Short Circuit 161

Anthony Sanders 00:04
Hello, and welcome to 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. We are recording this on Thursday, February 4, 2021. And in a moment, we'll turn to our wonderful guests to discuss a couple cases that have sallied forth from the Federal Courts of Appeals over the last few days. First, though, a couple reminders that many of our listeners know about. But perhaps not all. We not only have this Short Circuit podcast, but also the Short Circuit newsletter, where we read the 1000s of cases from the federal courts of appeals, so you don't have to, and every Friday give you concise and fun to read summaries of the most intriguing decisions, go to shortcircuit.org to sign up to receive the newsletter in your inbox every Friday, or go to the vault conspiracy blog, where it's later posted. Also, we are in the midst of season two of our sister podcast Bound by Oath: "no right without a remedy." Please subscribe on any podcast app or find it at shortcircuit.org. If you like that podcast, or even this one, please feel free to give us a five star review on Apple podcasts which will help the podcast find others who have not yet discovered the wonders of judicial engagement. This week, we have some old friends here who are not themselves actually old. Joining us are IJ attorneys, Tatiana Pino and Patrick Jaicomo. Welcome to both of you.

Tatiana Pino 01:39
Hey, thanks for having us.

Patrick Jaicomo 01:40
Hey, everybody

Anthony Sanders 01:41
It's great to have you both here. And we have some exciting stuff to talk about. So it's gonna have a kind of meta quality to it at first, we often promote ourselves on the medium called Twitter. And I'm sure some of our listeners spend a good deal of time on Twitter and other social media. And we have a case that's going to concern politicians using Twitter, and whether the First Amendment has anything to say about it when they block you. Tatiana is going to tell us all about that. So we'll use Twitter to get you to listen to something about Twitter, which in turn may lead you back to using Twitter some more or not if you're blocked, kind of like watching one division, I guess. But also, I know in our last episode, we discussed some international topics, and I said we'd be getting back to more domestic issues this week. Well, in our interconnected world, that's easier said than done, especially when we are connected by stateless vehicles carrying large amounts of cocaine on the high seas, Patrick will deliver the goods on that one, and how contrary to a classic Simpsons episode, what happens on the high seas can land you in trouble with the US Coast Guard. Also, before we go, we're going to circle back to something we briefly discussed before, a few weeks ago, and which is of utmost importance, fonts, which circuits use fonts you would actually want to use in your own appellate brief, and which think they're still issuing opinions on a typewriter. Okay, Tatiana, some important questions. Do you have a

First Amendment right to block me on Twitter? Do I have a First Amendment right to troll you on Twitter? And does that change if you're elected to our local waterboard?

Tatiana Pino 03:34
The answers to the first two are I can block you, you can block me. I can troll you, you can troll me on Twitter, that's all fine in games, because we're private people. Now whether if I get elected to a public office, that question is a little bit murkier. And it really will depend on how I use my Twitter account, whether I use it as a private person, whether I use it for campaign purposes, which is private, or whether I use it as like my official government platform. So it's a little bit murky, and I will dive right into what the Eighth Circuit said about that in a case called Campbell v. Reisch. This was actually a two one decision. The majority judges on the panel were Judge Morris Arnold and Steve Colloton. Arnold was the author. And the dissenter in this case was Judge Jane Kelly. It was decided last week, January 27. And it is an appeal from the Western District of Missouri specifically Judge Brian Wines. So here like Anthony mentioned, the issue is whether a politician can block her constituent on Twitter if the politician doesn't like the constituents view on Twitter. And so the facts of this case are really interesting. Basically in 2015, Sherry Reisch is a republican and she runs for state representative of the 44th district of Missouri. In her for her campaign, she creates her Twitter account, the handle is @Sherrymo44. For about a year she invites people to join her campaign, solicit donations and publicize her endorsements. And she uses hashtags like #mo44 and #teamSherry. She ends up getting elected and she tweets about her work as a state representative. By the way, she's still in office. She changed her location on her Twitter to District 44, Missouri, USA. Her profile picture was her in the Missouri House chamber. Her large photo of the banner photo was of her swearing in ceremony, and she continued to use hashtags like #mo44. But then she dropped some hashtags like the #teamSherry that she used in her campaign, and adopted other hashtags like #moallege. She tweeted about bills policy issues, pictures with other Missouri legislators, and their work her public activities, and she touted her legislative victories are, often harkening back on her political campaign promises. But interestingly, during her time in office, she didn't solicit for a single donation on her Twitter while in office, like she did when she was on the campaign trail. The tweet that gave rise to this case was that she, Reisch tweeted a picture of her opponent democrat, Marion Jones. And the tweet said, quote, “sad my opponent put her hands behind her back during the pledge and quote.” A Democratic Representative saw this and commented on Reisch’s tweet defending Jones saying that Reisch’s tweet was a low blow, and Jones is a patriot. Then Mike Campbell comes into the picture. Mike Campbell is the plaintiff here, and he's Reisch’s constituent. And what he did was saw the democrat’s comment bashing Reisch and retweeted it on his own Twitter page. Because he retweeted this comment that Reisch did not like, Reisch blocked Campbell, her own constituent, from her account. After this, Campbell was not able to see Reisch’s tweets, comment on her tweets, or otherwise join in any conversations going on Reisch’s page. So Campbell sued Reisch, claiming that Reisch violated his free speech rights because her block constituted government viewpoint based discrimination in a designated public forum. The federal trial judge here rules in plaintiff’s favor finding that the block was a free speech violation. And that Reisch cannot block people from her Twitter based on the content of their speech or viewpoint. Reisch appeals to the Eighth Circuit. And the issue before the Eighth Circuit is at the time of the block was Reisch’s Twitter used as a government Twitter account or a private Twitter account. Now, a note for non lawyer listeners here, the First Amendment prohibits only government censorship of speech. So whether Reisch’s uses her Twitter account for government purposes or private purposes, when blocking her

