Melissa Murray:

Listeners, she literally just perked up like a puppy with freeze, dried turkey treats in front of him.

Melissa Murray:

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

Leah Litman:

I'm Leah Litman.

Kate Shaw:

And I'm Kate Shaw.

Melissa Murray:

Just a reminder, we're on a bit of an irregular schedule as we wait for the court to issue the remaining opinions from October term 2020. But even though our release schedule is irregular, we're going to stick to our regular diet of breaking news, opinion recaps, and then some court culture. Today's episode will feature some SCOTUS news, and then we'll do a deep dive on Justice Kagan's approach to statutory interpretation since she's the only justice that could get it together to release opinions this week, and then we'll have a court culture segment on how we all learned the justices. They're listening to us, or at least they're reading many of our bad takes on Twitter.

Melissa Murray:

Then finally, we will pay tribute to the late judge, Robert A. Katzmann, the former chief judge of the Second Circuit who passed away on June 9th, 2021. Breaking news. There was a denial of certiorari in the case challenging the all male draft. The case was National Coalition for Men versus Selective Service. Justice Sotomayor wrote a statement, which was joined by justices Breyer and Kavanaugh saying that the role of women has changed dramatically in the military since the court upheld the male-only draft in 1981's Rostker versus Goldberg. But because Congress is now considering the question of whether women should be eligible for the draft, the court isn't going to take up the issue at this time.

Melissa Murray:

As she put it, "At least for now, the court's long standing deference to Congress on matters of national defense and military affairs cautions against granting review while Congress actively weighs this issue." Notably absent from the statement was Justice Kagan. Leah, Kate, why do you think she was absent from this? Why didn't she join?

Leah Litman:

One possibility is she has very strong stare decisis not for suckers energy, so perhaps she did not want to join an opinion suggesting that subsequent legal developments had undermined the weight of the court's previous precedent in Rostker. It's also possible maybe she didn't want to endorse the proposition that the court won't take up an issue at the same time that Congress is considering it. Maybe either one of those reasons, both of them in combination were enough to lead her not to join.

Kate Shaw:

Yeah. I think those both seem plausible. Also, it was an interesting sort of writing. It was kind of like nice inter branch communications, sort of saying like, this is not a very legal analysis, heavy couple of pages. It's sort of observed that the court had once considered this previously, talked about the fact that there was a hearing recently, there was a report that was done. So, Congress seems actively to be considering the issue. I think, if you sort of squinted at it, it seemed also to be sort of sending a message to Congress, like kind of keep focused on this, because we might have to take the issue up if you don't given how much has changed since the Supreme Court last considered the male-only registration requirement.

Kate Shaw:

But maybe this is something that should be considered by Congress, and I don't know, Justice Kagan, maybe she doesn't think that the court should be talking to Congress that way. I mean, I think it should, but maybe she doesn't, so I think that's another possibility.

Melissa Murray:

She has, I think, engaged in what we might view as sort of demosprudence or discussions with Congress. I'm thinking specifically of her opinion in Gundy, where she basically issued that warning to Congress like, get it together, make your principal as intelligible as possible, or you're going to bring down the whole administrative state. She definitely is in this inner branch dialogue, but maybe here.

Kate Shaw:

Like in opinions versus the orders. Well, is that a distinction she might think is significant? I'm not sure.

Melissa Murray:

Let me just say about this case. I'm actually kind of glad the court denied [inaudible 00:04:01] here in part, because there was really a kind of strange bedfellows coalition of groups on here. The National Coalition for Men has been very active in litigation against what might be understood as anti-subordination, anti-discrimination laws. So, laws that allow for certain things to happen to help women integrate into spaces that they were previously denied access to. But the National Coalition for Men has opposed those kinds of measures on the ground that they are gender discriminatory on their face, because they-

Leah Litman:

Violate bros rights.

Melissa Murray:

Yes. Again, I think the National Coalition for Men wants to expand the draft to include women, in part because they have this sort of very rigid idea of formal equality, and I'm not opposed to women serving in the military or certainly being eligible for the draft, but I wonder where a decision on a case like this would take us in terms of anti-discrimination law and the whole idea of an anti subordination as opposed to an anti classification norm.

Kate Shaw:

Yeah. So, this may have been a dodge bullet actually, potentially. So, we got one grant this week in a case called FBI versus Fazaga. That's a case challenging government surveillance under FISA and the alleged unconstitutional targeting of Muslims in particular. The specific question to be decided in this

case is whether section 1806(f) of FISA, the Foreign Intelligence Surveillance Act, displaces the state secrets privilege and authorizes a district court to resolve in camera and ex parte. The merits of a lawsuit challenging the lawfulness of government surveillance by considering the privileged evidence, so that'll be heard next term.

Leah Litman:

The court also requested a response to an application for a stay that had been filed by a coalition of realtor groups that were challenging the CDC, Center for Disease Control's eviction moratorium, which prohibits landlords nationwide from evicting tenants who fail to pay rent during the pandemic. The current moratorium will expire on June 30th, although it's previously been extended several times. The CDC eviction moratorium has been challenged in a bunch of places, sometimes successfully, but this case comes to the court in a weird posture.

Leah Litman:

The district court for the district of Columbia found the eviction moratorium likely invalid, but then, it chose to stay its own order, thereby leaving the moratorium in place pending appeal. Again, the moratorium expires June 30th. The DC circuit declined to lift the district court stay, but seem to adopt slightly different reasoning suggesting that it, unlike the district court, thought the moratorium was legally valid. So, the Supreme court requested a stay that is due this Thursday, the day we are recording. I guess, in my view, I think it's hard to see them staying the district court stay or lifting the district court stay after the district court concluded the moratorium is likely unlawful, but then stayed its order.

Leah Litman:

The court would essentially just have to disagree with it about weighing the equities on whether to grant a stay and not on the underlying merits. On the other hand, the most recent opinion is the DC Circuit stay opinion, which suggests maybe the order is valid. But again, that wasn't the reasoning of the district court. I guess I don't necessarily think they're going to act or do anything here, but it is something to watch.

Melissa Murray:

Right. In other news elsewhere, in the federal judiciary landscape, federal judge, Roger Benitez, who is from the Southern district of California in San Diego, struck down California's assault weapons ban. It's a ban on AR-15 weapons. I just want to highlight some of the greatest hits from this 94 page opinion in the case, which is called Miller vs Bonta. First of all, it should be noted that the judge declined to accept changes in the document before publishing it. So, these changes appear in track changes in the 94 paged document.

