcroft that a higher men's rea than the merely accidental or negligent conduct involved in a DUI offense is necessary to qualify as a crime of violence. Hence Mr. Palomar-Santiago's conviction for DUI didn't actually make him removable from the United States. He was wrongfully removed.

Melissa Murray:

Nevertheless, after Mr. Palomar-Santiago was found living in the United States, he was prosecuted for unlawful re-entry. He moved to dismiss saying that the underlying deportation order was invalid and the ninth circuit said that he could do so, even though he hadn't satisfied some of the conditions under 1326D, because Mr. Palomar-Santiago, they said was not convicted of an offense that made them removable.

Melissa Murray:

The Supreme Court in this case reversed the ninth circuit, holding that under 1326D such a challenge is available only if all of the conditions of 1326D are met.

Kate Shaw:

So, a couple of reactions, one sort of big picture AEDPA strikes again. AEDPA Is the extremely draconian statute that vastly limits the ability to challenge deportation and removal orders as well as criminal convictions. In terms of the opinion itself, a couple of things. It is on one level a very textual opinion.

Kate Shaw:

It leans heavily on the word. The opinion says the requirements are connected by the conjunctive and meaning defendants, must meet all three, right? This is not a disjunctive list. All of the conditions have to be satisfied. So that is obviously pretty traditionally textualist reasoning, but there's also this kind of purpose of strain in the opinion, right?

Kate Shaw:

The opinion asks, look, why would Congress have included these restrictions if certain litigants could just bypass them? So that actually is, I'm not sure it's smuggling in purposivism analysis, but I think it demonstrates that some of the time text and purpose do align. And here Congress writes a list, connects the terms with and, and is clearly doing so in service of some larger goal here.

Kate Shaw:

One, to restrict access to the ability to challenge these kinds of orders. But I did appreciate that there was that mode of reasoning, in addition to sort of the focus on the text alone, in this opinion. One of the things to say, this was argued in the April sitting. So this was a very quick opinion. It had been a short argument.

Kate Shaw:

Gorsuch and Kavanaugh and Barrett all declined to ask questions of the government. Gorsuch and Kavanaugh asked no questions of the respondent. So in some ways it's not surprising that it was as short as quick and as unanimous as it was.

Leah Litman:

The unanimity and speed of this opinion, raise some concerns for me about what the Supreme Court might do with respect to a pending petition that raises kind of a similar issue, but in the context of federal criminal convictions, rather than underlying deportation orders.

Leah Litman:

And the issue in that petition is whether there are procedural safeguards that allow individuals who are actually innocent of the crime of which they were convicted or their sentence because of some error of statutory interpretation, like the one at issue in this case to challenge their conviction. So just to give you some sense of the statutory backdrop.

Leah Litman:

There's a provision in Section 2255, 2255 (e) that says where the Section 2255 remedy is inadequate or ineffective to test the legalities of your detention, you can file a habeas petition. And Section 2255 (a) provides some rather severe limitations on when federal criminal defendants can file a second or successive 2255 motion to challenge their conviction or sentence.

Leah Litman:

Basically you can only file a secondary successive motion if you have newly discovered evidence showing you are innocent, or there's a new rule of constitutional law that the Supreme Court has made retroactive. And what that doesn't include is circumstances where some intervening decision of statutory interpretation makes clear that you were wrongly convicted.

Leah Litman:

That is what you did wasn't actually a crime under the statute, or you received a sentence that exceeds the statutory maximum. And the question on which some courts have deferred is if you are that person who was wrongly convicted because of an error of statutory interpretation or received an unlawfully high sentence because of an error of statutory interpretation, can you file a habeas petition under the Section 2255 (e) provision that allows you to do so?

Leah Litman:

Most court of appeals had said yes. And then as a court of appeals judge, Judge Gorsuch has said no. And recently the court of appeals for the 11th circuit agreed with Judge Gorsuch and also said, no. So there's this cert petition that argues this issue is raised in a case related to so-called Rehaif errors.

Leah Litman:

Rehaif, of course it's a Supreme Court decision that said in order to demonstrate that someone is guilty of unlawful possession of a firearm by a felon, you have to show that the person knew they were a felon. So this case is Jackson vs. Hudson number 2911. I actually think that this case doesn't present the issue in a super clean way, given that the real problem in this case is that the government failed to include a jury instruction to the jury of that element.

