Speaker 1:

Chief Justice when a man argues against two beautiful ladies like this, they are going to have the last word.

Speaker 2:

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

Melissa Murray:

Welcome back. This is Strict Scrutiny, your podcast about the Supreme Court and the legal culture that surrounds it. I'm Melissa Murray, and I'm your host for today's show. Although I am all alone without Leah and Kate, I am joined by a very special guest. Ginger Anders is a partner in the Washington, D.C. office of Munger, Tolles & Olson. She's an experienced appellate litigator having argued 18 cases before the US Supreme Court. She joined Munger from the department of justice, where she served as an assistant to the US Solicitor General and deputy assistant attorney general in the Office of Legal Counsel.

Melissa Murray:

During her nearly eight year tenure in the Solicitor General's office. She represented the United States in some of the most significant patent cases decided by the US Supreme Court in recent years, including Teva pharmaceuticals versus Sandoz and Commil versus Cisco systems. In addition to her work in patent law and IP, she wrote the government's briefs in Fisher versus University of Texas at Austin, Zivotofsky versus Kerry, Bank Markazi versus Peterson and American Express versus Italian Colors Restaurant. She's a graduate of Yale College and Columbia Law School, where she was an articles editor for the Columbia Law Review. And following law school, she did the trifecta of clerkships. Clerking first for Judge Gerard Lynch, then of the Southern district of New York. Judge Sonia Sotomayor, then of the Second Circuit. And then finally at the Show for Justice Ruth Bader Ginsburg.

Melissa Murray:

I will note that after having Ginger serving in their chambers, Judge Lynch was elevated to the Second Circuit. And Judge Sotomayor became Justice Sotomayor, and Justice Ginsburg became the Notorious RBG. Basically this is all to say that Ginger Anders can help everyone level up. That's why she's here on Strict Scrutiny today, helping us bring our best A game. Welcome to the podcast, Ginger.

Ginger Anders:

Thank you so much. It's so great to be here. Great to see you.

Melissa Murray:

Speaking of seeing us, I did not note, because this seems irrelevant given the other people that you've helped to level up their game, but you certainly helped level up mine when we were co-clerks together with then judge now Justice Sotomayor. It's really great to see you. I'm glad that you're here on the show today. Tell us little bit about what you've been doing in quarantine.

Ginger Anders:

What I have I been doing in quarantine? Well, I've been lucky to have the legal works or to continue, right. It's easy enough to do from home. I've been in a cabin in Virginia Woods actually just working on the cases that we had from before the quarantine, I guess. It's been interesting.

Melissa Murray:

It's definitely been an interesting time. I'm glad to hear that you all are in good health and that... Well, Ginger, you are the mother of many dogs. And so your dog mothering has definitely continued in quarantine. You have how many dogs?

Ginger Anders:

We have two beagles, both of whom are very happy to have us at home and to be mostly out in Virginia, where they chase squirrels and possums and whatever else comes across their vision.

Melissa Murray:

I'm asking for a friend, but what do you do to keep your dog from barking in the middle of Zoom calls or podcast recordings?

Ginger Anders:

Bribery might work, delicious bones that take them a while to chew.

Melissa Murray:

Like the bones of my children? Will that work?

Ginger Anders:

Whatever it takes.

Melissa Murray:

I'm not going to do that. Don't worry. But yes, I am trying to figure out how to keep this dog from crying during this podcast. He hears your voice Ginger, and he knows that you're his dog mother and he wants to see you and he's just crying.

Ginger Anders:

He's so cute.

Melissa Murray:

He's very cute, but not when he cries. In any event, we have an action packed show today for our listeners, as always we will begin with breaking news and then we're going to recap the March 22nd week of oral arguments. There are a lot of oral arguments that took place over the course of this week. So lots to cover. And then we'll do a brief preview of next week's oral argument, and then we will finish up with some court culture. First, breaking news. Ginger, this is actually something that is, I think, relevant to having you on the show. I know that you are working on this case, so you can't comment on it, but on Monday, March 22nd, the court announced that it will review the First Circuit's decision, throwing out the death sentence of Dzhokhar Tsarnaev who was convicted of helping carry out the 2013 Boston marathon bombings.

Melissa Murray:

Last year, a three judge panel of the First Circuit upheld Tsarnaev convictions on 27 counts but concluded that Tsarnaev death sentence should be overturned, because the trial court judge had not questioned jurors closely enough about their exposure to pre-trial publicity and had excluded evidence concerning Tamerlan Tsarnaev, Dzhokhar's older brother an accomplice. Writing for the panel, O. Rogeriee Thompson noted that Tsarnaev will remain confined to prison for the rest of his life. With the only question remaining being whether the government will end his life by executing him. Again, this is a really interesting case and perhaps one that speaks to the court's recent appetite for death penalty cases. Also on Monday Congress conducted hearings on D.C. statehood, which has been increasingly a topic of conversation. Ginger, what say you? You've been a long time resident of the district, do you feel that you are being unrepresented, but taxed, nonetheless?

Ginger Anders:

That's what our license plates say. It would be great to have a representation in Congress, right? Voting representation in Congress which we don't right now. That's something, I think we do feel, and especially the events of this past summer, right? It really brought home how we're not a state and it really can make a difference, right? National Guard Control, for instance, right? Was under president Trump rather than under the governor of our state, of D.C. I think it would be great to have D.C. statehood.

Melissa Murray:

Well, there are many who are sounding similar themes. Those in favor of granting statehood to the district have argued that D.C. has a larger population than two existing states, Wyoming and Vermont. And both of those States enjoy representation in Congress. They've also noted that D.C. residents pay more federal taxes per capita than any state and more total federal taxes than 21 States, but still have no voting representation in Congress. Some have suggested that resistance to D.C. statehood is rooted in the fact that D.C. residents lean democratic and could be a very significant voting block for the democratic party. And also the fact that there is a large population of African Americans in the district who may also lean Democrat and be a voting block in their own right. You're scoffing Ginger, do you think that's it?

Ginger Anders:

That certainly seems like it's probably part of it based on some of the rationales, D.C. doesn't have an auto dealer, would be the only state without a dealer, that's something that one of the Congress people said.

Melissa Murray:

Ginger is referring to the hearing itself where those opposed to D.C. statehood have sounded some originalists in textual themes, namely that the constitution explicitly outlined D.C. as a federal district rather than a state, but they've also made war novel arguments, including practical concerns like D.C. as Ginger says, does not have its own auto dealership, which apparently is a pivotal indicia of statehood these days. Zach Smith of the Heritage Foundation and arguing against statehood made an even more novel argument. Let's have a listen.

Zach Smith:

Framers also wanting to avoid one state having undue influence over the federal government. There's no question that D.C. residents already impact the national debate. For the members here today. How many of you saw D.C. statehood yard signs or bumper stickers or banners on your way to this hearing today? I certainly did. Where else in the nation could such simple actions reach so many members of Congress?