own constituent, is the key question as to whether there was a free speech violation. And in a two to one decision, the majority reverses the trial judge's ruling and agrees that Representative Reisch, agrees with her, and held that the block was done in her private capacity as a candidate for public office. So no free speech violation. Another note for non lawyer listeners, running for office is not a state act. It's a private activity. So when you campaign you do so as a private person. The dissent here Judge Jane Kelly, says that the evidence doesn't show that Reisch uses Twitter primarily for campaigning. Instead, it shows that she blocked Campbell to suppress speech that was critical of her conduct and her fitness for public office, and that the strengthens the inference that the conduct was attributable to the state. There's a lot of the dissent, and the majority disagree on a lot of points, but I'll just say, I was really surprised by the majority's view here. One of the main points that the majority of the dissent disagree with is on the nature of Reisch's post election tweets, the majority here focuses or seems to think that the pre election use and the post election use were too similar here to have it morph into a government Twitter account. The majority says that even after Reisch took public office, the quote, "overall theme of the tweets was that she was the right person for the job, and that the main purpose of the account was to promote herself for more electoral success down the road." They mentioned that you know her tweets harken back to a campaign promises, that she used similar hashtags. And then the majority does know that some of her tweets were about bills and official acts, but that but then to kind of just count them as well. These were sporadic or occasional stray messages, and that even then, they were fully consistent with showing voters that she was fulfilling campaign promises. But the dissent doesn't really buy that, the dissent says that, first of all, the dissent feels that the tweets are very different pre and post election. For example, you know, the fact that not a single request for campaign donations was solicited via Twitter as a politician made a difference to the dissenter, the fact that the hash tag #teamSherry was dropped, once Reisch enter political office mattered. And, and the dissent points out that the majority of the tweets once Reisch got into office were about new laws, Missouri legislators work, and about ratios, public activities, and she used it to interact with her constituents. And really importantly, and I actually agree with the dissent here. The dissent says just because a public officials actions coincide with their personal goals or career goals, doesn't make those actions less of public acts. And I think in a way that really matches reality. The dissent says it's very common for lawmakers to harken back on their political promises while carrying out their official duties. So the dissent says, so this factor doesn't merit the outsized importance, that the majority of places on it today. I, that's the reason why I was kind of surprised by the majority's view, I just, I found it to be kind of divorced a little bit from reality here, like, of course, politicians are going to talk about their victories openly. But those are still very much like that's what they do, right? They communicate with their constituents, to let them know, Hey, this is what I'm doing. But that's part of their official duties to do so. And then, interestingly, the dissent and the majority also disagree on what they call the trappings of official government, kind of signals on her page about whether this was the official government account, the majority, discounts all of that pretty much they say, well, her Twitter handle the pictures of her on the House floor. And even the political tweets are, quote, "too equivocal" to say that those tipped the scales on the side of a government account. The dissent disagrees. She says that well, Reisch persistently invoked her government position, and that this overwhelms any implicit inferences that she may have for her political ambitions in the future. And then finally, the majority and the dissent disagree over the nature of the page, the majority says that Reisch's account is basically completely private, it's, they call it a campaign newsletter, and that she can choose her audience and present her page as she sees fit. The dissent says, it goes the other way. The dissent

