

Supreme Court Term Roundup

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[00:00:00.2] Jeffrey Rosen: On June 27th, 2025, the Supreme Court delivered its final decisions of the 2024-2025 term. Hello friends, I'm Jeffrey Rosen, President and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit, chartered by Congress to increase awareness and understanding of the Constitution among the American people. This week, we'll recap the term with two of America's leading Supreme Court commentators, and it's always an honor to convene them. Steve Vladeck is Professor of Law at the Georgetown University Law Center. He's the author of the New York Times bestselling book, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic*. He's also the editor and author of *One First*, a popular newsletter about the Supreme Court. Steve, it's great to welcome you back to We the People.

[00:00:58.7] Steve Vladeck: Thanks, Jeff. It's great to be back.

[00:01:00.5] Jeffrey Rosen: And Sarah Isgur is the editor of SCOTUSblog and an ABC News legal analyst. She hosts the legal podcast, *Advisory Opinions*. Sarah, it's always wonderful to welcome you to We the People.

[00:01:10.8] Sarah Isgur: Great to be here.

[00:01:13.0] Jeffrey Rosen: Steve, on June 30th, you published a piece at *One First*, "A New Kind of Judicial Supremacy," and you said, "I think the single most telling opinion from the entire term is Justice Kavanaugh's concurrence in the birthright citizenship ruling, which in my view can fairly be read to stand for the proposition that the court will do whatever it wants, whenever it wants, never mind the procedural formalities that might get in the way." Tell us why you think the concurrence was so important and how that principle is reflected in most of the court's big decisions from the term.

[00:01:45.2] Steve Vladeck: Sure. I mean, I think one of the things that really separates this most recent term from a lot of the ones that we're used to is just how much of the bigger and more significant rulings came on emergency applications. And Justice Kavanaugh's concurrence came on an emergency application. It came with regard to the Trump administration's request to put back into effect most of the president's controversial and, to my mind, clearly unlawful executive order on limiting birthright citizenship. So what Justice Kavanaugh said was, this is something we should be doing, that whenever a president hands down a controversial new policy, there's always gonna be a debate as to what the nationally uniform interim rule ought to

be while the lawsuits challenging that policy make their way to the Supreme Court, should there be a uniform national rule, and if so, Jeff, who should hand it down? And the Kavanaugh concurrence is basically saying like, "Yes, more often than not, we're gonna want a national uniform interim rule, and more often than not, that rule should come from us, the Supreme Court, not lower courts."

[00:02:53.1] Steve Vladeck: And so Jeff, where I take that to be saying is Justice Kavanaugh both defending much of what the Supreme Court has done so far this term, it's granted 14 different emergency applications from the Trump administration, but also I think, Jeff, a promise that they're gonna keep doing this, that more and more of the Supreme Court's work is gonna be defined by these late-breaking, quick-hitting, emergency applications about whether some of the more controversial actions President Trump is pursuing are gonna be allowed to go into effect or gonna remain on hold while the case is challenging them, work their way through the lower courts and ultimately to the Supreme Court. So it's Justice Kavanaugh roadmapping both the world that we've seen over the last five months and the world that I suspect we're now gonna see much more of over the next three and a half years.

[00:03:45.6] Jeffrey Rosen: Thank you so much for that. Sarah, what do you think of Steve's suggestion about the importance of Justice Kavanaugh's concurrence and who do you think was the most influential justice this term?

[00:03:56.9] Sarah Isgur: Well, I think we have to back up to really grapple with what Steve's saying and how we got here and why the Supreme Court's in the position it's in, why we're seeing this new emphasis on its interim relief docket or the emergency docket. Although again, we used to call it the shadow docket as coined by Will Baude and obviously Steve's book here, but that was because we weren't really hearing why they were making their decisions. They weren't set for oral argument. We didn't know the vote count. A lot of that's changed. We're getting written decisions. They are setting some of these, rarely, cases for oral argument like they did in birthright citizenship. We're seeing where many, if not most of the justices come down on these applications. So shadow docket's not necessarily a great name anymore. Emergency docket's, not particularly accurate anymore either. For instance, the birthright citizenship executive order took three, four months between when the executive order came down and it was enjoined to when it was decided by the Supreme Court. That's not really an emergency the way that we initially named it that when we were talking 48 hours or a death penalty case that was on the emergency docket where it was a number of minutes potentially until an execution was supposed to take place.

[00:05:11.6] Sarah Isgur: So Justice Kavanaugh in his concurrence names it the interim relief docket, the preliminary relief docket, the interim before the interim. So I think we do need to maybe wrestle with how we're naming it, but here's what has happened over the course of the last 20 or so years. Congress has stopped doing its job. It has stopped legislating, which is that stable compromising way that we have dealt with our country's most pressing problems. When they stopped creating that stability and longevity over compromise between different factions in our country, the executive branch started to step in. And as President Obama said, "If Congress doesn't do what I want, then I have a pen and a phone, and I'll do it myself." And that was obviously on immigration, but he had his sort of year of executive action. And that's in some

ways where we really start to see these universal injunctions take off. They then accelerate during the first Trump administration, continue apace in the Biden administration, and then of course in the first 100 days of this Trump administration, it's like on rocket fuel. That's dragging the Supreme Court into fights that used to be in Congress, basically, and now it's the executive versus the judiciary.

[00:06:33.9] Sarah Isgur: So the Supreme Court is grappling with a new problem and its new role in the three branches of government. So first of all, I think we should give them a little bit of grace to figure out how to deal with this when they can't make Congress do their job, and they can't just wave a magic wand and stop the executive from doing these executive orders. It's a bipartisan failure across the board. So what Justice Kavanaugh is saying is, "Okay, we are gonna need this interim during the interim. What is going to be the rule while this litigation is pending?" Yes, this is the Supreme Court's job to set this national standard in the meantime. And while we're shutting the door on universal injunctions, they've left open any number of doors, windows, and like the roof to the whole house, because even in this case, the majority opinion by Justice Barrett said, "You could still have a nationwide injunction against the birthright citizenship order," and she's leaving that to go back to the district courts to make that decision of whether the states in this case to get complete relief would need a nationwide injunction anyway.

