

Short Circuit 208

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SPEAKERS

Anthony Sanders, Jaba Tsitsuashvili, Josh House

A

Anthony Sanders 00:01

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 Friday, February 25, 2022. Mel Brooks said, It's good to be the king. Well, we don't have royalty in America, but the keepers of power still have it pretty good. This week, we'll talk about how there's rules for you, and then there's different rules for the government. We'll do this with a little forfeiture and a little takings. But the forfeiture is not the one listeners will be thinking of; not civil forfeiture, the process where the government takes your stuff, but forfeiture of issues a party argues in a lawsuit. We learn that although private parties are usually told to make like a tree and get out of here, when they don't preserve legal arguments, the government gets to play by different rules, at least when they're searching your car. And you know, who else gets to play by different rules? The government. I'm not repeating myself here. I'm referring to a different part of the government, your county property tax authorities. If you don't pay your property tax, everyone knows the county can come and take your house and sell it off to pay those taxes. But what if they make a profit on that sale? Turns out that unlike your bank, when you default on your mortgage, the county gets to keep that profit. Pretty good gig if you can get it. Here to help me explain these amazing rules are two amazing attorneys. Joining us for the first time on Short Circuit is IJ attorney Jaba Tsitsuashvili. Jaba, welcome to Short Circuit and please tell the listeners how to actually pronounce your name.

J

Jaba Tsitsuashvili 01:49

Thanks, Anthony. Yeah, I'm really stoked to be here for my first appearance on Short Circuit. My last name is pronounced Tsitsuashvili. But like we spoke before recording, Jaba is good.

A

Anthony Sanders 02:05

Great. Well, thank you, Jaba. That's how our listeners can remember him by and we look forward to the discussion he's going to have about the Fourth Amendment and a bunch of other

stuff. But first, I'd like to also welcome IJ's Josh House, who is going to talk about a house in a little bit. Welcome back, Josh.

J

Josh House 02:26

Thanks. Happy to be here. And if you have trouble pronouncing my name, you probably shouldn't be hosting this podcast, Anthony.

A

Anthony Sanders 02:32

Yeah, yeah. Well, that might be another problem we'll get to another time. So Jaba, take it away. A lot of things going on in the en banc 11th Circuit. So this will just be a little taste for our listeners as to this case. But please tell us what's wrong with the en banc down there.

J

Jaba Tsitsuashvili 02:53

Sure. So yeah, there's there's really a ton happening in this case. Like you said, it's an en banc decision, where the entire 11th Circuit decides to take this issue. And they end up splitting a 7-2, 7-judge majority, a 5-judge dissent. And Chief Judge William Pryor writes a solo concurrence, which I'll get to in a little bit as well. But backing up a little bit here, I'm going to try my best to give a summary that doesn't go too much into the weeds, but also gives enough kind of flavor of what's happening and what's animating the discussion here. So what happened was back in 2013, an officer pulls over a car because he says that the car has veered into essentially, I think, the shoulder basically. And he notices that one of its blinkers is blinking rapidly. So he says, This gives me a reason that pulled the car over both because of the veering and because of the rapid blinker, which indicates that it was a malfunctioning blinker, and maybe that there was something wrong with a bulb somewhere in the car. He asks the driver to get out of the car, which under Supreme Court precedent he's allowed to do. And he then proceeds to ask the driver a bunch of questions about, you know, where are you going? Who are you going to see? Why are you going there? And then he changes gears a little bit and starts asking, you know, really just out of the blue with no basis, you know, do you have counterfeit goods in the car? Do you have drugs in the car? Do you have a dead body in the car? You know, he really ratchets it up really quick, and again with no reason to believe that any of this might be going on again. It was just, you know, a veering suspicion and a taillight suspicion basically that he pulled this car over for. And ultimately what happens is that he conducts a search of the car, along with another officer, and they end up finding a gun in the car. And the gentleman who was pulled over, he has a felony on his record. So he's in violation of a federal law, which makes it unlawful for anybody with a felony to have a gun. And so he's facing prosecution and a jail sentence. During his prosecution he argues that this evidence should be suppressed because there were various Fourth Amendment violations in the course of this stop that led to the search of his car. I would love to get into all of the Fourth Amendment issues that are actually implicated here, because I think they're fascinating in just kind of their individual particulars, but also as a matter of the big picture of, you know, kind of the erosion of the Fourth Amendment and the way that traffic stops are used as these fishing expeditions, essentially, to try to ferret out crimes without any reason to think that they're gonna find them. But I'll leave that for a different episode. I think because you know, this this case, really, the decision that we're talking about actually revolves around something completely different. Ultimately, he argues