Melissa Murray:

So what do you make of this Ginger? D.C. statehood is unnecessary because D.C. residents can always lobby in their favor with Congress persons by simply putting out a sign in the yard.

Ginger Anders:

That seems a pretty thin rationale to me. You could say that you could say that of residents of any state, right? We fought a revolution over this. It's not the same thing as being able to express your views. It's not the same thing as being able to vote, being able to have representation.

Melissa Murray:

The Heritage Foundation definitely knows about the American revolution. They venerate the American revolution to some degree. You would think that this is not the best argument for them, but nonetheless, we had Zach Smith talking about the possibility of getting your voice in Congress heard through the use of yard sign. Anyway, moving on. In other news, Americans have no right to carry guns in public or so said a divided on bonk Ninth Circuit panel on Wednesday, which reversed a prior Ninth Circuit decision that struck down Hawaii firearm restriction as unconstitutional. There is no right to carry arms openly in public, nor is any such right within the scope of the second amendment. So said US Circuit, Judge Jay Bybee noted progressive and gun control enthusiast. Just kidding, he is not to my knowledge, a gun control enthusiast. But this was a very significant opinion and I'm fairly certain, I don't know if you disagree Ginger, that this is definitely on its way to the court.

Ginger Anders:

Certainly, I think that gun rights advocates would try and take this to the court. I used to handle part of this docket when I was in the government. We did see a constant stream of these petitions for cert coming up, trying to broaden second amendment rights. It's interesting, it seems this decision fits within the pattern that I saw then a few years ago, which was that, there didn't seem to be any appetite for broadening second amendment rights beyond what Heller had already said and that core right to possess within the home. We saw actually many petitions that came up during that time that we thought were plausible grants and the court just never took them. It just seemed there that they weren't interested in getting involved in the finer tuned debate about this right or that right.

Melissa Murray:

Do you think it's different with the composition of the court changing, maybe there is more of an appetite now that they have a 63 super majority of conservatives?

Ginger Anders:

It could be. It's a little bit hard to know where someone like Justice Kavanaugh is, or at least I personally don't know where he is. I'm not sure that he saw a lot of this as a D.C. circuit judge. I think it may

depend, but certainly the court has moved to the right and you no longer have the chief justice as a fifth vote for moderation or for institutional caution.

Melissa Murray:

Right. Stay tuned, we will hear more. In other department of justice news, New York, Senator Chuck Schumer has recommended three individuals to lead the US attorney's offices in the Southern Eastern and Western districts of New York. The three are Damian Williams to lead the SDNY, Breon Peace to head the EDNY and Trini Ross to head the Western district of New York. They are all African-American, and that would be the first time that there would be three black leaders filling those critical positions, and the first time that an African American has headed the Southern district of New York. All of those are really interesting picks and we will see more as they go on toward selection by the president and then confirmation. But obviously Chuck Schumer's say here is pivotally important.

Melissa Murray:

On Thursday morning, we got some really interesting news from the court, just in time for us to head into the studio. The court dropped some opinions in some really important cases. The first opinion was in Ford versus Montana, which was an eight to zero decision, Justice Barrett did not participate in the decision-making process or in hearing this case, but it was a majority decision written by Justice Kagan. And this was that personal jurisdiction case that we had earlier previewed here on Strict Scrutiny. The TLDR, is that the court clarified the limits of specific personal jurisdiction and plaintiff's due process rights, holding that there were enough connections between the plaintiff's claims here and Ford's business activities within the state of Montana to be sued in Montana.

Melissa Murray:

And the decision rejected the Ford company's proposed proximate cost standard for establishing specific personal jurisdiction and product liability and negligence cases. On the whole, it was a victory, I think for consumers and certainly for Deepak Gupta, who argued on behalf of the plaintiffs. But there were some notable concurrences here from Justices Alito and Gorsuch, which seemed to suggest that they were somewhat skeptical of international shoe, which as law students know, as a stalwart of the personal jurisdiction Canon. This is also a notable case, not just because of the eight to zero lineup even with the concurrences, but it's the first case from the court civil procedure docket that's been decided without the benefit of the courts civil procedure guru, Justice Ginsburg, for whom you clerked Ginger. What would she have made of this particular outcome?

Ginger Anders:

I think she probably would have been on board with the majority. She was somebody who was incredibly precise about civil procedure, but also pragmatic at the same time, shot through Justice Kagan's opinion is just the idea that doesn't matter of common sense, right? Ford is selling cars in Montana, which is the state that was involved, it's encouraging people to drive their cars in Montana. And then, so to turn around and say that as against a product liability, based on an accident in Montana, that there wouldn't be jurisdiction. I think that was a little bit hard for many of the justices to swallow just as a practical matter. Right? I think that was a large part of the motivation.

Melissa Murray:

It definitely was opinion, I think rooted in just the practicalities and also the difficulties that consumers would have in raising claims if they were more limited in terms of personal jurisdiction and where these

claims could be brought and what the connections would look like with the business activities of the defendants. Another opinion was also issued this morning. This was a five, three decision in Torres vs Madrid in which the court held that an officer's failed attempt to detain a suspect by shooting her in the back is a seizure for purposes of the Fourth Amendment. The chief justice who wrote the majority opinion in which he was joined by, Justices Breyer, Sotomayor, Kagan, and Kavanaugh, observed that the officer shooting applied physical force to the suspect's body and objectively manifested an intent to restrain her from driving away.

Melissa Murray:

We therefore conclude that the officer sees Torres for the instant that the bullets struck her. There was a vigorous dissent from Justice Gorsuch in which he was joined by Justices Thomas and Alito, where he chided the majority for adopting what he termed a schizophrenic interpretation of the term seizure. He noted that the courts reliance on common law history was misguided in this particular case and the court was going down the wrong Avenue. What did you think of this one, Ginger? This was a really important Fourth Amendment case.

Ginger Anders:

Absolutely. I think, I was happy to see that it came out the way it did. I should say, I filed an Amicus brief on the petitioner side here. I think, what made this case really interesting is that, if you just think about the intuitive understanding of a seizure, I seized the car or I seized the contraband, you think I must have to have possession of that thing once I seize it. And so the idea that what happened here, they shot the suspect, she kept running. I guess in some intuitive sense, it doesn't seem like a seizure, but of course the consequences are of a ruling the other way would have been, that shooting someone to try to get them to stop is not a seizure. And therefore the Fourth Amendment doesn't apply at all. And so there's just no constitutional supervision, right? There is definitely nothing you can do. Right. Right. Exactly. And so that was a very disturbing consequences and one that would have been, I think really pretty cataclysmic, if they'd gone that way.

Melissa Murray:

What did you make of this lineup with the chief joining the liberals and Justice Kavanaugh?