[00:07:43.7] Sarah Isgur: So I don't know that we're gonna see some huge change, except where Steve is totally right that we're gonna see a lot more emergency applications to the court, and I think we're gonna see the court continue to weigh in on a lot of them as well.

[00:07:57.6] Jeffrey Rosen: Thank you so much for that. Steve, your reactions?

[00:08:01.3] Steve Vladeck: I mean, I think it is certainly true that there have been more emergency applications from the second Trump administration in the first five plus months than we've ever seen before. As we're sitting here, the administration has just filed its 20th. The Bush and Obama administration across 16 years filed a grand total of eight. So I think that's certainly a numerically true claim. I think it's worth pointing out a couple things though. One, that is partly a response to an unprecedented amount of executive action from President Trump, much of which I think is at least arguably if not patently lawless. Two, I mean, to Sarah's point about giving the Court some time to figure this out, I mean, as I document in the book, the court has been doing this for a decade now. I mean, going all the way back to the 5-4 unexplained order that blocked President Obama's clean power plan. This is a court that has not been shy about using a procedure that was previously mostly for death penalty cases for these kinds of whatever words you want to put in front of them, emergency, interim, whatever, massively important disputes.

[00:09:07.7] Steve Vladeck: And I guess I just, it's not... I haven't abandoned the moniker, "the shadow docket," the court's still not writing. I mean, the majority opinion we got in the birthright citizenship case was only the third majority opinion the court has provided across all of these Trump applications. Some of these applications are coming down with no explanation whatsoever, including even when we had one case where the government had defied the district judge. So, you know, Jeff, it just seems to me that the court, if it's going to be not just accepting, but as Justice Kavanaugh's concurrence suggests, leaning into this new normal. And I think I'm

entirely in accord with Sarah about where this new normal has come from. It seems like that should come with a little bit of better reflection about the burden that puts on the court to explain itself. And, you know, we're not always going to agree with the explanations, but part of what I'm really concerned about is that we've seen so many rulings from the court this term that put back into place deeply controversial initiatives of the Trump administration without any analysis or explanation whatsoever.

[00:10:10.9] Steve Vladeck: Even in the birthright citizenship case, Jeff, I mean, Justice Kavanaugh's whole concurrence is a pay on to the need for a nationally uniform interim rule. The court didn't provide one in the birthright citizenship case. And so, it just seems to me that there's, you know, a decent theory out there that really requires more consistent application and explanation from the Supreme Court to be viable.

[00:10:35.0] Jeffrey Rosen: Thank you for that. Sarah, you said on your podcast that you don't think the *Trump v. CASA* decision will change much and that it was a near perfect opinion because it cabined the role of the judiciary within its lawful bounds. Say more about that.

[00:10:49.7] Sarah Isgur: Well, let's get a little nerdy here, which I know Steve will jump on board with. He's a big nerd too, as are you, Jeff. What the Supreme Court decided here was... Or let me back up, what it could have decided here was the proper constitutional role for the court vis-a-vis the executive and the congressional branch. It didn't. Instead, what they said was, "We don't need to decide that right now. What we have here is the 1789 Judiciary Act, and it simply doesn't have any sort of wide-ranging searching ability of the courts to issue universal injunctions, i.e. to decide that an action by a president in this case is unlawful, and so we're just going to not allow it to move forward." For a district judge to decide that, regardless of the parties before them, regardless of the sort of case or controversy. And on the one hand, you had, I thought, a really interesting debate about the proper role of the judiciary between Justice Jackson in dissent, who said, "The president did something unlawful, and by golly, it's the judiciary's job to stop him." And Justice Barrett saying, "Well, if you want the president to be lawful and to be under the laws, then you need the judiciary to be under the laws as well."

[00:12:13.3] Sarah Isgur: And so, when we're talking about a district judge, they can't just say, "Oh, that's unlawful and we're not letting it go in anywhere." There's a process for this. And so, you can't have a universal injunction from a district judge, but as the majority also left open, you could have a state sue and say, "The only way, for instance, in a birthright citizenship order, for them to get complete relief for a baby born in New Jersey who may travel to Florida is to say that the order can't take effect anywhere in the country." That would still be national relief. You could say, "Refile your lawsuit as a class action suit." That would be fine as well. Number three, they said, "The Administrative Procedures Act, another act by Congress, does provide this kind of authority to district judges to set aside an executive order." So if you just reframed your lawsuit instead of against President Trump, against, for instance, the Secretary of Health and Human Services, then we could set aside that nationally. So I don't think it will change much.

[00:13:15.5] Sarah Isgur: It will change, you know, the caption of the cases, certainly, but it's getting to something else that the court does wanna change, which is, again, you have this problem of Congress not doing anything, and then there was this vacuum filled by the executive

branch. And Steve is right that it is hard with simply data to decide whether it is presidents doing more unlawful things, as you see the ramp up, you know, with President Biden and President Trump, I would argue, both doing things that they themselves said they did not have the power to do, and then just doing it anyway. Obviously, the most lawless example for me in the Trump administration, of course, is the TikTok ban. It's not in effect, though there's no lawsuit about that one. But President Biden's eviction moratorium, the student loan debt forgiveness, the vaccine mandate, though disclosure, my husband worked on that case. So on the one hand, you have presidents doing more bigger, bolder, lawless things with executive action. You also have forum shopping, where the advocates have figured out which judges to go to get the sort of universal relief that they want. And that's been a big problem flagged both by justices like Neil Gorsuch and justices like Elena Kagan, who said it cannot be the policy of the United States that a single district judge somewhere in the country can stop a president's action from going into effect for years while the litigation is pending.

[00:14:44.9] Sarah Isgur: And as others have pointed out, you know, what was going on is that the government would have to win 100% of the time, but the plaintiff only had to win once. This at least, I think, slows that down, maybe limits the virtues of forum shopping for advocates, and probably squeezes the circuit courts a little bit out of the game, right? They're our middle management in our federal judiciary, and it'll be really interesting to see what role they find for themselves, where the Supreme Court has said, like, "You know what? You guys aren't doing a very good job with this. We're going to have to step in and manage the district courts ourselves, basically."

