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SPEAKERS

John Wrench, Anthony Sanders, Robert Frommer

A Anthony Sanders 00:00

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, March 11, 2022. We'll get to a couple IJ attorneys talking about a couple of recent cases from the federal courts of appeals in a moment. But first, I have an announcement to make. I think it's the first time we've talked about it here on Short Circuit, although we've been talking about it on social media, and that is our upcoming live Short Circuit. So if you live in the DC area, you can come and see a recording of this podcast, Short Circuit, live. And it will be at the National Press Club on Wednesday, April 6, at 7pm. Doors open at 6:30. And this isn't just come see a few IJ attorneys talk about stuff like we usually do on the podcast. talk about few recent cases. This is going to be an all-star panel of Supreme Court attorneys who all clerked at the DC Circuit. So it's going to include Lisa Blatt, who is a top-notch SCOTUS lawyer, and Kelsi Brown Corkran, who is another top-notch lawyer. Lisa Blatt is at William and Connolly, and Kelsi is at the Institute for Constitutional Advocacy and Protection at Georgetown University. You may recognize her from our Section 1983 event that we did online about a year ago, she was on. And last but not least, Paul Clement, who is at Kirkland and Ellis and is also a top-notch Supreme Court attorney. So all three of them will be on the panel talking about recent DC circuit cases with our very own Anya Bidwell, who will be moderating the panel. It will be so much fun to see these four have their say about the DC Circuit, reminisce a little bit maybe about clerking there, and then there will be a reception afterward, with some drinks and hors d'oeuvres. It is all completely free. But it of course is time limited, because we think it's gonna fill up and we only have so many spots available. Already, about half of them are gone. So if you want to RSVP for this event, you should go right now or very soon to the link. Now we're putting the link on our webpage and also on our show notes if you're listening to this through your app, so you can find that but in case you can't, it's ij.org/event/scl, standing for Short Circuit Live. That's ij.org/event/scl, and you can register there. We would love to see you. It should be so much fun. And it will be the first formal Short Circuit Live we've had since the pandemic started. Our last was in Georgia in February 2020. Though we did have our live Supreme Court preview last fall, which which was a lot of fun. So this is also live as we're recording it, but not live as you're listening. But nonetheless, we still have a couple great guests who are going to talk about a couple great cases for you. They are my colleagues, Rob Frommer, senior attorney at IJ. Welcome, Rob.

R Robert Frommer 03:40

Welcome. Thanks for having me.

A Anthony Sanders 03:42

And his first time on Short Circuit, John Wrench, attorney at IJ. Welcome, John.

J John Wrench 03:48

Thanks, Anthony. It's great to be on for the first time.

A Anthony Sanders 03:52

And John and I should also say hello to all the students we met at the Federalist Society student convention that we both attended last weekend. It was at the University of Virginia. And we had a lot of fun talking to a few folks there. A few asked about Short Circuit. So shout out to to all those students. Now, we're going to be talking about a couple cases from the First Circuit and the Sixth Circuit this week. Rob is going to start us off in the First. And Rob, I think you have some grand stories for us. Is that right?

R Robert Frommer 04:26

I have some grand tales to tell you indeed. And my case is about, as we all might have guessed, grand juries. Now grand juries are ancient creatures of the law. You know, they first came up in the wake of Magna Carta. So like centuries ago. Now the idea behind a grand jury is that it's regular citizens who hear evidence to decide whether the government can prosecute someone for a crime. Now, despite their name, grand juries really aren't creatures of the court like the same way like petit juries are. A petit jury, if anybody's watched the movie 12 Angry Men, that's the people who actually decide whether you're guilty of an offense. So the grand jury we're talking about today was one that 50 years ago, investigated the so-called Pentagon Papers leak. Now for those who don't call, in both New York Times and Washington Post, there appeared this expose of stories detailing like strategic failures in the Vietnam War. And the government desperately tried to keep these from coming out. They even went to the Supreme Court to try to enjoin the release of this information. They obviously failed in doing that, but they were still upset about this information coming out. And so they've started to want to try to punish the people who are involved. So they convened a grand jury to start investigating. And the grand jury subpoenaed a gentleman named Samuel Popkin. Now this is a person who had crossed paths with the Pentagon Papers leaker, Daniel Ellsberg, in Vietnam. Now, when Popkin got to the grand jury, though, he refused to testify about some matters, and was held in civil contempt. Ultimately, he ended up spending eight days in jail. But the grand jury didn't get what they wanted. It ended up getting discharged, the jury got discharged without hearing any more testimony from Popkin. Now, let's fast forward to today. You know, decades later, there's this Harvard researcher and historian named Jill Lepore. She wanted to learn more about Mr.