Ginger Anders:

I think it does seem on some of the criminal justice issues, he has been somebody who might be in the middle of the court, as opposed to Gorsuch, Thomas and Alito tend to be much more, not on all issues, but on many issues, government friendly. I think the lineup is one that's not too surprising.

Melissa Murray:

One of the things we've talked about on this podcast before, and Leah has really sounded this theme, but after decisions like Ramos, for example, last year, there were a number of people who seem to be of the view that Justice Gorsuch was incredibly woke on criminal justice issues, you laugh, so did Leah. This I think suggests that he is perhaps more of a traditionalist, more in tune with the government than perhaps that single decision Ramos would suggest. And maybe this is more in keeping with his general sensibilities around criminal justice and criminal procedure issues.

Ginger Anders:

I think that could be right. He certainly in Fourth Amendment cases involving property, right? There's trespass rights, property rights, as we'll see, talking about some of the cases we're going to talk about. He's very, very skeptical of government intrusion. Right?. But this is in a different category of government action. It doesn't involve those sorts of property rights. You may have somewhat different view.

Melissa Murray:

The limits of libertarianism. That's a good segue for what comes next. Let's switch gears and talk a little bit about oral argument this week. It was a pretty light sitting for the court. They basically heard one case a day for about an hour. But the cases I think were really chockfull of really important issues. Lots of discussion of common law, antecedents and analogs, and not really sure that we actually got a clear sense of where the court would come out, but there seemed to be in all of these cases, a real interest in finding a middle ground between two positions. The first case which is heard on Monday, is Cedar Point Nursery versus Hassid. This is a case that we have previously previewed for you listeners. This one involves a decades old California regulation that grants union organizers temporary access to an agricultural employers property during non-working hours for the purpose of communicating with workers about their right to organize.

Melissa Murray:

Two California fruit producers have challenged this right of access on the ground that it amounts to an uncompensated taking of their property in violation of the Fifth Amendment. And so the question for the court is whether this uncompensated appropriation of an easement that is limited in time affects a per se physical taking under the Fifth Amendment. Monday's oral argument was incredibly lively with the justices very preoccupied with the question of, how to distinguish between a constitutional condition on market participation and an unconstitutional regulatory taking. What stood out for you, Ginger, about this oral argument?

Ginger Anders:

I think one thing that stood out for me was just the difficulty that the court is going to have in writing an opinion that sort of, as you say, comes in between the two extremes. I think this was a case in which both sides had line drawing problems I think. Certainly on the petitioner side, the idea that any kind of any government rule that says there are times when the government or some private party can come into your property for some government interest, the idea that that would always be a per se taking requiring compensation, some pretty striking consequences from the government's perspective, right? Because there are any number of administrative searches, inspections for OSHA compliance, even straight up criminal law enforcement, coming in to search somebody's house, any number of government intuitions you can imagine.

Ginger Anders:

And the idea that all of that might somehow become a taking and that the government would have to deal with that every time it wants to establish some sort of government right to come in, no matter how briefly. I think that is pretty staggering. And so I think the court was looking to try to avoid that result.

Melissa Murray:

Well, that seemed to be what Justice Breyer was, especially preoccupied. He came in hot with this whole question of an entire inspection regime that was off bounds if this actually was a regulatory taking. Let's hear a little bit from him from oral argument.

Justice Breyer:

think it's always excessive, there are dozens and dozens and dozens of statutes, which provide, for example, one brief tells us the Mine Safety and Health Act of 1977, allows the secretary of labor to inspect their coal mine at least four times a year. I guess so they could have say some kind of AA might delegate that authority to private inspectors, I don't know. All those long list of statutes, are they all unconstitutional?

Melissa Murray:

He also I think, not only highlighted the prospect of a slippery slope that might call into question a range of administrative regulatory schemes that occur at both the federal and state levels. He also displayed his particular penchant for inventive hypothetical. Let's go back to Justice Breyer who interposed the common law with the prospect of extraterrestrial life.

Justice Breyer:

I see, it's common though. Okay. Well, you know what they have, it's really surprising. I don't mean to sound so spacious or sarcastic, but I was trying to think of any examples. People now have in 15 years, their own private space ships or their own electric cars or their own driverless cars. There's a law that says people can go in and inspector the gas station. If you keep your car without using it inside your property for 10 years, they want to go inspect it. They have to do that, because it might blow up. They had no spaceships at common law. I'm just trying to think of an example where it's the same idea. They didn't have it at common law.

Melissa Murray:

What did you make of this, Ginger? I did not have spaceship on my oral argument bingo card for Monday.

Ginger Anders:

Justice Breyer always brings a really unique whimsy to oral argument. Sometimes you just want a little levity.

Melissa Murray:

He definitely brings it. He was very much of this view that we've got to be concerned about the slippery slope and suddenly we just don't have regulation at all. There were some others, I thought Justice Barrett actually raised an interesting point. So what if this is a regulatory taking? If it is, the point is then to compensate the employer for the use of the property during this limited period of time. And then she posed the question, how much is it worth? She suggested 50 bucks. What did you make of that line of argument?

Ginger Anders:

I think it probably understates the consequences for the government if the petitioner's regime were to be adopted. I think probably the real problem for the government would be that anytime a legislature

wants to enact a rule like this, there will be all kinds of political pressure because it will off the bat be understood as a taking. And then you'll have all sorts of litigation. The flood gates are really open, right? About what exactly is just compensation. Maybe it is only $50 and maybe a lot of these cases could be settled because the amounts are so small, but that won't always be the case. And so you're just upping the cost of regulation, right? It's a lot of the court's recent administrative state cases too, right? You're just raising the cost of regulating and just adding friction to the regulatory state.

Melissa Murray:

California raised that repeatedly. California's whole point here is that this should not under the standard articulated by the court in Penn central be considered a per se taking. So there should be no categorical rule, which is what the petitioner was arguing for. There should be no categorical rule that this is a per se taking, but rather the ad hoc inquiry should be followed. And that's just a more context dependent and more sensitive specific to the circumstances kind of inquiry. Justice Kavanaugh, again, seemed to want to go away from the whole question of ad hoc versus categorical. And instead find a way to meet in the middle and acknowledge the impact of these kinds of regulations on employers while also acknowledging the government's interest in regulating. He suggested the possibility of using an older NLRA case, Badcock as a guide.

Melissa Murray:

In Badcock, the question is whether or not rights of access can be available to organizers but not necessarily farm worker organizers. It's important to note, and Jenny Hunter of SEIU noted this on Twitter, Badcock although it is an NLRA, is not necessarily relevant to these particular factual circumstances because the NLRA due to a compromise with Southern senators, doesn't actually include workers within its ambit. It doesn't actually relate to organizers who are trying to organize agricultural workers. But did you think that Justice Kavanaugh was onto something here, that Badcock could perhaps be a way forward to wed these two very opposed interests?