Kate Shaw:

That's nightmare fodder, oh my God. Can you imagine as a law clerk?

Leah Litman:

I know.

Leah Litman:

But like, who among us hasn't published a decision striking down a ban on assault rifles and just forgot to accept track changes?

Melissa Murray:

Let he who is without track changes cast the first stone. Just procedurally, that was notable, but also really interesting was the tone of this opinion, which at 94 pages, felt a little bit more like a screed weighing into what I think is fair to say is a kind of culture war the issues of guns and gun controls and gun rights, more so than an actual serious opinion, sort of parsing this question of whether the California legislature had gone too far and in doing so, had intruded upon the rights, the second amendment rights of citizens. Some highlights, the opinion says that more people have died from the coronavirus vaccine than mass shootings. So, here's a direct quote, "More people have died from the COVID-19 vaccine than mass shootings in California." What? Huh? I don't even know what to say to that.

Kate Shaw:

Very relevant. Very relevant, very, very relevant to the legal analysis.

Melissa Murray:

Also, I want Jobert hearing for this. Come on, like what? The next sentence also says, "Even if mass shooting by assault rifle is a real harm ..." Assuming-

Kate Shaw:

Just assuming.

Melissa Murray:

Exactly. The opinion also goes on to compare assault rifles to Swiss army knives. I'm just going to say, I have a Swiss army knife. I took it all over Europe back before when you could do things like that. A Swiss army knife is for slicing cheese and possibly opening packages. An assault rifle is not for slicing cheese, and so anyway, but the first sentence-

Kate Shaw:

It just shows you don't own guns, Melissa, right? Real gun owners know you sliced cheese by just shooting an assault rifle into your fridge.

Melissa Murray:

I know that the stereotype of anyone who's spent time in California is that you are a pinko communist like you hate guns. My dad was an avid hunter. I grew up in a house with guns, so like I get it. I know how to handle a gun. I know how you're supposed to deal with them and how to store them safely. But this is just ridiculous, like regardless of where you fall on the spectrum with regard to second amendment rights and gun control, I think you would find it ludicrous and overstated to say that, as this first sentence of the opinion reads, "Like the Swiss army knife, the popular AR-15 rifle is a perfect combination of home defense weapon and Homeland defense equipment.

Kate Shaw:

That's where it feels like this kind of culture we're [inaudible 00:10:38], which is it's trying to normalize this weapon to say, this is very commonly owned by ... The vast majority of owners are law abiding

people. This is something that is or should be familiar in every household in the same way a Swiss army knife is. So, it feels like a facially preposterous opening, but it is suggesting a state of the world that is actually quite substantively relevant to the analysis that follows, right? Because the court then goes on to use these two tests, right? The first test, which is this so-called Heller test, basically just says, is the weapon commonly owned by law abiding citizens for lawful purposes?

Kate Shaw:

Basically then say that the answer to that question is, yes, the prohibition is unconstitutional. So, he says, look, I just told you, this is basically a Swiss army knife. Lots of people own them. Under the Heller test, this law is clearly unconstitutional.

Melissa Murray:

To be clear here, the court first uses the Heller test again, for the purpose of establishing that the AR-15 is a normal and normalized kind of weapon that individuals have in their home for purposes of home defense. Then he goes forward to use a second test, this two-step test that first ask, whether the regulation burdens conduct protected by the second amendment, and then second using a means and ends fit, which is basically, I guess like intermediate scrutiny, which is to say that, if the conduct to be is near the periphery of the second amendment right, then intermediate scrutiny is permissible.

Melissa Murray:

However, if the conduct is deemed more core to the second amendment right, then you have to use strict scrutiny. He doesn't really say whether this is closer to the periphery or closer to the core. All he says is that this would fail under intermediate scrutiny. I'm not even really sure where this falls on that spectrum of core versus periphery, but it doesn't pass intermediate scrutiny according to Judge Benitez, and the analysis stops there.

Kate Shaw:

We'll see what the Ninth Circuit does with this case. If the Ninth Circuit upholds the district opinion, then we'll definitely have a Circuit split, that the Supreme Court, I think, will very likely take up, so we'll keep a close eye on it. The president issued a pretty notable statement after the department of justice filed a brief in a case involving Puerto Rico's exclusion from certain social security benefits. The president's statement basically said today, DOJ will file a brief in the Supreme court in the case, United States versus Vaello-Madero, which addresses whether a provision in the Social Security Act that declines to provide Puerto Rico residents with supplemental security income violates the constitution equal protection principle.

Kate Shaw:

The statement explains that the provision is inconsistent with the Biden administration's policies and values, but basically, points to DOJ longstanding practice of defending the constitutionality of federal statutes, regardless of policy preferences, says the practice is critical to DOJ's mission of preserving the rule of law, and says, look, consistent with that general principle, the department will defend the constitutionality of the statute in this case. But look, as a policy matter, I believe Puerto Rico residents should be able to receive SSI benefits, just like all their fellow Americans, and we're going to work with Congress to make that happen legislatively.

Kate Shaw:

This drew a lot of intense reactions, I think on all sides. I will say, as an alum of the White House, not the Department of Justice, I think every administration wrestles with these questions where there are statutes that contravene the policy commitments of the administration, but where the longstanding norms in DOJ that statutes be defended seem to militate in favor of defense. There is no easy answer to how that tension gets resolved. I was in the Obama administration when the decision was made to stop defending DOMA.

Kate Shaw:

That was a very big deal, extremely carefully considered. I think, correctly made, but sort of made in the context of a rigorous process, it says, it should be rare that the Department of Justice declines to defend statutes, or we are worried that we are in an administration with an aggressive legislative agenda and concerned about what a future administration that didn't agree as a policy matter with statutes like the Affordable Care Act might do in the face of challenges to those statutes. I think it's actually a hard set of questions. I think what the Biden administration did here was defensible. I think that the statement should probably have been less categorical.

Kate Shaw:

It sort of seemed to suggest that defense was like an imperative, and that's not true as a historical matter, and I don't think it should be true as a normative matter. I think that it could more carefully have said it should be very rare. My administration is going to take seriously and we have not determined that this is one of those rare instances in which we're going to decline to defend the constitutionality of the statute. I think that was a missed opportunity to do a little public education about it. But I sort of understood where everyone involved was coming from. In a way, I think that a lot of people ... A lot of others didn't. I don't know if you guys were less receptive to the Biden administration's arguments in this matter.

Melissa Murray:

I think there's probably more to say about the administration's take on maintaining policies from a prior administration and other venues that maybe Leah would like to weigh it on.