Leah Litman:

It's not really an error of statutory interpretation where the defendant's conduct conceitedly doesn't violate a statute or the defendant's prior conviction conceitedly doesn't qualify for a statutory sentencing enhancement. But this is one of those issues on which the Trump administration switched positions.

Leah Litman:

Previously, the government conceded that where someone was unlawfully convicted of something that wasn't a crime, they could file a habeas petition challenging them. Here, the Biden administration hasn't yet announced any intention to change the position back. But they are recommending against Grant in this case, in part, because of the vehicle issue that I noted.

Leah Litman:

Which I think is probably correct, but I am still concerned about what the Supreme Court might do on this issue more broadly in the future.

Melissa Murray:

Okay, and then one more opinion. This one comes to us from Guam versus United States. And this is a case about monetary remedies under the comprehensive environmental response compensation and liability act better known as CERCLA. One provision in CERCLA allows a person who has resolved its liability to the United States or a state in a settlement to seek contribution, money, from another responsible individual.

Melissa Murray:

The question in this case is whether that provision allows contributions where circle liability has been resolved, or where liability under some other environmental statute or in some general environmental case has been resolved. And so here, the Supreme Court said in a unanimous opinion written by Justice Thomas, that it does require resolution of a CERCLA specific liability.

Melissa Murray:

So contributions require that resolution in order to go forward. And this was super short, super unanimous at just nine pages.

Kate Shaw:

Brief background on this case. So Guam and the United States are engaged in a long running dispute over the Ordot dump, which the opinion describes as a 280 foot mountain of trash near the center of the island. So the Navy allegedly deposited toxic military waste there for several decades.

Kate Shaw:

The United States later ceded control of a site to Guam which itself used the dump as a public landfill. The EPA then sued under The Clean Water Act and this suit ended in a consent decree. So some years later, Guam sued the United States under CERCLA alleging that the US's earlier use of the dump had exposed it to liability.

Kate Shaw:

The suit was in part a contribution action, which in the language, Melissa just read allows a person who has resolved its liability to the United States for some, or all of response action, or for some or all of the costs of such action in a settlement to seek contribution.

Kate Shaw:

Guam also sued separately under Section 107 of CERCLA, which allows a state or here a territory to recover all costs of a removal or remedial action from any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of.

Kate Shaw:

So the court of appeals below basically had said that if you can assert a contribution claim, that first claim I just described, you cannot assert a cost recovery claim. And that Guam had asserted a contribution claim and that they had brought that contribution claim too late, right? Because the EPA settlement that we previously described had triggered a three-year statute of limitations clock, which had long since run.

Kate Shaw:

So the Supreme Court here basically held that this EPA action that resulted in the earlier settlement, hadn't been a settlement of a CERCLA specific liability that would trigger this three-year clock and the court remanded, leaving open questions surrounding this other cost recovery action. So this is a short term win for Guam.

Kate Shaw:

Though I have to say, I have no idea how their other arguments will fare below because the court just didn't address any of them.

Melissa Murray:

Well, just to be clear, Guam may have lost even earlier because they had a 280 foot mound of trash that was toxic dumped on their islands. So let's settle with that for a little bit.

Kate Shaw:

Fair enough.

Leah Litman:

So I think this opinion is interesting to pair with the court's opinion of Palomar-Santiago, because on one hand, you know, they are nominally textualist opinions that are focused on the words of a statute. But both opinions are, let's say less fetishistically textualist than some of the court's opinions are.

Leah Litman:

And I think that these two opinions adopt arguably different approaches to textualism. Whereas Palomar-Santiago was very focused on the words in this particular provision and in particular, a singular word, and, this case is much more reliant on a method of interpretation or Canon of interpretation that some people call the whole code.

Leah Litman:

So examining a particular provision relative to, or in conjunction with a bunch of other provisions in the US code. And we should say, Anita Krishnakumar, a professor at Georgetown Law has written a fantastic article in NYU Law Review about the whole code Canon that is worth checking out. So again, this opinion, Guam relies on the whole act mode or method of analysis.

Leah Litman:

And just to highlight what that looked like and how it's maybe a little bit different than some of the textualism we've seen from the court recently, the court noted that the subsection that was at issue in the case centers on its entitled contribution. The court went on to note that a contribution suit doesn't exist in a vacuum, but instead is a tool for a particular purpose.

Leah Litman:

And that the most obvious place to look for the threshold liability is CERCLA's articulated statutory matrix. Notice how none of what I said is really about particular words in the statute. But instead it's about the context in which these words are operating and the point of the statutory structure.

