Short Circuit 130

John Ross 00:06
Hello and welcome to short circuit, your podcast on the Federal Courts of Appeals. I'm your host John Ross, joined today by IJ attorneys Michael Bindas. And Paul Avelar. Before we begin, I want to give a quick update on a case we discussed in February at our live show at the University of Georgia, the case is Pitch v. United States and it concerns grand jury testimony about the lynching of two African American couples in Georgia in 1946. No one was ever prosecuted, and the perpetrators remain unknown. However, there is a trove of witness testimony to the grand jury that's remained secret, and historian Anthony Pitch sought access to those records. And last year, the 11th Circuit ordered them to be released. But here's the update. The 11th Circuit sitting en banc has now issued a new decision reversing course and keeping the records sealed. We'll put a link to that decision in the show notes, as well as a link to Anthony Pitch's book, which was released in 2016. And with that, Paul, let's move to the 11th circuit for another unfortunately sordid tale.

Paul Avelar 01:09
So this is this first case is one that's both generally interesting. And one that I find personally compelling because my first ever legal work was as a student volunteer representing Victims of Crime when I was still in law school. The name of the case is In re: Courtney Wild but everyone's probably going to likely know it as the Jeffrey Epstein who definitely did not kill himself case. This is a case that's been going on for 12 years. And there are three opinions here that span 120 pages. So we're going to have to summarize quite a bit. Jeffrey Epstein, we all know who he is and what he did. And in Miss Wild was one of his was one of his victims. Between 2005 and 2007, Florida police and the FBI conducted an investigation into him. Every time a victim of Epstein's sexual abuse was identified, she was sent a letter saying that she was protected by the Crime Victims Act, which is a 2004 statutory enactment which gave Crime Victims for the first time in the federal system, though many states have enacted statutory and constitutional victim's rights long before this. By May of 2007, the US Attorney's office had completed an 82 page prosecution memo, it had a 53 page draft indictment against Epstein and his co conspirators, charging them with numerous federal crimes of sex trafficking minor victims. And while all this is going on, Epstein's defense team is meeting with the feds trying to convince them to not bring federal charges and that's not going anywhere until September of 2007 when two things happen. First, Florida brings state charges relatively minor in state court. And suddenly for some reason, the feds start talking about agreements with regards to Epstein's federal crimes, including a non-prosecution agreement in which the feds would agree to not prosecute Epstein and his coconspirators. In return for Epstein pleaded guilty to two state prostitution solicitation charges where he'd get an 18 month sentence. And they settled on this non prosecution agreement. And then the feds and Epstein's lawyers worked for months on how to hide this agreement from Epstein's identified victims. The agreement itself says it's not going to be a public record. There's emails going back and forth, saying "how do we keep this out of out of people's hands?" The state court has never informed about this agreement. And it's not until months later after Epstein has agreed to this state court plea that the victims then find out that the feds have done this and sue under the Crime Victim's rights act to have their rights respected.

John Ross 04:17
Paul, so tell us more about the Federal Crime Victims Rights Act. What is that? What does it give to victims? What protections?