Leah Litman:

Well, so I might not be able to weigh in quite as much as I would like to on the issue you are alluding to, which is there was another notable divide between the White House and the Department of Justice in a second case that involving E. Jean Carroll, the author who had sued former president, Donald Trump, for defamation after he said, among other things, that she was not his type when she accused him of raping her.

Leah Litman:

Under the Trump administration, the DOJ had filed a brief at the last minute arguing that the president's statements about E. Jean fell within the scope of his official duties and that therefore the United States should be substituted in as a defendant for Donald Trump again, because the statements were made in the course of his official duties. Because the Federal Tort Claims Act does not include a waiver of sovereign immunity for intentional torts, like defamation that would result in E. Jean's defamation lawsuit being dismissed.

Leah Litman:

We were waiting to get DOJ's brief under the Biden administration to see what they were going to do. The brief came in and they are sticking with the position of the Trump DOJ saying that, yes, the statements by Donald Trump were made within the course of his official duties, and the United States should be substituted in as a defendant for him. But then, after the brief was filed, the Biden White House appeared to try to distance itself from DOJ, saying, "It was not consulted by DOJ on the decision to file this brief or its contents." Biden and his team have utterly different standards.

Leah Litman:

I guess that makes it like a little better, but this is not an instance of an obligation of defending a federal statute that is under attack, nor is it an instance where, let's say there is a Supreme Court precedent on the books, or a court of appeal precedent on the books that is like exactly on all fours where DOJ needs to maintain some consistency and litigating positions. I think rather, it is because these are executive branch lawyers whose inclination is read these statutes aggressively to give themselves a litigation advantage and not anything beyond that "institutionalist" perspective.

Kate Shaw:

Yeah. I mean, I agree that these two are definitely distinct, defending a statute on the books versus seeking to intervene in a case like this the conduct is so egregious. I mean, I imagine like a Vanita Gupta giving a speech about, I don't know, like white supremacist terror and somebody who thought they were somehow defamed in the course of the speech, like seeking to sue her, and DOJ saying like, we can't make these decisions based on how-

Melissa Murray:

One person.

Kate Shaw:

Yeah. Or just like either how are substantive views about the person, and the conduct, the content, any of it like we just think the government officials need. Now, I think there's all kinds of ways you can draw a distinction between that scenario and the Trump one, because the subject of the speech was conduct that was so personal and so predated his time in public office. That seems pretty distinct from this scenario that I am describing. I think there's probably lots of other ways to slice it, but I can well see them saying that sometimes you need to just ... It's like a first amendment argument, that somehow like, the test of your commitment to the principles of the first amendment really comes when the speech is egregious as opposed to when you agree with it.

Kate Shaw:

You can see these DOJ lawyers saying like, we just kind of, as a principled matter, need to be able to intervene in cases like this and substitute the United States for private individuals. Although, I think that there are clear distinctions between this scenario and the Puerto Rico filing. And I want to to say

Melissa Murray:

I don't mean to say that they're the same. I'm just sort of suggesting that there seems to be a kind of, let's just sort of hue to a kind of principled stands on a lot of things.

Kate Shaw:

Yeah. I am sure the Biden DOJ is concerned about correcting, and perhaps over-correcting, from the problem of politicization of the department under Trump, right? Maybe DOJ is simply not consulting the White House about these really important high-profile filings, even to give it a heads up. Again, how those consultations happen is kind of fraught and high stakes, but typically, there is some notice given, and it sounds like there was no notice given, which makes me think there are maybe new firewalls being erected between DOJ and the White House, which I understand the impulse to do, but I also worry about kind of hobbling the president and his ability to sort of have his views known in important matters like this, because of the excesses of the Trump justice department. This is something that I worried about prior to January 20th and I continue to worry about now.

Melissa Murray:

The hits just keep coming. We should also note for full disclosure, Leah, you are working on this case.

Leah Litman:

Yes. Sorry. That's what I meant when I might not be able to chime in with like as much color commentary as I would like. Yes, I am one of the layers for E. Jean Carroll.

Melissa Murray:

All right. Well, that's a lot of breaking news. We should turn to the meat of the week, which is the opinions that the court has released. Weren't a lot of them to be clear, but the ones that came down were certainly interesting and significant. Let's start with Sanchez versus Mayorkas. This was the case that we previewed earlier in our episode with the Appellate Project and ACLU lawyer, Carmen Iguina Gonzalez. The case is about whether TPS, temporary protected status recipients, are eligible for LPR, lawful permanent resident status or green cards.

Melissa Murray:

As we explained on our earlier show, TPS is a kind of temporary immigration relief, where the government basically says, we're going to deport people from this country to that country because of dangerous or unsafe conditions like those arising from natural disasters or armed conflicts. LPR is a permanent immigration status, and LPR status is available only to those people who have been "inspected and admitted" into the United States or entered "pursuant to a lawful admission." To be clear, not all TPS recipients have entered the country lawfully. In fact, many did not. But many of these individuals can satisfy the other conditions for receiving LPR status.

Kate Shaw:

So, here, the Supreme Court, in a unanimous opinion by Justice Kagan, holds that TPS recipients have non-immigrant status, but are not admitted as required under 1255 and are therefore not eligible for LPR status unless they were lawfully admitted. So, put differently, their TBS status doesn't mean they are admitted if they have TPS status and they were lawfully admitted. They may still qualify for LPR status, but the TPS status itself does not mean that they have been admitted for LPR purposes. Mr. Sanchez, in this case, was not lawfully admitted, so he is ineligible for LPR status. The court here says that immigration status and admission are two separate concepts in immigration law.

Kate Shaw:

The court also notes the pending legislation, H.R.6, would deem TPS recipients to be lawfully admitted. This is another unanimous immigration opinion. It's actually the third successive unanimous opinion to read immigration statutes to deny relief to immigrant plaintiffs. That follows a unanimous Gorsuch opinion in Garland vs Ming Dei reversing a Ninth Circuit rule that benefited asylum applicants, and the unanimous Sotomayor opinion in Palomar-Santiago, in which the court held that the non-citizen petitioner could not collaterally attack his removal order because he did not show that he had exhausted administrative remedies and been denied the opportunity for a judicial review.

Kate Shaw:

We should note that Niz-Chavez backs this trend, so that was a case in which the immigrant plaintiff did prevail. It's interesting that we have these three cases unanimous. Is there a trend as to immigration cases in particular or statutory cases more broadly? Is it just too soon to know in terms of where we stand in the term?