that the the gun should be suppressed because it was obtained unlawfully in violation of the Fourth Amendment. So this is known as the exclusionary rule, where the court will exclude evidence that was unconstitutionally obtained in order to essentially make sure that there is a remedy when there is a violation of a constitutional right, which is something that we talk about a lot here at IJ too, right? If you have a right, there should be a remedy. And that remedy in criminal cases is suppression of the evidence, exclusion of the evidence from your trial. But there's also a good faith exception to the exclusionary rule. The good faith exception says that if what the officers did was in good faith on, you know, judicial precedent that, you know, seemed to authorize what they did, then the exclusionary rule will not apply. Because there supposedly it doesn't serve its kind of deterrence function, right? If what we're trying to do is deter officers from violating the Fourth Amendment that deterrence rationale kind of doesn't hold water where they are relying in good faith on precedent that then ultimately gets changed or overruled or altered or, you know, gets called into question. So, in the district court, at the trial court, the government argued that the good faith exception to the exclusionary rule should apply. So let me maybe back up a little bit here. The basis for Mr. Campbell's argument for exclusion was that there was a case in 2015, called *Rodriguez* in the United States Supreme Court, which said, basically, that officers are not permitted to extend a traffic stop beyond its traffic violation mission. Basically, you can't just start, like I said, probing about unrelated things and just keep the guy there and keep them talking, you know, unless you have some articulable basis for thinking that there's an actual crime afoot other than the traffic violation. So that's what the court said in 2015 in *Rodriguez*. In 2013, when the traffic stop occurred, the governing law in the 11th circuit was much more forgiving to officers in these circumstances. And basically, you know, I think there's a decent argument that under the 11th Circuit laws as they stood in 2013, that the officer didn't actually violate that that 11th Circuit law. So the question then becomes, well, if it's the case that it wasn't until after the stop that the *Rodriguez* rule gets established, shouldn't the good faith exception apply? Because the governing law in the 11th Circuit beforehand, you know, the stop seemed to be kosher, under that 11th Circuit law. So this argument gets hashed out before the trial court, and ultimately the trial court rules that there was no Fourth Amendment violation, and the motion to suppress the evidence is denied. So Mr. Campbell, the criminal defendant, he appeals to the 11th Circuit and when the government replies to his arguments, the government does not make an argument about the good faith exception. It's simply missing from the government's brief. It's not in there. So when the 11th Circuit panel, the original three judges that hear the case, they initially also don't address the good faith exception to the exclusionary rule. But then, on their own, you know, what's known as *sua sponte*, on their own, they decide that they're going to issue a revised opinion that does rely on the good faith exception to the exclusionary rule. And they say that the reason that the motions to suppress should be denied is because of the good faith exception. Now, they never asked the parties, you know, either Mr. Campbell or the government, to brief this. Because the government hadn't brought it up in its brief, and they didn't ask them to address it in some sort of supplemental briefing. They just kind of did it on their own and they relied on the good faith exception. Which is a little bit troubling, for some of the reasons that we'll get into in a second. Because, again, remember, the government didn't rely on it on appeal, and the court decided to rely on it without asking the parties what they thought about it. So then the 11th Circuit decides to take the case en banc. I guess it was 12 judges deciding it at this point. And in the en banc order, they do ask the parties to brief this question of whether the good faith exception applies. So now they are actually being heard on the question. But the issue remains of is it appropriate for the court to continue to kind of do this just *sua sponte* on its own given that, again, remember, the government had never brought this issue up on appeal except for when the en banc panel says, Hey, guys, can you please tell us what you think about the good faith exception here? So now the debate becomes, is it appropriate for the 11th Circuit to do this on its own, to essentially reach out and decide an