[00:15:23.3] Jeffrey Rosen: Steve, Justice Jackson said in her dissenting opinion in *Trump v. CASA*, "The court's decision to permit the executive to violate the Constitution with respect to anyone who's not yet sued is an existential threat to the rule of law, and this is at bottom a request for the court's permission to engage in unlawful behavior." Help us understand why Justice Jackson, and Justice Sotomayor as well, view the decision as an existential threat to the rule of law, and do you think they were right or not?

[00:15:53.3] Steve Vladeck: So I think that the tricky part, Jeff, is it depends. And it depends on whether Sarah's, I think, relatively rosy view of the availability of class actions is gonna turn out to be true or not. And so, let me sort of, you know, elaborate on that. So the first thing to say about class actions is that part of why they have, to some degree, gone out of vogue is because of the Supreme Court, is because of a series of decisions in the early 2010s that made it much, much more difficult to certify a nationwide class action where a small group of plaintiffs walks into a court and says, "We represent everyone like us across the country, we should be allowed to sue based on their behalf." Yes, that would be a viable alternative to a universal injunction if you had every single person covered by the president's birthright citizenship executive order represented in a nationwide class action. But Jeff, it's worth noting, even in a world in which that was viable, that wouldn't solve any of the problems Sarah identified. You wouldn't solve the problem of forum shopping or even judge shopping because you could walk into Amarillo or San Francisco or Boston with a nationwide class action, right?

[00:17:02.2] Steve Vladeck: You wouldn't solve the problem of a single district judge anywhere being able to block federal action everywhere. And so, I think part of what Justices Sotomayor

and Jackson and Justice Kagan, who joined Justice Sotomayor's dissent, are reacting to, Jeff, is that one of two things has to be true. Either class actions are going to be robustly available, in which case, yeah, this probably isn't that big a deal, or they're not. And I think, you know, the three Democratic appointees are a little more concerned that class actions aren't gonna be as available as a lot of folks think they might be, and that you could have a scenario, Jeff, where, you know, an executive order everyone agrees, or at least most people believe is unlawful, is nevertheless allowed to go into effect against those folks who don't have the resources to challenge it themselves, or who aren't part of a particular class, a district-wide class, a statewide class. So, you know, I think one of the real concerns that's animating both of the dissenting opinions is that this is an awful lot of procedural formalism that either isn't going to matter, in which case, why the fuss? Or it's going to matter enormously, in which case, holy cow, right, why at this exact moment in American history is the Supreme Court kneecapping the ability of the lower federal courts to hold the executive branch accountable?

[00:18:20.7] Steve Vladeck: It just seems like, right, one of those two things has to be true. And the other piece, just which I think is worth underscoring, and part of why I think the dissenters were also so vexed, you know, Jeff, the Court had opportunities repeatedly during the Biden administration to rein in universal injunctions. As recently as January, the Biden administration gave the court two very different, but I think equally attractive vehicles through which it could have done exactly what it did in the birthright citizenship case. Instead, it took this case, and it took this issue, in a context in which it's still not clear to me how the federal government could even show irreparable harm if we all really do believe that the policy is unconstitutional. So, I think, Jeff, the problem is that, like, how big a deal this decision is, how viable the charges leveled by the dissenters are, is really gonna depend upon what exactly happens now, and whether class actions turn out to be just a different type of vehicle to the same end, or, as Justice Alito and Justice Thomas suggested in their concurrence, whether there are gonna be tight limits on class actions and on state standing that's actually gonna make a number of these cases impossible to bring. That's the real debate that's not resolved by the decision itself.

[00:19:36.4] Jeffrey Rosen: Sarah, Justice Jackson and Sotomayor both invoked founding history. Justice Jackson said, "The founders squarely rejected a government system in which the king ruled all. In our system, the people are the rulers and we have the rule of law." Justice Kagan did not write separately in *Trump v. CASA*. You've written elsewhere, and I'll share your really interesting insight, that Justice Kagan was the most influential justice of the term. Tell us why you reached that interesting conclusion and what explains the split between Justice Kagan on the one hand and Justices Jackson and Sotomayor on the other.

[00:20:11.6] Sarah Isgur: Yeah, you know, in the non-unanimous cases, Justice Kagan was significantly more likely to be in the majority than either Justices Sotomayor or Jackson. And I think that's very interesting. There's some things about Justice Kagan that are different. One, she was in some ways put on the court in order to be the conservative whisperer and to be the influencer, to be able to join, perhaps with conservatives, but narrow the decision, sort of do the least amount of violence to liberal principles, perhaps, is a way to think about it. So I think there's that aspect of Justice Kagan, but why are we seeing it suddenly in the 2024/2025 term instead of for the last 15 years? And I do think there's this other part. She's an institutionalist. You know, when she goes out and speaks about the court, she says, like, she doesn't like all these

concurrences that are popping up. She compared it to, hey, everyone needs to hear my thoughts, in this very, like, pejorative way, potentially leveled at Justice Gorsuch and Justice Jackson, two of the justices who seem to write separately and particularly by themselves the most often on the court.

[00:21:28.9] Sarah Isgur: So I think she is a Court institutionalist. She thinks speaking with one voice as the court is important. And then you see that sort of political, and I don't mean partisan here, I mean the ability to, like, move between different groups and different ideas and forge compromise coming to the fore. You're an institutionalist, so you want to speak with one voice, and so you figure out ways that if the majority takes this out or writes it this way or decides it this way, that you're willing to join on. So we saw a huge jump in the number of 7-2 decisions this term where Justice Kagan broke from Justices Sotomayor and Jackson. I also think potentially, and I'd want to wait for more terms to see if this repeats itself or anything else in the future, Justice Sotomayor and Jackson, and I think the birthright citizenship case is maybe too good an example that is clouding my judgment and memory over the other cases, where, again, they're talking about sort of principles of justice but not necessarily the sort of textualism and grappling with the statutes at issue that Justice Kagan seems to prefer. And so, I do wonder whether there might be a more permanent break we see developing.