Leah Litman:

I guess like two things come to mind. First is that these immigration statutes are actually quite harsh, restrictive and draconian and anti-immigrant. That's part of what is generating these rulings, is they're interpreting the statutes, which are designed to be and are quite anti-immigrant. Second is it calls to mind this kind of famous letter that came out in Supreme Court papers where one justice said, actually I disagree with your opinion, but because it is June, I join, and I wonder if there's like part of that going on, end of term that's under pandemic conditions. This case at least was argued in the end of the April sitting. I think probably some combination of a lot of factors, but those were two that came to mind.

Melissa Murray:

I mean, again, I think Leah is right on this one. I mean, I don't know if it's necessarily an immigration trend or just a statutory interpretation trend with a statute that may actually just sort of trend this way because of its substantive content.

Kate Shaw:

Okay. I feel like we've made Leah wait long enough. We should talk about Borden.

Leah Litman:

Okay. ACCA, I burned for you.

Melissa Murray:

Yes. So, we finally got the ACCA opinion we've all been waiting for.

Leah Litman:

All right, time out.

Melissa Murray:

Listeners, she literally just perked up like a puppy with freeze, dried turkey treats in front of him. Fresh turkey treats.

Kate Shaw:

I've never seen you-

Leah Litman:

Fresh turkey treats, so excited.

Melissa Murray:

You are smizing. You were slightly deflated talking about the immigration cases, but now you are perky and bushy-tailed.

Leah Litman:

This opinion has everything that I love and so much more in it, so let's get started. This is Borden versus United States. The very important armed career criminal act case that I have been watching like a Hawk and waiting for. So, ACCA is the statute that requires higher sentences for certain persons convicted of possessing firearms after a felony conviction. The usual penalty for that crime is up to 10 years. ACCA imposes a mandatory minimum of 15 years for persons with three or more convictions for violent felonies. And it defines violent felonies as a list of enumerated offenses.

Leah Litman:

Those offenses that have, as an element, the use of force against another person. That clause is known as the elements clause, and it was the one at issue in this opinion. The specific question that the court addressed is whether a conviction for a crime that has a Mens Rea, a mental state of recklessness can qualify as a violent felony because it has, as an element of the use of force, against another person.

Melissa Murray:

Can I just ask you to clarify something for the untutored ACCA voyeur here? Is the whole idea of recklessness here is that these felonies that then trigger ACCA are things that you would do intentionally like the sort of harm against another person, but the recklessness mental state suggests that maybe you did not intend for the harm to happen to the other person?

Leah Litman:

Yeah, that was the gist of the defendant's argument, that ACCA is supposed to impose predicates for violent felonies, which mean like intentional or purposeful or knowing, but crimes committed with just like a reckless use of force or risk don't qualify. So, in a five/four opinion, the court agreed with that argument and said, no convictions for crimes that require only a Mens Rea of recklessness categorically do not qualify as having an element of the use of force, and therefore they cannot supply the predicate for the ACCA enhancement. Here's where things start to get awesome. It's an ACCA case. The defendant wins, and Justice Kagan wrote the opinion.

Leah Litman:

Technically, the opinion is 4-1-4. I'll break that down and explaining what it means, but Justice Kagan wrote the plurality of four. Again, the plurality says reckless crimes aren't ACCA predicates. Justice Thomas writes for himself. He's the one, that reckless crimes aren't ACCA predicates, but for slightly different reasoning that we'll talk about it in a second. Justice Kavanaugh writes the dissent that Kagan just mocks mercilessly again, adding to all of my vibes. This is truly my good place. Defendant wins, Justice Kagan writes, Justice Kagan goes straight dracarys all over Justice Kavanaugh like totally worth

the court adding an extra opinion day just for this case, and me sitting in front of my computer, just waiting refreshing.

Leah Litman:

This was everything. This was everything I wanted. I just want to note that while I am getting increasingly excited, Melissa and Kate are making these faces looking at me like, oh my gosh.

Melissa Murray:

We're also in the chat like, should one of us call somebody? Should we send help?

Kate Shaw:

We're your backup here. we have nothing that could possibly add to your excitement.

Melissa Murray:

I haven't seen Leah this excited since January 7th. I really want to haven't. She's just been in sort of listless since January 7th. This is the perkiest I've seen you in months. It's great to have you back, Leah. I'm glad justice Kagan could be the one to do it.

Kate Shaw:

Wait, can I just say something real quickly about, you said full dracarys like on the Kavanaugh dissent, which I think we will get to, but I realize that I need to qualify something I said last week about the Van Buren opinion. I said that Barrett like made kind of a tactical error in elevating the dissent because it sort of weakened her like she gave it all this air time. That's not an absolute rule, right? There are ways when you were in the majority to spend a lot of time talking about the dissent and still emerge in the power position. And Kagan absolutely demonstrates that this opinion, but I feel like Leah, I'm getting ahead of us. You should go on.

Leah Litman:

Okay. So, what's up with the Kagan plurality? It is joined by Gorsuch, Breyer and Sotomayor. It has some big textualist energy, albeit without the insane, I burned for you textualism references and without some of the general insanity of the methodology. For example, she notes that dictionaries offer definitions of against that are consistent with both parties views, how sane. In light of that, she places a lot of emphasis on the surrounding words, the fact that the language uses against another, and she also write points to the court's prior writings, and Leocal versus Ashcroft, as well as other cases, and also invokes both context and purpose while taking a sideswipe at Sam Alito.

Leah Litman:

Noting in a quotation, "In a case much like this one," then Judge Alito reiterated the point. He wrote that the quintessential violent crimes involve the intentional use of force.

Melissa Murray:

Receipts. Receipts.

Kate Shaw:

I also liked a couple of turns toward common sense and consequences, right? She basically is saying, let's think about the difference just in kind of tangible terms between the kinds of crimes that just require recklessness and the kinds that require knowing or intentional conduct. She says, take some examples that don't involve driving because there's lots of reckless driving offenses. So, a shoplifter jumps off a mall second floor balcony while fleeing security to land on a customer. An experienced skier head straight down a deep mogul filled slope back on a skis, arms out to the sides, off balance, and careens into someone else on the hill.

Kate Shaw:

A father takes his two year old Go-Karting without safety equipment and injures her as he takes a sharp turn. These are all cases in which an individual was convicted for a crime, which contained a Mens Rea requirement of recklessness. And she says, are these really ACCA predicates? It just makes the stakes tangible. She says, no, they really aren't.

