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SPEAKERS

Lisa Blatt, Kelsi Brown Corkran, Anya Bidwell, Paul Clement

A Anya Bidwell 00:07

Hello, and welcome to the Short Circuit Live podcast. We are recording from the National Press Club in Washington DC. With me today are three amazing litigators. They all know each other, and you all know them. Lisa Blatt is the chair of Williams and Connolly's Supreme Court and appellate practice. She is a legendary Supreme Court litigator with 42 arguments before the court. Lisa won in 37 of these cases. As an example of one such victory, Lisa successfully represented adoptive parents in a landmark case, Adoptive Couple versus Baby Girl, resulting in baby girl being happily reunited with her adoptive parents. Kelsi and Paul, our two other panelists, were also involved in the case. They supported Lisa's position as lawyers for guardian ad litem, with Paul also arguing that case before the Supreme Court. In addition to Lisa's Supreme Court practice, she also frequently litigates before the DC Circuit, including in one of the cases that we will discuss today. Lisa clerked for the legendary Ruth Bader Ginsburg during the 1989 term, when RBG was a DC Circuit judge. Welcome Lisa. Kelsi Brown Corkran is Supreme Court director at Georgetown's Institute for Constitutional Advocacy and Protection and senior lecturer at Georgetown University Law Center. Just last term, Kelsi secured two important individual rights victories before the Supreme Court in Taylor versus Riojas, involving unconstitutional prison conditions, and Torres vs. Madrid, a landmark Fourth Amendment case. Kelsi clerked for Judge Tatel on the DC Circuit, who succeeded Ruth Bader Ginsburg after she became a Supreme Court justice. Kelsi then clerked for RBG on the United States Supreme Court. Hi Kelsi. Paul Clement is a partner in the Washington DC Office of Kirkland & Ellis. Paul served as the 43rd Solicitor General of the United States from June 2005 until June 2008. He litigated over 100 cases before the Supreme Court including just this term an important Second Amendment case, New York State Rifle and Pistol Association versus Bruen. Following law school -- we can talk about whether NYU has a real campus.

P Paul Clement 02:34

I was just there it still doesn't.

A Anya Bidwell 02:40

Following law school, Paul clerked for Judge Laurence Silberman of the United States Court of Appeals for the DC Circuit and for Justice Antonin Scalia on the United States Supreme Court. Welcome, Paul. I want to ask all of you about your experience clerking in the DC Circuit. But first, let's just give our audience -- listeners in the audience here as well as at home -- a taste of this circuit's history as articulated in two very reputable sources. Chief Justice Roberts' article about the circuit that he wrote in 2006. And Justice Ginsburg's article that she co authored in 2002. So basically, the DC Circuit has generally been on its own track. For example, it was a part of the second Judiciary Act of 1801. And partially that was a reason why it was spared from the Jeffersonian backlash against John Adams' midnight judges. If you remember right before John Adams and the Federalists gave up power, they created new circuit courts and appointed sympathetic judges. The Jeffersonians promptly repealed the act and abolished the judgeships, but the DC Circuit survived since it was not part of that act. Next during the Civil War, the DC Circuit issued a couple of habeas corpus rulings challenging the union army's practice of enlisting underage soldiers without the consent of their parents. As a result, President Lincoln and the Republican Congress abolished the court and terminated the judgeships. They then created a whole new DC Circuit and appointed four Republican judges. Another interesting fact that puts the DC Circuit in a league of its own is that the DC Circuit retained local jurisdiction until 1970 when Congress finally established a local court system for the District of Columbia. That mixed jurisdiction got it in trouble in 1933, when the Comptroller General applied the federal employee pay cut to the DC Circuit judges. The judges sued, and it went all the way to the Supreme Court in the decision, O'Donaghue versus United States, the Supreme Court announced that DC circuit judges were Article III judges and therefore are different from federal employees. But three justices dissented from O'Donoghue, including Justice Cardozo and Chief Justice Hughes saying the DC circuit was established under Congress's Article I authority to provide for the governance of the District of Columbia, and thus did not have Article Three protection. So in 1948, Congress explicitly designated the District of Columbia, one of then 11 judicial circuit courts of the United States. So it went from a very precarious situation in 1933 to becoming the second most powerful court in the nation. Roughly a third of cases it hears has to do with administrative appeals. Even if there is no exclusive jurisdiction, parties often prefer going there because of judges advanced expertise in this matter. In addition, roughly a quarter of cases it hears deals with other issues involving the separation of powers and the reach of the federal government. The DC Circuit has always been here, during the inflection points of our history. It issued decisions involving the Watergate, the Pentagon Papers and the Vietnam War protests. It also issued decisions involving the Iran Contra affair during the Reagan administration, and the investigation centered on the Clinton administration. Most recently, it issued decisions involving the Trump administration, including the one that we'll be discussing today. But enough of me talking, let's put our panelists on the spot. Lisa, let me begin with you. What was it like to clerk in the DC Circuit and for RBG?