Ginger Anders:

It couldn't be, It certainly would be a narrow ruling that would apply really, holding to this statute. Sometimes the court does seek it out that when it realizes after briefing and argument, right? That it's got two positions, both of them are very difficult to limit. It's hard to know how to write an opinion while being certain of all the implications of the opinion. One thing I think may have made this perspective even more attractive to Justice Kavanaugh, is that, there are almost no statutes like the one at issue in California, statute that gives the right to union organizers to come on to agricultural property, to talk to workers. I didn't see any analog statutes in any of the briefing, nothing was mentioned at arguments. I don't think there's anything really like this that's out there, that's comparable. And so that means that if you were to rule on this ground it would be a pretty narrow ruling.

Melissa Murray:

Maybe that is a way out of it. It is worth noting that this very same California law that's being challenged here in Cedar Point, was also challenged at the California Supreme Court in the 1970s. And there the California Supreme Court upheld the law and the Supreme Court denied certiorari. There's, I think a whole nother dimension to this, which speaks to the institutional dynamics of the court that 30 years later the court is taking up again. That perhaps might speak to just the ideological tilt of the court, but also it's increasing skepticism of labor rights. More to come really interesting oral argument with lots of just really fantastic hypothetical's from Justice Breyer who outdid himself in this one. Well-Played sir.

Moving on to Tuesday, Ginger. This was another really important case dealing with criminal procedure, but with the added twist of criminal procedure and cross enforcement in Indian country.

Melissa Murray:

United States versus Cooley concerns a Ninth Circuit ruling that found that a former highway safety officer James Saylor of the Crow tribe of Montana, lack the authority to temporarily detain and search Joshua Cooley, who was a non-Indian, who was subsequently arrested by County law enforcement and indicted on drug trafficking and firearms charges. The question in this case is whether the lower courts aired in suppressing evidence on the theory that a police officer of an Indian tribe lacks the authority to temporarily detain and search a respondent who is a non tribe member on a public right of way within the reservation, based on the potential violation of state or federal law. This oral argument, Ginger was a battle of the Eric. So no women participated here, but two men named Eric argued on either side of this case. And this was another one in which the court seemed very preoccupied with the practicalities of what it means to enforce the criminal law of either the state or federal government or the tribe within Indian country. What were your thoughts about this oral argument?

Ginger Anders:

Sure. This is another one where the court was really concerned about the limits of each position and the consequences. From my perspective, I thought that the Ninth Circuit rule was quite striking, because essentially it was, that when a police officer makes a stop on Indian country, he first has to decide whether he thinks that the person in the car is an Indian or not.

Melissa Murray:

Which is kind of racial profiling really.

Ginger Anders:

Right. Because it's either based on his perception of their appearance or it's based on as I think, Eric Fagan for the government pointed out quite effectively at argument, you can ask them, but they don't have to tell you the truth. Right? First the officer has to make that determination, and then if the person turns out to be a non-Indian, the officer can proceed to investigate only if there's obvious evidence of I guess, impairing and obvious crime. Sort of this obvious immediate evidence of a crime, which almost never will be satisfied.

Melissa Murray:

Well, Justice Thomas had one very interesting hypothetical, that I think may test the limits of what is an immediate crime and process. Let's hear a little bit from Justice Thomas.

Justice Thomas:

I'd like to continue along that line counsel. Let's change the facts in this case just a bit, so that rather than the police officer determining that the respondent was nervous and that he had bloodshot eyes, rather he fit the description of a serial killer that the police officer was alerted to a serial killer who did not commit any of the crimes on the reservation, but happened to be exactly where respondent was. How would you make the exact same argument in that case?

Melissa Murray:

What do you think about this serial killer exception, Justice Thomas is carving out here? Is the prospect of a serial killer on the loose enough to make this an exigent circumstance that would warrant even detaining someone who is not subject to tribal authority?

Ginger Anders:

I think that's the question. And so, part of the problem here is that the Ninth Circuit standard, apparent and obvious crime is so new. It's not really familiar to us. And so it's a little bit hard to know how it would apply. I guess my intuition is that the officer certainly would have probable cause to think that maybe person is a serial killer and therefore they have committed these other crimes, but I'm not sure that that counts as an apparent and obvious crime. Just seeing somebody and thinking that they look a serial killer, they matched the description, that actually would rise to the level of the Ninth Circuit standard. I think that is one of the difficulties here for Mr. Cooley, that you can imagine situations in which you would probably want law enforcement to be able to investigate. And it's not clear that they would be able to honor the Ninth Circuit's rule.

Melissa Murray:

That was a hard line, I think for his attorney Eric Cankle to draw. On the other side though, deputy Solicitor General, Eric Fagan made an argument that the tribes had not divested themselves of what he called the core inherent authority as sovereigns, to investigate and detained suspects within their borders for violation of another sovereigns law. Which was an interesting move, and one that I think Justices Kagan and Sotomayor immediately picked up on. Why that appeal to this question of inherent tribal sovereignty or authority, as opposed to trying to fit this case into the framework of the court's 1981 decision in Montana versus US, which limited tribes authority over non-members on tribal lands, but allowed for certain exceptions, why wouldn't this just be easier to fit into Montana as an exception?

Ginger Anders:

Because it could be a couple of things. There may have been some doubt on the government's part about whether this investigative authority would rise to the level of something that would threaten the tribe. It would satisfy the Montana exception. United States often has an interest in protecting and recognizing the sovereignty of tribes, and throughout the government's brief, they make the point that they entered into treaties with tribes that presuppose this authority to investigate non-Indians and handover suspects to state or federal authorities. And so you could imagine that the government wanted to protect, on the other side, the tribes authority to enter into those treaties.

Melissa Murray:

Thinking about the broader scope of us tribal relations, this particular case comes on the heels of a very surprising decision last term in McGirt. How does McGirt shadow you think the court's disposition of this case, and specifically, where do you think Justice Gorsuch, who is perhaps the member of the court that is most deeply steeped in the vagaries of federal Indian law and indeed what it means to live in Indian country?

Ginger Anders:

Yeah, that's a good question. I think those sorts of realities can make somebody very cognizant of the fact that these are vast swaths of land that we're talking about. The question whether the tribe has authority to investigate what appears to be criminal activity within its borders, within the borders of Indian country can have significant consequences for the people who live there. Right? And so just as a

practical matter, does seem to me that there's a lot of intuitive appeal to the government's position that this would apply. What they say is that, the concerns would apply not only in public through ways like highways, but also to land owned within Indian country by non-Indian. Would you be able to investigate if you think that there's a crime being committed on somebody's property? Non-Indians property, those are questions that would have pretty severe consequences for tribal members.

