# Short Circuit 177

**Anthony Sanders** 00:07

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're recording this on Thursday, June 10, 2021. If you enjoy this podcast, you should check out our newsletter and often irreverent take on recent Court of Appeals opinions, which we've published every Friday, you can subscribe at Shortcircuit.org or find it on the Volokh Conspiracy Blog. And please, also check out our sister podcast the documentary series Bound by Oath, speaking of our newsletter and irreverent takes, who doesn't like a good joke, literary allusion, or pop culture reference? You can get all of those in, for example, any Dennis Miller monologue, but Dennis Miller isn't a judge, Rumpole of the Bailey used to bust out repeated quotations from the Oxford book of English worse. But Rumpole, who would be quick to remind us he wasn't a judge either, wasn't writing to judicial opinions. And some of us real life lawyers in our younger days, such as yours truly, wrote for our law schools parody musicals, which are essentially entirely composed of pop culture, incorporations and inside jokes. But the question we're addressing today is should the skills we honed in those tawdry affairs in our youth be transferred to the bench. Last week, Judge Kenneth Lee of the Ninth Circuit demonstrating he or maybe his clerks, transfer those skills very well. His opinion in a class action attorney’s fees appeal had repeated references to among others, Matthew McConaughey, Hamilton the musical, Star Wars, and the bachelor reality show. It's the latest, and probably the most over the top, example of cool judges trying to let their inner Dennis Miller's shine through. Is this a great way of making stuffy legal opinions more accessible to the public? Or is it disrespectful mega cheese? To help us answer these questions, we found the foremost expert on these issues. The dean of appellate twitter himself, Mr. Raffi Melkonian. Raffi is known to anyone who has spent any time on Twitter regarding what lawyers have to say. And he has also a real attorney. He is a partner at Wright, Close & Barger in Houston, Texas, a former clerk on the Fifth Circuit and the Delaware Court of Chancery, and a graduate of Harvard Law School, the University of Cambridge, and the University of St. Andrews. So, after Judge Lee's opinion came out, Raffi took to Twitter as he often does with many important opinions, and provided some erudite commentary on the writing style. So, we wanted to get him on to discuss the decision, but more importantly, the global topic of when judges should drop a cultural reference. And when they should leave that to the experts. Raffi. Thank you for coming on Short Circuit.

**Raffi Melkonian** 03:00

Thank you so much for having me. I'm glad to be here.

**Anthony Sanders** 03:03

Really appreciate having you on today. But that's not all we're talking about. We also have with us Short Circuit fan favorite, Diana Simpson, who also is going to bring us to the Ninth Circuit, but about a case involving law enforcement's least favorite name, Miranda. So, we'll start with Diana's case, and then move on to our cool judge's conversation. Diana, welcome back to Short Circuit. And speaking of pop culture references, what's the latest on our right to remain silent?

**Diana Simpson** 03:33

The right to remain silent. Well, so there is quite the fight going on at the Ninth Circuit right now about whether a non-mirandized statement that is introduced in a criminal proceeding deprives the defendant of his Fifth Amendment right against self-incrimination and provides a 1983 cause of action. So, this case called Tekoh v. Los Angeles County was originally decided back in January of 2021. And its most recent version, the reason we're talking about it this week is because it was just denied rehearing en banc. And so, I want to talk a little bit about the facts and a little bit about the original decision and then this really fantastic dissent from the denial of rehearing. And so, this case stems out of an incident at a hospital. So, Terence Tekoh was working at a hospital when a patient accused him of sexual assault. And so, the county sheriff deputy arrived and questioned Tekoh but didn't advise him of his Miranda rights. At the end of the questioning. Tekoh wrote out a quote regrettable apology that took responsibility for touching the woman. And so, Tekoh and the deputy's versions differ on precisely what happened. But both agree that Tekoh agreed to speak with the deputy, that the deputy never gave the Miranda warnings, that Tekoh confessed to the crime, and that his confession was later introduced at trial. The remaining dispute, the factual dispute anyway, surrounds whether Tekoh was in custody when he was questioned by the deputy without Miranda warnings. And so, whether the confession was thus coerced. And so, after this confession came out, Tekoh was arrested, and he was charged criminally, and the prosecution introduced his confession at his trial, and the jury acquitted him. They returned a not guilty verdict, and he walked free. But then he sues under Section 1983 and seeks damages for violation of his constitutional rights. And so, the particular lawsuit issue here arises, or the appeal arises out of a jury instruction. And so, Tekoh had requested but did not get a jury instruction that it was enough for him to win if he proved that the deputy got his confession without providing any Miranda warnings. The District Court refused to do that, and instead instructed that the deputy violated Tekoh's