L Lisa Blatt 06:45

Well, it was wonderful. I think I wanted to clerk on the DC Circuit, because someone who you probably don't know. It was Skelly Wright, who was a famous DC circuit judge, and Patricia Wald, and Abner Mikva. I applied to I think all of the judges, and got an interview on the spot with Judge Ginsburg, because Chris Landau had just turned her down to clerk for, I think it was Ken Starr, who then became Solicitor General. So it was a wonderful experience. I think I had a very strange and different relationship with the then judge and later Justice Ginsburg than most people that wasn't centered at all on the law. It was centered on fashion and children and

gossip. So but one of the most memorable experiences -- other than the fact that she introduced me to alcohol -- was -- its true -- her relationship with Judge Silberman and then Justice Scalia by then. Those were her two best friends. And when we organized her reunion, I guess it was maybe for her 10th year on the DC Circuit. Those were the two judges and justices she invited and she was just incredibly close to them. I'm sure she thought they were nuts, which they are, were, but she loved them. And it had such a lasting impression on me that conservatives also deserve to be loved. But she was great. She was I wouldn't say she used her clerks that much. By then she was a very experienced judge. And I'm not sure -- like I said, I don't I had a very strange relationship with her. I didn't understand FERC. This was way over my head. And I don't think she -- my first opinion I gave her she cut out the caption and then pasted it to the opinion. So fortunately, I have a great sense of humor, that that didn't even bother me. So I loved it. I loved the year. I loved getting to know the other clerks, the other judges. I remember meeting, then an attorney called Merrick Garland, because he had just quit his law firm job to get experience. I met then-Judge Thomas that year because he had just become a judge and could not have been more friendly. And so it was amazing. And then then Judge Ginsburg married me maybe a couple years later.

A Anya Bidwell 09:19

That's amazing.

K Kelsi Brown Corkran 09:20

I'll add because Lisa can't say this. The Justice was so incredibly proud of Lisa. I always get teary when I talk about her still.

L Lisa Blatt 09:29

Because I was her black sheep.

K Kelsi Brown Corkran 09:30

No, because there's so few women, still, who argue before the Supreme Court. I mean that it was her former clerk, who was the woman who had argued the most cases and was such a powerhouse. Anytime any of her former clerks argued before her, she would kind of give you a little smile and you knew that she was really proud but particularly Lisa.

L Lisa Blatt 09:55

When Patricia Millett became a judge she said to me that the Court lost one of their two tigers. Me being the other one. I thought that was cute.

A Anya Bidwell 10:06

Yes. I remember when Barack Obama nominated Judge Millett he said she until recently was the woman with most Supreme Court arguments.

L Lisa Blatt 10:15

Yeah, well, yeah, I'm not sure that's right. But maybe.

A Anya Bidwell 10:21

But I think he kind of had you in mind when he said that. Well, let's talk about Judge Tatel then Kelsi. Because Judge Tatel was nominated for Justice Ginsburg's seat when she went up to the Supreme Court. So tell us about your experience clerking for him.

K Kelsi Brown Corkran 10:39

Yeah, so I should first say you left out a really important part of my bio, which is that I worked for Paul.