Popkin's experience. So she submitted a FOIA request for the grand jury records, but the National Archives denied her request, citing grand jury secrecy. Now, that's not surprising given that one of the key hallmarks of grand jury proceedings are that they're supposed to be secret. But of course, Congress does has created some rules that allow courts to disclose parts of grand jury proceedings in certain circumstances. So Lepore wasn't, you know, giving up though. She sued the federal government, saying the court should order disclosure of the grand jury records. And the district court noted that the rules Congress laid out didn't expressly permit disclosure on the grounds that the documents were historically significant. But it decided that in circumstances when the rules are silent, courts possess what we call inherent authority to release grand jury records. So it ordered the disclosure of the records based on that inherent authority and in recognition of the fact that one of the rules says that, quote, records, orders and subpoenas relating to grand jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury. So the restriction there says that things must be kept under seal. And the district court took that as saying, well, since that grand jury proceeding is over, I guess I don't need to keep it under seal. Obviously, the government didn't like this result. And so it appealed to the First Circuit. And the First Circuit reversed. Now, the panel at the First Circuit, they first looked at that set of rules of criminal procedure that Congress laid out for when grand jury materials can be released. And it concluded that none of those rules authorized disclosure of grand jury materials in a situation like this, where really the only claim is that they're historically significant. And remember that language I just quoted to you. The district court thought it allowed it to release the records. But the panel thought that that language didn't somehow implicitly authorize their disclosure once the matter before the grand jury concluded. Well, then the court said, Okay, so we can't do this under the rules. Could the court do this under its inherent authority? And it turns out there's actually a pretty big circuit split on this issue. The Second and Seventh Circuits said courts have power to release grand jury documents under their inherent authority, even when it's not expressly authorized by the rules. But by contrast, the Sixth, Eighth, 11th and DC Circuits say the court's authority is strictly limited to the circumstances identified in the rules, can't go any further. So looks like the First Circuit's going to be weighing in on deepening a pretty big split. Well, turns out even though the First Circuit hasn't weighed in on the question, it didn't really want to further the split. It didn't want to get any deeper into this issue about whether courts had an inherent authority outside the rules that Congress put forward. And so what it said is, you know, even assuming that there is some sort of inherent authority out there, would it allow the release of grand jury materials in this circumstance, when the allegation is just that this is historically significant? And obviously, they're 50 years old? And to that question, the panel said No, said, both the rules and the cases that talk about grand jury secrecy, before Congress even passed the rules, said that the whole point of releasing was to, quote, protect legal proceedings and judgments, and to help with the, quote, court's fair administration of justice. No, I like knowing stuff as much as the next guy. But you know, getting history doesn't do either of those things. And so the panel said, well, even if that's desirable, that's not really for a single district court judge to decide. That should be something that's either better suited to Congress, or to the Rules Committee that makes the Federal Rules of Criminal Procedure. They'd be better judges of this than a single judge. So the end result, our historian doesn't get the documents, and the mysteries of the Pentagon Papers remain locked inside the National Archives.

A Anthony Sanders 11:19

John, what's your take on those mysteries?

