

The Short Circuit | Episode 145

Dude, where's my car? And, campaigning to disclose

Anthony: The Institute for Justice, the national law firm for liberty. Hello and welcome to the Short Circuit. Your podcast on the federal courts of appeals. I'm your host Anthony Sanders, director of the Center for Judicial Engagement at the Institute for justice.

Today, we're taking you back to the sounds of the seventies. No, it's nothing to do with Quentin Tarantino, but it does depend on when everybody was Kung Fu fighting, figuratively, at least in the Supreme Court. In 1976 and 1978, the Supremes belted out a couple of their greatest hits *Buckley v. Valeo* and *Monell v. Department of Social Services*. Those numbers are still spun today, including last week at the Sixth Circuit and DC Circuit in cases concerning civil forfeiture and campaign speech.

With me today are two of my favorite reservoir dog attorneys, Wesley Hottot, and Paul Sherman, both senior attorneys at the Institute for Justice. We'll start with Wesley who will discuss whether it's okay for a city to hold onto your car for three years without doing anything. And then move to Paul who will provide a masterclass in administrative law while the first amendment gives a cameo a la Jimmy and Pulp Fiction.

Wesley, welcome back to Short Circuit and tell us about *Monell*. Does it still apply in the Sixth Circuit?

Wesley: Well, not if you're bringing a failure to train claim, apparently, although it's important to note that the jury is still out on this case. *Nichols v. Wayne County* was decided last week after being pending almost a year after its oral argument. The sixth circuit in that case has a really strange panel opinion in which the majority declines to reach the ultimate issue, the concurrence reaches the ultimate issue, and the dissent is just blistering.

So, what's at stake in the case? Wayne County, which is where Detroit is, seized Stephen Nichols' car and held it for three years.

Why? Because when he was pulled over by police, he showed them an apparently fraudulent proof of insurance. For that relatively minor crime, his vehicle was held for three years with no opportunity to have a hearing before a judge. He sued and they promptly gave his car back once he sued--a typical government maneuver--but he sued for damages. And the question before the Sixth Circuit was whether

or not he was entitled to a prompt post seizure hearing under the Due Process Clause. As I said, the majority doesn't reach that question. The opinion by Judge Larson says that the *Monell* municipal liability doctrine applies to pattern or practice claims like what Nichols was making in his complaint. That's the idea that if a municipality has a policy or a practice that is so pervasive, that it could be attributed to the municipality, the municipality can be sued for damages without a showing, as you would in the qualified immunity context of there already being clearly established law in the constitutional question.

The majority reimagines this pattern or practice claim as a failure to train claim, pending responsibility, not on Wayne County for the three year seizure of the vehicle, but rather on an individual prosecutor who apparently goofed up by deciding he didn't want to pursue forfeiture of this, but then never informing anybody of that fact.

So, the upshot is that the failure to train claim, the re-imagined claim, that the majority finds in the complaint, they say requires clearly established law. That is, there must be a US Supreme Court case or a sixth circuit case on the ultimate question. Here, they would have to say that you had a right to a prompt post seizure hearing under the Due Process Clause.

And because that has been decided in the Second Circuit and the Seventh Circuit, arguably in the ninth, but not in the sixth and not by the Supreme Court, the majority says we simply can't reach his claims, we can't decide whether or not a prompt post seizure hearing is required.

And this is part of the shell game of immunity doctrines that today effectively shield the government from constitutional scrutiny. If you were to sue a police officer--listeners of the podcast are of course familiar with qualified immunity--the nearly impossible Hill that you have to climb to show that the officers violated your constitutional rights it's in a way that was precisely identical to how a court had held that had been violated by somebody else in the past. Now *Monell* liability, since the seventies, has stood as an exception to that doctrine, that look municipality is really has a program, a policy of violating people's rights or being indifferent to those rights, you can bring an arguably novel constitutional challenge to that, as a person should be able to. Here, the Sixth Circuit panel has invented yet another exception from constitutional accountability. The concurrence in the case by longtime judge, McCaig, actually reaches the prompt post seizure hearing question and says the Supreme Court's already decided it, in this case, \$8,850 and another case called Von Neumann.