Melissa Murray:

Here's my question, and this is I think, good going into our discussion of the Kavanaugh dissent. I want to come back to your point, Kate, about whether or not you make too much of the dissent and actually addressing it head on. Would it have been more effective ... It would have been less entertaining, certainly, but would it have been more effective if she just sort of ignored this in a kind of Mariah Carey, I don't know him, this is not worth my time?

Kate Shaw:

No.

Melissa Murray:

You're saying no.

Leah Litman:

I'm saying an emphatic no, like she torched this and laid waste to that dissent.

Melissa Murray:

Was Justice Barrett's problem that she did not go hard enough, was that the problem?

Kate Shaw:

She just didn't have great arguments, I think. If all you're going to do is spend a lot of time elevating arguments that are ... I think that Barrett had the better textual argument, but it was not so clear. I'm not sure. As I think about it, maybe Barrett just needs to like hone these skills or maybe this is like a Kagan-only special, but they're doing basically the same thing, which is responding at length to the dissent and it falls really flat in Van Buren, and it is just so delicious here.

Melissa Murray:

Well, I mean, it does feel like go rap battle. I mean, I think we should send her like an enormous gold chain in lieu of a dissent.

Leah Litman:

Big pimpin' Elena kind of style. Here's some examples of what I think we're saying when we say it was extremely effective. She basically starts out the section coming for his dissent, mocking his arguments this way. The dissent offers up two alternative, really mutually inconsistent counter-arguments, and the first dissent is all on its own, and the second, the dissent goes more conventional, essentially repeating what the government says, though with a distinctively question begging quality. It's just savage descriptors, right? Like the asides, the em dashes, I would be humiliated. I would be humiliated if someone wrote that about me.

Leah Litman:

Anyways, then she talks about those two arguments. On the first, she says, that is no way to do statutory construction. No wonder the dissent is the first to make the argument. It fails at every turn. The first argument was that the statute used a quote term of art, but the term of art wasn't actually in the statute. The term of art the dissent was pointing to was offenses. It was just an insane argument that again Kagan just laid waste to. Then on the second argument she says, and so the dissent must proceed to its ordinary meaning claim reprising, parenthetical, if at higher volume, the governments flawed arguments. That is a sick burn, right? Basically calling the dissent like a shrieking ...

Melissa Murray:

Shrill hysterical.

Leah Litman:

Shrill hysterical angry man. Right, exactly, exactly. Then, again, describing the argument, she says, but once again, the dissent is putting the rabbit in the hat, but Congress did not say recklessly. We must consider the elements clause as it is without first inserting the word that will presto produce the dissent's reading.

Melissa Murray:

Also, she put presto and parenthesis.

Leah Litman:

I mean, it's again, depicting the dissent as just like making stuff up and trying to pull all these fast ones and tricks. She's so good at characterizing another side's argument accurately while also extremely viciously, that I just think this really works. Just after reading this, the following thought crossed my mind. We only got two opinions this week, and we got them on two days. Last week, the court announced it was adding an opinion day on Thursday, in addition to Monday. Do you think that after reading like the back and forth between the majority and the dissent, the chief justice just put this day on the calendar, walked over to Elena Kagan's office and was like, "Elena, you can stop. He's already dead." I'm like, you need to but this one out the door.

Melissa Murray:

Okay. Can you imagine that or hitting send on the fax machine and then turning to her clerks and saying, "Y'all want to see a dead body?"

Leah Litman:

Exactly. While we're asking the burning questions about this opinion, following comes to mind. Is Justice Kagan leaving Taylor Swift like Easter eggs? For our listeners, in the opinion, she said, according to Borden, that word against means in opposition to. Examples are easy to muster. The chess master played the Queen's Gambit against her opponent.

Kate Shaw:

I mean, we definitely did refer to Justice Kagan as Beth Harman on a recent episode, and I just love the idea that Justice Kagan's listened to it and decided to add that reference, knowing that she in fact, is the chess master playing the Queen's Gambit. I mean, we can dream.

Leah Litman:

Yeah. Justice Kagan, if you're listening, please come on Strict Scrutiny and discuss ACCA with me, please, please, please, please, please. We will get Regé-Jean to read these lines from your opinion, right? Guys, it will be amazing.

Melissa Murray:

Yes, that would be amazing.

Leah Litman:

We'll get Taylor Swift to put them to music.

Melissa Murray:

To music.

Leah Litman:

Anything you want, girl, anything you want.

Melissa Murray:

Reading this the opinion in my card again, in your car again. Leah, do you want to go on and talk about Justice Thomas' opinion? I know you have thoughts.

Leah Litman:

Okay. Try to calm down.

Melissa Murray:

Take a breath, take a breath, take a breath.

Leah Litman:

It's hard. Justice Thomas wrote separately because he thinks reckless crimes aren't ACCA predicates because they don't involve the use of force, not because of the additional phrase against the person of another. He invokes his dissent in the courts prior case Voisine, which interpreted a separate statute, defining a misdemeanor crime of domestic violence and specifically the phrase use of force. That statute the, court had said in Voisine, did cover reckless conduct, and Justice Kagan actually wrote the majority opinion in that case.

Leah Litman:

In what might be the greatest footnote in this case, Justice Kagan said, in one paragraph of its brief, the government tries to erase this textual difference by invoking a sentence in Voisine. We think that a stretch that locution shows only sometimes we do not paraphrase complex statutory language as well as we might, parentheses, mea culpa. Anyway.

Melissa Murray:

My bad.

Kate Shaw:

My bad.

Leah Litman:

I loved it. it's so smooth.

Kate Shaw:

But she also explains in the preceding sentences, she's like ... There was a long unwieldy statute. I was just compressing the kind of basic essence in a sentence, like slow your roll putting this much weight on that one sentence, but the mea culpa inference was just amazing.

Melissa Murray:

There's just a lot of big majority energy in this like, sit down, son. That's not what I meant, son. Settle down.

Kate Shaw:

It's big plurality technically, but you're right, the energy is majority.

Leah Litman:

We should just elevate it now to a majority, right? I mean, come on. But back to the Thomas concurrence. Remember that Justice Thomas previously said that demonstrably, erroneous opinions are not entitled to stare decisis effect. In this case, Justice Thomas writes that he thinks the court's prior opinion in Johnson versus United States is wrong. Johnson is the case that struck down another ACCA clause, the residual clause as unconstitutionally vague. Thomas says, look, I don't think that clause was vague, and I think this guy's conviction would qualify as a violent felony under the residual clause, but not the elements clause that still remains, so what am I to do?