Melissa Murray:

It's already noted that non-Indians committing crimes in Indian country is already seriously under enforced and under policed. And that a number of tribes have noted this. There's just a lot going on in this case. Another law professor who does criminal procedure mentioned to me, that one of the things that he thinks is particularly interesting here, is that, it's actually a very big question about cross enforcement, whether particular sovereigns can enforce another sovereign's criminal laws. He wondered if this was going to be the vehicle for the court to flesh that out, given that it's not squarely a Fourth Amendment case, but rather a question of the Fourth Amendment being filtered or incorporated through the Indian Civil Rights Act. And maybe the court would balk at using this particular case as a vehicle for seeing something more profound or impactful about the question of cross enforcement. What do you think?

Ginger Anders:

I think that's probably right for that reason. Also I think, you had some justice like Justice Sotomayor questioning, whether we should really be viewing this through a Fourth Amendment or Fourth Amendment like lens at all, because if you were going to analogize a tribal policemen who doesn't have investigative authority to a private citizen, then you wouldn't assume that he was subject to the Fourth Amendment at all. I think there were a lot of complexities there that would prevent the court from saying anything that would have broader implications for the Fourth Amendment generally.

Melissa Murray:

Let's pivot from Indian country to Rhode Island, and yet another Fourth Amendment case, this one comes from Caniglia versus Strom. The question here is whether the community caretaking exception, which is an exception to the Fourth Amendment requirement, that a warrant is required for a search or seizure of private property, whether that caretaking exception to the Fourth Amendment should be extended from the herculean searches, which it's where it's typically been used to the home itself, which traditionally has been a place that has been sequestered from government intrusion. In Caniglia the issue there was, we talked about this before in an earlier episode, this was a gentleman, he and his wife were engaged in a domestic disturbance. The wife left the home. She later called husband because she was worried that he was perhaps suicidal.

Melissa Murray:

She called the next morning, didn't get word from him. And so she sent the police over for a wellness check, when they arrived, they found him, he was fine. They determined though that he should be hospitalized after they dispatched him to the hospital, they entered the home and seized a gun and some weapons and some ammunition. And so the question is whether that's within that community, caretaking exception to the Fourth Amendment. The First Circuit had concluded that it was. What did you make of this oral argument, Ginger?

Ginger Anders:

This has interesting crosscurrents with Cedar point with the takings case, right? The idea of, when, if ever can, the government come in to your property and when do we want them to come in. You saw a real division among the justices and their views of whether, those kinds of intrusions are generally benign and something that could be helpful to the occupant, the resident, or something that is to be feared really, right? So you had Justice Kavanaugh for instance, and Chief Justice Roberts saying, we have an elderly person who's fallen or-

Melissa Murray:

A lot of discussion of elderly people falling.

Ginger Anders:

Yes. And how often it happens, Justice Kavanaugh said several times that the statistics on this are quite staggering,

Melissa Murray:

And he really exercised about it.

Ginger Anders:

He did.

Melissa Murray:

I would not consider him elderly, but then again, on this podcast, we have noted that, although Jennifer Lopez is an older worker for purposes of the Age Discrimination in Employment Act, she's not really an older person. I would say Justice Kavanaugh is not necessarily an older person, but he was very much on this tip in oral argument.

Ginger Anders:

He was, and you also heard some of them referring to, you call your mother every Sunday, what if she doesn't answer? Right? You did get the idea that either the justices were thinking about themselves or they were thinking about elderly parents perhaps.

Melissa Murray:

They were being elderly, eventually.

Ginger Anders:

Right, right. Exactly, exactly. And so, you had the chief and Kavanaugh being very concerned about the idea that the police wouldn't be able to enter. Of course this is not for criminal investigatory purposes, right? This is for this community function for wellness checks, that kind of thing. And so, they seemed to want the police officers to be able to enter without getting a warrant first in at least some circumstances, but then you had people like Justice Sotomayor being much more skeptical.

Melissa Murray:

Well, Justice Sotomayor was actually really interesting, because she made the point repeatedly an oral argument that there had actually been two seizures here. That the first seizure occurred when the police

arrived, found Mr. Caniglia and determined that he needed to be dispatched to the hospital. And then the second seizure and the one that is more problematic in her view, is then subsequently going into the home and removing the weapons and the ammunition. The first, I think she would say falls within that emergency, older person falling exception that I think she would be okay with. But the second is very much outside of that. She seemed more in keeping with the lawyer for the petitioner, Shay Dvoretzky, who argued that the prospect of allowing the government into the home, really went against common law antecedents and also just just general understandings of the sanctity of the home. She seemed to be in league with that.

Ginger Anders:

She did. You could see as a factual matter, because there were two seizures. The first seizure took Mr. Caniglia off of the scene. Right? And sent him to the hospital for evaluation. And so that made the second seizure seem much less reasonable. Then they went into the house and took the guns after he had already been removed. And so, you can see, it didn't seem there was any exigency, certainly at that point. And then of course she had, this may be a case right, where you have an interesting division in the opinions because Justice Gorsuch was right there with her, but more based on his respect for property rights and skepticism of any sort of government intrusion onto private property, the home in particular.

Melissa Murray:

Well, that sort of, I think reflects the division and the weird coalition of unlikely bedfellows on the briefs in this case. You had a number of civil rights groups joining with, I think libertarian groups is a fair way to describe it. Both in their skepticism of the prospect of expanding the caretaker exception. You don't typically see a lineup like that, but you definitely saw it here.

Ginger Anders:

Right. And a lot of gun rights groups because major reason to go in would be to remove firearms.

Melissa Murray:

Exactly. A lot of strange bedfellows here. One thing that was really interesting, is that the United States intervened here and it actually intervened to take, I think, a quite sweeping position of the expansion of the caretaker exception. I think it actually seemed more expansive in the briefs than it did at oral argument. At oral argument, Morgan Ratner, who argued on behalf of the Solicitor General's office, seemed to be at great pains to walk back the expansiveness of her vision of this exception, as it had been stated in the brief. What did you think of this?

Ginger Anders:

It was interesting. I think that she did an effective job at argument of limiting the position to something that was narrower than what respondent's counsel was proposing. I think he'd gotten into a little bit of trouble before she stood up, before she even got on the phone, I guess, these days and not limiting his position. And so she came in and said, well, no, the government really can only come in where there's relatively immediate concern about the health or welfare of a person. It may reflect, I have no idea obviously how the argument process or the argument preparation process went, but oftentimes there were times I can think of where the position gets refined in argument, or gets refined during the moot court process. Right?

Ginger Anders:

The brief has been a little bit more abroad. And then you realize in the course of the moods, which in the SGs office are famously intense, famously rigorous that the position you've stated down needs to be narrowed. And so, this is not the first time the government has come in with a narrower position, an argument and something that it thinks is more easier to defend.