Leah Litman:

The court notably didn't make a move that it has relied on in so many other cases, noting that the absence of similar language in one provision relative to others, didn't necessitate a different meaning of that provision. So just to make this point clear, this was the reasoning. The court noted that 113F1, an anchor provision is especially clear on how liability in these contribution actions must arise under CERCLA.

Leah Litman:

And though 113F2 and F3 are not quite as explicit, the court says, they're phrasing in context still presume that CERCLA liability is necessary to trigger contribution F2 and F3 are the provisions at issue in this case, not F1. And the key distinction between these provisions is, whereas F1 says, any person may seek contribution under section of this title, i.e., under CERCLA, F3 doesn't say this title.

Leah Litman:

And often the court will say, well, that difference in statutory language means Congress intended something different for F3 rather than what it said in F1. In other places, the court didn't lean on the Canon against surplusage instead relying on a belt and suspenders idea that sometimes Congress uses duplicative language rather than saying, well, we're not going to interpret any language, not to have effect.

Leah Litman:

So again, this isn't the brand of textualism that we have seen this court adopt in previous opinions. And in fact, it argument, the justices made clear that the interpretive approach that they just adopted in this opinion really wasn't necessarily consistent with some of their hard and fast rules for textualism.

Leah Litman:

So, for example, at argument, the chief justice said this statutory interpretation theory you refer to as the anchor provision, I'm not quite sure where that fits in our sort of list of statutory guidelines. Justice Kagan made the point even more clear where she said, "Look, this anchor provision theory is just an effort to make lemonade out of lemons."

Leah Litman:

Because usually when one provision in the statute says one thing and the other provision say something else, we interpret them to mean something different. We don't take the language from the anchoring provision and just apply it throughout the entire code, which is basically what the courts did in Guam.

Melissa Murray:

Basically reticulated statutory matrices, I burn for you

Leah Litman:

Whole code, I burn for you. The court was tempted by the mystique of purposeovism, contextualism, structuralism, whatever you want to call it. The siren song of the whole code.

Melissa Murray:

That's all we had from the court. Again, super light. I imagine that means we're going to have a rollicking June

Kate Shaw:

Since we started recording the court announced that it's going to have more opinions on Thursday. So this week we will have more opinions. I know, I actually wanted a quiet week.

Melissa Murray:

No, hold me.

Kate Shaw:

The other thing I was going to say is, I feel like every... We've talked about getting geared up for the big opinions and the Affordable Care Act is obviously sort of at or near the top of the list. And the longer

that case is out there, the more nervous I get about what the court is going to do. It should be pretty straightforward to just say the mandate of separable and issue that opinion. And it hasn't done that yet.

Leah Litman:

So that also makes me extremely nervous, but here's what I've been telling myself to sleep at night is there is a standing theory, which it seems like might cause some justices to peel off the idea that there's a mandate. That's not backed up by a penalty.

Leah Litman:

So who's injured? Who has standing? I think that's going to cause some separate writing and then you're going to have the merits. And there is no way that a sane Justice will sign on to the proposition that the provision that the court upheld in Sebelius is suddenly unconstitutional and Congress takes away the penalty enforcement provision.

Leah Litman:

So that's going to prompt a descent. And then you know you're also going to get a descent on separability at a minimum by the justices who don't believe that severability should be decided in the same case as the case on the merit. So that's three separate issues. All of which you're going to have to dissents.

Leah Litman:

It's going to create a weird situation in which different justices will form different parts of the majority. So that's what I'm telling myself to get myself to sleep at night, but it still should not be taking this long.

Kate Shaw:

I think that's okay. I think that's really helpful, I do. And I also think it underscores the importance of all of us taking our time to read it carefully, because if it's going to be as fractured as you're suggesting and I, for what it's worth, I think that the second issue, the middle issue you identified about the sort of standalone unconstitutionality of the zero penalty mandate is going to divide the court really closely.

Kate Shaw:

Even though I think it should end, but I think it will. And everything else and on severability, it may be more than just one or two who peel off and say non separable. So yes, I think you're right that it's going to be a hot mess of nose counting with different parts of the opinion. And thus, we may not know for at least a few minutes after issuance, what exactly the court has-

Melissa Murray:

A few minutes? Well, this is always the rush on TV. They want you to just tell everyone what it means. And you're this opinion is 150 pages. Can we just take a breath?