issue that the government never brought up? And then that's where things get heated. I should say that this is over 130 pages of opinions between the majority, the concurrence and the dissent. It's about a 50+ page majority opinion, and it's about 70 pages from the dissent, really meticulously kind of going through and explaining why everything that the majority does and says doesn't really hold water. And if I'm honest, I think the the dissent has the better of it on almost all of its points. Now, the question really boils down to this very esoteric, very lawyerly debate, very just hairsplitting debate on the difference between, you know, acting like there's a forfeiture of an argument and waiver of an argument. And the majority says, and actually, you know, everybody agrees that there's a difference between forfeiture and waiver. Forfeiture of an argument is essentially inadvertent or mistaken omission of an argument on appeal, and waiver is a conscious decision or a strategic decision to not make a certain argument on appeal. And this is really important, because everybody agrees that forfeiture can be essentially excused. And, you know, judges can go out of their way to essentially reach out and decide an issue that's been forfeited. Now to be clear, they're only supposed to do that in exceptional circumstances. There's a big debate here about whether this qualifies as exceptional circumstances, even assuming that the forfeiture rule applies. But then there's a question of was this actually forfeiture? Or did the government knowingly waive the good faith exception argument by omitting it from its brief? And at the en banc oral argument, a lot of the judges asked the government lawyer questions that are meant to essentially probe this question of, well, did you forfeit the argument or did you waive it? Because that's going to be an important consideration deciding whether we can reach out and decide it. And the government lawyer kind of tries to, you know, hem and haw a little bit, but ultimately the word he uses is that this was a conscious decision by the government. Well, conscious decision to me sounds like it was a knowing decision to waive this argument and that it was not an inadvertent forfeiture of the argument. So the dissent I think understandably makes a lot out of this. They say, Look, the government lawyer himself told us this was conscious. And in the majority, there's like six pages with several half-page-long footnotes where the majority is accusing the dissent of engaging in, quote, antics during oral argument by trying to probe whether this was forfeiture or knowing waiver. And then in his solo concurrence, Judge William Pryor calls it an inquisition by the dissent. During oral argument, he says, This Inquisition designed to figure out whether this was forfeiture or waiver. The dissent, you know, it comes with receipts. It quotes extensively the actual transcript of the oral argument. And what turns out to be the case, I think, in the kind of modern parlance is that the majority and the concurrence, they really are telling on themselves, or in older parlance, they doth protest too much, because, ultimately, when you quote the transcript, you see that Judge William Pryor himself asked the question, was this a conscious decision or not? And I don't have the exact quote of how he said it, but he was the one who uses the word conscious. And then he accuses the dissent of having engaged in an inquisition at the oral argument. And the majority calls it antics and it's really the situation where it's like, okay, when you have to go this kind of over the top, again, like I said, you're kind of telling yourself, right? Especially when this stuff is written down and recorded in a public oral argument. So, I'm kind of rambling here, but I think this is a very key kind of point, right? Like, if this was indeed a knowing waiver, What the government called a conscious waiver, how can the majority actually say that in reality, this was a forfeiture, and that we are allowed to reach out and decide this issue? Right? Putting aside the question of whether exceptional circumstances exist that actually warrant us doing that. But the prerequisite question of forfeiture instead of waiver, it doesn't make any sense. The government told you this was conscious. So now this kind of raises the question, what's actually going on here? What's happening under the surface? What is leading the, you know, seven judges on the 11th Circuit to do this? To kind of so almost blatantly blur this distinction between forfeiture and waiver? And again, Chief Judge Pryor, William Pryor, in his concurrence he kind of says the quiet part out loud, where he says essentially that I don't like the exclusionary rule. And there's a lot of

