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Anthony Sanders 00:06

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, October 14, 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. Also, please check out our sister podcast, the documentary series, Bound by Oath. Listeners to Short Circuit are likely familiar with civil forfeiture, the process by which government acquires title to property it alleges is associated with a crime. Often it does this with little evidence, due process, or even criminal charges. Here at the Institute for Justice, we litigate civil forfeiture cases where the police seize 1000s of dollars from innocent people all the time, but one other thing about civil forfeiture is that because the lawsuit is often technically against the property in question, you can get some funny case names depending on what the property is, such as United States versus $50,000 in US Currency, or United States versus One Cuneiform Tablet Known as the Gilgamesh Dream Tablet, or the always popular, United States versus Approximately 64,695 Pounds of Shark Fins. Well, another industry name came across the Short Circuit newsletter last week: United States versus Letter from Alexander Hamilton to the Marquis de Lafayette dated July 21, 1780. When I first saw this First Circuit case, I knew we had to talk about it. Now, we'll be hearing about the case in a moment from Bob Belden, an IJ attorney who's making his first appearance on Short Circuit this week, but before that, I'd like to read you some lines from the letter. So, in this letter, Hamilton says to Lafayette, "Mr. Lafayette, rock hard, like Lancelot, I think your pants look hot," and he also said, "I'm just like my country. I'm young, scrappy, and hungry". Uh actually, sorry. I was reading off a different set of lines attributed to Hamilton, and I didn't even read

them correctly, so I'll stop there. I'm going to leave the rest of the case to Bob. So, Bob, welcome to Short Circuit.

Bob Belden 02:27

Anthony, thank you for having me. I'm going to do my best not to sing any lines from Hamilton, and that's because we want people to listen to the podcast.

Anthony Sanders 02:39

Another issue we litigated IJ is free speech. One aspect of free speech that we don't litigate much, but we have to know about because sometimes it's in the background, is retaliation by the government for speaking out. This is especially a concern if you depend on the government for your livelihood, such as if you need a permit approved by city hall to run your business. It's also even more of an issue if you work for the government. Now, hopefully, you've been disabused of the notion that shouting fire in a crowded theater is a good metaphor for how the First Amendment works. It is a bad metaphor, and you can go read Ken White, also known as Pope Pat, on the internet for that explanation. But this week, we're going to see the intersection of the First Amendment, a firefighter, and not a theatre, but a Hollywood studio, because someone actually should have shouted fire a little earlier on this particular film set in a New York city building. IJ Attorney Kirby Thomas West is here to share this First Amendment story about this government employee firefighter from the Second Circuit. Kirby, thanks for coming on, and since you're not in a theater, but instead in a virtual studio, you can go ahead and yell fire if you like.

Kirby Thomas West 04:01

Well, thank you very much Anthony. I will refrain from yelling. I'm still trying to recover from my disappointment learning that I'm not going to get to hear either of you singing anything from Hamilton. But alas, I'll soldier on and get to this other very interesting case out of the Second Circuit. So, this case