rights only if the officer coerced Tekoh into confessing under the totality of the circumstances. So, in other words, is the lack of a Miranda warning itself a factor for a Fifth Amendment violation? Or does the lack violate the Fifth Amendment right in and of itself? And so, the panel says that the introduction of an un-mirandized statement at a criminal trial constitutes a Fifth Amendment violation. So, the Fifth Amendment provides that no person shall be compelled in any criminal case to be a witness against himself. And so, SCOTUS implemented that language with a 1966 decision in Miranda, that I think everyone in this country knows whether it's from popular culture, Law and Order, what have you. I think everybody knows what that what that series of phrases includes. But so, to what extent is Miranda constitutionally required? Or is it just a procedural safeguard or prophylactic rule? And so, there was a series of cases about this following the original decision in 1966. And the important one for the panel is a 2000 decision called Dickerson, which concerned a federal statute that was enacted in the wake of Miranda and said that condition confessions are admissible as long as they are voluntary, regardless of whether Miranda warnings were provided. So that law basically sought to more or less overrule Miranda, and so SCOTUS struck down that statute and described Miranda as constitutionally based. And the panel describes this as something that Congress could not overrule. And so, based on Dickerson, the panel concludes that Tekoh has a claim that the Fifth Amendment right against self-incrimination was violated by the introduction of the non-Mirandize statement. And so, the panel recognizes that there's some subsequent cases that muddied what they see as a clear view of the constitutional nature of Miranda warnings. And they recognize that they were splitting with the Eighth Circuit, but they were aligning with the Seventh Circuit. And so, the panel then remands for a new trial with a jury instruction that the introduction of a defendant's non-Mirandize statement at his criminal trial is alone, sufficient to establish a Fifth Amendment violation. So, as you might imagine, the government petition for rehearing en banc, and this decision came out in just last week. And so, there is a dissent from the denial of rehearing en banc that that is comprised of seven judges, and it really kind of distills all of these issues down into a pretty punchy opinion, basically. And so, you know, it first looks to all the SCOTUS cases following Miranda, and it creates this kind of sassy chart that the left column has all of the cases referring to Miranda warnings as prophylactic, and the right column of this chart has all of the cases referring to Miranda warnings as a constitutional right. The left side has in very tiny text, a list of 21 cases, the right side is completely blank. And so, the dissent’s concern is that the decision was based on cherry picked lines from a few cases, and now causes the Ninth Circuit to split from Sixth Circuit courts aligning only with the Seventh Circuit. So, the dissent goes through the history of the Fifth Amendment. You know, the text at issue here is no person shall be compelled in any criminal case to be a witness against himself. And that stems from an ancient Maxim going all back into very dark history of what governments would do to get people to confess to things and kind of goes through the