elements of that in the majority to where they're essentially saying that this is policy considerations. They use the phrase, and the dissent, quotes it ad nauseum all the time where they say, We're making this decision based essentially on policy considerations, policy considerations, policy considerations, essentially just kind of reiterating, We just don't like the exclusionary rule. Because, you know, it's going to set criminals free and it's going to wreak havoc on society, and etc, etc. And, you know, again, William Pryor goes out of his way to make the point that this would result in this man who had a gun and a mask in his car being out on the streets. And he says, we can't allow these societal costs. But here's the thing: It's the prosecution's job to weigh those societal costs. Now we at IJ, we often talk about how it is judge's jobs to be engaged. And so maybe to some extent this kind of cuts against that notion. But I think that there's a really important difference here in the extent to which we kind of will lambaste judges for weighing social costs and lambaste them for not weighing them is that when when we say we want judges to be engaged, it's often in the context of the government is trying to do something to you with some sort of adverse consequences. And we want want judges to be engaged and step in and make sure that what they're doing is legitimate and reasonable, and that it makes sense. But here where the government has made a decision again, I quote, a conscious decision to not base their argument on the good faith exception. The government has weighed the social costs and decided that those social costs cut in favor of essentially taking the risk that they'll lose on their other arguments. And then therefore, Mr. Campbell's motion to suppress will be granted and he might actually not end up in prison. So the government has made those social costs here and decided it's worth losing on other grounds. And so why is the court here stepping in to essentially say, No, we think that this man belongs in prison. And it doesn't matter what the government's arguments are for or against it. And so it's really frustrating. Look, there's certainly a world in which I actually think that this is a good thing for judges to do, right? Because there's two ways that you could kind of conceive of this situation. If the government is getting special treatment, as we all I think agree and is explicitly kind of pointed out over and over again by the dissent here, if the government is getting special treatment and kind of having judges reach out to decide issues on its behalf and help the government out, to lend the DOJ, the most sophisticated, most well-resourced, richest litigant that comes before the judiciary. And the dissent points that out too; these are not unsophisticated lawyers. These are repeat players; they know exactly what they're doing. Now, there's a world in which I say, Well, why don't we level up instead of level down? Right? Like, why don't we instead of not giving this kind of solicitude to the government, why don't we also give the same solicitude and why don't we have judges kind of lend the same helping hand to pro se litigants? Let's level it up instead of level it down. Because the reality is that there are, you know, I don't know the stats so this number is kind of just pulled off top my head, but like hundreds of thousands of pro se litigants in federal courts every year, many of whom are in prison, and they time and time and time again are kicked out of court for not even just failing to raise substantive issues, but on procedural grounds, like because they couldn't meet some very lawyerly obscure rule for getting into the courthouse doors. Pro se litigants are kicked out on that all the time.

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Anthony Sanders 22:11

And small time attorneys, I think you could say even worse, because they're not even given the benefit of the doubt. When you're litigating for a private party, this kind of stuff would be very unusual to get away with.



... ..

J Jaba I Sitsuasnviii 22:24

Absolutely. Again, if you had an overworked, overburdened, public defender, civil rights lawyer, consumer protection lawyer, if you had any of them, putting aside whether it's a pro se, those folks don't get this kind of solicitude either. They don't get this kind of benefit of the doubt. They don't get judges reaching out to help them either. But again, I think it's particularly egregious when it happens to pro se litigants. And this is a problem of such a magnitude that former Judge Posner from the Seventh Circuit, he retired and basically said, you know, our judiciary is broken because pro se litigants aren't getting a fair shake. They're not being heard. They're being kicked out on these procedural issues. He ended up actually starting an organization after retiring that was intended to help pro se litigants, like I said, most of whom are in prison. And he ended up shutting down after a year because they were just like, We're too overwhelmed. We can't even handle the load. So I'm going on a bit of a tangent here. But I don't think it's a tangent, because ultimately, what's happening here is fundamentally unfair because this is the kind of reaching out to help a litigant that the litigants who actually need it do not get in our judicial system. And in fact, they not only don't get it, they are often lambasted or just kind of chided with this dismissive language like, It's your job to figure it out, basically. Well, guess what, we're practicing lawyers here and it's really hard for us to figure some of this stuff out sometimes. And there's also an element here where we do want judges to get it right, especially in our kind of precedent-based system, it's really important that bad precedent doesn't get set by one party making a mistake in litigation and then suddenly people are kind of bound by that in the future. But that concern doesn't exist here, when it's the government who's a repeat player and is going to be able to explain why in any particular case that was the outcome and in this case we are making a different argument. And it's also easily avoided by just saying the government didn't raise this issue here and we don't want parties to rely on it in the future. So there's so much here that is clearly animated by the majority's desire to reach an outcome that it wants, that disfavors this criminal defendant in ways and based on such dubious reasoning of this forfeiture waiver thing where the government told you we consciously did this. So there's no explanation other than we don't like the exclusionary rule. We want to put this man in prison. And we the judges are making that choice.