Paul Avelar 04:25
So the Crime Victims Rights Act was enacted initially in 2004. It was a bipartisan bill. Lots of have good feelings about it, and it includes specific enumerated rights that officers and employees of the Department of Justice are to make their best efforts to protect and the Crime Victims Rights Act also provides procedural mechanisms for crime victims to assert their rights in federal court. And among these rights, there are there are several rights, is the right to control with federal prosecutors, and the right to be treated with fairness and so Miss Wild suit in federal district court says, “You did not give me my right to confer with federal prosecutors and you did not treat me with fairness because you hid this non prosecution agreement from us.” And the question presented ultimately, after years of litigation, ultimately presented to the fifth to the 11th Circuit here is, do these do victims have these rights before the feds bring formal charges? Because again, the feds never brought charges here, they entered into a non prosecution agreement. And this is a statutory interpretation case. And there are three opinions. It’s a two-one majority split. And the majority admits, look, there's no such textual, temporal limit on these rights, but we interpret them to apply only after charges are brought. Part of this rationale is that some of these rights can only exist after charges abroad because they talk about rights of victims in proceedings. And so the court assumes that all of the rights must have a similar limit. But the real issue for the majority here is the slippery slope fear that victims would somehow interfere with law enforcement, open up the floodgates to lawsuit seeking to make prosecutors consult with them, before they you know, quote, “conduct a raid, seek a warrant or conduct an interrogation or otherwise, you know, somehow derail a criminal prosecution, criminal investigation.” And the other fear is that victims’ rights would infringe on prosecutorial discretion to determine whether a crime has been committed, whether there are victims, and would somehow victims’ rights would exert enormous pressure on the government's charging decisions. But as the dissent points out, these are slippery slope arguments, which are just arguments based on assumptions about empirical facts about what might happen. And as the dissent points out, the Fifth Circuit had interpreted these rights to apply pre charge and this parade of horribles hadn't happened. And what of all the states that have the same rights? What's their experience been, and this is simply not discussed by the by the majority. One other thing that I thought interesting to the court didn't discuss was that in 2015, after the events of this case, but before the 11th Circuit's opinion here, Congress amended the Crime Victims’ Rights Act to add specifically the right to be informed in a timely manner of any plea bargain or deferred prosecution agreement. That now maybe this amendment was retroactive or not, it's not discussed at all, but at least it tells us something about how to interpret the rest of the Crime Victims Act. Because non prosecution agreements, deferred prosecution agreements are clearly pre charged. So Congress didn't think that the charge/pre charge/post charge line was necessary to the statute. So it'll be interesting to see if this goes up on cert, and whether the Supreme Court takes it because there is obvious conflict here between the 11th and the Fifth Circuit's in the way they've interpreted this.

John Ross 08:20
Paul, if Courtney Wild had prevailed in this case, what were that what were the remedies that she was seeking?

Paul Avelar 08:27
So she initially sought a number of remedies way back in 2008, including essentially the right to undo the non-prosecution agreement until after she was allowed to consult with the federal prosecutors. She also saw it as prospective remedy and more training required for prosecutors, her attorney's fees, a whole bunch of things. And because this case dragged on for so long, it was complicated further, when Epstein definitely didn't kill himself while in jail, because that mooted some of the relief that she could have sought. You can't charge a dead man with more crimes. And so her ability to undo the non-prosecution agreement at that point essentially went away. And so the rest of the case was really about forcing the prosecutors to actually abide by the plain terms of the of the Crime Victims' Rights Act.

Michael Bindas 09:31
I think this case is really a good illustration of some of the difficulties that courts often face in how to interpret and construe statutes. Yeah, as Paul mentioned, the majority made much of the fact that while six of the eight rights in the Crime Victim Rights Act, specifically presuppose the existence of ongoing criminal proceedings. The two that Miss Wild was asserting do not. Now the majority took from that that, you know, while the two that she's asserting do not require ongoing criminal proceedings, we need to read those in the context of the other six and read in context with those will assume that all of these rights require some ongoing criminal proceeding in order for the victim for those rights to attach the dissents as well, the fact that those two that Miss Wild is asserting don't require some ongoing criminal proceeding is an indication that Congress didn't intend them to require an ongoing criminal proceeding that those rights could attach before the proceedings commence. And so I think you see the majority and the dissent, really struggling how to deal with this language. And, you know, another great indication of this, or the difficulties that the courts face with interpreting these statutes is the venue provision here. A victim proceeding under the Crime Victim Rights Act, has to assert her rights in the district court in which the defendant is being prosecuted for the crime, or and, this is the language in the statute "if no prosecution is underway in the district court in which the crime occurred." Now, the majority, Miss Wild, of course, says the fact that there's venue, even if no prosecution is underway, means that a victim can assert some of these rights before the prosecution has commenced. The majority reads that to say, well, that could also mean that the prosecution has already completed and therefore there's no prosecution underway anymore. And the victim can assert these rights kind of on the tail end of the prosecution. The dissent says, well, "who reads underway in that manner?" Right? When you say something like the baseball game is not underway. That means it hasn't started yet. It doesn't mean that it started finished. And it's not underway. So again, the court, you know, both sides here, the majority and the dissent are really struggling with at the end of the day, what is really just an artfully worded statute, or at least an ambiguous one. And it's a great illustration of the difficulties that courts struggle with in interpreting unclear statutes.