J John Wrench 11:23

Yeah, so it was interesting reading this and hearing the court think through, you know, how important does a particular historical question need to be? How long does it need to be under seal before this is the type of thing that a court should really get into? And it seems to not want to get into that at all. It does not think that the court's job is to decide, you know, this question is of enough historical importance, you know. And it actually, I have a question coming from this, but it even cited some of Lepore's work, almost implying that it wasn't historically important enough. One of them is a National Book Award finalist about Benjamin Franklin's younger sister. And the other one is, I think, an article that says that people should be telling the story of ordinary people. And so the court thinks that that doesn't seem to be important enough. And I'm just wondering what you think, Rob, about how important a historical issue would need to be, do you think, for either a court to weigh in on it, or for, you know, this law to be changed as a policy matter? How important with a historical question need to be?

R Robert Frommer 12:47

Well, I think the first certainly here is pretty clearly saying that it doesn't matter how important it is, it ain't for one judge to decide. Your inherent authority doesn't make you the, you know, the sole arbiter of what grand jury materials can go out there into the world. And I can understand that position. As much as, you know, I like knowing the past. I think it helps inform the future. I agree with the court that having one judge be in the position of deciding whether for him or herself this is important enough to go forward is probably not the correct approach. I mean, but I think what it does suggest here, and the court noted this, that in other instances, Congress had explicitly allowed the release of grand jury materials, would actually pass legislation to allow the release of materials in certain cases, like I believe, the JFK assassination was one of them. And I think that's probably where the inquiry should lie, before Congress or before the Rules Committee, which is a number of experts that come together to advise Congress about like rule changes. And so I get that there are things that are important. I get there are things that, you know, everyone wants to see. But at the end of the day, I think that ultimately it's going to be a question for Congress and not for any, I don't see any individual court taking a contrary position.

J John Wrench 14:28

Yeah, it's it is interesting, because it seems like, if that is the correct way to resolve this, it does put the government in a position of deciding what types of events are historically important enough that the public gets to know about them earlier than a certain day.

R Robert Frommer 14:47

Yeah, it definitely does.

A Anthony Sanders 14:49

I think, Rob, what you're saying has a lot to it. And I tend to think that the textual, you know

I think, Rob, what you're saying has a lot to it. And I tend to think that the textual, you know, the analysis in this case on what the rule actually means is probably right. Although I'd have to think more about it. But, you know, if say the rule was changed, and it was up to the judges discretion in a lot more open way. I mean, the judges already have individual discretion about releasing all kinds of things, right? Like, if you have a case, where stuff was put under seal through, say, a protective order, and then you try to get it open. Judge's rule on that kind of thing all the time. And this is, you know, something that happened 60 years ago. It doesn't seem like it really has much to do with national security now. I mean, it doesn't seem like that really was a part of the analysis, that, you know, any American soldiers are gonna be shot because this comes out now. Why would it be weird for a judge to rule on that just just as they rule on other kinds of, you know, materials being released?

R Robert Frommer 16:05

Well, I think the difference here is that when the rules, because I think it's ultimately a question of the court's authority, and the range of activities the court can undertake. Like when you point out here that the judges can release materials have been under seal. When they do that, and you go back and look why, it's again going back to the idea of the fair administration of justice, the idea that allowing the public to see this will help justice be done in this case, will help ensure the respect for this proceeding or particular matter in dispute. And so I think in those situations, what you're talking about is much closer to what the rules are actually contemplating. Whereas here, this is something that is just sort of different in kind. Tt has nothing to do with any given case or given matter before the court. It just is about the court's free floating idea that some historical event, enough time has passed, enough interest is there to release the materials. But that doesn't affect any of its current cases. So I think it's just a difference in kind that really suggests that maybe Congress, maybe the Rules Committee should come up with standards by which judges can decide to release these materials. I think the First Circuit here is just saying it shouldn't be done in an ad hoc manner like this.