A Anthony Sanders 25:18

Josh, do you think if you said you made a conscious decision to drop an argument on appeal to a judge, that the judge would just rule for you on that issue anyway?

J Josh House 25:28

No, absolutely, absolutely not. And I think it's important to look at this case, not as sort of some kind of over-engagement. It's actually just transcending the role of judges. They are doing, like we'll see sometimes with rational basis cases, they are making up arguments for the other side; they're engaging in prosecution of this person. They are weighing the costs and benefits of continued prosecution, or particular tactics, prosecutorial tactics, and it's not judge's jobs to be prosecutors. It's judges jobs to be judges. And so when we ask for judicial engagement at IJ, we're asking for engagement in the judicial role, not for judges to engage in prosecution.

A Anthony Sanders 26:09

Verv well said. Yeah. Jaba. I think you you said all the stuff that I would have about this case

and more, because there are such different rules that are laid out in the court's opinion. And you can tell that the majority knows what they're doing and knows that this is different when they say, Well, you know, it's only exceptional circumstances when this comes up, and we wouldn't do it here. We wouldn't do it here. We wouldn't do here, but really at bottom, they're like, This guy looked like a bad dude and he really belongs in prison.

J

Jaba Tsitsuashvili 26:43

Yeah, it's really frustrating. They're not that obfuscatory about it, right? They're pretty open about the fact that they're reaching out to do this, because they've decided that this man belongs in prison, regardless of the weighing of the costs and benefits that the prosecution itself has done.

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Anthony Sanders 27:04

Well, we'll keep our eyes on this case, see if it perhaps might go to a higher power at some point. But in the meantime, another case, a much shorter case but still important. It came from my home state of Minnesota in the 8th Circuit. By the way, the first case is *United States v. Campbell*, and this case Josh is about to talk about is *Tyler v. Hennepin County*, the county where Minneapolis lies. Josh, should you pay your property taxes in Hennepin County?

J

Josh House 27:39

You should definitely in Minnesota pay your property taxes. And that's what sets the stage for this case. It's about a different kind of forfeiture. We spoke about one kind of forfeiture already with forfeiting an argument. This involves what's called a tax forfeiture. And so in Minnesota, and in a minority of some states, if you do not pay your taxes, the government can come and rather than foreclose on your property, which is probably a term people are familiar with, a tax foreclosure or just a normal foreclosure where they sell the property to make up the difference that's owed, or a bank comes and forecloses to take the property because you owe the bank. A tax forfeiture simply transfers the property to the government entity that you owe property taxes to. And that is a more extreme remedy, because what will happen is what happened to the plaintiff in this *Tyler* case. So this was a 92-year-old widow. And she didn't pay her property taxes after moving out to a different property. She couldn't afford the property taxes on her condominium anymore, so when she moved into an apartment, she stopped paying those taxes. And eventually, you know, she was sent warnings that she was delinquent, and so forth. And the way the process works is that after there's an actual judgment that the taxes are delinquent, you have three years to file paperwork that either says you confess judgment, you're sorry, you didn't pay, put me on a payment plan, or you actually redeem it by paying the back due taxes. And at that point, you can keep the property. She didn't do either of those things, for reasons we've already discussed. There are probably all sorts of reasons that the average person, certainly the average 92-year-old person, isn't aware of how to file all the requisite paperwork.

A

Anthony Sanders 29:46

It's probably a little bit like that. I think this was 2016 when this happened. It's a little bit like

it probably didn't help that I think this was 2010 when this was going on, like right at the bottom of the housing market. I imagine that was probably in the background.