[00:22:41.3] Sarah Isgur: Now, that is not to say that she's not going to be with Justices Sotomayor and Jackson frequently on some of these more culture war cases, but when we see her break, I think it is fun and interesting to predict when she's gonna break and why she's going to break away from them. But, Jeff, this gets to a really interesting question for me, which is what does it mean to be an influential justice on the Supreme Court? And I'd be so curious to hear both you and Steve's answers to this, because oftentimes it becomes synonymous with justice most likely to be in the majority 'cause we're still living in this kind of Justice Kennedy era where there was a single swing vote. He was always in the majority. Dan Epps, one of his former clerks, said recently when asked about whether being a Supreme Court clerk was just this grueling all hours of the night type thing, and he goes, "Well, I clerked for Justice Kennedy and we never wrote dissents, so that cut out a lot of the work." Like, yeah, I bet it did. [chuckle] So you have that version of what it means to be influential.

[00:23:46.1] Sarah Isgur: You're in the majority, right? You're driving the ship. You decide which side wins and which side loses. But that's not quite a reality for this current court. So is it that, you know, Justice Kavanaugh is the most influential because he's been in the majority since he joined the court, more than any justice since potentially before 1953? Maybe. You could argue it's Justice Jackson, right, who's in dissent more than any other justice, but she's writing for the future, you know, that she might be the Justice John Marshall Harlan of her era and that that is its own kind of influence, refusing to be part of the majority. You could argue that Justice Thomas, who wrote more words than any other justice this term, is the most influential because sort of like a Justice Scalia, he's creating this body of law, you know, text, history, and tradition, the originalism 3.0, as I think of it, and that that makes him deeply influential because he's actually moving jurisprudence and schools of thought. But who is the most influential justice on the court really makes you have a whole conversation on what it means to be influential.

[00:24:55.0] Jeffrey Rosen: It certainly does. Steve, what do you think? Who's the most influential justice on the court and why?

[00:25:01.4] Steve Vladeck: I mean, I think Sarah's clearly right that a lot depends on what kind of influence we're talking about. I'm reminded in this context of the debate we have over scholarly influence and what it means for law professors to have influence. I guess it seems to me that it would be very difficult to tell any story of this term that doesn't strongly feature Chief Justice John Roberts as a critical player in much of what's happening. And I say that not just because of the numbers. I mean, if you look at, for example, Jeff, the eight decisions in which the court split 5-4 in argued cases on the merits docket, Roberts is in the majority in the most of those of any of the justices. He's in the majority seven times, right? As opposed to everybody else is there three, four, five, six times. If you look, Jeff, at the emergency applications, the biggest ones where the Trump administration has lost, Roberts is in the majority. If you look at the, you know, broader political concepts, I mean, who is the justice who gave perhaps the most visible public statement all term in response to anything President Trump did? It was Chief Justice Roberts back in April when he responded to President Trump's suggestions that the Chief Judge Jeff Boasberg in the DC District Court should be impeached by saying, "No, we don't impeach judges we disagree with. We appeal their decisions."

[00:26:20.4] Steve Vladeck: So, I think this is both visibly, and I suspect behind the scenes, a term in which John Roberts has had an especially outsized role in shaping the direction the Court is moving in. Folks can disagree about whether that's the relevant measure of influence, but it sure seems to me that, for better or for worse, this was another term, much like last term, where the court went largely as John Roberts went in just about every single big case. And I'm not sure you can say that about almost any of the other justices.

[00:26:53.6] Jeffrey Rosen: Sarah, what do you think about Chief Justice Roberts' vision and success in avoiding being defied by the president? He has been reluctant to order the president to do anything. There was that unsigned order that the administration facilitate the return of Mr. Garcia, but he seems eager to preserve judicial legitimacy by avoiding a direct confrontation. What do you think?

[00:27:21.7] Sarah Isgur: I don't know that anyone has studied the Chief Justice more closely maybe than you, followed very far away by me, but I'm fascinated by him. So you have this original interview with him shortly after he becomes chief justice in his only second term on the court, and I go back to that and read it like it is biblical text, Jeff, because it really lays out the Chief's own metrics for success. He says he wants to emulate Chief Justice Marshall, the OG chief justice, if you will, though of course he was the fourth chief justice, but John Jay, I mean, please, my friend. You really failed there. And he's defining that as this institutionalism, unanimity, speaking in one voice. By any of those metrics, that has not been this Court. This Court has not been more unanimous than past Courts by any means. There have been more concurrences written per term, per opinion, than at any point in the court's history. So it's really a fractured court in that sense. But in 2005, when he became chief justice and was thinking lofty thoughts about Chief Justice Marshall, perhaps he didn't have in mind the chief justice's role vis-a-vis Thomas Jefferson and *Marbury v. Madison* and, of course, Andrew Jackson yet to come.

But this idea of an executive trying to take on the judicial branch and the Supreme Court in particular and bend it to its will, politically manipulate it.

[00:29:02.0] Sarah Isgur: Thomas Jefferson, of course, impeaches or leads to the impeachment of Justice Chase on the court. His plan is to impeach Chief Justice Marshall next so that he can have a court that reflects his political views, not an independent judiciary. And Chief Justice Marshall really guides the court through the rockiest of waters where the Supreme Court, as we know it, would not exist. But for Chief Justice Marshall, he was considered incredibly charismatic and charming. Everyone liked him. You can think back to his time at Valley Forge. He's 19, 20 years old in that winter of 1777. He's sharing a cabin with James Monroe. He's the life of the party. Like, people are literally starving and dying of cold, and Chief Justice Marshall's like playing drinking games and telling them to quit complaining, that they're being whiners. Suck it up. He's the life of the party at Valley Forge.