Leah Litman:

So everyone get ready for a Dale Ho moment from the fight, where you read and you're like, oh crap

Kate Shaw:

Oh my God, seriously top 10 moments in cinematic history. I love that realization so much.

Melissa Murray:

He had so many. I mean, I don't know why Dale Ho was not nominated for an Oscar.

Leah Litman:

Not nominated for an Oscar, not nominated for a second circuit. These are errors that need fixing, academy and White House counsel. Just want to put that out there.

Melissa Murray:

When he's talking to himself in the mirror and his psyching himself up like that. I mean, it's like a rocky moment. I wanted them to put Bill Conti music around it.

Kate Shaw:

He sings arbitrary and capricious to himself in the mirror over and over, and I love it so much.

Leah Litman:

Every year for my students, I play them a clip of someone else in order to give them a sense of the kind of energy and confidence that I think they should be bringing to cold calls. So a few years ago I showed them the clip of Jennifer Lopez taking out the mic and the Superbowl halftime show.

Leah Litman:

And I was like, that's the sort of energy you bring to a cold call, right? The J lo Superbowl halftime performance at 50. And then this past year, it was Cody Rigsby, fix your wig, find your light, get your life together, right? Cold calls in the pandemic. And I think next year might be Dale Ho talking to himself. That's going to be-

Melissa Murray:

No, Beyonce homecoming walking out in the diasporic queen mode. Like the slow walk. That's the energy you bring to cold call.

Leah Litman:

That's going to be one year too. I'm just saying one of these future years is going to be Dale Ho talking to himself.

Melissa Murray:

That seems right. Dale Ho, Jennifer Lopez, Cody Rigsby, Beyonce, the Pantheon.

Kate Shaw:

It's a good roster, oh man.

Melissa Murray:

That seems right. Okay, so for some court culture let's talk a little bit about the White House, the SG and the court. So we have not gotten an SG nominee yet, and it is, checks notes, May. Yeah, I don't even

know what to say about that. I mean, they're doing fine within acting, but it'd be great to have the 10th justice installed.

Leah Litman:

Yeah, it's either nominate someone or just accept reality and know that Elizabeth Prelogar will be an amazing solicitor general. And because of the vacancies act, she would have to give up the title of acting SG in order to become solicitor general.

Leah Litman:

But now would be the perfect time to make that shift since there aren't arguments happening over the summer. And so take her out of the acting role now, so she can be confirmed as solicitor general before the start of the next term. I don't understand exactly what's happening here.

Melissa Murray:

Another issue that has been highlighted by University of Chicago law professor Dan Hemel is that the Biden administration hasn't really shifted its position from that of the Trump administration in a number of cases. Dan Hamill had an op-ed in the Washington Post that argued that the SG's office hadn't done enough switches to make clear the distinction between policy positions between the prior administration and this one.

Melissa Murray:

One place where perhaps a switch from the administration might be in order, is in a case called Wooden versus the United States where the issue is what counts as violent felonies committed "on occasions" different from one another. For example, burglarizing 10 units in a mini storage facility.

Melissa Murray:

As a Senator, Joe Biden had actually added the amendment that added the different occasions language emphasizing that career criminal status should not apply to someone who commits a one-time crime with multiple victims. This would be a very opportune moment for the Biden administration to switch positions in a case. But so far we haven't had anything. And so Dan Hemel rightly notes, what up with that?

Kate Shaw:

We talked previously about the fact that in Sanchez versus Mayorkas, which is a case about whether TPS recipients can apply for green card status, which is actually an especially pressing and pertinent issue, given that the Biden administration has reauthorized TPS for Haitians.

Kate Shaw:

That Biden justice department has not switched positions from the Trump justice department. And the Supreme Court here could actually hold that the statute clearly says that TPS recipients cannot apply for green card status rather than just giving the Biden administration a chance to change positions for the regulation.

Kate Shaw:

The Biden administration completely missed the opportunity to kind of force the court's hand by actually changing positions in the case.

Leah Litman:

And there's also another case for next term, Tsarnaev versus the United States. That case is about the constitutionality of the death penalty imposed on the Boston marathon bomber Dzhokhar Tsarnaev. Under the Trump administration, DOJ had petitioned for cert after a court of appeals vacated the Capitol sentence because the trial judge hadn't ensured an impartial jury.