J Josh House 29:54

That's right. And you can also understand someone saying, Well, to be honest, a payment plan isn't really getting me out of the problem here. I owe \$15,000. If I'm not able to make the tax payments already, maybe a payment plan isn't that big a deal. But the next step is probably the one again that she was not aware of. Because most states don't work like this, where instead of the government foreclosing on the property and then selling the property and then, you know, taking the money out of that sale, out of the foreclosure sale, to pay off the debt that's owed and then remitting whatever's leftover back to the homeowner, instead, they do a forfeiture. And this transfers the property to another government entity and in that transfer process gets rid of all the debts, sort of wipes clean the property. But it also wipes clean the homeowner's interest in the property. So that means that anything that happens after the forfeiture step is sort of free of any claims that the property owner had over the property. In this case, they sold the property for \$40,000. \$15,000, again, was the debt owed. And so there's \$25,000 here of equity, that Miss Tyler could have claimed. And when she sued, saying, you know, This is my property, I'm entitled to that. What the district court said, and the 8th Circuit affirmed in this opinion is No, you are not entitled to that money, because your interest was wiped clean when that forfeiture transfer happened and then the county transferred it to the other governmental agencies. So there were a couple issues that Tyler argued, and the main one that the 8th Circuit addresses is a takings issue. So she argued that taking the equity in the house, that is not giving it back to Miss Tyler, was a taking and that it should be compensated or not be done at all under the the Takings Clause of the United States Constitution. And I think they argued under the state constitution as well, but in Minnesota, those were sort of coterminous. So they bring this claim, and what the court decides, affirming the district court, is that in Minnesota you do not have a statutory right or any common law right to the equity that's left over after a forfeiture sale. There is some precedent that was cited. And by the way, this is happening under state law, because under federal law, your property rights are defined under state law. And so they go back into the common law in Minnesota, and they say, Well, yes, there are some cases that suggest that you do have a right in the equity, but when the Minnesota Legislature enacted this forfeiture scheme, that statutory revision of the common law wiped out any property interest that you could claim. So in other words, because the government says it can do this to you, it can do this to you. And that was sort of the sum total of the takings analysis. You know, there might be some interest in common law, some questions over common law, and ought that common law, the older common law, been incorporated sort of into a constitutional standard before the statute; there's probably some interesting debates there. The court does not get into that. You know, we talk about engagement. This is not just disengagement; this is just checking out. There's not much analysis in this opinion, even if the effects it could have over people who are in these states and live subjected to these property foreclosure laws could be pretty great. You know, the other form of checking out that the court does here is it doesn't even address Tyler's other arguments. It just says, We incorporate the district court's analysis here. And so I took a look at the district court's analysis, and unfortunately, the analysis by the district court on those other claims is not much more engaged. So the second claim that Tyler has is this excessive fines claim. In other words, if I'm being penalized for not paying my property taxes, but that penalty is all the extra equity in my house on top of those property taxes that I owe, that seems pretty extreme, that seems pretty excessive. So, you know, I'm being punished and I'm being punished to an excessive amount and therefore it violates the Eighth Amendment's prohibition