Melissa Murray:

The justices seemed to be of an appetite to whittle things down a little bit, find again that delicate balance between the two positions, some middle ground that would allow entry for these emergencies whether for seniors who have fallen or for the prospect of suicide threats, but that did not risk the caretaking exception being interpreted broadly to allow for limitless entry into the home. Justice Alito acknowledged at one point that one of the things that is troubling to a lot of people about the caretaking exception, is that it doesn't seem to have any clear boundaries. What do you predict in this case? How will Caniglia be resolved?

Ginger Anders:

I do think it will be some narrow middle ground. It's always really difficult to predict obviously, and even harder with arguments in this format, where you get less of a sense which side justices are really concerned about or attracted to, because of the questioning format. But it does seem there were significant concerns at the extreme on both sides. And so it could actually be that this is a case in which the government's narrowed position is something that would be attractive, that you allow police to come in when they really do think that someone elderly has fallen, but you don't allow them to come in, well, we think there are firearms here and people seem generally unstable in this house, right? Something like that wouldn't be quite enough. Or the Crabtree, as the chief justice mentioned, that wouldn't be enough either.

Melissa Murray:

Well, we will stay tuned and we'll see how this gets resolved, again, I think in all three cases, the courts seeking some middle ground. All right, so Ginger, it's time to get ready for this week coming up and what a week it's going to be. There's some really big cases. Certainly if you're a sports fan, there are some really big cases on the horizon for March 29th. On Monday, March 29th, the first case up is Goldman Sachs Group versus Arkansas Teacher Retirement System. The question here is, whether a defendant in a securities class action may rebut the presumption of class-wide reliance recognized in Basic Inc. versus Levinson by pointing to the generic nature of the alleged misstatements and showing that the statements had no impact on the price of the security, even though that evidence is also relevant to the substantive element of materiality.

Melissa Murray:

And then there's a second question. Whether a defendant seeking to rebut the basic presumption has only a burden of production or also the ultimate burden of persuasion. This will be something that those who litigate class actions and securities class actions specifically will be very interested in. Are you interested in this Ginger?

Ginger Anders:

Well, I don't litigate securities class actions.

Melissa Murray:

You're like, "No, no girl. I'm not interested." It's actually, I think going to be a really well done argument. Tom Goldstein is on the brief for the Arkansas Teacher Retirement System, and Kannon Shanmugan from Paul Weiss is on the briefs for Goldman Sachs, and also I think Sullivan & Cromwell, they're Goldman Sachs's long counsel is also working with them on that too. That'll be, I think a very, certainly as a question of craft will be an oral argument worth watching, even if you aren't exactly on the edge of your seat for class action security case.

Ginger Anders:

Yeah, that would definitely be a great argument to watch. They're both fantastic advocates. There has been a series of cases trying to limit the basic presumption in the past five to seven years, I guess, maybe longer than that. And so this is the first one with the new court or the courts new composition. I think, it'll be interesting to see. It might be an initial indication of how this court will think about securities law and class actions.

Melissa Murray:

And again, the two adversaries here I think are really interesting. Goldman Sachs and the Arkansas Teacher Retirement System, has a David and Goliath kind of quality to it. Moving along. The next day, Tuesday, March 30th, there's also another case that I think is going to be riveting to many, TransUnion LLC versus Ramirez. The question here is whether Article III or Federal Rules of Civil Procedure 23, that's the class action rule, permits a damages class action when the vast majority of the class suffered no actual injury, let alone an injury, anything like what the class representative has suffered. Again, these class action cases, I think may seem a little dry for individuals, but they are critical access to justice vehicles if you think about aggregate litigation being a way by which the little people can have their day in court.

Melissa Murray:

And so efforts to limit class action litigation, that's an important access to justice question. And this is another really big case with some really interesting and talented advocates on both sides. James A. Francis will be arguing on behalf of Ramirez and Century club's Scotus advocate, Paul Clement, we'll be arguing it for TransUnion. TransUnion not only are interested in keeping your credit card safe, they're also interested in bringing the biggest guns possible to this particular fight. And so they have Paul Clement who we've profiled on this podcast before. What do you think of this one, Ginger, anything to look for?

Ginger Anders:

I think you're totally right that there's a whole class of federal statutes that regulate commercial conduct vis-a-vis consumers. And really the only way to enforce them is through class actions. There's, there's just no other effective way to do it because for an individual plaintiff, the constant litigation would far exceed any kind of award. I do think this may be another case in which the court tries to limit that as it has through various arbitration and antitrust cases over the past few years. Also the question of when you have an Article III injury for violation of a credit reporting statute of the sort that said issue here. It's something they've been very interested in recent years as well, right? Statute create an Article III injury by essentially telling you that you have a right to accurate credit reporting or whatever it is. Something similar here, don't have it at my fingertips.

Melissa Murray:

Like I said, this is probably not high on my must follow lists of cases, but again, I think it would be wrong to dismiss the importance of these cases for questions of access to justice, consumer litigation, they're tremendously important. It just takes me a minute to actually get into it. This might be one of those. I think many Americans will be very much attuned to the court on Wednesday, March 31st, which is when the court takes up a series of antitrust suits. This time dealing with the question of college athletics. There's a suite of two cases, American Athletic Conference versus Alston and National Collegiate Athletic Association, also known as the NCAA versus Alston. Both of them deal with this question of antitrust liability and college athletics, and specifically the whole question of whether college athletes should paid like regular athletes, professional athletes, and is there an antitrust violation for failing to do so.

Melissa Murray:

The question presented in the first case American Athletic Conference versus Alston is whether the Sherman Act authorizes a court to subject the product defining rules of a joint venture to full rule of reason review and to hold those rules unlawful, if in the court's view, they are not the least restrictive means that could have been used to accomplish their pro competitive gold. The second question presented this one in NCAA versus Austin is whether the US court of appeals for the Ninth Circuit erroneously held in conflict with decisions of other circuits and general antitrust principles that the National Collegiate Athletic Association eligibility rules regarding compensation of student athletes violate federal antitrust laws. Fair to say, this is the most high profile case of the sitting.

Ginger Anders:

Absolutely.

Melissa Murray:

And it's playing out in the backdrop of March madness.

Ginger Anders:

That's right. That's right.

Melissa Murray:

How does that affect the justices? Do they have a bracket? Did their brackets fall apart over the course of the last week, amidst all of those Cinderella stories and whatnot?

Ginger Anders:

I'm sure that some of them don't know what March madness is. And then you have people like Justice Thomas who are huge sports fans, particularly college sports fans.

Melissa Murray:

Who doesn't know? Even I know what March madness is, even though I don't care.

Ginger Anders:

Well, Justice Ginsburg might not have in her day.

Melissa Murray:

She's like, March madness is when we all go and see Tosca and they play the music really loud in March. Not that, not that. I think they all reasonably have some, I bet like Gorsuch and Kavanaugh and the chief, they definitely follow it for sure.