Paul Avelar 12:17
You know, one thing that the dissent really makes a strong point of, and I do think it's worth noting here, again, is that until the victims brought this lawsuit, the prosecutors internally had said, you have these rights have already attached because we've identified you as victims, they told that to the victims directly. They said that to Epstein's defense team while these quiet negotiations are going on, it's only after these rights get asserted that the prosecutors then change their tune and say oh these rights

never attached in the first place. And, and it's easy to be cynical about this, but you really do wonder if anyone who wasn't a federal prosecutor could get away with that sort of change in position.

John Ross 13:04
Okay. And with that, we'll move on to the next case, which comes out of the Fifth Circuit, Michael?

Michael Bindas 13:10
Yeah, this case, it's called Cascabel Cattle Company v. United States of America, decided in the Fifth Circuit, and it concerns a quarantine, not the recent unpleasantness with the COVID virus but rather a menace of several years ago, the cattle fever tick outbreak of 2014. In 2014, the Texas Animal Health Commission, as part of a joint effort with the federal government, declared a temporary fever tick quarantine. It required ranchers, including the plaintiffs in this case, to submit their cattle for inspection and treatment to eradicate these fever ticks. That is what led to the plaintiff's loss in this case. They alleged that during this quarantine, the government caused the death or illness of a great deal of their cattle, at least 14 because of negligence in the roundup itself, and then quite a few others in the negligent application of a pesticide called Co-Ral that was used to treat the cattle for fever ticks. The plaintiffs who lost the cattle brought suit against the federal government running into the issue of sovereign immunity, of course, right, the United States can't be sued unless it consents to be sued. There is a statute called the Federal Tort Claims Act which authorizes suits against the government for certain Tort Claims. And therefore, it kind of provides a waiver from sovereign or waiver of sovereign immunity. But the problem is for these plaintiffs that there is there are 13 statutory exceptions in the Federal Tort Claims Act. One of them is for any claim for damages caused by the imposition or establishment of a quarantine by the United States. And the question in this case was whether or not the damages, the claim brought by these plaintiffs, did or did not fall within that quarantine exemption to the Federal Tort Claims Act. The plaintiffs said it did not fall within that exemption because their claim was not caused by the imposition or the establishment of the quarantine itself, but rather activities or negligence in the conduct of activities that occurred during the course of the quarantine. The government said no, this was a direct cause of the quarantine, and therefore, it falls squarely within this exemption to the Federal Tort Claims Act. And the Fifth Circuit sided with the government in this case. They determine that it did occur in the imposition of the quarantine and in interpreting the word imposition, they turned to a an Oxford English Dictionary edition from 1933, the year before Federal Tort Claims Act was established or adopted. And they read imposition to mean "the manner in which the quarantine is carried out and enforced." And they said that this injury occurred in the carrying out and the enforcement of the quarantine. And as for causation, they determined that the causation requirement in this exemption is proximate causation, did the damages kind of reasonably occur as a result of the imposition of the quarantine? Or rather, were they just some kind of incidental harm that that happened during the quarantine and as an example of that type of incidental harm, which would not fall within the exemption. They offered the example of a motor vehicle accident where a government official during the quarantine negligently drives a motor vehicle causes some injury that would not be caused by the imposition of the quarantine, but rather just a mere incidental injury. This was not that case. However, the Fifth Circuit concludes this. In this case, the injuries were caused in the imposition of the quarantine. And therefore, they felt squarely within the exemption and no recovery for the plaintiffs.

John Ross 17:26
You kind of feel for the ranchers in this case, because they're alleging anyway, that the government negligently rounded up cattle like how can you mess up rounding up cattle in a way that winds up killing and injuring a bunch of heads of cattle? That seems like something you ought to be able to do properly? Paul, what are your thoughts?

Paul Avelar 17:48
Well, you ought to be able to do it properly if you're a rancher. But if you work for the government, you're probably not a rancher, and you may not know what you're doing. And so, you do things negligently. And this is one of the things that we talk about here at IJ a lot, I think is how hard it is to hold the government accountable when it messes up. And here, these ranchers aren't even allowed to try to sue the government. They are out because the government has sovereign immunity, and they haven't waived sovereign immunity. So, it doesn't matter how badly they messed up, can't sue the government.