says that her account was used to communicate with the public. It is not at all private, the dissent mentions that Reisch's Facebook page is actually private, but the Twitter account isn't. And so there's a little bit of back and forth here. And the interesting thing, the majority says, you know, it almost compares Reisch's first amendment rights to Campbell's First Amendment rights, it says Reisch has a right to craft your campaign materials. And that right trumps Campbell's right to convey a message on her Twitter page that she doesn't wish to convey. And then, and then the majority says, though, Campbell and others may not like how Reisch runs page, the place to register the disagreement is at the polls, or at least on Campbell's own page. To be honest, I find this a little bit ironic. You know, the fact that Campbell was blocked, that means he can't tweet about Reich's tweets on his own page because he can't see the tweets, nor can even learn about his representative's actions by looking at her Twitter account. So to say that, you know, for the majority to say, well, well, Campbell can talk about all I can basically bash Reich all he wants on his own page. It undercuts that a little bit when Campbell gets blocked by Reich, right. And then the dissent's point of view, which again, I find to be more in tune with reality here is that the First Amendment violation turns on how Reich controls what she calls the interactive features of the Twitter account. And the interactive features are basically the comments section. And the dissent says that it's this comment section that is a designated public forum where, where government cannot censor speech based on a viewpoint and by blocking someone, you not only block them from viewing the person's tweets, but you block them from replying, retweeting, or even liking tweets. And importantly, it limits the blocked users ability to interact with other public users in the comment threads that appear below tweets. And the dissent, makes sure make sure to point out that Reich's own testimony at trial showed that she blocks Campbell and others because she thought they shared the view of her political opponents who said that Reisch engaged in quote, "unacceptable behavior as a public official." So under the dissent's view, this was an impermissible viewpoint discrimination and a violation of Campbell's first amendment rights.

Anthony Sanders 15:16
Patrick, how often do you block folks on Twitter?

Patrick Jaicomo 15:19
Very rarely, I've only blocked a handful of people who were becoming problematic. But I definitely share a more cynical view in these circumstances. And so to try to draw a distinction in the way that the court does here between campaign activity and activity in office seems a little bit strange, especially if you agree with the cynical view that most, if not all, the actions taken by politicians once in office are aimed at getting themselves reelected to office which you could view from a white hat perspective or a black hat perspective. But either way, if you think that's what politicians are doing, then it would seem like almost all their activities would fall into campaigning rather than actual acting as political representatives.

Anthony Sanders 16:03
Yeah, it seems like the way the majority goes about this is a little too clever by half by saying, you know, she didn't do just enough to turn this into an institutional account or, you know, a government's quote unquote, account. And then that would make the comment section into a public forum, it seems to me and I haven't read the other cases, like the case involving President Trump's Twitter account, and the Second Circuit, which is likely to be vacated. And then also the I know, there's another one out

there. And I think those went the other way, that it was a public forum. But I wonder how, you know, a way that courts might deal with this. And if it gets to the Supreme Court, how the Supreme Court can just kind of not have to engage in this issue. Is that is just to say that no matter whose account it is, the Twitter comment section just is not a public forum. Right. And I would frankly, think if you know, if, if courts want to go in the direction of saying it's a public forum, and if you become a politician, you just can't block anyone. I think that's defensible. It sounds a little odd to me. But I think it you know, as much as I love the First Amendment, it does sound a little odd to me. I think it's defensible. But this kind of lines around that the Eighth Circuit majority did really does seem problematic.

Patrick Jaicomo 17:28
Yeah, I share your uncertainty with what the right answer actually is, in these cases, but it does seem a little bit put on when courts explain Well, you know, this, this prevents someone from being involved in the discussion because they can't see the tweets or they can't retweet them. Because all of this presumes that the person who is in the crosshairs is incapable of creating a different Twitter account or opening incognito mode in their browser to go see what's being said. And again, I would, I'm like you, I haven't carefully read the other cases that addressed this stuff. But it seems odd to draw a distinction between the ability to block someone who's following you on a generally open Twitter account, versus the ability to have a private Facebook account that you can regulate the entrance into, into the group and then, you know, presumably police them to some extent.

