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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 24, 2021. If you enjoy this podcast, you should check out our newsletter, an often-irreverent take on recent Court of Appeals opinions, which we publish 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 and our latest two-part episode, the shooting of Bobby Moore. Now, if you're listening to this right after the episode came out, you're going to say, Court of Appeals? Hey, there's a lot of news coming out of the Supreme Court right now. Why aren't you talking about the Supreme Court? They issued something like 25 opinions yesterday. Well, if you want to know what's going on there, you have plenty of other information outlets at your disposal. And from time to time, we do talk about what those folks at 1 First Street do on this podcast. But our bread and butter are the Federal Courts of Appeals, which are always feeling like they don't get no respect. But that's especially true in late June, when all the SCOTUS summer blockbusters come out. We're more like, you know, the art house, cinema down the street. We're going to continue in our mission to highlight interesting goings on among the thousands of opinions that issue from the courts of appeals every year compared to, I think this year, the Supreme Court is going to have 63 merits decisions that were argued which is almost a record low for a very, very long time. If you're looking for content, the court of appeals is where it's at. And that was very true this week in the Fourth Circuit, actually issued I believe, at the end of last week, where I've got opinions to tell you about that began in Maryland and South Carolina, one on mootness and the regulation of federal employees' speech and one on takings and bees. Yes, bees, our friends with the honey. Here to tell us about the latest in the Fourth Circuit are IJ's Jeff Redfern and Adam Shelton. Welcome, gentlemen.

Jeff Redfern 02:23

Hi Anthony.

Adam Shelton 02:25

Hey, Anthony.

Anthony Sanders 02:26
Well, Adam, let's start with you. I don't know much about the Hatch Act. I know a little bit more after reading this case. But it sounds like a law that's very complicated and very hard to challenge.

Adam Shelton 02:38
Yeah, I think we've all heard a lot about the Hatch Act in general, but very few specifics over the course of the Trump administration. The Hatch Act is a 1939 congressional law which governs how, which governs where the rights of federal employees as citizens end, and where their responsibilities as government employees begin. So, the 1939 Act was the culmination of over 100 years of debate since the founding era of how to actually govern the relationship between being a federal employee and being a US citizen wanting to engage in elections and influence elections. Actually, in 1791, Congress actually considered a bill that would limit the ability of inspectors to participate in elections in any way other than voting. It didn't pass. And then about 10 years later, President Jefferson at that time, decried federal officials who were out stumping for different elections and for different candidates. So, by 1939, Congress just finally decided to really put a lot together that governed all federal employees. And in that act, they prohibited federal employees from participating in campaigns and helping manage campaigns. The Act was challenged a couple of times. At the Supreme Court, the Supreme Court upheld the act over some pretty solid dissents. Relevantly for us in 1993, Congress amended the Hatch Act, which allowed employees to work on campaigns on their free time, not when they were actually supposed to be in the office. But it tightened restrictions on what they could say in relation to elections and candidates or federal elections. Part of the structure of the Hatch Act is the Office of Special Counsel is given exclusive control over interpreting the act and investigating complaints under the Act and bringing disciplinary actions against employees in front of the Merit Systems Protection Board, which actually determines if there was a Hatch Act violation,

Anthony Sanders 04:58
And I should just interject for listeners, I believe this Office of Special Counsel has nothing to do the Office of Special Counsel that Bob Mueller was very much in the news a few years ago for right just happens to have the same day.

Adam Shelton 05:11
Yes, happens to have the same name. It's a totally different office. And really all they do is deal with the Hatch Act. I think there's about six employees. So, it's a very small office. In this case concerned to