goes back to March 2018, and the filming of an Edward Norton movie called *Motherless Brooklyn*, which was being filmed in Manhattan. Actually, in a five-story brownstone where they had essentially a studio setup inside the brownstone, and a fire broke out during the course of production, and tragically, a firefighter actually lost his life in this fire. It was a pretty devastating fire, and in the course of the investigation, the fire marshal who had been assigned to investigate this fire determined that the cause was one of two things. Initially, either a boiler that had been subject to some off unauthorized repairs, or from the activities of the movie crew who was working in the building, and he told his supervisors that these were the two causes, and then said, my tentative conclusion at this stage in the investigation is that it's more likely that it was the activities of the production crew. There was high intensity lighting inside the building, and he had noted that the crew had drilled holes in the floors, and ceilings, and walls, and that these holes could have punctured wires within the wall, and it wasn't, you know, all properly done. When he told his supervisors this, they called him to a meeting, and he allegedly he alleges, was told to issue a report saying that it was not the activities of the production crew, but it was that boiler that he had noted also had some unauthorized repairs to conclude his investigation and move on, and he says that he was told to do otherwise would be career suicide, because they didn't want to embarrass the production company and discourage them from continuing to work in New York City. He declined to do this; to file this in his view, false report and said, you know, no, I'm gonna stand by what I said. I think this was the production crew, and he actually went further and sent an email to his colleagues about what had happened and the meetings that he'd had with his supervisors, including the chief fire marshal, and he said, essentially in his email to his colleagues, he said, my advice is that you're going to be faced with a lot of pressures in this in this job, and you'll have pressures from your supervisors, and I urge you to stick by your training and do the right thing, essentially saying, he thought that the supervisors were acting corruptly, and you know, you guys have to hold your ground because this is what's going to happen to you too. He was removed from the investigation. Ultimately, somebody else completed the investigation, and did find that it was the boiler, and not the activities of the production group. Sorry, go ahead Andy.

Anthony Sanders 07:17

What a surprise.

Kirby Thomas West 07:18

Right. What a surprise. I can't imagine why that happened, and he you know, so he sent this email to his colleagues, and then he went further. He made a complaint to the New York City Department of investigation, and he filed a notice of claim saying that he intended to sue New York City, and to sue the fire department saying that this, you know, he had been retaliated against for his speech and things that he'd said on the job. After that, he was placed on modified duty status, which, you know, so at this point, he had not only been taken off of this investigation, but he also was placed on modified duty status where he was ineligible for overtime, and his role in his job changed quite significantly. So, in most of our employment, something like this, some speech would, you know, you can get fired for it. If one of us came on this illustrious podcast and said, the government's use of…

Anthony Sanders 08:17

Down with Scott Bullock

Kirby Thomas West 08:19

Yes, yes, or if in our next case, Bob says the government's use of civil forfeiture in the United States is constitutionally valid and important to fight crime, you know, we can…

Bob Belden 08:30

Depends on who you ask

Kirby Thomas West 08:33

Well, we could, we could face some repercussions from our employer, not least because there would be significant questions about our judgment and our ability to perform our job well, but when you're working for the government, you do have First Amendment protections on the job to a certain extent. And so, this fire marshal brought several claims. He brought a First Amendment retaliation claim, saying he had faced repercussions in his job because of things that he had said, and he brought two other claims. One other retaliation claim under New York Civil Service Law, and an intentional infliction of emotional distress claim. The District Court dismissed all three, and we found ourselves at the Second Circuit, which is what we are talking about today, and the Second Circuit said that the latter two claims were properly dismissed, but when it comes to the First Amendment retaliation claim, the Second Circuit found it much more convincing than the District Court did. There are a couple different requirements for a First Amendment retaliation claim in a situation like this. There has to have been speech, not just speech related to a worker's job or internal workplace grievances, but speech on a matter of public concern that's analogous to citizens speech and not just a, you know, government employee speech, and there have to have been some adverse employment action and a causal link between the adverse employment action and the speech at issue, and the Second Circuit said that all of those, it seems like all of those factors, had been properly alleged, and the District Court was wrong. An interesting thing is the speech aspect, the email that he sent, they did not consider to be citizens speech about a matter of public concern. They said that was related to internal workplace grievances and advising his colleagues of something, but there were a couple other things he did that did constitute speech. One of which, interestingly, was a lack of speech; was his failure to file a report when he was told to file the false report, and they said that that was, you know, speech, and it was buried on a matter of public concern, which is corruption and the government that he didn't want to do this because it's illegal to file a false report, and also his complaint to the Department of Investigations, Conversations he had had with the press, his notice of claim of intent to sue… all of these things constituted speech that was on matters of public concern, very important matter of government

accountability and government wrongdoing, as he alleged, and because there was this adverse employment action where they took him off the case, and they changed his role and put them on modified duty status, the Second Circuit said that the various requirements of a First Amendment retaliation claim seems to be there.