John Ross 18:24
Michael, this is kind of a topical case at this time. Are there any broader lessons here?

Michael Bindas 18:31
Well, I think that to the extent the federal government does anything that might result in monetary injury to citizens during the course of the current COVID crisis, you can pretty well rest assured that anyone seeking to recover for that injury is probably going to be out of luck. As bad result as this is for the cattlemen. I don't think it's any surprise that the Fifth Circuit came to the conclusion it does for the point that, you know, for the reason that Paul mentioned, it's very difficult, almost impossible to recover monetary damages from the federal government. And, you know, I don't think again, it's any surprise that the Fifth Circuit came to the conclusion that did hear,

Paul Avelar 19:20
You know, I've always been troubled by this notion of sovereign immunity. And I'm stealing from lots of other people who've said this before, but that doesn't make any sense in in America, it's really governmental immunity, because the government isn't sovereign. The people are sovereign. And so what does it mean to have sovereign immunity? I understand that. That's a concept that comes from common law. But England it has a monarch who is the sovereign. We don't, we fought a revolution, so we didn't have that sort of thing here. How does the term sovereign immunity really makes sense and this is a point that a number of state courts have noted in essentially determining that sovereign immunity no longer exists in those various jurisdictions?

John Ross 20:00
Okay, and with that, we'll move on to our last case which comes out of the Seventh Circuit, Michael.

Michael Bindas 20:05
Yeah, this case is called O'Brien v. Village of Lincolnshire, Illinois. And it involves an attempt by a couple of Illinois unions to kind of go jujitsu with the U.S. Supreme Court's 2018 Janus decision, which was a victory for non union members. The unions in this case are trying to use it to benefit the unions

themselves. And Janus, folks may recall was a case in which a non union member Mark Janus was forced to pay agency fees to the union. And those fees in turn were used to take an advocate positions in collective bargaining by the union that Mr. Janus found objectionable. He brought a First Amendment challenge to his requiring to be paid or his having to pay these agency fees. And the Supreme Court agreed with him, holding that kind of compelled speech is being compelled to fund the speech of the unions with which he disagreed, violated his First Amendment rights. Aha says the unions, we can turn our loss in that case into a vehicle for advancing our own agenda. And that's what they tried to do in this case. Two unions in Illinois and some taxpaying union members brought a lawsuit against the Village of Lincolnshire, claiming that its use of tax money to pay membership dues and fees in an organization called the Illinois Municipal League violated the union and union members First Amendment rights of free speech and free association. This, Illinois Municipality League or Municipal League is a nonprofit association of municipalities throughout the state. It advocates and lobbies on issues concerning municipal governance. The unions and union members in this case claimed that under Janus they're being compelled to pay taxes that in turn were used to fund messages of the league with which they disagreed, was a First Amendment problem in spell squarely under Janus and a particular concern to the unions was the fact that the league was advocating municipalities to support then Governor Rauner's turnaround agenda which took positions contrary to the union's views on issues such as collective bargaining, prevailing wage requirements, Right to Work laws. The district court dismissed the case and the Seventh Circuit affirmed that dismissal. It began by noticing or noting that Janus involved compelled funding of private speech in that case, it was Mark Janus being compelled to fund the speech of unions. And the Seventh Circuit noted that Janus didn't address the distinction between compelled funding of private speech and compelled funding of public speech. And that is a distinction with a difference because it's well established that that compelled funding of government speech is typically not actionable under the First Amendment. So the court that Seventh Circuit turned to a different Supreme Court case to determine “is this government or is this private speech” and that decision was a case called Johanns vs. Livestock Marketing Association. It involves a program that was a federally created program to market and advertise beef production and consumption in the United States. Listeners of a certain vintage may recall the marketing campaign beef, it's what's for dinner? That was a product of this program.

John Ross 23:53
I thought it was what's your beef?