informal guidance opinions issued by the Office of Special Counsel during the Trump administration. One dealt with the first impeachment and counseled employees that while they could have opinions on impeachment, and even speak opinions on impeachment, they can either advocate for or against the impeachment of Donald Trump. And the other issue or the other opinion at issue was one which said that they were not allowed to use terms like resistance, or hashtag resist, because in a vacuum, they had a political nature or a political overtone, but that different factual scenarios could actually lead them to determining that using resist and resistance were totally fine. It was just really fact dependent. So, the American Federation of Government Employees Union challenged these two informal guidance opinions on behalf of federal employees who wished to advocate for or against impeachment and wish to use words like resistant or hashtag resist, to comment on general issues of public under public aware of public controversy. So, by the time they got up to the Fourth Circuit, both informal opinions had been rescinded, because President Trump was no longer candidate for office. So, any potential Hatch Act issues were irrelevant, because he was, he was no longer a candidate for federal office, the court in in seeing that held that this case was entirely moot, because there was no actual threatened prosecution anymore at all, because the informal guidance had been rescinded. And the court also held that the issues were not ripe for their consideration, even if it wasn't moot. Because there had been no threatened prosecution. The opinions were quite vague. In the first place, it was hard to know what conduct was actually prohibited by the opinions of the Office of Special Counsel. And just other kind of factual issues that go along with the Office of Special Counsel, which is that the, their informal opinions are not binding on the Merit Systems Protection Board, which actually determines whether there was a violation. And they're certainly not binding on the Federal Circuit Court of Appeals, to which an individual can appeal an adverse finding at the by the Merit Systems Protection Board, as Judge Wilkinson put it the case here or the plaintiffs here, we're asking them to give an advisory opinion about advisory opinions.

Anthony Sanders 08:01
So, Jeff, what's your view on advisory opinions about advisory opinions?

Jeff Redfern 08:07
Well, I got to say, I find the mootness side of this case to be fairly unremarkable, or almost obvious, but the ripeness side of things is a little bit more disturbing to me, because, you know, this is a First Amendment case. And traditionally, you know, we have fairly relaxed standing standards, in First Amendment cases, you're supposed to be able to know before you talk, if your speech is safe, or if it can be punished. And, you know, there's certainly plenty of contexts where a very vague guidance

document, at least outside of the speech arena, is not going to be enough to get you into court where, you know, you would read an opinion like this and say, “Yep, that's right. We have no idea that you're ever going to be prosecuted.” But normally, the courts are so eager to protect speech and to avoid the so called “chilling effect” of documents like this, that something like this, I would think normally would pass muster as a ripe case. So, I find that a little bit disturbing. And I'm, I'm a little surprised, actually, that the court reached the issue because it really didn't have to, it could have just said, you know, that the cases moot. The court also didn't have to go out of its way to, you know, wax poetic for page after page about the Hatch Act and the wisdom of the legislators that crafted it. So, you know, this, this, on the one hand, this is an opinion that says, we really believe in judicial minimalism, we're not trying to go out of our way to strike things down, but it's a case it's going out of its way to decide issues, that it doesn't have to decide. And issues that are not necessarily obvious to everyone.

Adam Shelton 10:03

Yeah, I agree with you on the on the right this issue, maybe they felt they had to discuss it because that was the reason the district court dismissed the case, or ruled for the government in the case, but then it between the district court and the Fourth Circuit, their opinions were rescinded. So, the mootness doctrine should have taken over. But I agree, they definitely wax poetic about kind of the purpose of the Office of the special counsel, and really seem to focus in on the fact that, you know, their point is to avoid chilling of speech by offering these informal opinions. So, holding, holding that their informal opinions could be litigated, or could be sued under would defeat the purpose. I think that's what they were talking about. But it again, I agree, they didn't need to reach the issue. And they actually, kind of interesting for our listeners, they distinguish an IJ case here, or Cooksey case with the dietitian’s saying that case was ripe, because there was actually some sort of concrete threatened action. The website had been reviewed, and there was a red pen review of the website saying exactly what they thought was wrong with the website, and that if they didn't change it, it was going to get, they were going to bring enforcement against them. Whereas here, it was just kind of informal guidance. But yeah, they definitely need to reach the rightness issue here.