A Anya Bidwell 10:45

Right, that baby girl thing.

K Kelsi Brown Corkran 10:47

Right. But so I think you were my boss's boss's boss at the Justice Department when you were Solicitor General. And I was in civil appellate. And then I went to work at Bancroft, which was Paul's boutique firm before it folded into Kirkland. I was there 15 months and got to do incredible work with Paul and I left not because he fired me because I started my clerkship with Justice Ginsburg. And I also want to say I love the Short Circuit newsletter, I look forward to it. One thing that wasn't mentioned earlier is it makes me laugh out loud at least once each time I read it. And you totally got me with the April Fool's case last week. So I clicked on it. I was like what? Had to do with an ineffective assistance of counsel claim. Anyways.

A Anya Bidwell 11:27

Shout out to John Ross.

K Kelsi Brown Corkran 11:28

Yeah. So yeah, I would love to just talk a little bit about Judge Tatel's legacy. He's going senior, taking senior status this year, after 28 years of public service. As you said he was nominated to take Justice Ginsburg's seat when she was elevated. They remained close friends for for decades after that. So I think the most important part of his legacy will be his profound

jurisprudential contributions, particularly complex constitutional and administrative law questions -- even more particularly, environmental law. So the year that I was clerking, he wrote his dissent in Massachusetts v. EPA, which is, you know, we're now 16, 17 years ago, this is an incredibly important case involving greenhouse gas emissions. And Massachusetts was suing the EPA in an attempt to get them to regulate. And so there was the question of whether the state had standing to do that, and also whether the EPA -- the extent of its authority to regulate greenhouse gas emissions. And so the DC Circuit denied the state's petition with a dissent by Judge Tatel. The case went to the Supreme Court and the Supreme Court reversed in a decision that largely tracked Judge Tatel's dissent. And so not all of his opinions and with a victory like that. He wrote the majority opinion in Shelby County v. Holder, which was reversed by the Supreme Court. But his opinion there was the basis for Justice Ginsburg's dissent in that case. Which was ultimately what earned her the moniker Notorious RBG, and kind of catapulted her into worldwide fame. But that's a different story. And they're like movies about it that you can watch. So there's all of that extraordinary work he's done. And then I think he's just such a stalwart of engendering public confidence in the court and maintaining and preserving its integrity. He is so well respected on both sides of the aisle, both by jurists, he also shared close friendships with Judge Silberman and other of the Republican appointed judges on the court, and also with attorneys and litigants just because he takes his job so, so seriously. Every case is extraordinarily important to him, because it's extraordinarily important to the parties. They have a lot at stake. And so every single case, you know, clerking for him, you would see that he would read every word of the briefs with an open mind, thoughtfully considering all of the arguments. He would always come to, he always comes to oral argument prepared to ask really thoughtful questions. And then just his perfectionism in his opinion writing is a reflection of how seriously he takes public service. So that was one of I mean, probably the seminal writing experience I had was like a lot of the judges, the clerks would write the first draft of the opinion, and then you would give it to the judge, and he would totally rewrite it, as Lisa said. But then what he would do, and I think probably he still does this with his clerks. We would sit together for hours going over each sentence of the opinion, and why he had changed it and what he was doing in that opinion. Every sentence was extremely important to him. And so I learned kind of both substantively what was important. Organizationally, how to kind of present the arguments in a linear fashion. And even there has never been a human being in the history of the world who is more committed to using as few words as possible to express his ideas. I mean that you will not find an extraneous word in any of his opinions. I remember sitting with him one time, and he made a word plural, so that you could take out the "a", so that the sentence would be one letter shorter. And that sticks with me 17 years later, when I'm writing, I'm fixating over every sentence and I'm making words plural and obsessing over whether it needs a "that" or not. And so it was such a gift. And Justice Ginsburg did that as well. She would sit with you. Just such an education. I think I learned more in those hours sitting with him than I did in law school about legal writing. So I'm incredibly grateful. It was such a gift to me to get to spend that time with him. And then I think just he's been a gift to the country. So I'll stop there.