[00:29:58.8] Sarah Isgur: So in that sense, I wonder whether we will look back and see John Roberts as quite the Marshall-esque figure in his role vis-a-vis President Biden, suggesting packing the court and having a Supreme Court Commission, looking at fundamentally changing the independence of the Supreme Court. And then, of course, Donald Trump as almost a Jacksonian figure, threatening to defy the Court as well, or ignore the Court. So a lot of credit to Chief Justice Roberts. Again, you can only judge in hindsight. We'll see how he does, but he certainly is wearing some of the hat of Chief Justice Marshall, just not the one he thought he would wear.

[00:30:44.8] Jeffrey Rosen: Steve, what do you think of Chief Justice Roberts' success or failure in emulating Chief Justice Marshall? Marshall famously said, "I'm not fond of butting my head against a wall as in sport," and he upheld the Jeffersonians' cancellation of the Supreme Court term because he thought that Jefferson would defy him. And in *Marbury*, of course, he avoided a direct confrontation. You wrote a powerful piece about the court's decision in the third-country removal case. You called it a disastrous ruling, and you said that, "At the end, it reflects the majority of justices' willingness to appease a government, the behavior of which is increasingly unworthy of any such respect." Tell us about that case and why you think it represents a capitulation to presidential defiance of lower courts.

[00:31:34.6] Steve Vladeck: Yeah, it's funny. The more that Sarah was talking about John Roberts as John Marshall, the more I was thinking of John Roberts as Neville Chamberlain. So, you know, the D.V.D. case, the third-country removals case, I think is going to be one of those that we look back on as even more important than it might have seemed in the moment. The basic question here is whether individuals who are deemed removable in an immigration proceeding, if the government says, "Oh, we're not going to send you to this country, we're gonna send you to this other country," do they have a right to notice and an opportunity to challenge being removed to a different country on the ground that in that country they face torture or other forms of cruel, inhuman, or degrading treatment? A district judge in Massachusetts said yes, and then the First Circuit, the federal appeals court, left that ruling intact. The Supreme Court put the policy back into effect, basically stayed the injunction. And Jeff, what's especially striking about that is, I think, two things. First, this was a case where the Trump

administration had defied the district court twice, including, I think, most notoriously sending eight men on a plane bound for South Sudan that was eventually halted in Djibouti.

[00:32:44.0] Steve Vladeck: It was a case in which the government had, as I've suggested in the piece you quoted, I think, misrepresented some of the facts to the Supreme Court. And the Supreme Court granted the government's application anyway, Jeff, without providing a word of explanation, without explaining why they were letting the government both carry out these removals and get away with defiance of the district court. Maybe there were reasons. I mean, maybe there were jurisdictional objections to the district court's order. Maybe the government might have won that case on the merits. But this is exactly the problem to me with how much of this litigation is now being carried out through emergency applications. It has at least the appearance, Jeff, that John Roberts is trying to avoid as many of these confrontations as possible, even in circumstances in which the court starts looking like it's contradicting itself. This is the same court that in the Alien Enemies Act cases had said, "You have to give migrants notice and an opportunity to be heard before they're removed under the Alien Enemies Act." Why are these folks in the third country removals cases different? The court didn't say.

[00:33:48.1] Steve Vladeck: So, you know, Jeff, this is my broader concern about the moment we're in, which is I totally understand why the court is wary of confrontations with President Trump. I totally understand why the court might be worried that it has only so much capital to spend in confrontations with President Trump. But what's the hill you're gonna die on? I mean, what are you saving this capital for if not a case in which the administration is both defying lower court orders and seeking to remove people to countries where they can be tortured? That to me should have been the line in the sand. And if that's not, I worry about whether the court has a coherent view of what it is.

[00:34:30.4] Jeffrey Rosen: Sarah, what's your response to Steve's powerful charge that the Court is sanctioning noncompliance? Justice Sotomayor said in her dissenting opinion in the removal case, "Each time this court rewards noncompliance with discretionary relief, it further erodes respect for courts and for the rule of law. Is Chief Justice Roberts Neville Chamberlain rather than Chief Justice Marshall?"

[00:34:55.9] Sarah Isgur: No. And one of my pieces of evidence for that is that if you look at the entirety of the first Trump administration, President Trump lost at the Supreme Court more than any president in United States history. They are ruling against him more than half the time. No president has ever lost at the Supreme Court more than half of the time up until Donald Trump. So they're not afraid of ruling against Donald Trump. I do think that, A, I wish they'd written in that case, of course. I wanna know what they were thinking too. But I do think this is where you get an interesting side quest into the diversity of the Supreme Court. Our culture has focused so much on race and gender. We have not focused nearly enough on other types of diversity one might want at the Supreme Court or anywhere else for that matter, which is experiential diversity, regional diversity, for instance, Justice Barrett, who people have often pointed out is at this point the most interesting justice on the Supreme Court, much harder to predict than any other justice right now. She is very different looking than the other justices on the Court in terms of how she got there, where she was living, what she had done beforehand.

[00:36:12.1] Sarah Isgur: And I say all that because something you need to remember about Chief Justice Roberts, he worked in the executive branch a lot and in fact had quite a dim view of the Supreme Court or at least a snarky view of the Supreme Court well before he was a judge. He used to say only schoolchildren and Supreme Court justices get to take the summers off. Joke's on him, of course, because now with the emergency docket, they don't get the summers off anymore. And he would say something like, "At least the Constitution is safe for the summer," when the Supreme Court broke at the end of its term in June. So I do think that you have to grapple with the fact that so many of the justices worked in the executive branch and believe that while the executive branch versus the legislative branch, the executive branch loses in sort of a *Youngstown* framework, if you will, if the two go head to head. But within the executive branch and once Congress has given that authority, the executive branch has a lot of discretion to carry out Congress's legislative commands and certainly with respect to personnel within the executive branch as well.

[00:37:25.6] Sarah Isgur: So again, I would raise the idea of diversity at the Court and diversity among nominees could be a way more interesting conversation instead of looking at all the circuit judges. Why don't we look outside the circuit judges? Why don't we look outside the Acela corridor of New York to D.C.? At one point, every justice on the court, Jeff, was Catholic or Jewish, which by the way would be hilarious to any American or Supreme Court justice just 100 years ago when we were blocking all the Catholics and Jews. So progress certainly in some respects, but we've traded one type of diversity and we've lost a lot of others.