I strongly disagree with that reading of the Supreme court case law as did the Second Circuit, the Seventh Circuit, the Ninth Circuit. But the concurrence here, one justice's concurrence, believes that there is no right to a hearing and that if the government wants to hold your property for three years without a hearing, that's their right under the Constitution.

As I said, there's a blistering dissent here. It's from Judge Moore, considered a liberal justice by six circuit standards, and she calls the majority out and the concurrence. First, effectively calling them liars for the way that they attempt to characterize the complaint in the case. She lays out the numerous detailed, pattern or practice allegations that even the majority agrees would not require clearly established law.

She attacks this idea that clearly established laws required even for failure to train claims--that is the re-imagined complaint--and ultimately, she finds the Second Circuit case *Krimstock* and the Seventh Circuit case *Smith v. City of Chicago* to be persuasive. She would have at least allowed this case to proceed.

What's at stake here is merely whether this guy gets to do discovery and make a summary judgment motion. Instead, what the majority says is not only we will not reach the constitutional issue, but Wayne County is immune from the constitutional question because of our new immunity doctrine. I think that, you know, this is a clear candidate for en banc review--that is a hearing by the full Sixth circuit, rather than just the three judges that heard this case. And ultimately, I think the Supreme Court might be interested in this as my explanation has suggested there's an active circuit split on whether a prompt post seizure hearing is required and you're certainly not as a circuit court allowed to invent immunity doctrines that the Supreme Court itself doesn't have.

Paul your thoughts?

Paul [8:07]: Yeah. I mean, this is another example of courts extending and expanding these judicially made immunity doctrines. This is really something that IJ is trying to take on now with our project on immunity and accountability because these doctrines prevent people from getting their cases heard on the merits at all. So, it's not even whether they're going to win or not, it just prevents us from clarifying these important constitutional questions that affect thousands of people.

Anthony: Wesley, one thing that, I was struck by was the importation of qualified immunity into the *Monell* context on whether someone's been, been trained--they don't call it qualified immunity, but it

sounds like the same thing-- is there a circuit split on that now? Or is it just so novel that there's not even a split, it's just some weird stuff the Sixth Circuit has said?

Wesley: No, there's no split on that question. I don't think there's any room for a split given *Monell* and the Supreme court's decisions under *Monell* since the seventies.

What seems to have happened here is that there's some stray language in a sixth circuit opinion from a few years ago that says, of course before a municipality can be responsible for failure to train, there must be an individual actor employed by the County who did something unconstitutional.

Now that makes sense as a matter of logic, but the majority seizes on that language and says, well, if the individual were going to be liable, you would have to have clearly established law that what they had done was wrong. Now the dissent makes a compelling case, that this really is focusing on one sentence in an opinion that doesn't support the overall idea. I mean, the Sixth Circuit has not had a clearly established requirement for failure to train claims. It just had some stray language that perhaps could suggest that it existed. Judge Larson is a relatively new judge, she's a Trump appointee, and I think that when Judge Moore who's, you know, been on the court since the Clinton administration, asked her colleagues to review this en banc, that it's going to get a hard look.

Anthony: What do you make of the fact it's actually an unpublished case? Even though it has these three opinions and they go into all kinds of new law and yet they, they don't want to publish it. I am not a big fan of the publish/unpublished distinction in the first place, but what do you make of that?

Wesley: Well, yeah, you're really touching on a nerve for me too. One way of viewing the unpublished nature of this opinion is the cynical view that the majority is trying to disincentivize further review either by the en banc court or the Supreme court, because conventional wisdom is that the en banc court and the Supreme court don't particularly care about unpublished opinions.

Why? Because they don't actually bind a future panel of the sixth circuit. Someone else could come in and say, yeah, this panel decided that, but you don't have to follow it, you should decide it a different way. The other way of viewing it perhaps is that because the majority views this as effectively a pleading

mistake, you've characterized your pattern or practice claim, you've characterized your failure train claim as a pattern or practice claim that they believe that it really only pertains to this one plaintiff and that other people in the future wouldn't make that same mistake.