history of all of that, talks about Miranda, and then all of the series of case law afterward. And its view of Dickerson. And so, Dickerson was the case that the panel relied on. Its view of Dickerson is that it didn't really change anything. While it held that Congress could not supersede Miranda, it still only described it as a constitutional rule and not a constitutional right and expressly said that it was not going further than Miranda. And then a case three years after Dickerson called Chavez confirmed this reading of Dickerson. According to the dissent, where a for justice plurality reiterated that Miranda remained a prophylactic rule and not a constitutional right, and did not give rise to a 1983 decision. And they dropped this as a footnote. But I think this is a fairly important fact when analyzing these cases. Chief Justice Rehnquist wrote Dickerson, and he joined in the Chavez plurality and full. So, the suggestion that Dickerson announced this big shift in the understanding of Miranda seems a little unlikely, because why would Rehnquist have done that and then later agreed that it doesn't, it's not itself a constitutional right. And so, the Ninth Circuit now is part is contributing to the circuit split the Second, Fifth, Sixth, Eighth, Tenth, and Eleventh circuit's all hold that Miranda is a procedural safeguard, and that the remedy for its violation is exclusion of the statement, not a 1983 action. And then the Seventh Circuit and now the Ninth Circuit are aligned. And so, one would think we're going to be facing a cert petition soon. And that one, I would assume, if I were I a betting person, I would say I would bet that SCOTUS will grant cert on this. That's a pretty deep circuit split. These are important issues about what the Court has said about what the effect of Miranda is, but what the effect of the Fifth Amendment is. And it’s really just interpretation of Dickerson, and then, you know, everything else stemming from that. And so, I'll be excited to keep an eye on this case going forward, because I don't think this is going to be the end of jurisprudence on this issue.

**Anthony Sanders** 11:47
Raffi, what's your bet on where this case and this issue are going?

**Raffi Melkonian** 11:52
Well, I certainly agree that it's heading up to the Supreme Court. Maybe not right now. But in the near future. I will note that the majority or the, you know, the people who didn't want to hear it en banc, say that the circuit split isn't as deep as the dissent says. And so maybe that's true. And maybe it turns out, the Supreme Court doesn't right now think there's a deep enough split, to take up the case. In terms of how it gets resolved, you know, I would generally bet that the dissenters here are going to prevail on the Supreme Court as it sits right now, though, I think it's a pretty difficult question. As I was thinking about and I was I was listening to the summary, what it reminded me of is sort of this dispute between prophylactic rules and the real rule in religions a lot. You know, there's a lot of religious faiths, where

the core of the prohibition you have is acts, but then there's all these prophylactics around acts to prevent you from getting even close to violating the religious, you know, tenant. And I, I'm sitting here thinking are those part of the religious tenant or not? And so, I don't know how to resolve that question or this one. But I know it's I think it's pretty close.

**Diana Simpson** 13:10
Yeah, it's almost as like chicken and egg problem, like, you know, what is the right itself? And you go back, and you look at the text, and, you know, it's you can't be compelled to you know, self-incriminate basically. Well, what does that mean? Does Miranda itself mean that, or does Miranda mean something else designed to get us to that point? And it's really just kind of an interesting question to ponder. I think.

**Anthony Sanders** 13:32
I was sympathetic to the dissent's discussion of all this, but what I couldn't get around is, Dickerson says this is a constitutional rule. And they basically say, well, it's not a constitutional right. It's this constitutional rule. And is that the concurring justices pointed out like that's, that's kind of not a thing, a distinction between those two. But you know, what's left unsaid in all, and I found fascinating in left unsaid between the panel opinion, the concurrence, which is also worth reading, and the dissent is that everybody knows what happened in Dickerson. This case, it was decided, I think it was seven to two, maybe it was six to three, decided in 2000, is that for years and years, Chief Justice Rehnquist and before that Associate Justice Rehnquist, had been trying to take down Miranda. He's not, everyone knows he's not a fan of Miranda. The question finally comes along in this really odd circumstance where there was a statute that the government wasn't even enforcing. I think they had to get an amicus to argue the case even at that point, somehow it gets before the Supreme Court. And Chief Justice Rehnquist, as is the Chief Justice's want to do and often does, assigns the opinion to himself, even though everyone believes and knows. He doesn't really believe in the result that came out in that case and wrote the opinion in a way that I've heard many people say this, in fact, I even once heard Ted Cruz say this when he was a lawyer, well, long before he was a senator, that the opinion doesn't make any sense. It says, it's we did all this stuff, yeah, we said we, you, you can have a right, you could have alternatives to Miranda prophylactic rule, but it's a constitutional rule. And so therefore, it's mandated by the Constitution is the implication. And, you know, later he joins this dissent or plurality, whatever it was that the other case, I'm not as familiar with undercutting that, but he wrote that opinion. And that opinion, was a majority opinion. And so, everybody knows what's really going on is that was this kind of mangled compromise where he gave it to himself. So, you know, someone like Justice Souter didn't