Leah Litman:

He says he would overrule Johnson, but since that's not going anywhere, he says, "I reluctantly conclude that I must accept Johnson in this case, because to do so otherwise would create further confusion and division about whether state laws prohibiting reckless assault satisfy the elements clause. Is he abiding by a wrongly decided case because of reliance interests or consequences?

Kate Shaw:

It kinda seems like it. It's like it's an oddly pragmatic and weirdly tortured couple of pages. Also, for the first time, Leah, your description just now made me really retroactively sad that we didn't have a podcast when Johnson came down, because that would have been epic. Maybe we need to like turn back time and make that happen.

Melissa Murray:

Okay, Hermione, get your time turner.

Leah Litman:

Happy to do several emergency episodes about that.

Melissa Murray:

All right. We should know that 4-1-4 opinions sometimes create very difficult questions about which opinion controls on what the governing law is, and as an example, we need look no further than last term with June medical, the Louisiana abortion case in which you had justice Breyer plurality, but the chief concurring, and under the rule of marks, a number of different circuit courts decided to follow the chief's opinion. But there's no doubt about the legal rule that emerges from this case. Justice Kagan made the point clear when she responded in a footnote to Justice Kavanaugh as follows, "The dissent also goes through a complicated counting exercise about how different justices have divided in this in two other cases, apparently to show how unfair it is that the dissent's view has not prevailed here."

Melissa Murray:

"But there is nothing particularly unusual about today's lineup. Four justices think that the use phrase, as modified by the against phrase in ACCA's elements clause, excludes reckless conduct. One justice thinks consistent with his previously stated view, that the use phrase alone accomplishes that result," Justice Thomas, "and that makes five to answer the question presented, does the elements clause exclude reckless conduct?" Answer, yes, it does.

Leah Litman:

Boom, lawyered.

Melissa Murray:

Lawyered. All right. There are 21 outstanding argued cases. There are three weeks left, which means we are going to have some chock full of nuts episodes going forward. So, stay tuned for those. Really quick, let's do some court culture before we shift into our final segment. Kate, are the justices reading our tweets?

Kate Shaw:

Yes, but not necessarily exclusively through their burner accounts. I suspect that like all nine of them, or like a solid four or five are actually lurking on Twitter, but even if I'm wrong, or even for those who aren't, it turns out that Kathy Arberg, who has been the court's public information officer for about 30 years, is retiring this summer and gave an exit interview to Marcia Coyle, who gave her a delightful tidbit, which was, that over the course of the past year, the Public Information Office has clipped approximately 10,000 news articles related to the court and the justices, and that, of that 10,000, approximately half of them have been tweets.

Kate Shaw:

Kathy's office is excerpting tweets. We don't know anything about the curatorial paradigms they're using, but they are somehow sharing, and we can just sort of hope against hope that some of Leah's voting rights act tweets are among them. But so the justices are keeping up with Twitter in some fashion. I don't know. I feel like that makes me think differently about tweeting about the court knowing they're actually reading us.

Melissa Murray:

I wonder if they have a finster.

Leah Litman:

I am willing to lean in to this and I want to know which justices think my voting rights act tweets are funny, which nicknames does Justice Alito know I gave him, and does Neil Gorsuch think we want Regé-Jean Page to actually play him on this show or does he understand it's a joke? Anyways, these are just some questions.

Melissa Murray:

Wait, was it a joke? Because I thought we were serious.

Leah Litman:

Well, it was like an ironic reading.

Melissa Murray:

Was it ironic? I just thought we wanted Regé-Jean

Leah Litman:

No, we definitely sincerely want Regé-Jean Page on the show, I think just the question of him reading Neil Gorsuch-isms. Is it favorable to Gorsuch or is it less favorable?

Melissa Murray:

Oh, it's a huge glow up.

Kate Shaw:

Gorsuch may think it's the actual resemblance between the two that is leading Leah to be nervous about that impression.

Melissa Murray:

Yeah. Sorry.

Kate Shaw:

I'm sure that he thinks it's a compliment, if he knows about it at all, which we're going to go with yes.

Melissa Murray:

I think it's fine if that's what he thinks. It is a compliment. He is a very well-trained actor with wide range that anyone should be pleased to have reading his writing.

Melissa Murray:

That was a fun bit of court culture, but I think now we should segue into our next bit of court culture, which is decidedly, I think I'm a little sadder and more difficult. That of course, is the breaking news that we got on June 9th, that Second Circuit, former Chief Judge, Robert A. Katzmann had passed away. Earlier that day or June 9th, we actually had words from Senator Chuck Schumer who offered well-wishes to Judge Katzmann on the Senate floor and noting that the judge was ailing. We're joined today by several of Judge Katzmann's former law clerks who are here to share some of their memories and remembrances of their judge. Bernie Meyler is here, and she is the Carl and Sheila Spaeth Professor of Law and associate dean for research and intellectual life at Stanford Law School.

Melissa Murray:

Rachel Bayefsky is an incoming assistant professor of law at the University of Virginia, and part of that school's incredible hiring run this year, which we have previously discussed on this podcast. And finally, Lindsay Nash is a clinical assistant professor of law and co-director of the Kathryn O. Greenberg Immigration Justice Clinic at Cardozo Law. And it's especially fantastic that Lindsay is here because her work on immigration and immigrants rights is related to some of the work that Judge Katzmann found most meaningful in his career.

Melissa Murray:

We should note that Judge Katzmann founded the Immigrant Justice Corps, which is a fellowship program that helps to meet the needs for legal assistance for immigrants, and he also organized, as chief judge, a study group on immigrant representation, which then led to the first government funded program for providing legal counsel for detained non-citizens. Judge Katzmann had a very long and varied career in the law. In addition to being a judge, he was also a professor at Georgetown law school, also affiliated with the Brookings Institute, and he also worked as counsel for Senator Daniel Patrick Moynihan of New York, and was specifically denominated by the Senator to shepherd, then judge, Ruth Bader Ginsburg, through her confirmation hearings when she was nominated to the Supreme Court.

Melissa Murray:

He was an incredible scholar, authoring the book, Judging Statutes, as well as the courts and Congress about inter branch dialogue, and notably in addition to a JD from Yale law school, he was also a judge who was trained as a political scientist, holding a PhD in political science. That really doesn't capture the weight of the man. Bernie, Lindsay, Rachel, we'd love to hear about your judge and what you're remembering on this sad day. Bernie, I'll start with you.