[00:38:06.4] Jeffrey Rosen: Steve, you had further commentary on the D.V.D. case as one in which the government didn't have clean hands. And it really was another case where the liberal justices are accusing the majority of tolerating lawlessness, of accreting all power to themselves of the U.S. Supreme Court to decide all questions rather than lower courts and basically sanctioning noncompliance and lawless behavior. Why have the dissenters reached that conclusion? It's obviously not just one case, but a series of cases that's led them to this position. And are they right or not? Is there no executive action that the majority will not stop?

[00:38:50.4] Steve Vladeck: So first, Jeff, I mean, I think to pick up on Sarah's point about diversity, I think it's worth stressing that exactly two of the nine justices on the court today have spent any of their careers as federal district court judges. And they've both been among the most regular dissenters in these cases, Justices Sotomayor and Jackson. That seems telling in at least one respect. You know, Jeff, I think part of the problem here is that there are two different things happening at once. You have an administration trying to persuade a Supreme Court that is likely to be at least relatively sympathetic to a lot of what it's doing on the merits to let it do these things while these cases work their way through the courts. And so, you know, much like was true during the first Trump administration, I mean, Sarah says the administration lost more than any other president on the merits. That's true, but they won more than any other president on emergency applications. Right. So in some respects, we've seen this pattern already. But Jeff, what is different about this time around is that there was nowhere near the same attack on district courts during the first Trump administration.

[00:39:54.0] Steve Vladeck: You didn't see President Trump complaining that district judges should be impeached. You didn't see this, the physical threats to the safety of district judges,

dozens of whom, Jeff, are getting these, you know, pizza deliveries to their home addresses in the name of the murdered son of, you know, one of their colleagues, of Judge Esther Salas. Right. You didn't see these efforts to try to intimidate and bully district court judges. And then you didn't see these efforts at non-defiance. And, you know, I think reasonable folks can disagree about how much the administration is complying with district court orders in some of these cases. But I think there are at least two pretty darn open-and-shut examples of non-defiance. One before Chief Judge Boasberg in the J.G.G. Alien Enemies Act case. One before Judge Murphy in the D.V.D. third country removals case. And in both of those cases, a majority of the court gave the Trump administration emergency relief. And so, Jeff, I think part of what Justice Sotomayor is picking up on in her dissent in D.V.D. is that, especially without an explanation, the court is basically telling the Trump administration it will pay no penalty and it will suffer no cost if it defies district courts.

[00:41:04.1] Steve Vladeck: Whereas, Jeff, when it was defiance of the Supreme Court that was at issue, and that was what we saw in mid-April with the impending removal of a group of migrants from the Blue Bonnet Detention Center in the Northern District of Texas, then we saw the Supreme Court jump back in very aggressively. And it seems to me that it's not an especially coherent or stable theory of judicial power when the court will act aggressively to protect its own mandates but not the mandates of its lower court colleagues. That seems to me a distinction that is deeply problematic, all the more so when it's unexplained. And just, Jeff, one last thing on the D.V.D. case. I mean, as we're recording this, there has been a pretty significant fight in the Supreme Court since its original ruling in that case over exactly what that ruling meant. The Trump administration has asked the justices to clarify whether their original ruling applied to all of Judge Murphy's orders or just one of them. The plaintiffs have pushed back and said the ruling didn't say anything, and Justice Sotomayor said exactly the opposite. So, Jeff, there's just so many different layers of what's wrong with where we are in this one case. It's why I think it's such a revealing microcosm of why what's happening with the court right now I think just hits a little different than even the last couple of terms with the same conservative supermajority.

[00:42:29.2] Jeffrey Rosen: That's an interesting distinction between the court defending its own prerogatives but not those of lower court judges. Sarah, do you think that's fair? On the other hand, Chief Justice Roberts did criticize a call by President Trump for the impeachment of Judge Boasberg. It was a rare public statement. Do you think the Chief is standing up for lower courts and against administration defiance or not?

[00:42:55.9] Sarah Isgur: I also think there is a way to see all of this with a through line that the Supreme Court's getting a little fed up with these district judges. They're fed up with the forum shopping by the litigants, certainly, and Steve is absolutely right. You can forum shop by going to Amarillo. You can forum shop by going to San Francisco. It reflects so poorly on the judiciary, I think, when the forum shopping works, so to speak. And it has become more and more partisanly tinged. I don't think that's coincidental since Harry Reid ended the filibuster for lower court judges in 2013. When you are now nominating people who do not need to get votes from anyone from the other party, you're gonna end up with the types of people who want to become judges and the types of people who do become judges to look quite different and to look more extreme, not partisan, but more ideologically extreme because they don't need those votes from the other side. And I think we're seeing the fruits of that now. So, I think the Supreme

Court is very frustrated that these lower court judges are kind of fulfilling this political and ideological slant that is so bad for the legitimacy and credibility of the judiciary.

[00:44:17.2] Sarah Isgur: I'm gonna get these stats a little bit wrong, but in President Trump's first term, the judges that issued these universal injunctions against him certainly leaned Democrat. In Biden's administration, they were exclusively appointed by Republicans. And then, obviously, in this Trump administration, we've now gone to almost exclusively democratically appointed judges. And the problem with that is that, of course, with forum shopping, you actually never get the chance for a Trump-appointed judge to rule on a Trump order because someone has forum shopped it to get the most likely outcome. So it's bad all around. I think the Supreme Court is frustrated with those lower court judges for getting over their skis, for stepping into the Supreme Court's role. You know, maybe we should have talked about this at the beginning of what exactly we're talking about here with these orders and why Justice Kavanaugh called them the interim during the interim. Because there's no question that the Supreme Court can stop a president's order nationwide. The question is whether a district judge can do that universally. And what happens in between basically when the order is signed and when it gets to the Supreme Court on that sort of fast-paced, what's the status quo going to be basis?