Now, one problem with that theory is that they affirm a dismissal with prejudice. And as lawyers out there know when you granted dismissal based on a pleading failure, you're supposed to give the pleader an opportunity to fix it. If the sixth circuit is going to reimagine this as a failure to train claim, then Mr. Nichols should have the opportunity to make failure to train allegations.

Anthony [12:22]: One crazy thing about this case I think for the average non lawyer listening is that you can have your car just disappear down a rabbit hole and have no opportunity to get it back for three years, and there's nothing constitutionally wrong with that.

We will now move on to something else that seems to have disappeared down a rabbit hole for quite some time: that's this a campaign finance legislative of regulatory case that Paul is going to talk about, which I believe began in 2012, and we're only now finally getting the DC Circuit's ruling on the merits.

Paul, if you could explain where this case came from, what it has to do with what people are maybe viewing on television this week in the next couple of months and where it goes from here.

Paul: Sure. So, the case is *CREW v. FEC--Citizens for Responsibility and Ethics in Washington v. the Federal Election Commission*--and the case really highlights some of the unresolved issues that exist in campaign finance law following the Supreme court's major decision in *Citizens United vs. FEC*. Probably most of our listeners are familiar with *Citizens United*, but for those who are not, in 2010, the Supreme court decided a case called *Citizens United* and held that it is unconstitutional to limit the amount that corporations or unions can spend on political ads. Before that decision, it had been flatly illegal for corporations and unions to spend money on political ads, except in very limited circumstances. In the *Citizens United* decision, they struck down those prohibitions, but they also upheld a disclosure regime. So, a lot of the modern fight over campaign finance now is about how far disclosure can go and that's what's going on here.

So, the FEC has long interpreted campaign finance law as it regards what are called independent expenditures. So, these are ads that are not by a candidate or by a party, it's just an independent group

spending money on ads that say vote for vote against. The FEC has long said that you only have to disclose the donors who support those ads if they gave money to support a specific ad. The problem is that this has always been in serious tension with the statutory language. This is just the way the FEC has interpreted it through its rulemaking process, but this wasn't a big deal before *Citizens United* because there were so few groups that made these kinds of independent expenditures.

Now in the wake of *Citizens United* there's a lot of groups that run these kinds of ads, and what is most concerning to the folks who want to see greater regulation of campaign finance is ads by 501(c)(4) organizations. These are nonprofits that are allowed to promote or oppose candidates, and they are generally not required to disclose their donors.

The result of the FEC's rule was that these groups could raise tens of millions of dollars to run ads and they weren't subject to any of the campaign finance laws disclosure rules. The DC circuit, two members of it, decided that this is an irreconcilable conflict with the statutory text. The third member of the panel was Senior Judge Williams, who sadly passed away recently. We don't know what his view would have been but the result is that so-called dark money, which you often hear about, is going to be subject to more disclosure going forward. At least when it comes in the form of these independent expenditures.

As a statutory matter, I think it's a relatively straightforward case. I've always kind of thought that the FEC's rule on this, even if it was somewhat a sensible rule, was in serious conflict with the statutory text. What I think is more interesting in these areas of campaign finance disclosure is the question of what we're really getting from this disclosure. Does it really benefit voters? Because I think that that's something that is frequently asserted and for which there is really not very strong evidence. You know, some of the biggest makers of independent expenditures for example, are groups like the NRA or the NRA political action fund, whatever their 501 (c)(4) organization is. You know, you don't really need to know who the donors to the NRA are in order to make some assessment about what their ads indicate about candidates and whether you trust them or not. If you're an NRA supporter, you know what the NRA stands for. And if they endorse a candidate, you know how you feel about that.