Bob Belden 11:36

So, Kirby, I was looking through the Second Circuit opinion, and there's a footnote on page 23. That references the fact that the firefighter brought a Monell claim, which I think many of our readers would know that that is a sort of way to hold a city or a municipality liable for the result of an official policy or a custom that violates the person's constitutional rights, and I'm curious if you know anything from the record about what the firefighters allegations were about an official policy or custom that would have resulted in the negative employment actions that that he faced?

Kirby Thomas West 12:25

Yeah, that's a great question. I did not look to the record. I also noted that claim, and I, you know, honestly, I'm not sure where that would have been because it did seem like the supervisors here were… It seems situation specific to me in just reading the description of what happened, but I do think there was something else, about he had alleged that this was something that was a repeat occurrence, that the city was, or that the fire marshals were worried about keeping business in New York City, about not embarrassing the wrong people, not implicating people who it would be politically inconvenient to implicate in wrongdoing. And so, I would imagine that that could be it, that there's a, you know, a policy of law allowing these kinds of political considerations to taint investigations, but I'm not sure from the record.

Anthony Sanders 13:29

When it seems like they would be policy makers because they think, I can't remember their exact title, so they're pretty high up in the fire department.

Kirby Thomas West 13:39

That's right. It's the chief fire marshal, so I mean he has to be a high up policy maker for purposes…

Anthony Sanders 13:44

And that doesn't mean just because they give an order that that's, you know, a “policy”, but they also, you know, his statement, look out to the rest of you, they're coming for you next. I’d be careful what you say, you know, indicates that maybe there's more, I mean, maybe he was being dramatic, but… but maybe there's more there. You know, another kettle of fish is, I can't remember if he's suing these individuals for money, but that means that later there could be qualified immunity in this mix as well, because this is really just this 12 b 6 and qualified immunity doesn't, doesn't show up. Yeah, but it also seems like he's asking for, you know, to get his position back, perhaps, in the department, and then that could be a different story, because you could get that through injunctive relief I suppose.

Kirby Thomas West 14:38

One thing I was a little surprised about was, so, establishing that causal link for purposes of First Amendment retaliation, the court didn't spend much time on that. They essentially said, this happened, the adverse employment happened action happened pretty soon after. It was like five months or something after he did this, so we think it's pretty clear, and I think that's absolutely true, but in First Amendment retaliation cases, and others in other contexts outside of public employees, but where the government is like targeting you with fines or enforcement actions and things like that, courts often hold it to a much higher standard. It's not just like, well, I did this thing, and then soon after, you know, this bad thing happened to me. They have to say, well, do have proof that this, you know, bad thing was related to the thing that you said. An interesting IJ case that we have going on right now, where we

have great proof of that, is our Wisconsin Fines and Fees case that listeners should check out, where we have a board member from a town saying, well, you shouldn't have ticked off the board members, and we wouldn't have done this to you, in an email, which was handy, but in this case, you know, it was just that the proximity and time was enough to establish that that was a causal link.

Anthony Sanders 15:49

Yeah, and it seemed like with his background and how else the department functions it, at least it was properly pled that there's not good other explanations. One thing that I got from this case, and I don't know too much about how public employee First Amendment law works, and this Garcetti case, which is always cited when we're talking about public employment retaliation, it's a case from the Supreme Court from about 15 years ago, and it lays out a test for how you decide if there's retaliation to this kind of circumstance, and it has, you know, it's the law that they were applying, that the Second Circuit had to apply, but it reminded me, I think, how inadequate it seems that that test is. First of all, the issue has to be one of public concern, it can't just be something, you know, improper that your supervisor and you are talking about, and that, you know, maybe you stood up for yourself, but because it's not public concern, the First Amendment doesn't come into play, and then it has to be used speaking as a citizen, not as an employee, and I get that this is a really messy area when you apply the First Amendment to public employment, and there's probably no good answer, unlike maybe some other areas of the First Amendment, there really isn't a good answer here. There's just a test we tried to, you know, to do the right thing, but definitely there could be a better one, I think, then how the court has to go about it here.