write the opinion on the fight for like, strong ruling. And now 21 years later, we're still living the results of that. And it's really hard to get around, you know, what, even if it's just a few cherry-picked lines, it's a holding and a Supreme Court case. So I was, you know, everyone kind of dancing around that fact, is, is really interesting. I think when it gets to the Supreme Court, of course, they won't be hamstrung by that dancing around and can do their own dance. But I found that funny. One other thing I wanted to know is the end of the concurrence is interesting. They say, talking about the dissent, “that is a complaint about Miranda and Dickerson, not the decision here, perhaps the defendants will find it helpful in preparing a petition for a writ of certiorari. But it is a poor reason to grant rehearing en banc.” I think you could say that about most dissents to remands en banc are most dissents in general. But it's funny, they happen to call that out in this time.

**Diana Simpson** 16:58
Sorry go ahead, Raffi.

**Raffi Melkonian** 16:59
No, I was just going to say it seemed to me like the concurrence, or at least those particular judges in the concurrence, were not really disagreeing about the merits of how the Fifth Amendment works of the dissenters, you know, if they were writing on a clean slate, but of course they are. And so, I thought, I thought that sort of flavor was pretty interesting.

**Diana Simpson** 17:19
I agree. And it was another interesting little tidbit was that the three judges who, there was one judge who wrote the concurrence and two judges who joined, and those three judges were the panel, were on the panel that all of this stemmed from. You know, in so it was, essentially defending themselves. And I would assume that one or more of them have written a dissent in the past that is, you know, not just about getting their own views out there, but perhaps in aiding an issue to get to the big court. So, who knows?

**Anthony Sanders** 17:53
Well, that, of course, is not all that was going on at the Ninth Circuit the last couple of weeks. So, Raffi, tell us about this, that I should say this case was litigated by our friend, Ted Frank, who was on last year to talk about his class action work. And he was with a lawyer in this case. But as much as we love Ted, that is not the reason that we took this case, we took it for some colorful language that was used. So, tell us, Raffi about the case and the language.

**Raffi Melkonian** 18:24

Yeah, absolutely. So, the cases Briseno v. Henderson from the Ninth Circuit. And as you say, it's an interesting case, both on the merits, and because of the language that's involved. So let me start a little bit with the merits, because I think it helps some of the discussion later. It's a case about Wesson, which is a company that makes canola oil among other things. And he was selling its canola oil with the label 100% natural on it. Now, as anyone who follows me on twitter will know I'm a cook, I'm a pretty enthusiastic amateur cook. And one thing all of us know in the sort of cooking circles is that canola oil is a disfavored oil, people don't like canola oil. Partly there's this perception that it's lower quality. But partly it's an affiliation with genetic modification. So, most canola oil is genetically modified. It's a variant of rapeseed oil. And in order to get canola oil, you have to do something to it. So, the point is that almost all canola oil is genetically modified. And so, these plaintiffs alleged in their suit that the 100% natural label on the oil was misleading because the oil was genetically modified. Now, as the case was going on, and the plaintiffs were pleading and r-pleading their case and bringing in new experts in this and that Wesson dropped the label, not related to any settlement, but they just decided to remove the 100% natural you know, advertisement on label in the middle of the case. All right, so Conagra, which is the parent company of Wesson tried to sell Wesson in the middle of all this going on. And first they made a deal with Smucker's, the jam company, though Smucker's does a lot of other things, to sell the company, but it ran into FTC problems. So, there was an antitrust issue. And the deal fell through. So Conagra then decided to sell the company to another competitor, called Richardson. That deal went through. After all that the case settled, the settlement included a few cents for each bottle that people had bought of this 100% natural canola oil, if they sent in a claim, you know, it's not as if Conagra was just sending out checks, you had to send them, you know, a claim that you had bought this many bottles of the elicit, you know, oil.