Ginger Anders:

Yeah. I'm sure they I'm sure they do, and their law firm certainly advise.

Melissa Murray:

Kagan, I think Kagan follows it too.

Ginger Anders:

Probably.

Melissa Murray:

I don't know that our justice follows it that closely. I don't recall her being super into it.

Ginger Anders:

I don't think so. She's more of a baseball fan.

Melissa Murray:

She's definitely more of a baseball fan [crosstalk 00:54:59]. For sure. For sure. Again, this actually I thought was fascinating last week when they had all of that discussion of the disparities between the amenities and circumstances that had been allotted to women basketball players at the NCAA tournament versus the male players. How do you think that will shadow, if at all this particular go around with the court?

Ginger Anders:

I think it will be there in the back background, you see it in the Amicus briefs too. It's in the case as well as in the press. The NCAA is making a pitch here that it should be subject to very, very limited antitrust scrutiny, because its rules are designed to promote amateurism. By that we mean they're distinguished from professional sports, but their briefs also talk about educational and personal enrichment, that comes from playing sports, that kind of thing. I think they are trying to have some of the moral high ground here, right? And so that backdrop is not helpful.

Melissa Murray:

Amen. We want the women athletes to be even more amateurish than their male counterparts, does not look like a great look going into this oral argument. I think this will be another very good oral argument in terms of craft, because we have, again, some really big guns out here. Representing the big 10 athletic conference and the NCAA are Andrew Pincus of Mayer Brown and Seth Waxman of WilmerHale. These are both repeat players before the court. Waxman famously served as Solicitor General of the United States. And Pincus has argued something in the range of 30 cases before the court, including a recent victory in AT&T mobility versus Concepcion, which is again, one of these very important class action cases in recent years.

Melissa Murray:

On the other side for Shawn Alston and the student athletes, is Winston & Strawn's, Linda Coberly. She is a very experienced appellate litigator, but I think this might be her first outing at the court. Is that your understanding as well, Ginger?

Ginger Anders:

Yeah, I think that's right.

Melissa Murray:

What's this going to be like? This is a high profile case to be taking your maiden voyage.

Ginger Anders:

It is. But again, the telephonic format is really going to change the experience, right? It makes it much more regulated, and so, no one justice can stay on you, on a particular topic, for very long. In that sense, maybe it's a little bit better to do your first argument under this format.

Melissa Murray:

That's true.

Ginger Anders:

I think it will be really interesting. I think the NCAAs position here is a fairly broad one, right? They are asking to not be subject to very much antitrust scrutiny and they largely one below actually. The Ninth Circuit upheld the vast majority of their eligibility rules. It's really only a couple of things that we're talking about, that they didn't fully win on. It's already interesting that the court granted cert in that context, that may suggest some larger interest in thinking about the way that antitrust law applies to these sports leagues and in particular the NCAA.

Melissa Murray:

I think it will be really interesting, maybe even groundbreaking and just the way we think about the question of college athletics going forward. As you say, this is not a case they necessarily had to take up and the fact that they're interested in doing so suggests maybe some movement.

Ginger Anders:

Definitely.

Melissa Murray:

In any event, Linda Coberly is the only woman arguing in next week's sitting. I guess that's progress, to have one of, I guess, seven, the magnificent seven, she's one of them, good for her. Linda, we wish you well here at Strict Scrutiny in your maiden voyage, we're really looking forward to watching you take your shot at the highest court in the land, as it were basketball metaphors, Ginger, basketball metaphors.

Ginger Anders:

Also more of a baseball fan.

Melissa Murray:

I also hate sports. Okay. It's time for some court culture. Ginger, I want to hear about what it's like to clerk at all the levels, you have been leveling up from day one in your time here in the world of the court and its ecosystem, starting at the Southern district. Then you go to the Second Circuit, then you go to the Supreme Court, then you argue before the Supreme Court, tell me what it's like to practice and be at all of those different levels.

Ginger Anders:

They're all amazing in their way. I love the Southern district, I loved being able to see trial proceedings and all the interesting parties.

Melissa Murray:

You saw Lil' Kim. You saw Lil' Kim.

Ginger Anders:

That's right. That's right. Lil' Kim was sentenced right before my wedding, in fact.

Melissa Murray:

That was good. You saw Lil' Kim and you got to see lots of litigants at the Southern district.

Ginger Anders:

It's such a range of cases, copyright cases about rap songs and criminal proceedings and trademark cases about the local wine shop, that we can go visit a few blocks away. It was just so much fun, right? To see all that, and Judge Lynch was just a wonderful mentor. And then the court of appeals is amazing as well. [crosstalk 01:00:21]. We had so much fun.

Melissa Murray:

We did have a lot of fun.

Ginger Anders:

Were really lucky, right? The four of us were close and we just had a really great time. That's particularly nice in the appellate court, I think. Right? Because the work can be a little bit more monastic. You get your cases and you read the briefs and you read your bench memos and then you draft opinions. It was so nice to just all be friends and have the interchange.

Melissa Murray:

Can I tell a story about you?

Ginger Anders:

No.

Melissa Murray:

I think we really corrupted you. I certainly do. I often think about it. Listeners, Ginger is not just like a savant in arguing before the Supreme Court. A very talented appellate litigator. She's actually a violin prodigy. You studied violin in high school, at Cleveland's equivalent of Julliard.

Ginger Anders:

Yeah. The conservatory there in Cleveland.

Melissa Murray:

She is an amazing violinist. You would come to chambers early, early, early in the morning when no one was there [crosstalk 01:01:24] practice. And then the cretins would arrive sometime around 8:30 and disturb you with all their stuff. But you would go home and you would practice. And then one day we were just like, "Ginger, we're going to burn this violin to the ground if you don't come do some stuff with us." And you were like, "Oh guys, I have all these things I'm doing." No Ginger, "We're kidnapping you and we're going to make you watch America's Next Top Model." And then you loved it. You loved America's Next Top Model.

Ginger Anders:

That was a great season of America's Next Top Model.

Melissa Murray:

You watched this religiously. Do you remember the best lines? It was cycle three. Was it cycle three? I think it was cycle three.

Ginger Anders:

I don't remember which cycle, but there were lines that we all repeated to each other, definitely.

Melissa Murray:

When Simon Doonan said to Catie, "My dear, I did not say you were a whore. I said you had whore style." We corrupted Ginger. She was literally just like, she was a girl who came in and played her violin, worked on her work, left and played the violin and more. We're like, no, we're going to corrupt you. We did, and we totally. TJ too, Amy, Carper, Mehta and I, we corrupted you Ginger. We also corrupted the justice, I think, because we got her to watch America's Next Top Model.

Ginger Anders:

That's right. That's right. She was a lot of fun.