Tatiana Pino 18:16
Yeah, I mean, interesting. One thing I found interesting, compared to the two cases that the majority cites here, which one of them is a Trump case and the other one is a case called Davidson, is that, well, first of all, we all are familiar with how President Trump used his Twitter was unabashedly public and open. But and in Davidson, the issue was the chair of a local board person, or sorry, the chairman local board was using it to for official purposes, even though he had his own private campaign one separately, so there were separate accounts there. But one thing that I thought was interesting was the court, just like, I guess, analogizing, the way that a legislator with these two other actors who, to me are more executive like, well, Trump was definitely executive and the chair of this local board is more executive. But if you look at their, if you look at the executive nature of the tweets, for example, they were action oriented, right. So President Trump would tweet, you know, let's just say I'm closing the border. Right. And, and that was much more action focused, and that became the official policy, but a legislator doesn't act that way every day, right? The legislators act are more negotiations supporting or opposing bills, trying to garner support for their view. And so it's just because it's just not as action oriented. So of course, of course, they're going to be of a different nature, but I don't know I personally think that given, I do think that her page had the trappings as the courts call them, the trappings and the signals of an official public account. One thing that I'm not clear about which I wish was clear was whether she tweeted about her personal life on this account. I think that would have definitely have made this a blurrier situation, and the court probably didn't have to rely on the campaign angle. But you know, if there's any indication that this was actually more of a, a truly personal account, I would probably feel differently, but it doesn't seem like it really was other than the campaign stuff. So, so yeah, but I just I, I think that it took, you don't expect a legislator to tweet the same as someone in an executive position.

Anthony Sanders 20:36
Right. And I mean, you know, the trickiest issue, which thankfully, I don't think is going to come up much is judges, tweeting, you know, Article Three judges, it seems like they stay off of actually tweeting, as we know, but state judges they get, they often run for office, and they do it to keep their public persona out there, which is totally understandable. And they're usually very judicious about their Twitter accounts. But you know, if a judge block someone, right, is that where judges don't say that many, you know, they don't take commands on Twitter, but how would that be looked at? There's a lot. And so because of all these swirling really hard issues, I wonder if you know how this eventually will be resolved. Unfortunately, I think this issue eventually may be resolved by the Supreme Court, just say this isn't a public forum. But we will see.

Patrick Jaicomo 21:29
This might be counterintuitive, coming from a lawyer. But I my biggest hope with all these cases is that the ultimate resolution isn't some stupid requirement for a disclaimer being put in someone's Twitter handle. You know, you people see this all the time their employers tell them to put something like these don't represent the views of my employer, and all sorts of other silly stuff that you see shared around Twitter and Facebook. But just the whole discussion that that Tatiana mentioned of well, you know, it says this, or it doesn't say that in the header. And we can interpret that one way or the other. It would seem totally pointless if the ultimate resolution here is you just have to say in your Twitter bio, these are my personal views and not the views of my public position in the government.

Anthony Sanders 22:12
Well, what we really need is congressional legislation that allows for the politicians have a little extra space where they can put that disclaimer in the 280 characters. So

Patrick Jaicomo 22:21
They can make up a form that they have to circulate somehow.

Anthony Sanders 22:26
Yes. If you if you can't tell I'm being sarcastic. Well, thanks, Tatiana. Well, one thing that you can tweet about, in addition to what we just referred to, is Admiralty law. Now in law school, a couple roommates and I would joke that when we graduated, we'd open our own Admiralty law practice, which is a fascinating area. And I really truly mean that if you guys out there who practice haven't ever looked into it, or law students who ever looked into it, but our Admiralty law practice was, we would open it up the three of us. And we had a slogan, which is “you've got a boat, we've got a case.” Now, Patrick, tell us about this guy who was sailing the Caribbean? Does he have a boat or a case now?

Patrick Jaicomo 23:15
Well, he definitely has a boat. And he definitely has a case. This is United States v. Abar. And this confronts what happens to you if you're a foreign national who's found on a stateless vessel in international waters with a hunk load of stateless cocaine, as our friend Bob McNamara said. And it's an interesting question. And I think it's one that sort of disappoints many pop culture sensibilities because as Anthony mentioned earlier, the Simpsons among many, many, many other media commentaries have talked about international waters and all the fun high-jinks you can get up to in

international waters. But this this, no pun intended, this case takes the wind out of those sails. Because as it turns out, if you're in international waters on a stateless vessel, you are actually subject to quite a bit of law. And so what this case is about is the defendant Abar was one of three men who was found on a quote, *go fast boat*, which seems like some strange Google translation of another language into English. I don't know why they don't just say speedboat. And if go fast boat means something else. I couldn't figure it out. But these three men were found on a go fast boat, about 200 miles south of Puerto Rico in the Caribbean waters that belong to no nation about halfway between Puerto Rico and Venezuela.