Leah Litman:

And again, despite Joe Biden campaigning on a promise to end the federal death penalty, the United States has not conceded there was an error in that case and effectively withdrawn the cert petition. They are also in court as we are recording advocating in favor of the death penalty and the Dylan Roof case involving the mass shooting there.

Kate Shaw:

And then just two other pieces of actually non SCOTUS, but still important, maybe non DOJ position changes that we wanted to mention. So first in this long running dispute regarding whether executive privilege shields part or some of the testimony of former White House counsel McGahn from congressional oversight, this is a case that has been pending in the courts that would have been argued again this year.

Kate Shaw:

But at least for now the Biden justice department appears to have been saved from having to take any public position on this question or set of questions by an agreement in which McGahn will testify behind closed doors I believe next week. And second, an ongoing case regarding an OLC memo to former attorney general Bill Barr regarding the Mueller report.

Kate Shaw:

It looks as though the Biden justice department will be appealing at least part of a district court order directing the release of that OLC memo. And I do think that in the sort of realm of executive privilege, there has been more continuity than change across administrations. And so it will be very interesting to see how these institutional considerations shake out as this appeal proceeds.

Kate Shaw:

I think we know that at least in part, this order will be appealed, but I don't think we know just what the appeal will look like. So I think we'll keep a close eye on that, which could be heading for SCOTUS, although it's not just yet.

Melissa Murray:

All right, now that we have some extra time we wanted to highlight something that's a kind of bully pulpit for us. We wanted to highlight some of our favorite women's SCOTUS advocates. There are often so many questions about where are the women at SCOTUS. And we just want to underscore that the women are there.

Melissa Murray:

You just have to go and put them in front of a podium. So this is the strict scrutiny binder full of women and people of color advocates. Okay, so up first we are going to give you some of these advocates and a little clip of them in action. So first is Ginger Anders. Ginger is a former Strict Scrutiny guest and my former co-clerk.

Melissa Murray:

She's a litigator at Munger, Tolles and here's a little clip of her showing her stuff in Kappos versus Hyatt. A SCOTUS case holding that a patent applicant's ability to introduce new evidence in an action against the PTO was only limited by the rules of evidence and rules of civil procedure, allowing a district court to decide de Novo a factual question without giving deference to the prior decision.

Speaker 4:

You only get a 145 proceeding when you have new evidence.

Ginger Anders:

No.

Speaker 4:

Because I have no new evidence and I want to challenge. Can I bring a 145?

Ginger Anders:

Yes, Section 145 permits any applicant dissatisfied with the decision of the PTO-

Speaker 4:

And on what basis does the court decide the case de Novo?

Ginger Anders:

No, the federal circuit has held that in those cases, a substantial evidence review applies and where the federal circuit gets that it's this court case in Oregon versus Daniels. That was an action under section 145's predecessor.

Leah Litman:

Okay, so what's so good about this clip. I'll start-

Melissa Murray:

Everything.

Leah Litman:

Right, everything would be an acceptable answer. Immediately answering the question with both an explanation and a citation. Many of the clips we're going to be playing today are from the old days of Supreme Court advocacy when arguments were in person and you had way less time to answer a question. And it's in that setting where Ginger's skill of both clearly answering the question, getting out an explanation and a citation all within the span of several seconds is extremely valuable.

Melissa Murray:

She's always been that good. I mean, I can confirm she's been that good for literally the last 15 years. So yes, put her in. She's ready to go.

Leah Litman:

Someone else we wanted to highlight is Lindsay Harrison, an attorney at Jenner & Block arguing in her Supreme Court debut as an associate in Nken versus Holder. The Supreme Court case that held traditional factors, govern the court of appeals authority to stay removal proceedings pending judicial review. So we're actually going to play two clips from this argument here.

Speaker 6:

I think it's a fluke too, but you gave, in my recollection, I forget where it was, I think you gave citations to three or four cases in which that actually happened, didn't you?

Lindsay Harrison:

The Singh case, your honor, is one of those cases. There's also the Lindstrom case from the seventh circuit. And it does happen that either because of a miscommunication or some other reason that the state is not effective. And in that case, an injunction would be.

Speaker 6:

I understand [inaudible 00:35:41] granted in a very high percentage of those cases. I'd be curious to know, A, the percentage of the cases which is granted, and B, the percentage of those cases that are ultimately decided in favor of the government.

Lindsay Harrison:

The data that I believe your honor is referencing was the rate at which petitions for review are filed and not the rate at which stays are granted or filed.