A Anthony Sanders 17:35

Yeah, I take your point there that the judge really then is sitting as historian judge, and not judge judge. I do think, though, that this is something, so the historian in me is coming out and saying, you know, gosh, this is a silly system. I mean, I get grand jury secrecy. That's very important. But something from like 100 years ago. I mean, there's no time limit, right, in the rule? Like technically a grand jury sitting 150 years ago, there's no way to get those documents unless Congress does something.

R Robert Frommer 18:11

Yeah. And, you know, Congress could pass a rule saying for grand jury records more than a certain number of years old, maybe it's 100 years old, that those are presumptively available, and that the government needs to put forward some actual evidence for why they should continue to be secret. But that, again, would be a rule for Congress. Right? [Not] a single judge sititng up in Boston or wherever.

A Anthony Sanders 18:36

A Anthony Sanders 18:36

Well, if Congress does want to do that, let me lend my hearty support wearing my historian hat. And, you know, there's lots of records that after so many years are released, like say, I don't know if it's still true, but the UK has had basically a rule that state secrets are released after 100 years. So you know, eventually, at some point, all the stuff from World War One about the secrecy that they used was released. There's something I don't know about that. The census in the UK is released after 100 years. The census here is released after 72 years. So like I think the 1950 census is just about to be released, or has been released. And then the 1940 census was released 10 years ago. So that's all stuff that's important for historians, and for just, you know, family history folks. But also, if something happened 100 years ago, there's no one alive today that's going to be that embarrassed by like what they did, right? Maybe you had a grandpa who was involved and you want that to be shut up. I I just don't see much of a public interest there. The funny thing is that on our last Short Circuit Live in September 2020, we talked about one of the cases that this court cited. Our friend Eric Segall actually presented that case. It was Pitch versus United States. And the funny thing was that after that was presented, it went on banc and was reversed, and lines up with the First Circuit on the five part of that five-two split. So this case very well could be making it to the Supreme Court with that circuit split, or maybe the court's just gonna let it, it hasn't taken other cases like Pitch that have tried to go up. So maybe it'll just let sleeping dogs lie. But hopefully, in the end, Congress can sort this out.

J John Wrench 20:30

I was wondering what you all thought of, you know, if this went to the Supreme Court, do you think a handful of the Supreme Court justices would agree that courts aren't competent to weigh the importance of history? I mean, aren't there a handful of judges on the Supreme Court that regularly weigh history and make determinations, and not based off of something 60 years ago, even? And so, this does seem like it raises those questions a little bit.

R Robert Frommer 21:07

Yeah, but courts always like to be able to kick the ball to someone else. I think that's a more powerful instinct here. Get off my plate.

A Anthony Sanders 21:19

I think what maybe you're saying John is, like, the originalists on the court. With all the emphasis on history, you have an originalism kind of like this idea of getting access to these historical documents. But there's a tension there, because those same people are very textualist, or they say they are. And in this I think that the more textualist position is to deny that the district court can open these records.

J John Wrench 21:44

Yeah, I think that that's definitely part of it. But also the First Circuit's point that, you know, judges aren't really historians, they aren't competent to go through this type of analysis. And I do think that there's some justices on the US Supreme Court who might not totally agree with

that. I think originalism in part depends on judges feeling confident enough to do that.

A Anthony Sanders 22:11

Well, another judge, who's not on the Supreme Court, who's a big fan of historical analysis, is Judge Sutton on the Sixth Circuit. It has nothing to do with history, but he had a few things to say about, well, a little bit to do with history, about the Administrative Procedure Act recently. So tell us about that, John.