Anthony Sanders 24:38
Although in the US an economic enterprise, right, which is has kind of a quasi status under international law.

Patrick Jaicomo 24:48
So they didn't mention that in any way. In the opinion.

Anthony Sanders 24:51
I think it's in the first footnote, okay. Say like, it doesn't matter. We're gonna assume it doesn't matter.

Patrick Jaicomo 24:56
Yeah, they treat this all it's just international waters and all the discussion takes placed in the context of what happens when you're found in the waters that are not controlled by any nation, and you're on a vessel that's not flagged under the flag of any nation. And so these three were found on their dead go fast boat about 200 miles south of Puerto Rico, strangely enough, spotted by a British frigate, a helicopter actually sent out from a British frigate spotted this dead boat, and then got the US Coast Guard involved who showed up and boarded the boat and found the three men with all the cocaine, and found that the boat was also stateless. It was not flagged under any nation, and as many people went, may know, and I know very little about this subject other than having read this case, flagging of ships is almost like setting up corporations. And so typically, depending on the laws of your country, and the country you want to flag under, you can flag a ship under any flag. And so for example, a lot of cruise ships, even though they might be connected with a nation, and the opinion itself is actually kind of sparse on discussions of where these guys were actually from, it suggests the defendants from the Dominican Republic, but doesn't really say so. Specifically, it also suggests that the boat was coming from Venezuela, but it doesn't actually say that anywhere. And so we're left with the situation of what happens when the US Coast Guard finds you in international waters on a stateless vessel with a bunch of cocaine. And the disappointing answer to perhaps anarchists and sea setters everywhere, is that you're still on the hook, you can be charged under American law and go to prison for a long time, because you had that cocaine, and ultimately, the conclusion which draws upon all sorts of case law from the 19th century when piracy was the issue de jour and the first circuit, which Fun fact, so the first circuit, you're thinking, well, we're about 200 miles south of Puerto Rico, but way, way, way away from mainland USA. So of course, if you get caught doing something bad, you'll end up in a courtroom in Boston, Massachusetts. And that's because the First Circuit covers Rhode Island, Massachusetts, New Hampshire, Maine, and then naturally Puerto Rico. And a question that I had, and none of this is brought up in the opinion was basically where this boat was found is equidistant from Puerto Rico and

the Virgin Islands. And the Third Circuit has jurisdiction over the Virgin Islands. So I don't really understand what went into the decision from the coast guard to take them to Puerto Rico, as opposed to the Virgin Islands or whether that is relevant to this issue, but it didn't come up. So we have this Boston court deciding that if you're found in international waters on a stateless vessel with cocaine, you can be charged under US law. And strangely and very counter intuitively, the explanation is that when you're on a stateless vessel, under international customs, you're subject to the jurisdiction of any nation that has reason to bored you under this concept called the right to visit, which essentially says that any warship or law enforcement ship of any nation is able to, quote unquote, visit, any ship that it believes is stateless. And so here that visitation occurred after the British tipped off the American coast guard, who then boarded this ship and found all the cocaine. And because of this right to visit, that means that this stateless vessel is subject to the jurisdiction of whatever state visits it and that essentially, is the big distinction between the majority and a concurrence in this case. So the majority says, this issue of jurisdiction is simply decided by several factors. One is if you're on a stateless ship, you can be subject to the jurisdiction of any nation, and there's a bunch of flowery old timey language that discusses y our protection on the high seas and your exposure as a potential pirate if you're, if you're operating stateless vessel and all this sort of thing.

Tatiana Pino 28:42
Was it just me or did you also read those quotes in a pirate voice?

Patrick Jaicomo 28:48
I was reading them in more of like an old timey voiceover with like, from a fancy wigged, man.

Anthony Sanders 28:53
I had an old timey voice. I guess I was picking one side of Pirates of the Caribbean, the old timey English and not the pirate side.