Leah Litman:

So what did Lindsay do well here?

Melissa Murray:

I felt she was a little bit law professor, gently correcting filling in the gaps because you can't know everything. And she built a ton of credibility by helping out here without making Justice Kennedy embarrassed or look embarrassed. So I thought it was a helpful kind of fill in, very law professorish.

Leah Litman:

Yeah, and without sounding like a jerk too, because Lindsay is someone who can speak very quickly and is definitely more than capable of doing the oral argument style, where you just bulldoze through questions and over people speaking. But that's not actually always helpful. She is a person of many talents and some of those talents are on display here.

Kate Shaw:

Yes, also can I just say perfect command of the record, right? It's you don't always see that with advocates, even who are doing good arguments. They sort of try to gloss over the edges of things they're not totally sure about, and she just, complete mastery.

Kate Shaw:

Okay, next one that we wanted to highlight was Christina Swarns in Buck versus Davis, which is a case involving the availability of a certificate of appeal ability to raise an issue of ineffective assistance of counsel.

Speaker 8:

What concerns me is what the implications of your argument would be for all of the other prisoners who, let's say they're not even capital cases, but they want now to raise some kind of ineffective assistance of counsel claim that is procedurally defaulted. And they say we should have relief from a prior judgment denying habeas relief.

Speaker 8:

And what would prevent a ruling in your favor in this case from opening the door to the litigation of all of those issues, so that those Martinez in Trevino would effectively be retroactive?

Christina Swarns:

Well, I think there are three factors I think that makes Mr. Buck's case unique. First and foremost, it involves an express appeal to racial bias that not only undermine the integrity of his own death sentence, it undermine the integrity of the courts. Second, he now faces execution. This is a death penalty case.

Christina Swarns:

He now faces execution pursuant to that death sentence that is unquestionably, and I will agree with you, indefensible and compromised by racial bias. Third, there's no question of Mr. Buck's diligence here. Mr. Buck has consistently and unrelentingly pursued relief on his claim. So I think that those factors make Mr. Buck's case unique.

Melissa Murray:

So we should note that Christina is the head of the innocence project. And for many years before that she was a litigator with an NAACP Legal Defense Fund. So she is a civil rights lawyer par excellence, and she is especially good in these circumstances where she's doing death penalty litigation, which is often not only difficult as a practical matter, but also incredibly emotionally draining.

Kate Shaw:

And terms of her answer here one of the things it demonstrates, I think really effectively that it's important to know when to go narrow. And in particular, if you're looking to get Justice Alito's vote in a criminal case, you have to go narrow. So it is this super efficient answer that is framed both in terms of facts and generally applicable legal principles, and a rule the court could apply in other cases. So, chef's kiss.

Leah Litman:

Next up is Debo Adegbile who is an NYU law graduate and a litigator at Wilmer Hale. So let's hear him in the 2013 blockbuster Shelby County versus Holder.

Debo Adegbile:

The pattern in the cover jurisdictions is such that the repetitive nature of discrimination in those places take, for example, the case in Leland. After this court ruled that the redistricting plan after the 2000 round of redistricting bore the mark of intentional discrimination in the remedial election, the state of Texas tried to shorten it.

Debo Adegbile:

We can strain the early voting period for purposes of denying the Latino community of the opportunity to have the benefits of the ruling. What we've seen in section two cases is that the benefits of discrimination vest in incumbents who would not be there, but for the discriminatory plan.

Debo Adegbile:

And Congress, and specifically in the house report, I believe it's page 57 found that section two continues to be an inadequate remedy to address the problem of these successive violations. Another example that makes this point very clearly is in the 1990s in Mississippi, there was an important section two case brought finally, after 100 years, to break down the dual registration system that had a discriminatory purpose.

Debo Adegbile:

When Mississippi went to implement the National Voter Registration Act, it tried to bring back dual registration and it was section five enforcement action that was able to knock it down.

Chief Justice Roberts:

Do you agree with the reverse engineering argument that the United States has made today?

Debo Adegbile:

I would frame it slightly differently Chief Justice Roberts. My understanding is that the history bears some importance in the context of the re-authorizations. But that Congress in none of the re-authorizations stopped with the historical backward look. It takes cognizance of the experience, but it also looks to see what the experience has been on the ground.

Melissa Murray:

Okay, so what's great about this? He was incredibly knowledgeable and offered a conceptual reframing of what it looks like the court actually would seize upon and characterize in a certain negative way, a kind of reverse engineering argument.