P Paul Clement 16:04

That's really amazing. I thought we only did that when we had to get under word counts. I didn't realize people actually did that when they were subject to no word count.

A Anya Bidwell 16:12

Paul, why don't you tell us about Judge Silberman.

P Paul Clement 16:14

I will. But let me talk first a little bit about how I ended up applying to the DC Circuit because I think it actually speaks volumes about what makes the DC Circuit different. Unlike Lisa, I did not decide I wanted to apply to the DC Circuit because it was Judge Bazelon's court or Skelly Wright's court or really for any particularly noble reason. And when I was a second year law student and thinking about applying for clerkships, some of the 3L's told me you really should apply to the DC Circuit. And I started doing some research about the DC circuit's docket and its ad law cases and its FERC cases. And I started to think these 3L's were playing a trick on me. Because it actually didn't at first blush seem like the most interesting set of cases that you could have. And compared to other circuits, where you tend to have everything from diversity cases that are coming up through the system and presenting interesting issues of kind of state law. And on top of that, constitutional issues that are the kinds of constitutional issues that can arise everywhere, but typically would apply in terms of states rights or other issues that just don't arise in the DC Circuit. And then capital cases, no capital cases in the DC Circuit. So the the DC Circuit docket is just very different from the other circuits. And even as I started interviewing with some of the judges, I was a little skeptical about this whole DC circuit thing. And then I interviewed with Judge Silberman, and I was sold. I think I was also given an exploding offer. So I didn't have a lot of choice in the matter, but I was really blown away by the experience of interviewing with Judge Silberman. And what made Judge Silberman so wonderful to clerk for is he was a tremendous jurist. I think he would rival Judge Tatel for trying to be economical with his words. But he also had this amazing career even before he got to the judiciary that made him just one of the most interesting people you could ever talk to you. This person was Deputy Attorney General when he was 34 years old. So he just had this incredible career. He had told off Marshal Tito in Yugoslavia when he was the ambassador of the United States to Yugoslavia. Yugoslavia doesn't even exist anymore, right? I mean, this man's career has spanned decades and amazing public service, but amazing stories. And he was not unwilling to share those stories with his law clerks over lunches. And it was just an amazing year. One thing that really made it distinct is it was an entirely oral clerkship. There were no bench memos. Those were people that those were things that people in other chambers had to do. But we had no bench memos. Everything was presented to the judge orally, you talk through the cases, argued about the cases. Sometimes we'd walk out of his chambers, and his secretary was looking at us was like, is everything okay? I mean, the voices were raised, but we really, it was it was such a wonderful experience with him and just exchanging ideas and talking through issues and the rest. So it's something that I think was just such a formative experience. And clerking for Justice Scalia, they were very good friends and the clerkship was also a pretty oral clerkship. So those those combinations I think of clerkships was really extraordinary. The one other thing I just wanted to say about the DC Circuit that makes it different, particularly from the clerk's perspective, is all the clerks are in one building. It's not like the typical regional circuit where maybe there's two other chambers in your building. And then some of the law clerks for the other judges you might see episodically at a sitting or something. But otherwise, you don't really get to know them. So you really got to know the law clerks for the other judges. You got to know the other judges to a degree that I think is pretty unusual. We play basketball together. We played softball together, sometimes with the district court clerk's little bit of poker. That's right.

A Anya Bidwell 20:46

And you say district court clerk's because district court,

P Paul Clement 20:49

They're all in the same building.

A Anya Bidwell 20:50

As well as the FISA court, right?

P Paul Clement 20:52

Well, they didn't tell us there was a FISA court back then. But, but the district court, you know, a lot of the district court clerks were people we went to law school with, so we already knew. Deanne Maynard, who's a friend of ours, was on the district court that year. We played softball together all of the time. So that that sort of experience as a law clerk, I think it's very different from a typical law clerk to a regional circuit judge. And I think it I think it really makes the clerkship a special experience. Now, when I later found out that Fifth Circuit clerks got to go to New Orleans on a per diem, I was a little jealous about that. But otherwise, I think a DC Circuit clerkship just can't be beat.