on excessive fines. And what the court said is that well, No, despite the fact that, you know, you might look up in a dictionary and say, well, what is a penalty? A penalty is a punishment. This is not a lawyer punishment. This is this was not intended to punish people if you look at like the history of enacting this scheme. Okay, okay. Fair enough. But there's also a Minnesota case on on the books that actually says that tax penalties are punishments and can be considered fines. So how does it deal with this? And the answer is that it really doesn't. It turns to US Supreme Court cases. It basically acknowledges that as a state case, but says, Look, under federal analysis under US Supreme Court cases, this is not a punishment. And what's more, is that the way it tries to do that is it cites two civil forfeiture cases from the United States Supreme Court, *Austin v. the United States* and the *Bajakajian* case. And what's really interesting now is in both of those cases it was found that there was a punishment, and that it could be an excessive fine under some circumstances. What they say is that those cases actually provide a distinguishing factor, because in both of those cases, there were criminal laws sort of floating around in the background. So even though they were civil forfeitures, they were civilly forfeited, because of some suspected criminal violations in the background. And because there's no similar criminal sort of environment here, that this is just purely within the civil box, and therefore there's no punishment, there's no sort of punishment for a criminal act. That is how the district court sort of distinguished what went on here and in all those cases, but again, just because it's not a misdemeanor or a felony to not pay these taxes doesn't mean it's not a form of punishment. And so I think that the shortcuts in the district court analysis just show that there's some empty logical holes that sort of need to be filled, and you just don't get engagement with that in this opinion. And you certainly don't get engagement with just the everyday notion that if I'm being penalized for not paying a tax, that I'm being punished for not paying a tax, especially if the amount that's being taken from me is up and over just the amount the government was owed in the first place. And then really quickly, the last argument that was brought was a due process argument, arguing that it was just simply irrational, arbitrary for the government to take a bunch of extra money that it wasn't owed, to take a property even, to transfer a property as a remedy for unpaid taxes. There are other ways to remedy this and it's just irrational to do this, to use this as a remedy. And I think what ends up happening is that the court just gets its constitutional analysis completely, sort of backwards and wrong. It says, Well, the reason we don't even need to really engage with this is that in order to claim your due process rights have been violated, you have to have a property right, or you have to have a fundamental right. And property rights are not fundamental rights. It actually says that in the opinion. And not only that, it says that, you know, one of the ways we know that a property right can't be a fundamental right is that we have a Takings Clause to protect property rights. And so if you have a takings claim, then you clearly couldn't have a due process claim. And that gets it wrong for all sorts of reasons. But the primary one is that the Takings Clause and the Due Process Clause are doing different things. With substantive due process the idea is that no amount of government procedural hurdles in the world could justify what the government's doing. The government's actions are just that wrong. Takings is, if you think about it, all about process; it's saying, Well, the government can do this thing, it just needs to go through a process that includes giving you the fair market value of that property, paying you for the public use of the property.

A

Anthony Sanders 38:13

And also, if it's a private use, then it can't do it. So in one sense, the Takings Clause is substantive. It wasn't in this case, but if it was a private use, and you could say that there's this overlap between the two clauses on that point.

J

Josh House 38:27

Sure. But as you say, that's not even a complication, if you will, that the court really needs to worry about. I think the point here is that, if the district court in this case had been taking the bar exam, and I had been the judge of this particular constitutional analysis, I would have said this was done backwards, and I would have marked him a couple of grades off for that. And I just think it's a shame that the 8th Circuit, rather than engaging with the opinion, straightening out the law, or at least getting the constitutional analysis in the proper order, the fact that it simply ignores all the district court's bad analysis and just incorporates it into its opinion without anything, it just shows the amount of disengagement on this issue from the 8th Circuit. And it's unfortunate to see.

J

Jaba Tsitsuashvili 39:10

But it's also kind of particularly terrifying, right? Because you have a judge saying that property is not a fundamental right because it is in the Constitution. And then you get judges telling us all the time that something can't be a fundamental right because it's not in the constitution. So essentially, they're telling us there's no fundamental rights, right? Because something's got to give here. It's terrifying. And, you know, what's also terrifying is that this notion, which we've actually seen a few times recently, if the government is doing something to you, where they're were having adverse consequences on your liberty or your property, we're not going to deem it a punishment because we don't want to, for the excessive fines analysis. It's really disconcerting.

J

Josh House 40:00

Yeah, and it's also, I think, a problem from not just the legal analysis, but just what's on the ground. What's going on here is not only what we've already spoken about, which is just pro se litigants really having trouble navigating a complicated system, especially older ones. But there's also this issue of, for better or worse, you might disagree with this, but in much of American society, the house, a property, is a savings account. It is a store of long-term value for Americans. And so the idea that, hey, all that equity that you've built up and saved over the years in your property can just be taken with just a quick action, maybe because you didn't file the right paperwork. I think that's what really is bothering people about these systems. And it's a shame that, again, we don't even get a real analysis from the court as it's upholding a system that can really impact the bank accounts and the lives of a lot of Americans.