J John Wrench 22:29

He did. So I'm going to discuss a decision out of the Sixth Circuit by Judge Jeffrey Sutton. And it's about whether the IRS complied with the Administrative Procedure Act, or the APA, when it issued a rule in 2007 without first going through the notice and comment process. So that might sound less grand than grand jury proceedings, but I promise you. you know, I'm going to make it hopefully as interesting. Or Judge Sutton is going to make it as interesting. And so I'll start with a little background on the APA before diving into the opinion. So the APA is a federal statute that governs how administrative agencies like the IRS create regulations. And so the APA distinguishes between legislative rules and interpretive rules. Legislative rules, which are binding agency regulations, they must go through something called the notice and comment process, which the court refers to in the opinion as a light shedding process. And to comply with that requirement, agencies must normally, and this is a good quote from the court, they must publish a notice about the proposed rule, allow the public to comment on the rule, and, after considering the comments, make appropriate changes and include in the final rule a concise general statement of its contents. And so courts must set aside agency actions that fail to comply with the notice and comment requirement. So you can see why it matters whether an agency action is defined as a legislative rule subject to that requirement, or an interpretive rule, which is not. And how do courts distinguish between legislative and interpretive rules? On page five of the opinion there's this really helpful paragraph, so this is a quote from the court: Legislative rules have the force and effect of law. Interpretive rules do not. Legislative rules impose new rights or duties and change the legal status of regulated parties. Interpretive rules articulate what an agency thinks a statute means, or remind parties of pre-existing duties. When rulemaking carries out an express delegation of duties from Congress to an agency, it usually leads to legislative rules. Interpretive rules merely clarify the requirements that Congress has already put in place. So now to the IRS. The IRS is authorized to penalize anyone who fails to provide information concerning what are called listed transactions. And those are certain transactions, which, according to the IRS, raise a red flag that someone might be trying to avoid paying taxes. And in 2007, the IRS issued a notice, and I just want to distinguish between the 2007 notice and the notice and comment process. Those are different things. But the IRS issued a notice in 2007 without going through notice and comment that designated a type of listed transaction, and the type of list of transactions called certain employee benefit plans featuring cash value life insurance policies. Now, that's a that's a bit of a mouthful, and I am not a tax attorney. The important thing? Yeah, every listener just yawned throughout the world. The important thing here is that in 2019, the IRS concluded that a business called Man Construction and its two owners violated the IRS 2007 notice by participating in an employer benefit trust between 2013 and 2017. So the IRS was looking at that employee benefit trust and said, We think this is a listed transaction. And so the IRS penalized the business $10,000 and the owners more than $16,000. Both the owners and the business paid the penalties. But

they sought refunds on the ground that the 2007 notice was invalid, because the IRS failed to go through notice and comment. So as I mentioned before, not all agency rules have to go through notice and comment. So the first question for the Sixth Circuit was whether the IRS's 2007 notice designating the relevant listed transaction was a legislative rule or an interpretive rule. And so the court concludes that the 2007 notice is in fact a legislative rule that needed to go through notice and comment. And the court really has two main reasons for that. The first is that failing to comply with the 2007 notice comes with a risk of penalties and criminal sanctions. And the court notes that plaintiffs only had a duty to report listed transactions like this one after the 2007 notice was issued, and that the risk of penalties and criminal sanctions is a major characteristic of legislative rules. The second reason is that Congress delegated to the IRS the authority to identify particular transactions that carry the risk of tax abuse. And that's exactly what the 2007 notice did. This wasn't merely an interpretive rule in which the IRS was kind of thinking out loud about what listed transactions might mean. Rather, the the court held that the 2007 notice was an exercise of delegated authority and, this is the turn of phrase at the Sixth Circuit used, had the stripes and colors of a legislative rule. And I really liked that. And so the court the Sixth Circuit concludes, this was a legislative rule, it needed to go through notice and comment. But the IRS still has one fallback argument. It says okay, even if the 2007 notice is a legislative rule, Congress exempted the IRS from the notice and comment requirement. And so the court starts by recognizing that the baseline assumption for agency action is that it must go through notice and comment, but Congress has occasionally exempted agencies from that requirement in the past. And so Congress must make such exemptions expressly, but it can, quote, express any such intention, either expressly or by implication. I want to read that line again. Congress can make such exemptions expressly, but it can express, this is the quote, express any such intention either expressly or by implication. So perhaps ironically, the court calls this the clarity imperative. I'm not sure whether the court was making a joke or just calling it what other courts have called it. So the court is going to go through examples of okay, how do we tell when Congress is exempting an agency from the notice and comment requirement? And so one example is when Congress creates agency procedures that explicitly deviate from or modify the baseline APA procedures. That's a more express example. You can look at the statute and you can see that Congress has done something completely different from the APA process. And so another example is when Congress creates agency procedures that are incompatible with the APA. And so that's a little bit more implied. That's a situation where you look at the process and there's no express statement that the APA is being modified, but they don't really fit together. And so that's an implied exemption. And so the court concludes that Congress did not exempt the IRS from the notice and comment requirement and it relies on three reasons. So first, the court says that nothing in the statutory tax indicates that Congress clearly departed from the APA's notice and common requirement. And so here's the quote from from the court: Potential inferences layered on top of conjectural implications do not suffice. The government notably has not identified any case in which Congress exempted an agency from the APA's requirements via such a winding and elaborate route. The second reason the court rejects this exemption argument is that the IRS argues that Congress impliedly ratified the agency's nonconformance with the APA. So what the IRS is saying is, well, we haven't been following the notice and comment requirement, and Congress really hasn't done anything about it. So it's ratified our noncompliance. And so the court responds to this by saying ratification can happen. There are some circumstances, but, quote, inaction on Capitol Hill rarely suffices on its own to show a deviation from the APA. And so finally, the the IRS raises some legislative history arguments, which don't really go over well. So the court dismisses those saying, well, first, the IRS says, Look, tax shelters are a problem. You know, a representative from the IRS has even gone to Congress to testify about this. And the court says, tax law isn't special. For any tax law practitioners on the podcast, I don't think that was personal. But the court is definitely saying,