Kirby Thomas West 17:24

It does seem messy to apply. Like, the examples in the opinion are, you know, there was a schoolteacher who complained to his superior about a student who wasn't disciplined after assaulting the teacher, and that was considered just part of his job and not citizens speech. There wasn't like an analogue to some kind of citizen complaint to supervisors in the school, and then there's a police officer

who complained to his supervisor about arrest quotas, which you think might be part of his job, but that was considered to be citizen speech that citizens can go and make complaints to police departments, so it is kind of a hairsplitting kind of thing.

Anthony Sanders 18:00

Well, the case is Specht versus The City of New York, from the Second Circuit, and so I encourage you to go check it out. You will learn a good bit about first amendment retaliation from the opinion. Another thing you will learn about, is why you should never steal documents from the Massachusetts archives, and Bob's going to tell us about that from the First Circuit with judge, a judge that we often note on Short Circuit can expand your vocabulary.

Bob Belden 18:39

Quite… There are some doozies in this opinion, but not as many, not as many as the average, so I didn't have to have my thesaurus on hand while reading, but thanks for passing it over to me, Anthony. Yeah, this is the United States versus Letter from Alexander Hamilton to the Marquis de Lafayette, dated July 21, 1780, and, as Anthony mentioned, because it's a forfeiture case, the proceeding is technically against this letter, so that's why it has this odd name, but it's a good case to demonstrate the sort of steep uphill climb for any person like many of IJ's clients, who tried to contest a civil forfeiture by the federal government. Even if you're not charged with any wrongdoing at all, and your family has been in possession of the subject property for more than 70 years, it can still be taken from you through civil forfeiture, and kind of at a high level, the First Circuit here concludes that the letter is a public record under Massachusetts law, and so that resolves all of the claimants claims here, essentially because, as a public record, the only person or entity that can own the letter is Massachusetts, and no other person, including the claimants here, can assert an ownership or possessory interest in the letter. The letter itself has got sort of an interesting background. It dates to 1780 as the title of the case mentions, and it goes from Alexander Hamilton, who was in New York at the time, as you'll know from

the play, or the musical rather, and he sends this letter to Marquis de Lafayette, our friend from France who is in Rhode Island at the time, and he's warning the marquee that the British troops that are stationed in New York are moving on and going to be threatening Rhode Island and Massachusetts. So, Lafayette gives the letter to a Continental Army General in Massachusetts, William Heath, who then forwards it to the Massachusetts sort of Executive Council, which ultimately sends troops out to Rhode Island to help. That was in 1780, and at some point, thereafter, the letter is moved to the Massachusetts archives, which is a Massachusetts government entity that stores records, and the letter is there from at least the 1850s through the 1920s, which we know from various records at the archives have. It's at that point, somewhere between 1920 and 1950, that the letter disappears from the archive, and there's a dispute about what exactly happens to it. It's kind of interesting. There was this guy named Harold E. Perry, who worked at the archives, and to borrow a phrase from Judge Selya, Mr. Perry purloined a number of famous documents and effects from the archives, and either, you know, hoarded them in his Cambridge apartment, or sold them to disreputable dealers around the country.

Anthony Sanders 22:21

I love how he describes Perry as a kleptomaniacal cataloger. Yes, I guess you don't want to be.