Melissa Murray:

So he was really great here and just sort of talking about the history, reframing the chief justice's understanding of the history and trying to bring the chief justice in a different direction, which ultimately the chief justice did not go, but he really tried. And I think certainly convinced me.

Kate Shaw:

Yeah. And I mean, this certainly goes beyond just this clip, but he also was arguing along with the solicitor general's office. So I think there's a special sort of set of skills involved in figuring out how to be complimentary and not duplicative when you've got another lawyer on the same side of the cases you're in, and in particular where that lawyer's like the solicitor general. And I think he added a ton of value to that argument, obviously beyond just this clip

Melissa Murray:

Complimentary as in complimenting, not like you are so nice Mr. Solicitor general. But like that you fit in well, like you were great.

Kate Shaw:

I have nothing to add to the perfect argument of the solicitor general. Complementary.

Melissa Murray:

He was probably complimentary and complementary, which is a special skill on its own.

Leah Litman:

So the next advocate we wanted to highlight is Danielle Spinelli, a lawyer at WilmerHale. And this is from her argument in Malthena versus Malveaux, which was the Supreme Court's case in which the court was initially going to decide the question about what exactly Montgomery and Miller required in re-sentencing proceedings for juveniles who might be subject to life without parole. So let's play that clip here.

Speaker 14:

Why isn't a discretionary sentencing regime, enough procedurally to satisfy the substantive rule articulated in Miller and Montgomery?

Danielle Spinelli:

Because the substantive rule, which I think I agree with your articulation, the substantive rule requires that in order to ensure that juveniles don't receive an unconstitutionally disproportionate punishment, a court must consider the characteristics of youth and must make a determination as to whether that juvenile-

Speaker 14:

Senator, sorry to interrupt but this is important. You said two things, doesn't a discretionary regime where the argument can be raised necessarily satisfy [inaudible 00:43:37] Montgomery's requirement of consideration?

Danielle Spinelli:

No, it doesn't. And let me explain why in this particular case, it doesn't Because this was decided not... He was sentenced not only before Miller, but before Roper. There's no possible way that the judge could have silently in her head considered the factors that weren't even articulated in the first instance by this court until much later.

Leah Litman:

So why I like this, as this exchange really highlights in the normal Supreme court format, it can be really hard to get out an answer just because the justices themselves are so eager to basically participate in the argument as an advocate and talk to their colleagues. And Danielle clears space for herself here and does so both very efficiently.

Leah Litman:

Especially I think compared to the question she is receiving. Like in the amount of airtime she actually gets to make her point. And I just think her response was super devastating and we highlighted this actually in the briefing and from the argument when we covered the case when she was arguing it.

Melissa Murray:

Next up is Nicole Saharsky. And she is arguing here in Puerto Rico versus Sanchez Valle which is a case about whether or not Puerto Rico and the United States are the same sovereign for purposes of double jeopardy. So here's a clip of her going toe to toe with Justice Scalia.

Justice Scalia:

The DOJwill not prosecute a crime that has already been prosecuted in Puerto Rico.

Nicole Saharsky:

Right? And the justice department can work with Puerto Rico to decide who will prosecute what crimes. In fact, we do that as a general matter so that there's usually not any overlap of the kind that occurred in this case. But I think that's just a very different thing from suggesting that Puerto Rico is a sovereign under-

Justice Scalia:

No, I understand that. I'm just saying that if you like that result, it can be done by the statue.

Nicole Saharsky:

I'm sorry if I misunderstood the question, I'm just trying to be extra careful because-

Justice Scalia:

I'm trying to be helpful.

Nicole Saharsky:

I know. I do understand that now. I just want to make sure that I'm being clear because I think this case does raise a lot of important questions. And I do think that this court's jurisprudence over the past 100 years has been very careful about what it means to be a double jeopardy sovereign.

Melissa Murray:

So here's what's great about this. She recovered, she shook herself off. She laughed, she got out a key substantive point and Leah, I think you will appreciate she is a very good, fast talker.

Leah Litman:

I love it, that is my speed. Just resonates with me. So another advocate we wanted to highlight is Amir Ali of the MacArthur Justice Center. So here are two clips of an exchange he had in Garza versus Idaho, which is about the ability for a defendant to challenge a lawyer's decision in the case.