just because the agency is doing something that involves tax doesn't mean it gets carved out from the APA's normal processes. And so the US Supreme Court has actually stated that it's, quote, not inclined to carve out an approach to administrative review good for tax law only. And then the court's second reason for rejecting this legislative history argument is, it's not enough to show, it's never been enough to show that Congress has modified the APA procedures. And so, the court notes that legislative history, when it's taken into account, is meant to clear up ambiguity and not create it. And the court ends that rejection by saying, congressional ambiguity does not a clear statement make. And so after going through that, it's decided that the IRS needed to go through notice and comment and then it wasn't exempted. The the court ends by stating, quote, any exceptions to the sturdy protections established by the APA notice and comment requirements must come from Congress, not us and not the IRS.

A Anthony Sanders 33:16

Rob, you've experienced some time with the IRS, haven't you?

R Robert Frommer 33:20

I've had my, yeah, I've had a little bit of a run in here or there. I have nothing to talk about. But what's crazy to me here is well, first I there's a couple of things. One is, like, judge Sutton does an excellent job in this opinion of clearly laying out the arguments and where the court lands on them. A lot of times and opinions, you'll have to hunt through dozens and dozens and dozens of pages to try figure out what in the world the court is saying. And here it's very clear. You know, for instance, on page seven, the court says, did Congress expressly exempt the IRS from the APA's requirements? No. It's very straightforward. Second, this is far more respectful to the IRS than I think that they had any right to deserve. By any lights, anyone who's taken an admin law course can tell that this was a legislative rule, because before the legislative rule, you couldn't get in trouble for doing what these guys did.

A Anthony Sanders 34:37

No one could argue that, well, you should have known that. We were just clarifying things. I mean, it's just a whole new rule.

R Robert Frommer 34:44

Right. Now, why do you think, John, why do you think the IRS, is it just that they are trying to just win this one particular case? Why do you think it is they're trying to really push this interpretive rule rather than just simply go back to the drawing board, do notice and comment and get this thing done right.