Bob Belden 22:30

It sounds bad at least. So, the letter goes missing somewhere between 1920 and 1950, which we know from a report that Massachusetts degenerated in the 1960s. It said that the letter was missing. It didn't say it was stolen specifically, but said it was missing. The next time the letter sort of resurfaces publicly is in 2018, when Stuart crane sends the letter to Potomac Auction Company, which is just across the river from DC and Alexandria, Virginia, and the good people at Potomac, sort of doing their due diligence, look through these public records to see if anything that they've gotten from Mr. Crane is stolen, or you know, otherwise acquired on the black market, and they, they find that the letter is listed as missing by the Massachusetts archives, so they contact the archives, contact the FBI, and shortly

thereafter the FBI seizes the letter, and five months after that, the US government filed a forfeiture complaint in the District of Massachusetts, and the rules for a forfeiture complaint are laid out in Rule G of the Supplemental Rules for Admiralty and Forfeiture Cases, but the key part here is that the government has to identify a statute that has been violated and therefore makes the product the property subject to forfeiture in its view, and here, the government identified 18 USC 981 A1C as the basis of forfeiture, and under that rule, if property constitutes or is derived from proceeds traceable to a violation of certain statutes, it will be subject to forfeiture, and here, the government identifies by cross reference the RICO statute, which by reference incorporates a money laundering statute, which by reference incorporates another statute that prohibits the transfer of stolen goods worth more than $5,000 a night. I kind of, I lay out that that incorporation of various statutes, because in the District Court, there was sort of a suggestion that, you know, maybe the Crane family should have known that what they had on their hands might not have been of lawful provenance, but I wanted to highlight the various statutes to show that it's not always clear what is alleged to be the violation. But in any event, the government claims that the letter, which is valued by the folks at Potomac between $25,000 and $30,000, was stolen by Mr. Perry, and he sold that other dealer somewhere in the US, and that would be a violation of these underlying statutes, and regardless of whether or not the crane family, who inherited it from their grandfather, who bought it in the 40s, regardless of whether they knew it was stolen, or had any had any reason to know that the government wants it to be forfeited, So after filing the complaint, the court sends out… The court and the government send out notices to potential owners. The crane estate, and the Commonwealth of Massachusetts were the only people to file claims of ownership, and at the District Court level, the government moved to strike the crane families claim of ownership on the letter. I won't go into the merits of what happened at the district court, because they largely overlap with what what's in the First Circuit opinion, but there are really two issues that that the government puts forward. The first is sort of the familiar foe for IJ clients, the standing argument. The government says the Crane family doesn't have statutory standing or constitutional standing, and here, statutory standing really just requires that you comply with the notice and claim provisions in the rule

governing forfeiture actions. There's not really a dispute about that here, that there sort of is at the District Court level. The government suggests that the Crane family filed their claim out of time. You have to kind of dig into the district court opinion to find that the government apparently sent notice to the wrong Crane estate or wrong Crane family, so there was a bit of a delay, but…

Anthony Sanders 28:03

Didn't the guy who had the Crane, who actually had the letter, he like died two days after the case was filed?

Kirby Thomas West 28:11

Yeah, like mentioned in a footnote.

Anthony Sanders 28:13

Yeah, I don't think he… He probably didn't know about the case when he did die, but in any case, I guess that maybe that was some confusion.

Bob Belden 28:22

He did. He died two days after the letter was seized, and, you know, one of the things that doesn't get mentioned is that this guy, you know, really, I don't think had any reason to question the legality of the letter, the provenance of the letter. We know from some of the filings at the district court level that nothing else that the Crane family sent to the Potomac Suction Company raised any red flags or was otherwise questionable origin, so the statutory standing issue sort of resolved without much discussion, but then you also have to have constitutional standing because Article Three says you have to have a case or controversy, and there's a standing doctrine that requires you to establish an injury in fact, traceability, causation, all of those things, and in a forfeiture action, the court describes it as a pretty low bar. All you have to do is make a colorable claim of ownership or a possessory interest, and offer some