It's very unlikely that your vote is going to be swayed by the identity of someone who gave \$200 to the NRA, and that's one of the really remarkable things about this disclosure regime is that if a group makes \$250 in political expenditures on independent expenditures, it has to reveal the name of everyone in

that reporting period who gave them \$200 or more. The paperwork burden, at least for groups that amass large numbers of relatively small contributions is going to be huge.

Anthony: Now, Paul, one ambiguity I see as someone who's not stewed in this area didn't get is I know these 501 (c)(4) there's also this major purpose rule that you can, you can be a 501 (c)(4) that does a lot of stuff, but you can't have a majority of your spending be just on ads. That's really what a PAC, an independent expenditure PAC should do. So, if you are a 501 (c)(4) that does other things, do you now have to disclose all your donors or only donors who give you money for independent expenditures, even if it's not for a particular one?

Paul: Yeah, so there were actually two disclosure provisions at issue in this case. One of them dealt just with contributions that support an independent expenditure. With regard to that one, the organization only has to disclose those donors who earmark funds for independent expenditures. But there's another broader provision that essentially subsumes that one and requires 501 (c)(4)s to disclose all of their donors over \$200 during the relevant reporting period. I think what we're probably going to see is that 501 (c)(4)s are not going to want to disclose the identity of donors who give them general operating funds. These are donors who may not even know about the political ads that these groups are running, may not have opinions or may even be opposed to some of the candidates that the group is supporting.

So, what I think they're probably going to do is shift a lot of their activity over to different types of groups with which they can be affiliated. One of those would be political committees--that's kind of the classic entity that's regulated by the Federal Election Commission. These groups are not 501 (c)(4)s.

These are what some people listening may have heard of called 527 groups. So those are groups that raise money, they don't have to pay taxes on the money, and they can spend all of the money on candidate advocacy, unlike 501 (c)(4)s which have to devote a majority of their funds to non-candidate advocacy.

Anthony: Wesley?

Wesley [20:20]: Sure. I mean, Paul, I just wonder, I was struck, I'm also like Anthony--not a student of this area. I was struck by the disconnect between the statutory language and the FEC rule, which apparently has been on the books since the early eighties. I just wonder if you have any insight as to how the FEC got this so wrong. Were they playing games or is it debatable?

Paul: You know, in this case, I don't think they were playing games and the FEC is accused with some frequency of a certain amount of game playing because of the structure of the commission itself. So, unlike a lot of agencies, the commission has an even number of people--there's six members of the commission. And by statute no more than three of them can be members of the same political party. So, the way this works in practice is that in the Senate, the Democrats propose three people, the Republicans propose three people, and you end up with an evenly divided commission.

And there's been a lot of criticism recently that in hotly contested cases, the Republican commissioners tend to be very deregulatory, the democratic commissioners tend to be very pro regulatory, and so they often deadlock. And the result of a deadlock is that the commission can't take action. Proponents of campaign finance reform point to that and say that the Republicans are keeping the agency from effectively enforcing the laws. I don't think that's what was happening here because when this rule was adopted in 1980, you didn't have 501 (c)(4)s running these political ads.

In fact, 501 (c)(4)s are a type of corporation, so as a general matter, before *Citizens United*, they were prohibited from running ads. The exception was from a Supreme court decision in 1986, called *Massachusetts Citizens for Life v. FEC*. In that case involved a 501 (c)(4) that took, it was either no corporate money or a very, very tiny de minimis amount of corporate money, and all its donations really came from individuals. And in that case, the Supreme Court said, well, these what came to be called the MCL groups, they can run ads. And, you know, at the time it seems sort of sensible that if you have this, you know, small 501 (c)(4) and it's not taking corporate money, really all you're interested in is who's giving the money for their political ads--you don't really care who's funding their general operating expenses. But now in the wake of *Citizens United*, you have many times more, 10 times more, the amount of money being spent on these independent expenditures, and so, the tension in the statutory text and the rule has really come to the fore.

Anthony: Another thing I wanted to ask was just, you know, I think a lot of listeners would say, what's wrong with disclosure? You know, maybe it's not that effective as you were suggesting, but it gives people the information if they want it, so why not? Why is more disclosure always a good thing?