A

Anthony Sanders 41:02

You got it this a bit, Josh, and it's kind of at a meta level. But the court basically says, Because Minnesota has this, you know, statute that allows for this, under state law that extra equity if you go through this process isn't property. And so there's no property to worry about, because just by definition of state law on property. Well, the Supreme Court has often said property is defined by state law, and then the federal constitution has protections on that property. But ultimately, the kind of private law analysis of what property is, that's just a state law thing. I don't think the Supreme Court when it said that means that that means that you can just

change all the property rules as a matter of positive law and then we'll just take it as it comes. Because you could think of all kinds of crazy stuff that a state could do by changing statutes to make, like, property by definition different. And then I guess you don't have a takings claim because that's what state law says. That's really putting the cart behind the horse. I guess you could make the argument here that this statute, I think the statute was enacted in like the Great Depression, if I remember the case, right, so maybe if you brought a case just after then you could say, well, that was a taking. Of course, you wouldn't even bring that case, because if you don't pay your property taxes, this won't even come up. But now it's just kind of embedded as part of the background property law in Minnesota, so you can't make that claim. Like that's not what it means to have state law define what property is. This case this case, by the way, is being litigated by our friends at Pacific Legal Foundation, and they have a couple cases going like this, so that this whole issue might get to the Supreme Court eventually. But some other case that deals with the interplay between state law and federal law, I hope they suss that out, because that's a real scary power that the state might have, just change property rights and have it not even encompassed by the Takings Clause.

J

Josh House 43:17

And there's a tension here, right? There's a tension here between that move and what the court did on the excessive fines analysis. Because what's interesting is that when it came to the property analysis, they didn't look at the original foundation of the property rights. They said, No, no, no, the more recent law controls, but when it came to excessive fines, they said, No, we realize that more more recent Minnesota law considers these fines to be penalties. But we're gonna go back to sort of what the actual conception of a penalty and a punishment is, not what the state says is a punishment, but actually what the common law or the complicated constitutional definition says is a punishment. So on the one claim you've got it going one way and on the other, the other way. And you just feel like this is a way of affirming without putting much thought into the opinion.

J

Jaba Tsitsuashvili 44:14

And again on that excessive fines point, we've seen courts where they'll do exactly the same thing that Anthony was saying, with respect to the property rights issue, where they'll say that the scope of penalty is also defined by state law. Kind of the opposite of what this court did. But again, it's a situation where courts are analyzing it in diametrically opposed ways. But both regardless of how they're analyzing it, they're reaching the same conclusion, which is that you lose. And it's also, I think, really problematic for courts to decide that states can just avoid the Excessive Fines Clause and avoid the Eighth Amendment by just saying, We don't deem this punishment, we don't deem this a penalty regardless of what it actually does on the ground.

J

Josh House 45:00

When you look at these two cases that we've spoken about today next to each other, it really does feel like one rule applies to the government and another rule applies to the common person. When the government didn't bring a claim, when either chose not to or forgot not to, it didn't matter. The court will go out of its way to give them a helping hand. But when a 92-year-

old widow didn't file, like, the correct paperwork within a three-year timespan, she loses all the equity in her home. And it just doesn't seem like you can square those technical violations with the outcomes that resulted.

A

Anthony Sanders 45:29

Well, often on Short Circuit, we have happier cases and happier stories. So I'm sorry that it's two two big depressing ones this week. But I'd like to thank our IJ attorneys for telling those stories in the best way possible, perhaps to lead to better outcomes in the future. So thank you guys both for coming on. And next week, we will have a happier story because we're having another special episode where we're going to be talking about animals and the law. So all you animal lovers listening, like what's the law that applies to how you walk your dog or how you raise your your farm animals, we're going to talk about the law of trespass and bees of all things. We're also going to be talking about drug dogs. Everything you wanted to know about animals and the law, that is going to be next week. But for now, we'll leave you with those depressing stories of judicial abdication, or judicial checking out I think is the new cool thing from what Josh said. But in the meantime, despite those stories, I want everyone to get engaged.