evidence of that ownership, and that should be sufficient for constitutional standing. So here, the First Circuit doesn't deal withstanding in and of itself. It combines that inquiry with the merits issue here because, in the First Circuit's view, everything in in dispute here can be boiled down to a question of whether this letter is a public record under Massachusetts law, and the Crane Family Estate, they offered up four arguments as to why the letter was not a public record, and even if it were a public record at one point, it could have been lawfully alienated by the Commonwealth of Massachusetts, and the Crane Estate also offered up an innocent owner defense under federal law, and also made an equitable claim that latches should bar the federal government from asserting this forfeiture claim, and the court rejected all of those arguments, and really decided that because this letter was a public record, it described that question as outcome determinative. So, it's a public record, which means that Massachusetts law puts it presumptively in the custody of the Secretary of State, who has a statutory duty to keep those records safe, and to preserve them. So, following from that, it means no matter what happened in the 1922-1950 window, where that letter went missing, doesn't matter if the government tried to sell it to somebody, or if Mr. Perry, the purloiner, whether he actually stole the letter, doesn't matter what happened to it, because there's a statute on Massachusetts books that says, we are supposed to preserve this document. That means it can't be transferred. Ownership of the letter cannot be transferred to another person intentionally or negligently unless Massachusetts legislature provides for its transfer. So, it couldn't be lawfully alienated. And so, following from there, the court concludes, you can't assert an innocent owner defense, which is, in this case, a little bit of a misnomer because, like civil forfeiture as a whole, the innocent owner defense places the burden on the property owner to come in and prove, you know, that you had no reason to believe that this property you acquired or own was potentially subject to forfeiture, and the First Circuit doesn't really discuss the innocent owner defense, but the District Court points out that there's a statutory exemption to the innocent ownership defense, where, you know, essentially, if it's impossible for you ever to come into legal possession of an object, you can't claim to be an innocent owner. And pointing to the statutes that identify this letter, sort of generally, as a public record, and obligate the Secretary of State to preserve and safely keep it,

the District Court concluded that that meant nobody, but the Commonwealth of Massachusetts, could own it, and therefore, the Crane family could not be innocent owners. And then finally, it's not really clear that this ties directly to the question of ownership of the letter by the Commonwealth of Massachusetts, but the Crane Estate essentially said, you know, this claim should be barred by latches because our family has been in possession of this letter for 70 years, and Massachusetts hasn't done anything to get the letter back, and the record at the First Circuit is a little bit light on this, but there's a reference in some places at the District Court level to a Massachusetts Attorney General report or initiative in the 1950s to try to recover famous documents that were stolen by this Harold E. Perry guy, and the AG wrote letters to a bunch of newspapers and dealers around the country, and identified a lot of documents specifically, but didn't identify this letter as stolen. And so, the estate tries to say, you know, basically 70 years have gone by, and you know, you haven't really done anything to try to get this letter back. You shouldn't be able to do it now. And as Judge Selya notes on the next to last page of the opinion, the First Circuit gives short shrift to that argument, and essentially concludes that latches doesn't apply when the government is making a claim against you. So, at bottom, the letter turns out to be a public record of Massachusetts, and therefore nobody but Massachusetts can own it, and even though the Crane family had it for more than 70 years, they're not allowed to keep it.

Kirby Thomas West 35:11

Bob, I wonder what you make about the argument the court makes that this statute that empowered, that directs the Secretary of State to keep these things secure, means that, it means that the legal status of these documents is always at their own by Massachusetts, because to me, I read that statute more as this is a duty of the Secretary of State, and the Secretary of State could face repercussions for failing to live up to that duty or for violating that duty, but I don't know that it naturally follows, that that statute gives like, legal significance to every public document, no matter what the state actually decides to do in real life. So if the secretary of state at some point or somebody had, you know, if it wasn't the kleptomaniacal cataloger, but somebody had actually sold this document to somebody, and it did get

into their hands, for all intents and purposes, legitimately, it seems like to me that there might have been state officials who violated the law, but I don't know that that means that the letter itself never could be owned by anybody but the state.