Melissa Murray:

I think she loved it as much as you did. I think she was puzzled, briefly abused by it, but then alarmed, is the only way I can describe it.

Ginger Anders:

Probably. Well, reality TV.

Melissa Murray:

She was very put off. When they voted the girl out, she was just like, "They've done all of this work and now one of them has to leave." We're like, "Yes, that's how this works." She was very put off by that. But yes. Okay. Second Circuit was great. You had amazing co-clerks, some truly wonderful people helped you to find your way in pop culture, which is important, I think.

Ginger Anders:

That's right.

Melissa Murray:

Then you go to clerk for Ruth Bader Ginsburg and this is before she becomes the Notorious RBG. Did you know she was going to be a Notorious?

Ginger Anders:

No, that's part of the fun of it, right? That she's the last person you would imagine having that moniker or enjoying it as much as she did. I think she really adopted it. Right? And really loved it, I think in the last few years. It was again, very different. One thing that's different about it is that you have the cert pool, right? So you have all these cert petitions that you have to review and the clerks split them up amongst chambers. That was just a whole new skill. Right? And just a whole new view of the legal system. Right? Just seeing all of these petitions coming up from all of the circuits and all of the state courts and just how much is out there and how little the Supreme Court can review compared to all the people who are seeking it. And then the advocacy is amazing. Right? You just see these-

Melissa Murray:

Men named Paul.

Ginger Anders:

Right. That was amazing, right? To be able to go to pretty much every argument, for that term and just see all the different people and see who was effective and who the justices thought is less effective. That's true at all levels of the court system. Right Part of the great thing about clerking is that your judge will tell you afterwards whether they found some lawyers courtroom technique effective or not, or off-putting or whatever. And that's true with the Supreme Court as well, so that was really educational, thinking about becoming an advocate yourself, right? One day.

Melissa Murray:

You were at the Solicitor General's office, let me make sure I get this right. You were there when Kagan was SG.

Ginger Anders:

I was.

Melissa Murray:

You were also there when Katyal took her place. And then Don Verrilli.

Ginger Anders:

That's right.

Melissa Murray:

And then you peaced out.

Ginger Anders:

That's right. I was there for the full eight years of the Obama administration. I spent the last few months in the Office of Legal Counsel.

Melissa Murray:

What is it like to go before the Supreme Court and, Ginger Anders representing the United States?

Ginger Anders:

The United States part of it is really, it's just such a privilege, right? To say that you're representing the United States, it feels like such a huge responsibility. You do have that obligation to do justice or act in the public interest. We really took that super seriously. And so you stand up there and you feel like you have this huge responsibility to uphold that, to not let anyone down in the government. That was a really pretty weighty part of it. But at the same time, you feel every argument, it's true of anyone in private practice, too, right? They're such team efforts. The argument is just this little tip of the iceberg and there have been all of these people who have helped write the brief and then done moots for you and consulting with you.

Ginger Anders:

Especially within the government, you're so lucky when you represent the government because you have these subject matter experts and the agencies, the people who have handled the litigation to that point. When I had cases about treaties, I could talk to the people at the state department who had been the ones to administer that treaty for 10 years or whatever. When I had labor cases, I could call up the department of labor and ask them to find me some statistics, it's this amazing resource.

Melissa Murray:

It's like having a research assistant really.

Ginger Anders:

Right. And they're the-

Melissa Murray:

It's not like having a research assistant.

Ginger Anders:

They're the foremost experts in their fields. And so you're able to draw on that and that's an amazing thing as well. By the time you stand up there, you feel all of these people have contributed to making you ready to be up there and you just have to communicate it to the court.

Melissa Murray:

That's a lot of pressure.

Ginger Anders:

Yeah. It can be, it can be. It does feel like that. It also feels like you've been well prepared too though. Right?

Melissa Murray:

It's like sitting there, I'm like, I wonder if my research assistants, when I finally send papers out to lobby, they're just like, you better bring the sombrero, like, this better be good. I hope they're not doing that. The pressure, now that I'm thinking about it, that's incredible pressure. You worked with some truly terrific lawyers who have gone on to do amazing things. One of your colleagues at the SGs office is none other than California Supreme Court, Justice Leondra Kruger, who is perpetually mentioned as a likely prospect for the Supreme Court. What are some of the best memories of being in that office?

Ginger Anders:

Gosh, there are a lot. We had a really good group and we were very lucky. There are 16 line attorneys, most people who start in the office are maybe in their early 30s, and then people stay for anywhere between five or 10 years. We were all in a similar place in life, I'd say. We hung out a lot together. I had one friend who I had tea with every morning, just come into his office. He was a Scalia clerk, we had a very different views on a lot of things, but close friends-

Melissa Murray:

But not tea. But not tea.

Ginger Anders:

But not green tea. We had, yes, we agreed on the green tea. And so every morning we'd have tea together. It was a really nice way to start.

Melissa Murray:

That's a very Ginsburg, Scalia story, except not with opera, but with green tea, I like that.

Ginger Anders:

That's right.

Melissa Murray:

I bet you're both like, that's exactly what they would have liked for their clerks, to find common ground over some inanimate substance.

Ginger Anders:

It was a really nice office too. That ideological mix is important for the office actually. Right? Because if you're about to argue a statutory interpretation case, you really want to be mooted by people who represent the full range of the court, and somebody who can tell you how Justice Scalia at the time, or now Kavanaugh or whomever, would approach those sorts of issues. The office was always very mixed

and tried to do that on purpose. We, I think took some pride in the fact that we were all personally close friends.

Melissa Murray:

Well, as someone who takes a lot of pride in personally bring your close friend at some point, I will say, Ginger played the music at my wedding. She's been there from the beginning. Godmother of my dog.

Ginger Anders:

Adorable thing.

Melissa Murray:

Yes. Yes. I'm so glad that we could have you on the show. We love when you are arguing before the court. We're really excited to watch you do your thing before the court and everywhere else. We're really excited that you were able to join us today. Thank you for helping us break down last week sitting and the sitting to come. Ginger Anders, anytime you want to come back to Strict Scrutiny, we are extending an invitation to you and you join the litany of open invitations we have. We have one out to Meghan Markle. We have one out to Elena Kagan. We have one out to Taylor Swift. We have one out to Amanda Gorman, and now we have one out to you, Ginger. So please feel free to come back any time. Thank you for joining us.

Ginger Anders:

Thank you so much. It's really great. A lot of fun.

Melissa Murray:

All right. That's all we have time for today, Strict Scrutiny listeners. Many thanks to our producer, Melody Rowell, who always takes this raw audio and turns it into something fantastic. And today she has her work cut out for her as well as Eddie Cooper, who does our music and many thanks to our Glow subscribers. If you'd like to support the podcast, please feel free to do so by subscribing at glow.fm/strictscrutiny. See you next week.