Michael Bindas 23:54
That was Wendy's with the little old lady. But these programs are common. I mean, think “the got milk?” ad is one of these programs, the state where I live, Washington, has similar programs for everything from what you know, promoting Washington beer to Washington lentils to Washington apples, they're very, very common. And the Seventh Circuit looked to that decision to determine whether or not as I mentioned, this was public or private speech. In that case, the board that came up with the promotional and advertising material, “the beef, it's what's for dinner,” was comprised of private member's, industry members. And therefore, the plaintiffs in that case maintain that it was compelled funding of private speech. The Supreme Court in that case said “no that these members are in in large part appointed by the Secretary of Agriculture, they're subject to the Secretary of Agriculture's recall. And the secretary at

the end of the day has ultimate decision making on whether to approve or disapprove any particular message that's being put out there." And in light of that, the Supreme Court said that it is government speech, not private speech. And it doesn't matter that the government is seeking the assistance of some private persons or some private actors and putting that speech together at the end of the day, who has the approval over the speech and the message it conveys? That was the government. Government speech, again, it's difficult if not impossible to challenge compelled funding of government speech, and therefore the plaintiffs in that case lost. And so the Seventh Circuit in this case applies the Johanns decision to the facts here and comes to the same conclusion that the Supreme Court did in that case. They say that this Municipal League is a voluntary association of municipalities across the state. It is authorized by Illinois statute municipalities are authorized to join it. Under this statute, the Village of Lincolnshire, voluntarily joined it. The bylaws of the organization, give the member municipalities control over the messaging and the advocacy that the league kind of promulgates. And in that light, this was government speech, it didn't matter, as it didn't matter in the Johanns decision that, you know, the Municipal League might be categorized as private as opposed to public, really what the court was looking at is whose message was this? Was this a governmental message, governmental speech, or rather private speech? The court said at the end of the day, it's governmental speech and therefore, under Johanns, the plaintiffs did not have a First Amendment claim for having to fund the speech.

John Ross 26:57
Paul, is there anything you want to say?

Paul Avelar 26:59
There are a lot of issues still litigating with Janus right now, including in a number of states compelled support of state bar associations. And I'd be curious to see how courts would break down state bar associations on this public/private sort of breakdown. There's one US Supreme Court case out there Keller v. State Bar of California, but that's obviously years before Janus and years before a lot of the cases that led to Janus came down. It'll be curious to see how those cases really do shake out. But Michael's absolutely correct that, that when the government basically says "Well, now we're speaking we can force you to fund our speech, even though you disagree with it." It's quite difficult, constitutionally to fight back against those things, which is particularly troubling given the amount of public/private overlap that seems to happen in so many of these supposedly government institutions that people are forced to fund.

John Ross 28:03
Michael, this is actually an area IJ litigated in way back in the 1990s. You want to tell us about that case?

Michael Bindas 28:10
Yeah, our former colleague, Steve Simpson, was involved in a case challenging the compelled funding that was resulted in the Got Milk? ads, he represented a dairy farmer in the Third Circuit and challenging the compelled funding of that program. And he won. This was a pre Johanns case. And the Third Circuit agreed with Stephen and IJ, and our client in that case. Unfortunately, that victory was short lived, because Johanns was decided very shortly thereafter. And when it came out the other way,

allowing this compelled funding of governmental speech that had the effect of essentially overturning the Third Circuit decision. So it's an area we have some familiarity with. And it's interesting to see it rearing its head again.

John Ross 29:02
Is there an appetite to do more in this area? Or is it mostly a settled question do we think for now?

Michael Bindas 29:08
You know, in terms of whether or not you can challenge the compelled funding of true government speech, I think, you know, as you've heard from Paul, and for me already, I think that ship is pretty much sailed. But when you get into these more difficult issues of speech that purports to be governmental, but really is put out there by private actors, and where the message is developed by and ultimately approved by private actors who may be simply appointed by some government official, it gets much more dicey. And I think the, you know, the Bar Association example that Paul used is a much closer case. And I think there's still work to be done in this area, notwithstanding the fact that when it comes to speech that's clearly governmental. It's difficult if not impossible to challenge the compelled funding of that.

John Ross 30:07
Okay, and that concludes the show. Thank you all for listening and be sure to tune in next time for more judicial engagement.