Anthony Sanders 11:27

Yeah, that case, our Cooksey case about our client who was giving advice on like, how to have a diet online was all he was doing, and was threatened with, with enforcement against him. He definitely had stronger facts. And I agree with you guys that this case at this stage, likely would be moot under most under understandings of mootness. But the threat that these people were under when the opinion was out there is not conceptually, I think, different than what Steve Cooksey, was under, in our dietitians’

case. They you know, this group that issued this advisory opinion, they are the prosecutors who would bring the case against these people. So that it's like if the police say, if you go and do this, I'm going to prosecute you. And then the court says, “Well, you know, you don't you don't have standing to sue about that, because we don't know what the judge is going to say when you're actually prosecuted.” And so, you know, it's just the prosecution. We went through this in a case I litigated a few years ago with IJ about rental inspections and challenging a Fourth Amendment type challenge to a city that was trying to inspect the interior of our clients home, some of which were tenants, they didn't want the inspection, they went to court to try and challenge it, and some courts along the way, bought the argument that well, you know, who knows what's going to happen, when you actually challenge that that inspection, you might win. And so, you don't have standing to try to stop the prosecution in the first place. So that, you know, the waxing poetic about the intricacies of the Hatch Act in how it all works. And that, you know, we can't upset that balance here, I think is you guys are right is a is a load of judicial application wrapped as you know, some kind of administrative law doctrine. But really, the bottom line is you write, the opinions gone, no one's going to right now get in this enforced against them for saying resistant hashtag resistance. But, you know, in the future, if someone becomes president again, definitely could. Perhaps it's not quite ripe for that. But we didn't need all this other discussion along the way.

Adam Shelton 13:59

No, but it will be it will be very interesting to see if the Hatch Act ever goes up to this current Supreme Court, which has been generally pretty pro-free speech. And even at the time when Hatch Act came up to the Supreme Court twice before, it wasn't there were not unanimous opinions upholding the act. And they were certainly and have been and continue to be First Amendment concerned with how broad the Hatch Act is and how much chilling effect it can have on federal employees speech should be quite it'd be very interesting to see if there ever is a case that goes up to the Supreme Court challenging the constitutionality of the Hatch Act itself. What this current court would do.

Anthony Sanders 14:38

Yeah, I think that's very true. That in spite plus those opinions were given an age where there was a lot more deference to labor relations, as we saw at the Supreme Court with a case that came out yesterday Cedar Point nursery and the balance of labor relations and property rights. I think similarly here, labor relations, and free speech, we might see a reassessment of that. So, the case

Jeff Redfern 15:07

Oh, sorry, I was going to jump in and just say that I don't think, you know, if this were to go up, I don't think I'm going out on a limb to say that whatever the court does, it would not be an opinion that looks like this one that relies so heavily on legislative judgments. You know, these kinds of opinions, we're used to seeing them in substantive due process cases about economic liberty and things like that. But it's pretty remarkable to see language like this in a First Amendment case where there's, you know, supposed to be pretty exacting, judicially administrable tests, and no real deference to the legislature. So, I think that whatever the supreme court does, it's not going to look like this.

Anthony Sanders 15:50

That's absolutely right. Well, the case is American Federation of Government Employees v. Office of Special Counsel, as always, there'll be a link up to it on our show notes. And then moving on elsewhere in the Fourth Circuit, we have quite a different case. Yawn v. Dorchester County. Jeff, tell us about bees and takings. And unfortunately, what happens to the bees when you spray them with pesticides?

Jeff Redfern 16:22

Sure. So, this is a case out of South Carolina, started back in 2016. You may remember at the time, people were really worried about this virus called the Zika virus, which is those

Anthony Sanders 16:35

That was like 3 viruses ago.

Jeff Redfern 16:36

Yeah, it's like least three viruses ago. So, at the time, state officials are really pushing to have a lot more pesticide spraying to control mosquitoes and stop the spread of the virus. So, the plaintiffs here, they're beekeepers, now unsurprisingly, the pesticides that kill mosquitoes also kill bees. So, before there was going to be this large spray, county officials issued a press release, and they call all the local beekeepers that they had on this phone list to warn them so the beekeepers could, you know, either put their bees inside or cover them up or do things to protect them. Now, these plaintiffs though, they were on the list, but for some reason, they weren't called. They just got skipped or, you know, somebody made a mistake. So, they, they didn't hear about it on the phone, they didn't see the press release. And, and their bees were not protected when the spraying happened. Now the pilot who was doing this aerial mosquito spraying so that he had a map of all the hive locations and the turned off the sprayer as