A Anya Bidwell 21:34

Another interesting thing about the DC Circuit is that you don't have the blue slip rule, right? Where a senator from the state gets to kind of have a say about who to nominate from that from their state. And in DC Circuit, you actually had judges from North Carolina, South Carolina, Colorado. So you have kind of a greater geographical diversity, as well as the diversity of experiences.

P Paul Clement 21:58

I think that's very true. And I think sometimes the lack of a blue slip has affected who ends up on the DC Circuit. I think in some examples, you have a judge who ran into a blue slip problem in his or her home state, and all of a sudden the DC Circuit becomes an attractive option. And then you also have the ability to appoint some people like really all three of the judges we clerked for, who were really sort of DC people. I think it would have been hard to -- Judge Silberman started his legal career in Hawaii. But I don't think at the point that he was nominated to the DC Circuit that he still had a lot of home state connections to Hawaii or New Jersey, where he grew up or anything like that. So I think it really does, it gives you that unique sort of membership of the court.

A Anya Bidwell 22:47

Yeah, fascinating place. With that in mind, then let's start talking about the cases. After all, this

is a Short Circuit podcast where we discuss circuit court opinions. Let's start with you, Paul. And this fascinating case, Trump versus Thompson. Could you introduce the case?

P Paul Clement 23:04

I'll introduce the case, and I will start introducing it by just sort of as a transition to what I was saying about the DC Circuit and its unique makeup of cases. So I don't know that any law clerk or any judge comes to the DC Circuit just to do the FERC cases. And some of the cases are not super exciting. But there are other cases that could only arise in the DC Circuit. And they are some of the most important separation of powers cases that any court is dealing with. Many of these cases end up going to the Supreme Court afterwards. And I think that's one of the things that makes the DC Circuit so special and unique. And one of the reasons I wanted to talk about the Trump v. Thompson case is because this is a case, only in DC only in the DC Circuit, would you have a case like this. So the case in a nutshell arises out of events that everybody is familiar with, starting with January 6, and then the appointment of the congressional committee to investigate January 6. The committee has asked for lots and lots of documents from various sources, including many of the documents that were generated in the oval office on January 6. Now, where are those documents right now? Most of them anyways are in the archives. They're transferred there under the Presidential Records Act. And so as a matter of form, what you have is a request from Congress to the archives for these documents. But when they ask for presidential records, which these clearly are core presidential records, because they're records from the Oval Office on January 6, it triggers a process where the sitting president gets involved. And potentially in a situation like this, the former president gets involved as well. And what happened in the case of these documents is the archives received the request, asked the current White House for their view on whether they were wanting to assert executive privilege. The current White House Counsel sent a letter saying that the White House, the President doesn't want to assert executive privilege over the documents -- not that they're not subject to executive privilege. But that based on the extraordinary situation, the current President's view of the extraordinary need for the documents that they would not assert privilege. That prompted under statutory process notification of the former president. The former president, shockingly, had a different view, and thought that that that executive privilege should be invoked on the documents and ultimately sued in the District of Columbia District Court to essentially enjoin the archives from transferring the documents over to the congressional committee. Lost in the district court, came up to the DC Circuit, before a panel of Judge Millett, who we mentioned earlier, Judge Wilkins and this new, newly elevated judge to the DC Circuit who'd barely heard any appellate cases, Judge Jackson, soon to be Justice Jackson was also on this panel. And they issued their decision, essentially affirming the district court and siding against former President Trump. I think it's probably fair to say this is the most consequential decision that Judge Jackson sat on as a DC Circuit judge. And the opinion for the DC Circuit is roughly 67 pages long. It covers the waterfront. It's another one of these opinions, it's hard to imagine this opinion being written by Judge Tatel since it's 67 pages -- might have been a little too long. But also hard to imagine this opinion being written in a different circuit, just because of the nature of all of the material it covers. There's an extensive discussion of OLC opinions and even Senate testimony by OLC deputies. And there's a sophistication with the DC Circuit judges when they're dealing with these separation of powers cases that you're really only going to get if you routinely have these cases as an important part of your docket. And it's all reflected in this opinion. The opinion focuses a lot, if I were just going to describe it to you in sentence or two, I would say the DC Circuit opinion really focused on the fact that both the current President and the Congress had made a judgment that they really wanted these documents. And that joint judgment of both political branches really made it a pretty