Bob Belden 36:20

Yeah, no, I, I have a similar read of the statute to you, Kirby. I think that when I read the language shall be safely kept, or shall be preserved, you know, I thought safely kept doesn't necessarily rule out the idea that, you know, the Commonwealth can loan the letter out to somebody who would then you know, potentially have a possessory interest in it sufficient to bring a challenge to a forfeiture action. The preserve language, by that I mean, you know, to me, when we're talking about historical documents, that could very easily be read to mean, you need to preserve the, you know, the meaning of this document or the information that was conveyed from Alexander Hamilton to Marquis de Lafayette so that we have a historical record of the things that have happened, rather than, you know, focusing on the actual ownership of the piece of paper, and, you know, it does sort of this kind of Trump card. At the end of this case, we have this statute that says, we shall keep and preserve this document, therefore, no matter what happens, you know, nobody else can own this document. It just seems like it sort of invites a parade of horribles about you know, well, what if the, what if the archives was just, you know, sitting documents out in the hallway, and people were happening by. Are they safely keeping those, you know? And if somebody else comes into possession of those innocently, are they not allowed to have them? It is sort of an interesting illustration of how, when you get into a forfeiture action like this, the deck is, you know, quite a bit stacked against the person who's trying to come in and prove that their own property is not the instrumentality or the proceeds of a crime, and one sort of the description of how this letter goes missing in the opinion, I think is another really good example of that. When you contrast it to the evidence that the estate came forward with relating to the provenance of the letter that the Commonwealth of Massachusetts says, there's a 30-year window where this letter may have gone missing, and we don't really know how it went missing, but it doesn't matter because we can just say,

we have this statute. The Crane family on the other hand, they you know, they wake up one day in 2018, and to borrow a phrase from Pope Pat, Ken Wyatt, you know, they get a notice that they've been doing the RICO, and that they're going to lose this letter, and so they've got to, you know, scramble around and say, you know, does anybody remember R. E. Crane? Well, maybe not, but let's go through his effects. Okay, well, we found this envelope from a rare documents and rare art dealer in Syracuse, New York, whose last name is Hi, so I can't remember his first name. And they claim he's reputable. They claim he's reputable, and the envelope is postmarked in 1945 I think, which would have been sort of in the window where this letter might have gone missing, and when the opinion is describing the evidence that the estate was able to marshal, you know, the opinion doesn't take them to task, but it does note that the estate is light on hard facts about the provenance of a letter, you know, that belonged to somebody who got it 70 years ago. I mean, I don't know that I own anything from 1945, but I'm sure my grandparents do, and if I ever had to prove that they didn't get it from somebody who stole it, I wouldn't know where to start. And so...

Anthony Sanders 40:21

Here's one thing that is completely missing in this opinion, and it's the words "bona fide purchaser". It doesn't show up anywhere in the opinion, and we all know from property class, and the non-lawyers listening, you've probably heard this word anyway, that you know, there are situations where if you are a bona fide purchaser, and you bought something from someone who maybe got that from someone else, and you go back, and it actually was illicitly gotten, it was stolen, or they got it from a pawn shop who got it from someone who stole it from a home or whatever it is, that you don't necessarily have to give it back if you are a bona fide purchaser. And I know you don't always get to keep it if you're a bona fide purchaser, but I mean, that's kind of what the definition is. And so, you know, there has to be some factual scenario, I would have thought, where say that the Commonwealth actually did sell this letter, but they didn't keep a record of it somehow, or they said, you know, we don't need this anymore. We got a copy of it, but you know, that was 1945. We don't have the records. It goes to some dealer. This