he approached. But, you know, whatever happened, the plaintiffs who had all of these, these beehives had a lot of their bees killed, and state agency investigated, and the results were inconclusive. They said it could have been the pesticides, but they couldn't be sure. So, these beekeepers brought a suit alleging that this spraying, among other things, constituted a taking of their personal property for which they were entitled to be compensated under the Fifth Amendment. The same provision that applies when the government uses eminent domain to, you know, take your house to build a road or a school or something. Now, the District Court held that there was no takings claim here because the spraying was done pursuant to the so-called police power. This is the state's general legal authority to protect health safety, morals, general welfare, etc. Now, on appeal, the Fourth Circuit said that's wrong. In fact, it's very wrong. It's axiomatic. The court said that the police power is not exempt from the taking's clause. Nevertheless, the Court affirmed on different grounds. It said that the death of the bees was not natural and foreseeable. In other words, it was an accident. And there's no takings liability for accidents. So, you know, if the police commandeer your car, to chase down a suspect or fleeing suspect, they would owe you money. If they are chasing a fleeing suspect, and they get into an accident and damage your car. You know, and your car's not the one they commandeered, then they don't owe you compensation. Now,

Anthony Sanders 19:30
at least under the taking's clause, right?

Jeffrey Redfern 19:32
At least under the taking's clause, there might be negligence liability. But that's all governed at least when the government is a defendant by various tort statutes that determine when and under what conditions you can hold the government liable for the kind of negligence that you would sue your neighbor for if they crashed into your car. Now, this case is important because this mistake that the District Court made is actually becoming really common. We came across this in a 10th Circuit case that we had. Some of you may remember where a homeowner had a fugitive barricade himself inside his house. And the police SWAT team essentially destroyed the house with a tank to drive out the fugitive. And afterwards they told the homeowner, well, tough luck. You know, this is all pursuant to the police power, it was important to get this dangerous criminal off the street, so we can't be held liable. And the 10th Circuit agreed. They said, Yep, the police power is exempt from the taking's clause. Now, this is if you're a, you know, a doctrine nerd, this is an interesting mistake that the courts have been making. Because if you go way back to the 19th century, there are these Supreme Court cases that say, there's no takings liability for exercises of the police power. The thing is, back then, the police

power meant something different than it means now. In all those cases, the court was talking about regulating uses of your property, in particular regulating harmful or noxious uses. So instead of having just general nuisance liability, in tort, you started to have regulatory schemes that told people you can't, you know, operate a tannery here, or, you know, spew these chemicals there. And people brought takings claim, saying that you've destroyed the value of my property. And the court said, “No, no, no, no. All they're doing is preventing you under their police power from harming the general public. That's not a taking.” Well, the police power is much broader now. Basically, it means almost everything that the government does. And since the early 20th century, the Supreme Court has consistently said that the police power is not exempt from the taking’s clause. There are a lot of facts and circumstances that go into determining when various exercises of state power constituted taking. But there's certainly no blanket exemption. And some of the things that come into play as the court or as the Fourth Circuit noted, in this case, are whether it was intentional or foreseeable. The Supreme Court has echoed that recently, in a case called Arkansas Game and Fish about intermittent flooding, where the Army Corps of Engineer was destroying a bunch of valuable land through the way it opened a dam. And the court on remand said, “Look, just because it's intermittent flooding, because it's for the general health and safety, and welfare of the people doesn't mean that it's exempt. Go back and look at all the facts and circumstances consider whether they knew what was going to happen when they opened this dam and so forth.” So that's essentially the approach that we have been advocating here, both in the 10th Circuit, and in a recent similar case in Texas. And it's refreshing to see a federal court properly reject this argument that is started to gain some traction in lower courts that the police power is supposedly exempt. It makes the work of courts more difficult, because then they have to look at all the facts and circumstances. They can't just say, well, the police were doing a good thing, therefore you lose. But it's certainly what the Supreme Court has told the lower courts they have to do.