straightforward case that the former president wasn't going to be able to sustain his claim of privilege. That the need, as verified by the political branches, overwhelmed his claim to privilege. A funny thing that happened, which is the former president's lawyers filed an application to stay the DC Circuit decision, stay the mandate pending cert. And the Supreme Court issued what I guess you'd describe as an order. It doesn't even rise to the level of a per curiam opinion. The words per curiam I don't think appear on it. But what the DC Circuit said, or rather the Supreme Court said in that very brief order, is that we're going to deny the motion to stay the mandate. But the discussion in the DC Circuit opinion that focused on the status of the President and the former president here being the person invoking the privilege was dictum, and shouldn't be essentially given any weight going forward. And I just want to read you the last sentence of this order. It says any discussion of the Court of Appeals concerning President Trump's status as a former president must therefore be regarded as non binding dictum. This is a pretty wild move by the Supreme Court to basically take a 67 page DC Circuit opinion, that's mostly about the fact that this is the former president making the assertion against the wishes of the current president and effectively dictimize it, if that's a word. And so I don't know if my co panelists have thoughts about this. Kelsi, you were involved in it a little bit a little.

K Kelsi Brown Corkran 29:47

A little bit. I thought that quote came from the Kavanaugh concurrence. That's from the actual opinion?

P Paul Clement 29:51

That's the last line.

K Kelsi Brown Corkran 29:52

Oh interesting.

L Lisa Blatt 29:53

Justice Kavanaugh goes further.

K Kelsi Brown Corkran 29:55

He goes further -- he does something similar.

P Paul Clement 29:56

Yeah. And says it's wrong. I mean, so he does go much further, but that's from the ...

K Kelsi Brown Corkran 30:00

Kelsi Brown Corkran 30:00

That's from the actual opinion. I read it when it came out. Yeah, I think your description of it was exactly right. And just to pick up a little on your point about the sophistication of Judge Millett's analysis, I think you see this dynamic between the DC Circuit and particularly Judge Millett and Chief Justice Roberts. One, so you mentioned that Trump lawyers went to get a stay from the Supreme Court. The DC Circuit panel entered an administrative stay until the Supreme Court ruled on the emergency application for a stay. And that was a show of courtesy in respect to the Supreme Court, because if they hadn't done that, then the Supreme Court justices would have been scrambling within hours to have to decide whether or not to grant the stay or not. And so we could see that decision coming out very differently if they couldn't have time to even read Judge Millett's 67 page opinion before entering the stay in order to keep the archivist from releasing the documents. The flip side of that is, once the the DC Circuit panel entered that administrative stay, the Supreme Court could have just sat on this a really long time. Right, like there wasn't a expiration date on the stay that the DC Circuit put in place. So you know, it could have been months. It could have waited until after the midterms, right? Just leave this out. And they're not actually doing anything one way or another. That's not what happened. Within a couple of weeks, the application went first to the Chief Justice. The pinion, I guess it is, says that he referred it to the whole court. And they ruled on it. And so I think that that rapport you see -- it doesn't always go that way, right? Often the Supreme Court reverses what the DC Circuit does. But I think it's a reflection of these two very important courts in the same city with judges who all know each other having mutual respect. So I think that all just procedurally played out exactly as it should have. And then the other piece of that is in this 60 plus page opinion by Judge Millett, she essentially goes through every single possible way that President Trump could lose and explains well, you lose under all of the ways. And by doing that, she gutted or the panel gutted kind of the significance of the legal question. Because there's a really interesting legal question here: is what authority does a former president have to intervene in order to keep documents from being released? What's the executive privilege there? And her opinion, you know, as you said, it kind of comes down and says, well, you lose, under any way. And so when you read this denial of this stay application by the Supreme Court, they say, you know, that important question isn't presented here, because you lose all of the ways. And so I think, Judge Millett did the Supreme Court a favor when she wrote the opinion that thoroughly.