Patrick Jaicomo 29:00
Right, exactly. Well, this is the you know, because these are statements made by the guys with the feather pens, who are sending you to the gallows. They're not the statements made by jack Sparrow. So ultimately, the first circuit decides this case, it's strange to me, too, that this is such a murky issue, you'd think that this particular issue would have been absolutely nailed down through the course of the 19th century. But essentially, the First Circuit says that the United States has jurisdiction over stateless vessels anywhere as long as the United States is the entity that is boarded and seizes the vessels. And so the concurrence sort of disagrees. And it adopts a position that apparently the United States took in the case, which is just the United States has jurisdiction to prosecute you if you're on a stateless vessel anywhere in international waters anywhere on the planet, without regard to whether the United States was the entity that boarded or seized you. And the concurrence hangs on to an 1820s case from the United States Supreme Court that at least say Just this is the breadth of how jurisdiction works in this context, that case involves piracy charges and a murder charge committed on the high seas. But essentially, it also suggests then that you could theoretically be under the jurisdiction of every single country if you're on a stateless vessel in international waters. And so just for example, if you committed some sort of petty crime that maybe landed you in jail for six months in the United States, it's not clear to me why then you couldn't be charged in the United Kingdom, Canada, Venezuela, Liberia, and

everywhere else if that's what those countries wanted to do to you. And maybe that's the answer. I don't know. But it's certainly an interesting question.

Tatiana Pino 30:40
But, Patrick, it like this is all for a bigger purpose, right? Like, isn't there a consensus among the international community that it's a good thing to be associated with a particular state, like there are a lot of, you're actually protected? In many ways, if you do associate, so to sort of, I think disincentivize, the disassociation, like, it kind of makes sense to me that that it would be that broad of possibility that any state, like if you don't declare it, good luck, because anyone who finds you, you're going to be subject to that. And actually, I find it really, I actually find this really humorous. And the opinion, the majority actually seems to be giving advice to people who do international drug traffickers. And they said, if you're on the high seas, and you want to be prosecuted by your own country, should you be caught, make sure that you're sailing under that country's flag? Right. So I love that I love like the practical, like the practical note here of the court.

Anthony Sanders 31:40
And it's not that hard to get, you know, a flag of convenience like Liberia, like you said, or Panama. I mean, that's what most, you know, knowledgeable sailors do.

Patrick Jaicomo 31:51
Yeah, yeah. So to Tatiana's point, there's definitely like a Leviathan angle here where all the all the governments of the world are happy to agree that if you don't submit yourself to the jurisdiction of one of them, you're really out there in the open, which, you know, is a concept that flows from the idea of being an outlaw and all the rest of it. And I think this case is particularly unique. Because as Tatiana said, you know, the court said, hide under the flag of some country, or you'll be exposed to the , the sort of all of them essentially. And this is a unique case, because it's a, it's not, it's not disputed that this was a stateless vessel. So you could see a situation where there might not be a proper registration, but you'd say like, well, we're coming from Venezuela, this is a Venezuelan boat or something like that. Or like Anthony said, you'd have the wherewithal to have asked for some sort of flagging mechanism from another country. Of course, if you're just using a speedboat, to traffic drugs through the Caribbean, you're probably not too worried about those sorts of niceties. And you could if you really thought about these questions, make the calculated decision that you'd rather be in a US prison than in a Venezuelan prison. I don't know if any of those considerations went through the minds of these guys that were found on this particular boat. But yeah, it's definitely interesting.

Tatiana Pino 33:04
That reason is like a pretty interesting point. I think, actually I think that concurrence makes this point about notice, right? Because the majority says, Well, everyone pretty much in the world is on notice that international drug trafficking is a serious crime anywhere. So you know, at your own risk, you do it. But what people probably don't have notice of is the holding in this case, which is if you fly under, sorry, if you sail a stateless boat, you're going to be subject to the law of any country that finds you. I mean, really, who, what drug traffickers are reading these opinions to know that and to have the wherewithal to think twice, like, Oh, I should buy a flag, or at least say I'm from a say that this boat belongs to a country if I'm caught.

Anthony Sanders 33:49
All right. And I mean, the real, the real issue is, yeah, what if it's something that is illegal in some countries and not others?