Adam Shelton 23:34

I agree, reading this decision definitely reminded me a lot of the 10th Circuit's opinion, it lacked, and I was quite happy to see the Fourth Circuit here, kind of reject that argument and say, “No, no, no, the police powers aren't just some special general exemption that you get, we still have to look at the facts,” which is exactly kind of what we want courts to do is look at the facts in every individual case and judge it for that case, that it is under the facts and under the law, and not just create a whole host of special rules that say, if this is done, or if it's done under certain powers, then there's nothing you can do and you're just kind of out of luck.

Anthony Sanders 24:09

I thought, uh, Jeff, maybe we could, for listeners' benefit, break down a little bit of how the court approach the takings issue, because we hear, you know, in different cases, and I think the casual observers of this area of law definitely, rightfully, get confused when they hear about, like, a takings claim like this, versus a regulatory taking, versus, you know, an eminent domain claim versus like the kind of claim that that you're litigating that are the end that we litigated, and that that 10th Circuit case. So, like, how does that how does that all line up, you know, like a regulatory taking is, is what happened to these poor bees a regulatory taking? Is it a physical Taking, how are we supposed to look at it? Of course, the court decided wasn't taking, but the theory behind it like, what? Where does that fit in?

Jeff Redfern 25:08

So that's a really interesting question. I think that the right way of looking at this and courts have looked at this in in consistent ways, is that, you know, there's, there's a general test under a case called Penn Central, that helps you to determine when something that the government does, other than just condemning your property and taking title to it constitute the taking. And, you know, there are three factors that you look at, but the first one is the character of the government action. And the Supreme Court has said that when the character can be characterized as a physical appropriation are much more likely to find a taking. So, what that means is, if the government is just telling you, no, you can't do this, or you can't do that on your own property, you're going to have a much higher burden on the subsequent steps to prove that there's a taken, you're going to have to prove that you've lost a lot of value in your property. When what the government did is more like a physical appropriation when they are literally going on your property, or they are damaging your property by spraying chemicals, as in this case, then the burden on the property owner is much lower, and the courts are much more likely to find a taking. But it is I think it's essentially a unified analytical approach. It's just that when the government does something physical, your burden is a lot lower. And I think this certainly qualifies as something that that is on that that physical end of the spectrum.

Anthony Sanders 26:45

And it seems like the court was definitely saying that if, if these if the, for whatever reason, the county had sprayed these chemicals at the beehive, and had done it purposely and purposely hadn't told these farmers, that would be a taking, even though they weren't like literally taking any stuff off the land. It's just that there's this test for like, What's the taking? And what's just a regular tort?

Jeff Redfern 27:13

Yeah, I think that's right. I mean, you could imagine maybe a hypothetical situation where, you know, there's some plague of locusts or something that is, it's just advancing, and it's an emergency, and you have to spray immediately, and there's no time to warn the beekeepers or, or even if there were they wouldn't be able to protect the bees in time. And they knew, you know what, we're going to have to kill all these bees in order to stop the plague of locusts. I think that under the Fourth Circuit's approach, that would be a taking.

Anthony Sanders 27:45
Right, right. That one, I mean, one, at least heartening thing about the case, I should mention, by the way, which is argued by our Friends of the Pacific Legal Foundation, who also had scored the victory in the property rights case of the Supreme Court yesterday, that Cedar Point Nursery case, it seems like they these beekeepers, they had state law claims under the State Tort Act, or whatever they call it of South Carolina, that was remanded the state court. So, I mean, I know nothing about South Carolina, taking, you know, municipal liability or government liability law, but it seems like they would have a shot in state court. But that would then depend on like state sovereign immunity doctrines. It doesn't depend on federal takings doctrine.

Jeff Redfern 28:35
That's right. And I think it's, you know, again, I don't know anything about state tort doctrine and sovereign immunity, either. But it's hard to read these facts and not think, yeah, the state here, the county here was extremely negligent in not making sure that these people with valuable bees knew that they were about to drop pesticides right by their facility.