**Anthony Sanders** 20:56

Receipts that I'm sure everyone keeps around the house,

**Raffi Melkonian** 20:58

I file mine in alphabetically, right? Yeah, absolutely. But they also agree to an injunction, a strange injunction that we'll talk about in a second, we're Conagra agreed that they would never advertise 100% natural Wesson canola oil ever again. Now, the parties value the settlement at something like 100 million dollars, the notion was that this injunction was worth something like 30. And then if every single person who had bought canola oil showed up with their receipts, there would be $65 million dispensed,

and then the lawyers were going to get $7 million. So, you end up with a 7% attorney fee, essentially, which, you know, on its own seems totally fair, like that's a normal attorney fee in the class action settlement. But of course, it's not that simple. Everyone knew that most people don't claim their, you know, damages in this kind of case. That's especially true here, because the plaintiffs didn't send anyone notice, as the opinion points out. So, it's sort of unclear how they were supposed to come up with the claims. But also, the settlement was designed in a way that is, you know, courts feel is pretty unfair. So, one thing is there was a reverter clause. So that means if that $7 million dollar gets reduced at all, the attorney fee, the new money doesn't go to the class at all, it goes back to Conagra. And so, courts have said that, you know, is indicative of an unfair class action settlement. So, one class member objected, as you noted, represented by Ted Frank, who does this for a living, and the District Court rejected Frank's attacks on the settlement, but the Court of Appeals reversed. So first, the Ninth Circuit held that the injunction that we're talking about is valueless, like basically was worth zero. And why is that? Well, Conagra doesn't own Wesson anymore. So, the notion that it can provide value to the class by promising not to sell 100%, natural Western canola oil is ridiculous. Like they don't have less than canola oil anymore. So, the court said that the value of that is zero. And then the court also held that the district court had failed to analyze the attorney fee properly under the new federal rule of civil procedure 23. In so holding the court held for the first time in the Ninth Circuit, that these amendments and the rules that are in applied to post class certification, class action, so that's a new holding in this case, and it said, basically, look, you have to analyze the attorney's fees when you're analyzing whether the class action certification is fair. And so, the Court reversed. And, you know, mainly, in addition to this, you know, basically valueless injunction, the court pointed out of the $65 million, that Wesson or Conagra was potentially going to have to pay out they had actually paid out only $400,000. So, you know, a tiny percentage of what they had supposedly promised and what the attorney fee award had been premised on. So, the Court of Appeals reversed, and it's being remanded to the trial court, for everyone to try to figure this out in a more fair way. So that's like the dry bones of the case. The reason this case got a ton of play on #appellantTwitter and other social media outlets is the language Judge Lee used in in writing the opinion. So, he decided, obviously, to have some fun with this case. He the very first line of that opinion is, “We can perhaps sum up this case as how to lose a class action settlement in 10 ways.” He referred to the case as having a “squadron of red flags.” He included a spoiler alert in the middle of case as you might do on Twitter. And then he said that Conagra has promised not to use the 100% natural specification was, quote, “as meaningful and enduring as a proposal in the final rose ceremony in the Bachelor.” So, I don't watch The Bachelor, but I take it that these are not enduring proposals. I think that's what that means. And because after all, Conagra, as I said earlier, didn't own Wesson anymore, so how could they promise to not use that label? This the

court said, “was like George Lucas promising no more mediocre and schlocky Star Wars sequels, after selling the franchise to Disney, such a promise would be illusory.” The judge then cited Hamilton. And also, there's like a page long explanation of how law students who don't understand Erie turn into lawyers who don't understand Erie, and he just sort of threw that in there as well, in case you know, you wanted some thoughts about Erie.

**Anthony Sanders** 26:06
So that's Tompkins railroad for non-lawyers listening, which is a case that no one outside of the legal profession ever needs to know.