Paul: Yeah. So, you know, disclosure is not cost-free. So even if we assume that there are benefits to disclosure--that it helps voters make better decisions, or the more sophisticated argment you hear is that it helps information entrepreneurs so people like reporters gather the really interesting information and distribute that to voters--even if you take that as a given, that has to be balanced against the costs these rules impose. One of those is just compliance costs, so if you're an organization that takes in thousands and thousands of contributions in the range of \$200 to \$500, you have to keep track of these very meticulously and disclose all of them to the FEC.

When you make those disclosures, that puts the person's name, address, occupation, and employer on the internet effectively forever. Not only is there the paperwork burden, but there's a certain privacy aspect to it. And, you know, maybe we are interested in knowing who's giving \$10,000 to support a political ad or a hundred thousand dollars or some interesting amount of money, but if someone's giving \$200 or \$300, no one can seriously suggest that that is going to corrupt the political process. I think if people have ever gone on a website, like OpenSecrets where you can look up campaign finance contributions, you know, people look up celebrities or they look up their neighbors--there's a certain voyeuristic element to it, and there can be dangers associated with this. Years ago, there was a woman named Gigi Brienza who made a contribution to John Edwards' presidential campaign. She gave I think \$300 or something like that. So, as a result, her name, address, occupation, and employer were put on the FEC's website and an animal rights terrorist group went on the FEC's website and searched people by employer for folks who were affiliated with this laboratory that did animal testing and then published their names and addresses online effectively as a hit list. And this woman learned about it when she was contacted by the FBI. There is just a social cost to having this information out there and then, you know, the flip side of it is what's the benefit of having \$200 contributors disclosed. And I frankly have never seen anyone produce a convincing argument for disclosure at that lower threshold.

Anthony [26:10]: Well, there's one group of listeners, who I don't want to leave out here. We've talked about a lot of, a lot of fun exciting subjects, one a very fun, exciting subject we haven't gotten to is administrative deference and administrative law. So, for our administrative law listeners, and I know who you are, Paul tell us about, one thing I was struck by in this opinion is, there was a Chevron analysis. And for those who don't know, Chevron is this dance that courts go through whether they defer to an administrative interpretation of a statute or whether the court does an independent interpretation. The Chevron analysis was very, very fast for something that did not seem entirely straight forward. Very complicated case, lots of moving pieces in the regulations and the statute. And yet they said, well, Chevron doesn't apply here because Congress's intent is clear after a number of pages of analysis. I take that maybe as a sign that the DC circuit is, as the Supreme court seems to be, really moving away from Chevron, maybe even faster than we thought in the past. I think, you know, if this came out 10, 15 years ago, there would be a long Chevron analysis about step one, step two. We didn't even have any steps at all. We just said, well, Chevron doesn't apply and to move forward.

Paul: Yeah, I thought that was interesting too. So, for listeners who may not be as familiar with Chevron deference, Chevron was this case from the US Supreme court, and the principle it stands for is that when courts are reviewing an executive agency's interpretation of a statute, they will defer to a reasonable interpretation of a statute. Even if the court thinks that there's a better interpretation, if the statute is ambiguous and the agency's interpretation is reasonable, courts will defer to that. Now in recent years, there has been a lot of criticism of Chevron deference in that it's essentially surrendering, what is the judiciary's province, which is interpreting statutes and it's handing it over to the executive branch. I think you're exactly right, I think if this case had been decided a few years ago, there would have been a much more extensive discussion about whether the statute was ambiguous, and in this case, the, the court just to search the statute is not ambiguous, it's perfectly clear on its face, and so therefore, we don't get into Chevron analysis at all. For people who were skeptical of Chevron deference, and I'm one of them, I think that that is probably a positive sign, but it's certainly a surprise given that these are two of the more liberal members of the DC circuit.

Anthony: Well, thanks to both of our guests for joining us. I'm going to remind you all to get engaged and thank you for joining us on the sounds of the seventies, where the good times keep on trucking.