Anthony Sanders 28:59
Yeah, they'd call these people before. The people before had covered the bees. Like they didn't bother going out. They knew where the beekeepers lived. It wasn't like they knew there's some beekeepers out there, you know, do what we can they actually knew these people were there, they just tell them we are going to do something kill their bees. Adam, before we leave, I'm interested in something of how this case intersects with the project on our project on immunity and accountability at IJ, where we've been working on things like qualified immunity and how you can get help from the government when it harms you. I mean, here, I think, you know, at bottom in some ways, why the Fifth Amendment, the takings clause calls out the people is because often under state law, it is really hard to get compensation. There can be damaged caps that are usually found constitutional under state law. And there could there is sovereign immunity. I mean, at bottom, there's sovereign immunity, if the state

really wanted to not compensating someone when its own officers have negligence, what do you see is like, you know, the intersection here between the Fifth Amendment and then accountability doctrines if say they do go to, you know, I, again, know nothing about South Carolina State law, but say that they actually really couldn't get compensation for this or it would be it would be puny compared to the damages that that they received, how would that then intersect with maybe the Fifth Amendment or some other part of it?

Adam Shelton 30:37

It's an interesting topic to think about, because it is kind of, we hear frequently, like, oh, we can just go to state court, you can just get damages in state court, state courts have, or states have their own tort acts, they have their own kind of history. And you know, all tort law, for the most part is state tort law. But you're right, it's frequently very hard to get damages against government officials and state courts, because I mean, state courts are so different than federal court. So, it's hard to litigate in state courts, unless you're an expert in that specific state court, frequently. But there is a part where, you know, the Constitution is preeminent, the Constitution is there to ensure that all of our rights are protected. And when the states are failing to protect our rights. You know, that's kind of what we saw with the whole purpose of Section 1983, which is what this lawsuit was actually brought under. It was to ensure that state court or it was to ensure that people had avenues to protect their rights when state courts were refusing to do so. So hopefully, they have some remedy under state law, especially in this case, but we have seen that the federal courts do take this kind of into consideration when they're dealing with claims under the Constitution of is there another way you can possibly get compensation or is the constitution your only avenue? It's quite an interesting case. It'll be a very interesting case to keep an eye on in state court. And then if it's appealed up to the Supreme Court, this decision here, especially after Cedar Point, and with kind of the seeming potential circuit split with this case, and the 10th Circuit of what do our police powers, or does action taken under the police powers explicitly exempt from the Fifth Circuit or from the Fifth Amendment taking jurisprudence? It'll be really interesting to see both kind of that petitioner what the court does with that, especially after Cedar Point yesterday, where the court seems to be more favorably looking towards property rights. And just what happens to state court, if it goes back to state courts, we can really see, you know, is state court in South Carolina a viable option to get damages when the government damages or destroys your property. Maybe not intentionally, but negligently, at least your property still destroyed at the end of the day.

Jeff Redfern 33:04

I think you're definitely right at a higher conceptual level. You know, accountability is a big umbrella, and we're looking at is a similar instinct not to hold government accountable. I think on a on a narrower level, though. I think that one of the reasons that plaintiffs in some of these, these takings cases have had trouble is because they're bringing both tort and takings claims, which, you know, I'm not saying that's the wrong choice tactically. But I do think that sometimes the courts here will reject a tort claim. And then after they've gone through all this work to explain why, you know, what the police or what these government officials have done was reasonable and correct. It seems jarring to turn around and say, but you owe them money anyway, under the taking's clause. So, I think that some of these courts are muddling these tort concepts with takings concepts and not really properly appreciating that takings liability has nothing to do with wrongdoing. It's just about the question of who pays for something that benefits the public.

Anthony Sanders 34:16

Right. And I think your bottom-line Jeff, that this is a good step in the direction of having taking's claims not be just washed away, when someone raises the police power is a powerful one. Well, thank you both gentlemen, for taking us through this tour of the Fourth Circuit. We will be touring through other circuits in coming weeks, and we have a special episode or two also up our sleeve. But in the meantime, I want everyone to have a good weekend. Enjoy those last couple days of Supreme Court opinions for June if that's what floats your boat, but for everybody, I would ask all of you to get engaged.