Patrick Jaicomo 33:55
Right. And I think that that's a good point that Tatiana raises, because, well, two things. One is that for whatever reason, and I don't fault the attorneys in this case, because Holy smokes, this is a unique issue to have to argue, but for some reason, the issue of due process wasn't raised on appeal, which is this concept of fair warning. And like Tatiana said, I think it's quite a stretch to assume that somebody in the situation of the defendant of this case would have fair warning that, you know, 200 miles out in the middle of the ocean far away from anywhere, but certainly far away from the mainland United States that you would have fair warning that the United States would arrest you and charge you with crimes under American law. So that's, that's the first piece of the puzzle, and I completely lost the thread on the second piece. So

Anthony Sanders 34:40
Well, to your point, Patrick. I mean, I think, you know, these running drugs, which I've never done in the Caribbean, but I would think if you are a drug runner in the Caribbean, you know that the United States as an interest in that, has territories in the area, but what if you know what, if you were in the southern Indian Ocean, for some reason and a United States vessel just happens to come by on its way to the Persian Gulf or somewhere like that and picks you up. There's not a lot of notice there, you know, there may have been if there is an Indian vessel or Madagascan vessel, but it is pretty, it is pretty wide that, that, that reasoning there. But I think part of that is to what Tatiana was talking about. You know, the one thing I in the brief amount of international law I learned in law school, is that the international community of states really don't like people getting out of that community. So whether it's a seasteader, and I know that some good libertarian friends who are interested in that as well as your seasteading, or, you know, someone just getting out of being part of a nation, there's this huge, there's this huge presumption in international law that you can't do that. So obviously, one way to try and do that is just have a boat out in the ocean that doesn't have a flag. So I think that the thinking here, and it seems like that if you look at international law outside of the United States, that pretty much points in the same direction, at least that's what the opinion says is that if you try and do that, you're going to incur a lot of liability. And that could be that you could be picked up by any nation on Earth, I mean, North Korea, who knows, for violating their laws. So you really need to have a flag on your boat, which is itself a violation of international law. This I mean, this goes back as that as they, as they pointed out, this goes back to the Constitution itself, which, you know, Article One, section eight, saying what Congress's various powers are, doesn't have a lot of powers that are exercised today, right, which is the whole argument about the Commerce Clause. But it does say that Congress has the power to define and punish piracies and felonies committed on the high seas and offenses against the law of nations with today, we would call international law, it's right there in the Constitution that, you know, some stuff like this can be regulated. So all of that, you know, comes to this point that if you try to get out of the international community, you, you really don't have a lot of options. One other point on this is, you know, one nation that kind of has fallen out of the international community in recent decades is Somalia, where they essentially didn't have a government after 1991. And I know at various times

they've tried to reestablish it, and that country is kind of fragmented. But an interesting story there is they had a fellow ambassador to the United Nations when the government fell. And he just stayed in New York at the United Nations for years. And he would vote, he would participate just like other delegates do the United Nations, even though his government was gone, and the warlords are running the country, and the UN didn't kick them out. Because the UN, this club of nations was like, you're part of the club, we're happy to have you stay here, even though it doesn't make a lot of sense. And so please stay part of this community, because this whole statelessness, you know, leads to pirates, or monkey knife fights on board ships, or whatever it may be.

Patrick Jaicomo 38:30
Yeah, that was I mean, that was what I was getting at with this concept of Leviathan, just saying, like, you better join somebody, because otherwise everybody's going to eat you alive, you know, and we saw this, the question then becomes is like, well, what does happen to a government in exile, I mean, Juan Guaidó and all this stuff at the State of the Union a few years ago, or whenever that was with Venezuela. Those are interesting situations, of course, at least Venezuela as a concept still existed in that in that context. But I did remember this, the second point in the thread from what Tatiana said, which was this issue of drug trafficking, because in all these historical concepts, there's this issue of universal jurisdiction over certain things. And one of those things is murder, because everywhere thinks murder is bad. Drugs don't fall into the universal jurisdiction concepts historically, are in the treatises, but the court kind of just says, Yeah, well, you know, it's not exactly the same, but pretty much everyone thinks drugs are bad, right? And, and I wonder what's going to happen, you know, in a situation where, for example, the United States, fingers crossed, decriminalizes or legalizes marijuana, for instance. Now, these guys had cocaine, not marijuana, but you could easily see situations like that, where you stop a drug trafficker, and they've got a ton of marijuana on the ship. Well, how do you argue that there's universal jurisdiction for something like that if a country like the United States or Portugal or any other country has said, well, that's not illegal here? And I don't know the answer and I shiver when I think of the consequences for space drug trafficking and what sort of issues this precedent will create in the next several centuries as we venture beyond the earth.