[00:45:38.9] Sarah Isgur: So what's the role of the district court in that in-between moment? Between when the president signs an order that let's say is totally unlawful and when it can get to the Supreme Court? What's that very short status quo going to be of a couple weeks? You know, to Steve's point, you can really dislike what the Supreme Court decided in *D.V.D.*, but that's not a problem with the docket so much. That's that you disagree with the Supreme Court's decision of what that status quo is going to be while the case is pending. But what happens with the district judges there? You know, again, I mentioned Justice Kagan was frustrated with them. Justice Gorsuch has expressed frustration with them. And I think in some of these cases where things are moving fast, where you hear the judges speaking intemperately, I would say, to the government, you can argue that the government had it coming, right, that these guys are lunatics and they have terrible policy ideas. But when these district court judges are taking on the role of advocates, the whole thing leaves a bad taste in the mouth, again, for the credibility and legitimacy of the judicial project.

[00:46:46.6] Sarah Isgur: So I do think there's a lot of frustration with district court judges, and yet there's a line not to be crossed. And I think you saw sort of Chief Justice Roberts say, "We're going to reprimand the district judges, you don't get to threaten the district judges," right? It's sort of like my family. I get to talk crap about them, but you don't.

[00:47:03.8] Jeffrey Rosen: Steve, what do you think of the suggestion that the Supreme Court may be defending its own prerogatives and embracing judicial supremacy, but it is willing to check the president when push comes to shove? Is it? We just had a few other executive power decisions this term, including one where the court upheld the president's ability, at least for now, in *Trump v. Wilcox* to fire the heads of the National Labor Relations Board. Are there areas of executive power where the U.S. Supreme Court will check President Trump or not?

[00:47:39.7] Steve Vladeck: I mean, I think so far, at least, we're wanton for evidence on much in the way of examples of this sort of checking.

[00:47:47.8] Sarah Isgur: *Chevron* and *Loper Bright*, are a great example where President Trump is much weaker than his predecessors have ever been to...

[00:47:55.4] Steve Vladeck: I'm sorry, I took the question about checking President Trump, not checking the institution of the executive branch. And it seems like when the Court is going to let the president unilaterally fire people in defiance of statutes that say you have to have good cause to fire them, when the court is gonna let the president unilaterally rescind immigration programs that require all kinds of procedural and substantive criteria to be satisfied, I mean, I don't know how you can point to anything the court has done this term as any kind of check on the executive branch, save for that one intervention in the Northern District of Texas case where Jeff, again, I think as time has gone on, it looks more like the court was protecting its own prerogative than the due process rights of those migrants. I think the other problem is, I mean, listen, I've been beating the drum about judge shopping for years now, but that's not a reason to discredit district courts. It's not a reason to neuter their power. And it's not a reason, I think, at all, right, to restructure the relationship between the federal courts and the executive branch writ large just because the rules regarding venue and standing have become too permissive.

[00:49:05.4] Steve Vladeck: Were it otherwise, Jeff, I don't know how you could explain the raft of decisions we got this term, where the court actually made it easier for especially big corporate interests and conservative litigants to bring various challenges in courts they wanted to bring them in. I mean, the *FDA versus R.J. Reynolds* case is a good example. The case about Article III standing to challenge the EPA's approval of California's greenhouse gas regulations is a good example. So the theory that this is a court that thinks it's become too easy for litigants to manipulate where they bring lawsuits, I think is belied by the decisions in which the court is making it easier for litigants to manipulate where they bring lawsuits. It really seems to me that this is a court that is much more focused on the specific question of the relationship between district judges that maybe they don't like and the executive branch. And I'll just say, my own two cents on this is, I don't love universal injunctions, but I think that those problems go much beyond universal injunctions. I think those are the kinds of policy debates that we have historically left for the legislature.

[00:50:13.4] Steve Vladeck: And I think it's a very dangerous road to go down where the Supreme Court's gonna say, "Only we and not the lower courts are gonna be the principal check on the executive," because, Jeff, it's committing the court both to intervening more often and earlier than it historically has wanted to, and it's kneecapping the ability of the courts that are often in a much better position to assess the facts on the ground.

[00:50:38.2] Sarah Isgur: I think one major pushback to this is that the court that was overturned the most this term was the most conservative circuit court. It was the Fifth Circuit. So if, you know, Steve's judicial realist view that they're just politicians in robes would be true, why are they taking fewer cases than ever? Because if you have this conservative super majority, you should be taking all sorts of cases and overturning all sorts of president. They're overturning less president. They're taking fewer cases. They're overturning the most conservative circuit court the most often. I just, the numbers don't bear it out.

[00:51:13.9] Jeffrey Rosen: And Steve, to support Sarah's point, in *FCC versus Consumer Research*, the Supreme Court slapped down the Fifth Circuit. It rejected a non-delegation challenge to the Universal Service Fund. So that's Justice Kagan over Justice Gorsuch's dissent. And then, in *Kennedy v. Braidwood*, the court rejects an appointments clause challenge to HHS preventive services task force. Justice Thomas writes for the dissenters. Are those examples of the court checking the executive?

[00:51:48.1] Steve Vladeck: I think, I mean, both of those cases are actually the Court letting the executive branch prevail, right, not checking the executive. I think the larger point, just to Sarah's point about the Fifth Circuit, is like, yes, there are still gonna be substantive questions on which the middle of this court is not as far to the right as the Fifth Circuit. I'm not sure that tells us as much about this Court as it tells us about the Fifth Circuit. The reality to me is that this is a court that has set itself up to basically be the supreme, not just court, but the supreme sort of policy approvers in the land. And, you know, to some degree, that's because they're filling the gap that has been created by Congress's abdication of its power. But Jeff, look at some of the big cases from this term. I mean, the *Free Speech Coalition versus Paxton* case, where a majority says we're going to apply intermediate scrutiny, not strict scrutiny, to an obviously content-based regulation of speech. You know, what does that difference mean in reality, Jeff? What it means is that there's more room for judges to approve of content-based speech regulations because they think it survives this lesser form of scrutiny than the much tighter, much less malleable strict scrutiny standard.