**Raffi Melkonian** 26:15
Absolutely not relevant to your life at all. But it's a case that is relevant to many of us who practice in the federal courts. So that that's what really got everyone's attention about this case, not as much the very interesting class action certification questions.

**Anthony Sanders** 26:30
And so, Raffi, tell us what you did to maybe improve upon this language?

**Raffi Melkonian** 26:35
Yeah, approve upon or not. So, I noticed there was a debate going on Twitter about this kind of writing. And it was, it was sort of getting mixed up with the merits of class action certifications. But really, people were kind of like, well, this is cheesy or whatever. So, I thought, okay, let's take the three, quote unquote, most cheesiest parts of this opinion, and, and strip out the flourishes and just write plain boring English. And so, I put those up on Twitter, you know, I put on the left side of the screen, Judge Lee’s version, and then on the right side, the version without the flourishes. And to my mind, and, you know, we can talk about why you think this eventually as well, I thought the new one was better, it was certainly less funny, less amusing, but I thought like it let the other parts of the opinion, which is actually very well written and very strong shine through better than all the jokes and the cultural references. And so, you know, I'm pretty ambivalent about the opinion as it was. But when I change this couple of things, it seems to me the opinion got stronger and more persuasive.

**Anthony Sanders** 27:48
Diana, does a good pop culture reference make you more persuaded by an opinion or less?

**Diana Simpson** 27:57
Probably less, you know, as a litigant, I, you know, litigator I suppose, I find it difficult to quote these kinds of opinions, you know, and to rely on these kinds of things, because some judges are vehemently opposed to this kind of stuff. And, you know, if they're going to sit down and read it, I mean, perhaps, you know, this decision is going to be important in the future for these kinds of class action decisions. And so, if you're citing it in another circuit, and you happen upon a judge who just hates this kind of writing, I think they might be less inclined to find it persuasive. You know, I'm not to say that I'm a fun hater. I you know, I think some of this is fun. I there was a line in there about in early 2018, “the Smucker deal hit an insurmountable regulatory jam.” That's my kind of humor.

**Anthony Sanders** 28:44
There is some grease in the wheels at times.

**Diana Simpson** 28:46
Yeah, I think like a little bit here and there is fine. But like quoting Matthew McConaughey, on your first page of your decision, like, I just don't, it just seems a little too far. It's like Steve Buscemi walking in saying, “how do you do fellow kids?” Like, that's kind of how I interpret this. And this is serious stuff. And, you know, people don't litigate for years over things that aren't, well, I guess some people do, but most people don't litigate for years over things that aren't important. And it just, it just feels like it kind of decreases the seriousness of what is otherwise a pretty big deal.

**Anthony Sanders** 29:23
Yeah, so I have way too much to say about this case, that I'll save most of it. But for our listeners benefit, I thought it I thought it'd be interesting to talk about like this kind of cuts to the heart of the question. What are judicial opinions for? Right? So judicial opinions in their raw sense, I guess are the explanation for why a party won or lost a case and the reasoning for that, and then that in the common law, tradition becomes part of the law that then is cited in the future, and so in distilling what the law is, you read that, that opinion. But, you know, there's also a notion that judicial opinions in some sense, need to be interesting, not just to have people read them, but to have people be understand them a little better. And in a sense, judicial opinions are a form of literature. Now, they're not literature for literature’s sake, they're not just written for readers sake, they're written to prove a point and usually to say what the law is, although the dissent, right, you might say has a different meaning. But in having a pop cultural reference or a literature reference or all kinds of there's, you know, I thought of a ton of examples through history of ones that are very memorable, such as one that was reminded to me

earlier today was Justice Blackmun in Flood v. Kuhn. If you guys remember that case is about the baseball's antitrust exemption, he starts off the opinion with listing every cool baseball player he could think of, basically, and I heard I heard later, I don't know if this is apocryphal or not, but that he was reminded about the he didn't mention Pee Wee Reese, and he actually cried, because he felt so ashamed, he didn't mention Pee Wee Reese. So, right, I think that's a case of it going overboard. But in bringing this, you know, parts of our culture, parts of our heritage into a judicial opinion, it definitely can make it more human, more interesting. But of course, there's a point where you get over the top. And for whatever reason, I think we are all agreed this opinion, whether it's a clerk had a little too much fun, and Judge Lee let it go. Judge Lee was just having a really fun day, and he just wanted to go with it, this is a case where it was over the top.