Anthony Sanders 40:17
Well, there's a lot that can be said about that, including, you know, getting a US flag and what tariffs you have to pay on your importation of cannabis. But let's go to the most important matter for today's podcast. Fonts. So Tatiana, and Patrick, and I think I've discerned opinions on this. But for lawyers out there practicing, you know, a lot of you probably use Times New Roman, because it's what Microsoft Word wants you to use. That it's just the, or, you know, whatever the default is on your Microsoft Word program. It's, it's easy. We're used to it, it's in newspapers. So I get how it's used. But the federal courts of appeals, some of them just go the easy road. Some of them however, realize that Times New Roman is not made for, is not made for documents, like briefs, if you read a book, it's not going to be in Times New Roman, it's going to be in a pleasing, serif font such as century or other fonts like that. And so I thought we would just take a quick review of what the fonts are around the federal courts of appeals, and how maybe this reflects the legal profession in trying to modernize itself and use various fonts. So as Diana Simpson noted, an IJ attorney a few weeks ago, the First Circuit, which was Patrick's case, today, they use courier, which is like an old fashioned monospace font. Yes, we all agree. That's a bad idea.

Tatiana Pino 41:42
I couldn't even read it. I had to look, I went on Westlaw, and I read it through Westlaw, because I refused.

Patrick Jaicomo 41:46
I could make it work. But it for those at home who aren't familiar, it's kind of like the typewriter looking font, where all the letters are equally spaced apart,

Anthony Sanders 41:54
And there's no spaces everywhere. I know it has a benefit for submissions to courts that they can count lines and have it be all the same if you have like a word count. But other than that it has no purpose. Now the Second Circuit and the Seventh Circuit, and much of my prejudice, by the way comes from the Seventh Circuit's excellent practice guide which talks about some of these issues. They use Palatino which you can I'm sure you can find on your Microsoft Word, your word program. The Fifth Circuit recently changed its font and it now has equity font which is a nice and fancy font. I do say so myself, so you should check out a Fifth Circuit opinion for that a recent one, the DC circuit and the Supreme Court you century schoolbook. Which is a nice solid serif font, meaning it has the serif so we won't go into that, on the characters. And then the odd thing about the Supreme Court is the Supreme Court's ortis orders use this weird non serif font called lucid sans if I'm pronouncing that correctly, and I'm not sure why there's that distinction I'm sure it has some historical basis. All the other circuits from what I can tell although some look a little funny use Times New Roman and if any listeners think that's wrong, feel free to tweet at us or email us we love getting responses especially about font but I think that's the lay of the land on the federal courts of appeals. And Tatiana I know you are actually not that down on Times New Roman, which it seems like many of us can you tell us why.

Tatiana Pino 43:46
I like times new roman Well, I confess, it is a creature that has grown on me. As to the point that I mentioned at the beginning, we just use it all the time. I mean, so it's become my default I even when I'm typing something on a personal for myself, I do it in Times. And one thing that I really love about it is that you can, this is so dorky, but you can actually tell when periods are italicized in times pretty clearly or at least I've trained myself to spot those. They're smaller, they're closer to the last letter. It's so dorky, but I just don't find it as easy on other fonts. So I'm at times new roman gal through and through.

Anthony Sanders 44:26
Well Spoken like a true blue booker and cite checker as well. So yeah, that that that does speak well of your legal habits.

Patrick Jaicomo 44:35
I'm definitely a century school book man myself. I don't have disdain for Times New Roman. I just think the century family of fonts looks nicer. And that's actually what the Supreme Court requires for its submissions. I'm about to say something that I think all the reporters' offices across the country would be horrified to hear but I think it would be fun to essentially allow the authoring judge or justice to select their preferred format for releasing these opinions, you know, I don't understand why we would have

sort of dis-uniform, dis-uniformity among the circuits, but not within the circuit. So it's like every First Circuit case has to look in this terrible way. And they know what they're doing because they've got a decent looking font for the actual title of the court itself at the top of the opinions. I just want more freedom for everyone.

Anthony Sanders 45:27
Well, thankfully, most courts allow you little freedom in your brief, although I know some courts require a certain font, but that that allows us to pick and choose and I have I've grown over the years to warm to a Bookman Antigua is what recently but century is a is a good one as well.

Patrick Jaicomo 45:49
I've seen more of from the circuit courts of requiring font size than actual font style. So if memory serves, I think the Sixth Circuit requires 14 point font in brief submitted to them. You can guess why , I won't suggest anything.

Anthony Sanders 46:03
No, and we're not going to go there. And we're not going to go much else to be truthful. So whether thank you for joining us today and whether it's about fonts or other walks of life, we ask you all once again, to get engaged