[00:53:04.3] Steve Vladeck: You know, you can go down almost the whole line of cases the court handed down this term. There are results that could be portrayed as more left-leaning than right-leaning insofar as you're upsetting the status quo from the Fifth Circuit. But Jeff, the story of this court, I think, is very hard to tell as a court that is pushing back against presidential power, even if you want to go back to last term. I mean, Sarah mentioned, you know, *Loper Bright* and the administrative law decisions from last term. I mean, those cases are all about reining in the power of executive branch agencies, but not reining in the power of the president by himself. And indeed, Justice Kavanaugh has adverted to this distinction over and over again. So, Jeff, it's possible that a year from now, we'll look back and say, actually, the court really was just parrying for time, that the court really was willing to stand up to a lot of what Trump was doing when the merits reached the court. But I guess I'll just say, the evidence to date is to the contrary. And meanwhile, a lot of harm is happening on the ground. I mean, if we really do think this court is going to end up holding, that a bunch of these executive branch actions and policies are illegal, look at the damage that will have ensued during the, you know, 12 months, 18 months, two years that these policies were in effect.

[00:54:22.8] Steve Vladeck: And so, you know, I think one has to really look at the whole waterfront before we can say that this is a court that has shown any real willingness to push back against anything but the most extremely lawless behavior by President Trump.

[00:54:36.7] Jeffrey Rosen: Sarah, if you had to identify a big area where the court next term might check President Trump, what would it be? Tariffs? Birthright citizenship? The independent agencies? What do you think?

[00:54:50.3] Sarah Isgur: I certainly think we're gonna see the birthright citizenship order found unconstitutional. Whether they actually reach the question of what the 14th Amendment, you know, what "subject to the jurisdiction thereof" means, I'm not sure. I think we may just get a decision that says the president acting alone certainly doesn't get to redefine it and that, you know, it would have to go through Congress and we're happy to look at it if Congress doesn't, you know, sort of its own punch shutting the whole thing down. But we could get one on the merits of the 14th Amendment itself. You know, I think it's important to think about the statistics that we've seen from the court on the opinions of the court for the last several terms now. I'll mention this terms where we saw the 6-3 alignment, the ideological alignment in only 9% of the cases. That means over 90% of the cases had at least one liberal justice in the majority. 6% of the cases were decided with a 6-3 alignment with the three most conservative justices in dissent. And if you put that out to 5-4, including 6-3s and 5-4s, it's 15% and 15%. So clearly this Court isn't nearly as easy to pin down as its political critics on the right and the left would like to make it seem.

[00:56:06.2] Sarah Isgur: And the pushback to that is always like, well, but the big cases. The problem with saying the big cases is that very few people are willing to name for me what the big cases are at the start of the term. They like waiting until the end of the term when they have the outcomes and then they pick the 6-3 ideological cases as the big cases and they ignore the, for instance, 9-0 cases we had written by Jackson, Sotomayor, and Kagan on, as David Latt has referred to it, the "God, guns, and gays," three cases that we got on the same day that were unanimous. Those weren't considered big cases until we got the outcome and then everyone forgot about them because they weren't divisive enough and they weren't split along those ideological lines. So if your definition of big cases is it has to be 6-3 ideological, well, then it's a circular definition and it's not very interesting to me. I think that next term, all eyes will once again be on Justice Barrett. She is an enigma. People can't predict where she's gonna come out. I think certainly she has been the justice of the six conservatives to rule against Trump more than any other justice, including when she's in dissent, which I think is so interesting because oftentimes you'll see a justice if they can't change the outcome, go along with the majority to at least cabin the majority opinion, narrow it.

[00:57:27.9] Sarah Isgur: You haven't seen that from Justice Barrett. I think that in and of itself makes her fascinating. You've also seen Justice Jackson really flank Justice Sotomayor on the left side of the court. Justice Sotomayor only was the most senior liberal justice on the court for a couple years after Justice Breyer retired, and already she's not necessarily the voice of the liberal wing of the court. How that's gonna work out? Fascinating. Justice Jackson certainly seems to be writing for a different audience than Justice Sotomayor is writing for. That audience might just be Justice Kagan, by the way, when it comes to Justice Sotomayor trying to get her to join the dissents. We're certainly not gonna see a slowdown in these applications to the Supreme Court on Donald Trump's executive orders, but I think we're going to start to see them actually get to the end of the line, if that makes sense. So we've seen sort of the first part, as Steve said. We haven't seen parts two and parts three of this play. So next term is definitely going to be sort of act two of the Donald Trump versus the judiciary play.

[00:58:38.2] Jeffrey Rosen: Thank you so much, Steve Vladeck and Sarah Isgur, for a wonderful conversation. I'm so excited that we're gonna continue it next week when both of you

are coming to the National Constitution Center for our annual Supreme Court review. We're hosting it this year in collaboration with the Center on the Structural Constitution at Texas A&M, and we've got a marvelous lineup of scholars from diverse perspectives, including both of you. It'll be so much fun to show you around the NCC. We're gonna try to get into Independence Hall, and we will continue to model thoughtful, illuminating, and meaningful discussion about the U.S. Supreme Court, which is just exactly what both of you have done on the podcast today. Steve, Sarah, thank you so much for joining.

[00:59:23.1] Sarah Isgur: Thank you.

[00:59:23.7] Steve Vladeck: Thank you, Jeff.

[00:59:27.6] Jeffrey Rosen: This episode was produced by Samson Mostashari, Bill Pollack, and Griffin Richie. It was engineered by Bill Pollack. Research was provided by Gyuha Lee, Griffin Richie, Cooper Smith, Trey Sullivan, and Tristan Worsham. Friends, next week, we're hosting a Supreme Court review at the National Constitution Center. It's on July 8th, and if you can join in person in Philly, please do, or check us out online. And always remember, when you wake or you sleep, that the National Constitution Center is a private nonprofit. This podcast and all our work is made possible thanks to the generosity, the passion, the dedication, the commitment to civil dialogue and lifelong learning of people like you from around the country who are inspired by our mission. Please consider supporting it by donating today at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.