**Diana Simpson** 31:55

Yeah, for sure. And I think, actually, if you go back and read the dissent in the case that I was talking about just a little bit ago, the dissent from denial of rehearing in Tekoh. You know, I think that that's a really well written opinion, in that it's not dry, I mean, that this could theoretically be a dry issue for some people, I suppose. But it's not it, you know, it uses really great sentence structure and strong verbs. And it's just very, it's technically well written, I think. And it's also just a very interesting issue. And so they do that without resorting to kind of these jokes. Now, I think it'd be extremely inappropriate, in a case with this fact pattern to use those kinds of jokes. And so perhaps that's, that's a distinction when judges are writing these opinions. But I think you can be interesting. And you can include little fun things here and there. But I feel like when the when the fun cultural references are the focus, you're really taking away from the point of the opinion and the effect of the opinion.

**Raffi Melkonian** 32:55

And, you know, there's, of course, the worry that in a serious case, if you make jokes, you're hurting the litigants, or you're, you know, disrespecting litigants. Now, Briseno is, of course, a serious case in the sense that there's a lot of money at stake. But it's not a serious case, in that it, you know, it doesn't go to the liberty of somebody or to their constitutional rights, it's just about whether some lawyers will get this or that amount of money. So, like, if you are going to make jokes, this is the kind of case to make jokes in, I still think it's probably over the top and you could dial back the jokes, without making the opinion totally uninteresting. But there is like a world where there are judges who make jokes in cases that are completely inappropriate. And there I think we need or, you know, the profession ought to draw harder line and say, like, look, if someone is going to jail, or they're losing their home, or they have a title seven case that you're throwing at a court, you really just need to be respectful and dry. And that's

just part of what comes with that commission that's hanging on your wall, you know, to provide justice in an impartial manner.

**Anthony Sanders** 34:03
Yeah, I think that's a great point, Raffi. I thought I saw one thing you said on Twitter was that you're more on Team dry opinions than you used to be. And maybe it's the experience of having, you know, real life clients and knowing that this really means something to them, and they're going to be reading the judges words, probably differently than the lawyers are that brought you to that conclusion.

**Raffi Melkonian** 34:26
Yeah, absolutely. Uh, you know, when I was in law school, I would read Justice Scalia's opinions, like a lot of us did, and try to like, emulate them, though, of course, this is another point we need to make, which is that most lawyers are bad at that. And like, you should just not because you're not funny, and you're not clever, and Justice Scalia was just smarter than you.

**Diana Simpson** 34:48
100%

**Raffi Melkonian** 34:50
And so like, you just don't do that. Do what you can do. So back then I thought, oh, this is how you write. So, I'm going to try to do this, and when I was a law clerk, my first time around at the Delaware Court of Chancery, I tried to write a draft like that. And my judge brought it back to me with an X on it and said, this is not how we behave. And I took that lesson. But then when I got my own clients, I realized what he was saying, because even a case that doesn't seem really big, outside to observers, it's probably the worst thing that's ever happened to that person. Litigation is terrible, and you don't want to be doing it. I mean, other than people who litigate professionally, but like if you're a regular person, it's an appalling and expensive endeavor, and it really hurts you emotionally. And so, the idea that you're going to, like, have fun with someone's like, you know, again, title seven case, I keep mentioning that because that's something I've litigated as a plaintiff. It's it really you really understand when you have your own clients that you shouldn't be doing that as a judge. And so, I've really come around to my old vice chancellor's views. And also, the Fifth Circuit Judge I clerked for is Jennifer Elrod, who also took a very sober approach to opinion writing,

**Anthony Sanders** 36:14
Right, outside of opinion writing, she, of course, can take a less sober approach such as the Hamilton parody that she did last winter that a lot of people probably saw online. But that's a different story when you're actually writing about someone's liberty or property.