Bernie Meyler:

Thanks so much for celebrating Judge Katzmann's life in this way. It's just a terrible loss that he has passed away so early. As those of us who had really any encounter with him, knew he was both brilliant and also incredibly kind and humble throughout his life. In a way, I think of him as someone who managed to, more than anyone else I know, institutionalized kindness. I'll just tell a sort of story about how I see that having unfolded in his life. When we were clerking, and I actually clerked the same here as Melissa did on the Second Circuit, during that clerkship, we encountered a number of very poorly drafted briefs for immigrants in asylum cases and other kinds of cases.

Bernie Meyler:

In one particular instance, there was a set of briefs that had been almost kind of copy pasted by the same lawyer for different clients, and that person was ultimately censured, but I remember talking with judge Katzmann about how horrified he was at the lack of adequate representation for people who were coming from other places, who maybe had language barriers that were preventing them from hiring better counsel. I see how, over the years, he worked to help establish the Immigrant Justice Corps, help establish different procedures for immigration cases at the Second Circuit. He worked tirelessly to sort of translate that impulse of initial fellow feeling for the people he saw before him into an institutional context.

Bernie Meyler:

Similarly, when I was clerking for him, at some point, we had brunch with my mom, he had never met her before, and suddenly, she launched into a critique of the Second Circuit because she had helped a pro se petitioner with a case and thought that, that woman had been unfairly treated, and I was about to hide under the table, but Judge Katzmann was so kind in his response, and sort of really took on board the critique of how the judiciary treated pro se plaintiffs and pro se litigants, and then over the years, would update me, especially as he was a chief judge on his progress in securing better treatment for pro se litigants. I think of that institutional kindness as kind of his hallmark, and there are lots of other stories I could tell, but those will be my initial ones.

Melissa Murray:

Rachel, do you have any recollections you'd like to share with us about your judge?

Rachel Bayefsky:

Yes, certainly. And, and thank you so much as well for doing this. I clerked for Judge Katzmann when he was the chief judge of the Second Circuit. As the chief judge, we really got to see how he took his responsibilities in that role extremely seriously. He really loved the Second Circuit, its history, the former judges, its traditions. For example, the practice of holding oral argument on most cases. He immersed himself deeply in making sure that everything ran smoothly and efficiently. He had come from the world of think tanks and academia at Brookings and at Georgetown. Sometimes, people with that background, there's the perception that their head is in the clouds or they're somewhat impractical, but Judge Katzmann was exactly the opposite.

Rachel Bayefsky:

He was the quintessential manager with a prodigious attention to detail. I think for him, the smooth administration of justice was not just a pragmatic issue, it was intimately tied up with the important substantive goal of ensuring that the courts were responsive to citizens' concerns. It was really wonderful just being able to see that commitment behind the scenes.

Melissa Murray:

Lindsay, I should say I had a conversation with judge Katzmann, I guess, in the summer of 2019 at a breakfast, and we were talking about immigration law, and he mentioned twice that he had this wonderful former clerk who was doing absolutely amazing work, leading an immigration clinic at Cardozo. So, he was incredibly proud of your work. I got the sense that maybe some of what you're doing now was informed by your time in his chambers.

Lindsay Nash:

Yeah, absolutely. First of all, that sounds exactly like the judge, like every time you want to talk to the judge about something he's doing, he deflects and starts talking about how great someone else is and heaping praise on other people, so that's exactly who he is. But yeah, I mean, I was actually lucky enough to start working with the judge even before I started clerking for him. I knew I would be clerking for him, but clerkships were kind of backed up at that time, and so I had three years until I would actually start clerking for him, but I knew that I wanted to work in the immigrants rights arena, and I knew that the judge cared about these issues.

Lindsay Nash:

I was really lucky to be able to work with him in the context of the study group on immigrant representation, which is a group that he launched comprised of lawyers and advocates from all different sectors in New York that worked together to think about how we can address some of the problems that he saw, and it was a very Judge Katzmann-like approach. He wanted to study the problems and study the solutions. As a just graduated lawyer, I was like, this seems like a slow approach, and also it seems like so intractable. I don't know how we're going to make this change, because at the time, there were very, very few jobs for immigration lawyers and new graduates.

Lindsay Nash:

But in his Judge Katzmann way, he foresaw that study was exactly what we needed and was what would be the launchpad to some of these amazing programs that you've heard about. So, I was able to work with him on launching some of those programs, and that really, I think, changed the course of my career. It made me see how important it is to train new lawyers to do this kind of work and to think about this kind of work in a holistic way, to think about the problems and how we can solve them and the people at the heart of these cases, and that was very much something that moved Judge Katzmann, and honestly, in a way that there was no reason for it to.

Lindsay Nash:

He didn't work in immigration courts, he didn't see the inside of immigration detention centers, and so I think it really says something about who he was, that he saw that in appellate briefs and did all the work that he did to push back on that.

Kate Shaw:

Can I ask anyone to comment a little bit on Judge Katzmann and statutory interpretation? We were talking a lot this term about the court has a lot of big statutory cases, many of them sort of surprisingly unanimous. I think that textualism is really kind of ascendant on the corridor sort of in a pretty dominant position. I think Judge Katzmann was one of the most effective critics of some of the precepts of textualism that we have had writing on the bench and also in his scholarship. Melissa mentioned Judging Statutes. It's a terrific book that I would commend to all of our listeners. It's short. I like to teach from it, so I think it's a great teaching aid, but I also think it's just a wonderful overview of a pragmatic approach to statutory interpretation.

Kate Shaw:

I would call it purposivism, but it's not particularly interested in labels. It's interested in kind of doing the hard work to figure out sort of what a statute is trying to accomplish. Sorry, I'm editorializing a little bit,

but I'm curious, now having read a lot of his scholarly work and opinions in statutory cases, what the process, if anybody wants to comment on, is sort of what you learned about interpreting statutes from the judge, or sort of how he approached statutory cases when he were in his chambers.

Leah Litman:

And maybe just one hook for our listeners, it was ultimately Judge Katzmann's view about title seven that the court affirmed in Bostock versus Clayton County. Judge Katzmann wrote the opinion in the Second Circuit and Altitude Express in which he held that Title VII prohibits discrimination on the basis of sexual orientation. So, just to give our listeners some sense about how he's contributed both to the field, as well as Supreme Court jurisprudence more gently.