Speaker 18:

So in other words, I think it was voluntary and all that, and it's not beyond the constitutional limits. I just am not guilty. So I want to appeal.

Amir Ali:

So your honor, a few responses. I think the first response I have is clear in whose view. This court has always recognized that there's a role for the court in that sort of distinction. And that's always been a possibility whether there's an appeal waiver, whether it's Flores Ortega, and it's just a guilty plea.

Amir Ali:

The guilty plea waives all non jurisdictional claims. So that's always a possibility and courts have dealt with that for over 50 years under Anders and it hasn't been a problem. And what it's provided is the protections that that decision was all about and has been applied by this court several times since. The second response I have is-

Speaker 18:

I think you're going a little too fast. I'm breaking that down, all right? Defendant comes to you deciding whether he wants to rescind the plea agreement. Nothing prohibits a defendant for rescinding a contract, correct?

Amir Ali:

That's right your honor. Although I don't think that our argument's contingent on that, this idea of an autonomous right to breach. I think that is correct though.

Speaker 18:

And I understood that to be your position. You said you had two answers to my question. What was the second one?

Amir Ali:

Sure. And Justice Sotomayor touched on them, but let me just repeat them in a slightly...

Leah Litman:

So what I enjoyed about these exchanges are he makes space for himself by saying he has multiple responses he wants to get to. And in fact, the chief justice was so interested in what he had to say. He made sure to make time for Amir to get to his second response.

Leah Litman:

And I think Amir navigated that really definitely by also making sure Justice Sotomayor, didn't feel disrespected and noting that a lot of what he wanted to say came out in his exchange with Justice Sotomayor. So just great etiquette, great making space, all of it.

Leah Litman:

So another advocate we wanted to highlight is Sarah Harrington formerly of the Civil Rights Division and Office of Solicitor General and Goldstein Russell. And now back at the Department of Justice heading their civil appellate division. And this is from her argument in Kansas versus Glover.

Speaker 20:

The declaration here is effectively saying that, that I assume. I'm an officer, this is what I do. I assume this is the driver.

Sarah Harrington:

This is Kansas not-New York

Speaker 20:

This is the owner, okay? Touché.

Leah Litman:

Making a correction that goes over well and a joke at basically a Supreme court justice's expense is extremely difficult to pull off. So only the best of the best. So the last one we wanted to highlight is a recent one from Jessica Mendez colberg's argument in Aurelius. And we actually highlighted this clip at the time, but we will play it again here.

Speaker 22:

I guess, again, I just don't see the pertinent of the insular cases.

Jessica Mendez:

Well, as I mentioned, and also in last term this court went ahead and overruled the Korematsu case in the Trump versus Hawaii case the court said that the case had nothing to do with the Trump versus Hawaii case, but still it was a morally repugnant doctrine that was purely considering the basis of race. And therefore it was overruled.

Jessica Mendez:

The same here with the insular cases, and I cannot stress enough that the parties have relied on the insular cases in this case. That is why it's the perfect opportunity to address them.

Leah Litman:

What's not to love about this exchange? It is fearless. It is pointed. It is correct and effective, hard to do a better job than that.

Melissa Murray:

So this is all to say, there are binders. Binders, literally binders full of women and people of color. If you have a situation where you need an advocate before the court, there are some people. If you were a justice and you're trying to appoint someone, here's some binders full of women for you.

Leah Litman:

Yeah, and we didn't even get to over half of them. I didn't even get to Dale fuck them up Hoe. So many more people to highlight.

Kate Shaw:

And we are going to pull those binders out the next time we have a light opinion day and give y'all some more ear candy because these folks are the best.

Melissa Murray:

All right, I think that's all we have time for today. Again, this was a lighter episode, but we are gearing up. We're supposed to get some opinions later this week and we will cover them for you. So thanks so much to our listeners. You make all of this worthwhile and we really appreciate you.

Melissa Murray:

We also really, really appreciate Melody Rowell, our producer, who's going to take this morass and turn it into ear candy. We're also grateful to Eddie Cooper who makes our music. If you'd like to support the pod, and we hope that you will, please check out our fabulous merchandise. It's great for your hot girl summer.

Melissa Murray:

Get yourself a terrific t-shirt, starry decisis is for suckers, better bitch than mouse. So many choices. And if you prefer not to wear our merchandise, I don't know why, but if you would prefer not to, you could always support us by subscribing to our Glow Campaign. That's glow/strictscrutiny. We'll see you later.