**Raffi Melkonian** 36:30
Absolutely. I've acted in a parody with Judge Elrod, where she was dressed as Princess Leia. So, I am not saying Judge Elrod is always serious, but in opinions, she's serious. I think that's important.

**Diana Simpson** 36:44
Yeah. And I don't think that opinions have to be boring or dry, to be straightforward and fair to the litigants, even in a challenging kind of factual situation. It's just that if the judges want to write in kind of an acerbic way, or one, you know, invoking all of the different aspects of the cultural references or whatever, that's fine, but perhaps do it on your own time. You can write a blog, you can open, you know, write a book, do those kinds of things, put your writing there, and then keep your legal writing, I think a little more buttoned up, not to say boring, just a little, I think just a little less, kind of juicy or whatever.

**Anthony Sanders** 37:23
Yeah, it's funny Raffi to say that about clerking because I as an ex-editor of the law school musical at Minnesota, as I was referring to earlier, went into my clerkship and put zinger kind of lines in my writing. And my judge would always take them out. He was very kind about it, but I later learned, yeah, I'm glad that you got that out of your opinions. And I tried to grow a little from that. This reminds me of my least favorite reference, in an opinion. And I'm actually not sure whether I agree with it or not. But at the time, I was not super happy about it, and that is a case we litigated in Minnesota few years ago with IJ about a constitutional case, Fourth Amendment equivalent to the Minnesota constitution case. But the court ruled essentially that it the question was not before it properly, which you always hate to have after years of litigation and getting to the Supreme Court. And Justice Paul Anderson, who we dearly love at IJ. Paul, if you're listening, we love you still, but it was his last day in the court. He was just retiring. And he had a concurrence where he wanted to say we had a really, he thought we had a really good shot at the at the underlying issue of the constitutional issue, but he's not a thinks it's good that the court isn't really on it now. And he quoted noted constitutional scholar, Phil Simms, ex giants' quarterback, and then CBS color man, who had just said in the Super Bowl that year, "that's a good no call." When the refs didn't call "pull a flag" when they could have it was kind of marginal. And anyway, he started off the

opinion with quoting Phil Simms and then went from there about well, it was a good no call. We of course did not think it was a good no call. You know, had I been someone I don't know, challenging my imprisonment, a habeas case, I wouldn't been happy about that. But I don't know. Our clients never complained about it. And I guess it was just a few of us lawyers in the office. But before we leave, I thought a fun thing to do was I looked around in the Lexus database for all cases. So, all American cases ever decided that are either published or in more recent decades, non-published, and see how much you know how much of this happens, right? How much do we actually have citations things? So, I thought, I searched some famous literature and pop culture references. Hamlet has been cited about 400 times in sometimes probably there's lines from Hamlet that you know, they don't even say Hamlet or Shakespeare, but Hamlet and Shakespeare together 400 times. Bob Dylan has been cited over 400 times in judicial opinions. Dickens' Bleak House over 300 times, which is not surprising, because that's the Jarndyce v. Jarndyce case that is famous. And to give you a sense of like, how something can be in the culture, right, like Hamilton the musical, but maybe 50 years from now, no one watches it listens to it anymore. Sir Walter Scott, who was like the big novelist, 150 years ago and nobody reads today. He's been cited well over 100 times in in judicial opinions. So, you know, did those add to those opinions? Did they not? I bet some were great. I bet some were mega cheese, and probably best left unsaid. But that's the lay of the land and perhaps Judge Lee wasn't that outside the box, but he was definitely over the top of the box in this case. So, thank you guys, both very much for coming on the show today. Raffi, really appreciate you coming on. And we'd love to have you on again some time to talk about the news of the day, perhaps in a less cheesy context. But for everyone else, I will ask you to get engaged.