family buys it. Obviously, it seems like they did nothing wrong. Like, how does the court not even talk about why them being a bona fide purchaser doesn't, you know, mean, something? And it seems like they're just saying, well, it's because the state essentially can't stop owning this thing unless they actually pass a statute, it is automatically the state's property no matter what happens. I mean, it sounds to me like somehow, how state property is dealt with in the UK, where the crown, you know, often just… If the crown owns a copyright, for example, I don't think it ever goes out of copyright. It's just, it is the Crown's copyright, and, or the crowns property, and, you know, it would take an act of Parliament to change that. It seems like this, just kind of this theory of sovereignty above it all with how the property works, and maybe that's true? I mean, it didn't seem like they brought up any other cases where this had ever happened, but it would have been helpful to go through the bona fide purchaser analysis, which I think is really what they were getting at with their innocent owner claim, and I don't know if that's a fault of loitering, or just a fault of the opinion not being engaged on that.

Bob Belden 43:01

No, I think that, I think that the bona fide purchaser argument came up at the District Court, and it may have been asserted in the briefs at the First Circuit, but I think, you know, as you point out, the conclusion that this was a public record, and there was no statute enacted by the Massachusetts legislature to authorize the alienation of the letter means that, you know, in their view, nobody can be a bona fide purchaser for value.

Kirby Thomas West 43:35

And the thing I thought was interesting was, Anthony, to your point that there's this kind of mentality throughout the opinion that the government stuff is always the government's and there's nothing you can do about it, the one case that was cited in a footnote as evidence that maybe sometimes the government might dispose of property, and a fortuitous person might find it, and it might be legitimate for them to keep it. The person that's in that case, so it's a case from the 1950s. The person actually

lost, and the facts were so outrageous, I went and looked at it. It was somebody who had found used shell casings that had been on public lands that the army had used, that had been on public lands for four years just sitting in like a trash heap, and he took the use shell casings, and sold them for scrap metal, and was brought in for that. For taking this scrap metal and selling it, he made like $87 in 1951, and he lost because he had like, taken property that was the government's, and stolen property, and so he… But that was the case that they cited as, well maybe sometimes this would be okay, because they…

Anthony Sanders 44:40

Did he lose because it was just considered not abandoned on the facts?

Kirby Thomas West 44:45

Yeah, yeah. But I mean, it's just funny that that's the example of like, well, maybe this could be… This could happen sometimes that you fortuitously get government property, and it turns into yours, but actually, we don't have a good example of it.

Anthony Sanders 45:00

Right, when they mentioned like, you can't, usually, you can't adversely possess government land, but you can adversely possess private land, so there are certain risks with them. Another thing that I was struck by was that this was thrown out on standing, and as we talked about last week on this show, standing comes up all too often in these cases, and this is a case where I think they confuse standing for the merits. I mean, maybe the merits, it sounds like, you know, based on this theory, they would have lost on the merits, but it didn't sound like standing to me. And Judge Selya even says up front, we know often these two are confused, and you try not to do that, but this is actually a case where they go together. I didn't think they went together at all. I thought that these people, obviously they have a possessory interest in this, or a colorable one, and let's fight it out. And on the facts, it seems like

they're going to lose because they can't cap a claim, but that's not a standing issue. So anyway, it poisons the well even more for standing, the standing case law that government lawyers love to cite.

Bob Belden 46:06

Yeah, couldn't agree more. The passage describes all you need for standing as an allegation of ownership and some evidence, and that's exactly what the Crane family put forward here, and, you know, no standing.

Anthony Sanders 46:21

Well, I'd like to thank our listeners for standing with us this whole time. Love to thank Bob and Kirby for discussing these cases, even if there was no singing. Perhaps next week, things will be different. I'll try to dig around for some singing attorneys who might want to come on the show. None come to mind at the minute, although there's a… I know there were a couple of Fifth Circuit judges who did a wonderful Hamilton Spoof last winter, so you know, maybe they can give us some recommendations, but otherwise, all of you, I hope you have a wonderful weekend, and in the meantime, I'd ask that everybody get engaged.