J John Wrench 35:12

Yeah. So I think that that's a really interesting question. And I think it's wrapped up in, from the agency's perspective, the notice and comment process is, at least to some degree, a burden, right? I mean, if they don't have to go through notice and comment, someone at the agency

right? I mean, if they don't have to go through notice and comment, someone at the agency can issue an interpretive rule. It doesn't require them to post it subject to the public's comments, and it doesn't require them to respond to those comments. It's you know, I'm sure to the IRS, they would they would tell us, it's a burdensome process. So I think that that's one reason. I think that's the generous reason to say why an agency might want to use an interpretive rule rather than a legislative rule. I think another reason, and I'm not saying this just in the context of the IRS, but if you can get a court to accept that an interpretive rule, which didn't go through notice and comment, can bind parties despite that, that's just a much easier way to expand authority and to reach things that you might not be able to reach either through notice and comment or under the agency's statutory authority. And so I think that's a less generous reading, but maybe some agencies somewhere once has ever considered that. But I do think that that could be a consideration. And so that I think that also answers the question of like, Why do you have the IRS in court? Which, I agree with you, Rob, I think that this is pretty obviously a legislative rule. But the IRS has an interest in a court saying otherwise. I mean, like it said, it hasn't been complying with notice and comment in other areas for a while, and so much so that it thinks that Congress has ratified it.

A Anthony Sanders 37:25

I mean, this is not an isolated incident, of course, the IRS, or any federal agency, issuing a rule that is really substantive, or whatever the terminology is, but it passes it off as interpretive. And I wonder also, if, when this was issued in 2007, admin law was a little bit more loosey goosey then, and maybe an agency would wouldn't do this today? Or maybe it's different. I mean, even, you know, even deference now is not like it used to be, not as agency friendly, like it used to be, at least considering some recent Supreme Court opinions. And so this might be something that's a little less common now. Or it might be it has more incentive to try this type of thing now.

R Robert Frommer 38:15

Well, I think one thing that we see, and I agree with you, this is really the IRS's attempt to get maximum power with minimum fuss, really. But we see this all over the place with government agencies, and it's just sort of their incentives, right? They want to be able to have the maximal degree of power with a minimal degree of burden. And so we see these kinds of shortcuts, frequently, not just in the admin law area, but we see this in the law enforcement area with like with search and seizure rules, for instance, where they'll try to create exception after exception to the warrant requirement. Why? Well, for the simple reason, they want to be able to avoid the fuss of having to go get a warrant. But the reason I think that we've seen a difference in admin law, and also a little bit of a difference in search and seizure law, is that in the past 10 years, I think what we've seen is a growing recognition of courts that they really do sit there to check the government's homework, to make sure that the government is on its P's and Q's because courts and judges are ultimately the bulwark of our rights, are the ones who keep this gigantically powerful state from arbitrarily invading our lives, or in this case, you know, taking tens of thousands of dollars from them. And you have to jump through those hoops. I think that is a lot of what's been going on in recent years. And to be honest, I hope it continues.

A Anthony Sanders 39:46

Absolutely. And we will continue watching that continue on Short Circuit. Yeah, I have to think that this rule, I mean, I'm no admin law scholar. There's a number of folks we could have on here who probably know the numbers on this, but I got to think there are rules, all kinds of rules like this that are actually enforced. And they don't get challenged in court because they're not about tens of thousands of dollars. And these seem like fairly sophisticated businessmen who are involved in here. They had a construction company, but they knew enough to put this thing together and they were going to lose a lot of money. And so they went to court. There's probably all kinds of folks who don't go to court when something like this comes up. And in the search and seizure context, Rob, like you said, unless someone is actually prosecuted and has their stuff taken away, that usually doesn't get into court. So it's only the tip of the iceberg, I think we can all agree. Well, the tip of the iceberg in Short Circuit is this show that you're listening to today, but, as I said at the beginning, if you want to see it all in person and you live in the DC area, or for some reason, want to come to Washington, DC to see it, again, it's April 6 at 7pm, at the National Press Club. The link is on the show notes, and we'd love to see you. But before then, I want all of you to do something else. And that's get engaged.