Bernie Meyler:

Yeah. I started answering the question maybe. I think that, for me, he really trained me in how to think broadly about statutory interpretation. I can remember dealing with one case that involves statutory interpretation and he ... I hadn't taken a class on it in law school, but he told me, "Okay, well, you need go to the law library," which he then devoted a lot of attention to also at the Second Circuit. "And take up the microphones and these are the committee reports that are most important for you to look at, and then you can look at floor debate, but it's really the committee reports that are crucial here." We went through a lot of the sort of steps of how to think about researching the context of a statute and think about it in a broader way than simply by the language. That was always really important in his assessment, I think of different statutes.

Rachel Bayefsky:

Yes. I would also say that I think his pragmatic approach to the interpretation of statutes stemmed, in part, from his background exploring the relationship between courts and Congress. I think it came from an interest in inter branch comedy and making sure that the judiciary respected the legislature's work product, and so would look into how that legislative work product had actually been produced and interpret statutes in a way that was sensitive to that.

Melissa Murray:

It's funny you mention courts and Congress. When I was clerking for Justice Sotomayor when she was on the Second Circuit, I had just finished reading that book. We had lunch with the Katzmann chambers pretty regularly, because Judge Katzmann and Judge Sotomayor were very, very good friends. Bernie, we used to joke that like our chambers were sort of like cousins in a way, judicial cousins, but I asked him to sign my book and he had a very wry sense of humor. So, he signs it for me and then says, "Don't go selling this on eBay." I was like, "Oh, I would never do that." And he was like, "I know, you'd get nothing for it."

Melissa Murray:

But I was like, no, I actually want to keep this book. So, he was incredibly humble and kind of funny, but this really sort of deadpan dry wit that came out in all of these really lovely ways. Lindsay, can you tell us again, the work that he did in the immigration rights community, I think doesn't get as much play as his work as a jurist, but he was incredibly committed to it, as well as to the cause of civics education. He really believed that we weren't doing a good job in teaching civics to the younger generation and ... Both the question of immigrants rights and the representation of immigrant communities and the questions

of civic seem incredibly urgent at this particular moment, so I wonder if he might say a little bit about what he taught you about both of these things.

Lindsay Nash:

Absolutely. I mean, I think that at the heart of both is that is his commitment to having justice be accessible and more fair. He talked about both as an administration of justice issue and as an access issue. He loved the courts and he wanted the courts to be accessible to people, and he knew that if the courts accessible to people because of their income or because of their understanding of the English language or their inability to sort of access other points of entry, it wasn't going to be the court system that he believed it could be.

Lindsay Nash:

So, I think that was driving his focus on both ends, is sort of the through line between them. I think that's something that he really instilled in his law clerks. I think there's a deep commitment to serving those goals, although his clerks work in many different substantive areas, I think that's one of the commonalities that you'd see, is that he instilled those values in all of us.

Melissa Murray:

We should also note that at the Second Circuit, as chief judge, Judge Katzmann initiated the justice for all courts in the community, which is a civic education initiative of the federal courts of the second circuit, which basically provides civic education under the idea that broad access to the court is actually necessary to foster a robust democracy and to make those norms of democracy available to all. That is available, and you can see some of the work that's being done on that at the second circuit if you go down to the Thurgood Marshall building in Foley Square, or the Daniel Patrick Moynihan building at 500 Pearl Street.

Leah Litman:

I saw a tweet you know, me and the public information office at the court just monitoring tweets by another former Katzmann clerk, Andrew Bradt, who's a professor at Berkeley, that said, Hand, Friendly, Katzmann, basically putting Judge Katzmann together with the former Second Circuit judges who have made such substantial contributions to the law and the legacy referring to Judge Learned Hand and Judge Henry Friendly. I guess for people, particularly law students who didn't lawyer in an age in which judge Katzmann was such a presence on the bench and on the legal profession, like what are some things you hope to become part of his legacy in the legal community just like those other judges, Judge Hand or Judge Friendly kind of came to be known even after their terms of service.

Lindsay Nash:

Well, I can start and it may be something that's a little bit outside the Judge Friendly and Judge Hand legacy, but I really think that he's a civil rights hero. I think that he wasn't always framed exactly that way or seen that way during his life for obvious reasons. He's a judge and there were some constraints of his position, but I think the changes that he's made and the real transformation he's made for immigrants who are in legal proceedings in the United States, make him that kind of hero. I think that's a major part of his legacy.

Bernie Meyler:

I would add, I think following up on the comment about inter branch dialogue before, that one of the aspects of his legacy is really encouraging that kind of communication between the courts and Congress rather than an oppositional relationship among the branches. I think that he's someone who had a deep institutional knowledge of the executive branch Congress and the courts. I think that kind of depth of institutional awareness and also interest in playing out that connection among the branches is something that should remain.

Rachel Bayefsky:

Yes, I think both of those points are very true, and I would add a point about his style of judging as well, which is that he was extremely concerned about collegiality on the court and being part of an appellate panel. In fact, I think there was a point, if I remember correctly, which I might not, in his clerkship handbook, that he gave out to incoming clerk saying that he did not give stylistic comments on the opinion drafts of his colleagues, and which I take to be a way of not sort of needlessly bother colleagues about something that didn't necessarily need to be raised.

Rachel Bayefsky:

I think, whenever we gave comments to other chambers, he would always say, "We want to focus on the most important ones." I think for him, collegiality on the court was not merely a matter of trying to sort of get along. I think he understood that in the long run, having a court in which judges respected one another and worked well together and complemented one another was in the ultimate interests of justice, so I think that is also an important part of his legacy.

Melissa Murray:

That's a terrific note to end on. Again, we are celebrating the life and work of Judge Robert Allen Katzmann, who passed away on June 9th at the age of 68 after a long and distinguished career in academia and Congress, as a lawyer for Senator Moynihan, and finally, as a judge on the Second Circuit. We've been joined by three of his clerks, Bernie Meyler of Stanford Law School, Rachel Bayefsky, who will be joining the University of Virginia's Law School, and Lindsay Nash from Cardozo Law School. Thank you so much for joining us. And we send our warmest condolences and best wishes to Judge Katzmann's family, including his wife, Jennifer Callahan.

Leah Litman:

Thanks everyone for listening to this episode. Thanks so much to Bernie, Lindsay, and Rachel for joining us to pay tribute to Judge Katzmann. Thanks to our wonderful producer, Melody Rowell for splicing together all of our adios. Thank you to Eddie Cooper for making our music. Thanks to all of you for listening. If you'd like to support the show, you can do so at glow.fm/strictscrutiny, or by getting a glow up on our website by purchasing some merchandise. Thank you also to Justice Kagan for giving me life this week. Thank you.