P Paul Clement 32:56

But I will say the funny thing is, she did go through and march through all of the different possible tests. But really, at every point in her analysis, she depended on the fact that it was two against one, and it was the sitting President endorsing essentially the views of Congress. So that's what I find so puzzling is because the court relied on the formal fact that she rejected the claim under every test to say that we don't really have to view this as having any holding on the status of the former president. But it was the fact that it was the former president. Because if it was the sitting president, you couldn't get a two for one. Because it would be the sitting president would either not assert the privilege, in which case would be straightforward. Or the sitting president would assert the privilege and then it would be a one on one battle. So this two for one, you're outnumbered dynamic, really seemed to me to be the entire reasoning of the opinion. And now it's kind of poof. To use a technical term. I thought it was extraordinary. And really what I thought was a tour de force. I mean, Judge Millett writes with such color and flair, I love reading her opinions. My favorite was the one where the, I guess it was the FAA was not making the seats wide enough for passengers. And it was just the most amazing discussion

of a person who has trouble fitting in their airline seat. And she just has a way to really bring a lot of life to the opinion and this was a glorious opinion. It's got a lot on January 6, and it it just kind of threw it away after the Supreme Court said what they said it was kind of all irrelevant.

A Anya Bidwell 34:40

It felt a little bit like she just wanted to kind of lay out the case also of what happened on January 6, right. So a lot of pages right at the beginning. It's just kind of here's what was going on.

L Lisa Blatt 34:54

Yeah she just wanted to tell the story.

A Anya Bidwell 34:57

Yeah. The other thing I thought was interesting in the opinion is that she actually acknowledges an interesting thing that could go in the former President Trump's favor, which is they're asking for documents so soon after his presidency, right. And she kind of doing the oral arguments and then in the opinion itself, she kind of mentions it and says, you know, the parties really didn't pause on it carefully. So I'm not going to say much on this. But I do think that it could be, you know, harmful, potentially, to ask former presidents for documents this quickly after they leave office. Because it creates bad incentive for presidents who are actually sitting in office right now knowing that somebody will come after them once they go. And that kind of goes to just how carefully she thought through every argument for and against. With that, let's move on to our next case, Atchley versus AstraZeneca. Kelsi.

K Kelsi Brown Corkran 35:53

Yeah, so this case arises out of a series of attacks on Americans who were living in Iraq, during the US military presence there in the early 2000s. So the plaintiffs in this case are hundreds of victims of those terrorist attacks, some service members, some civilians, and then also the family members of those victims. So the terrorist attacks were undertaken by a group. Gosh, I was gonna ask you how to pronounce this Lisa before we started, Jaysh al-Mahdi. But that is not the defendant in the suit. As Anya said, it's AstraZeneca. It's a collection of medical supply and manufacturing companies, some of which have become a household names because of COVID vaccine. So there's AstraZeneca Pfizer, Johnson & Johnson are all defendants. I think there are 21 defendants total in this case, and you're now so excited to hear how these companies are involved in the terrorist attacks. So I will tell you. I will say first, this case is at the pleading stage. So these are all allegations, although it is an incredibly detailed complaint -- 588 pages of allegations and public sources. And its plaintiffs are represented by Kellogg Huber. So there are very well represented. So the allegation here, and there's a lot of wonderful lawyers on the other side as well. So the allegation is that the these companies were providing medical supplies to the Iraqi Ministry of Health, which was at the time wholly controlled by this terrorist group. So they were selling medical supplies to the ministry, which was, again the face of the terrorist group. And not only were they selling the supplies, but they were also giving cash

kickbacks as bribes. And they were providing some free goods on the side that the terrorist group would then sell on the black market. And then all of this kind of money that was coming in was used to finance the terrorist attacks on the plaintiffs. So that's essentially what the allegations are. The district court dismissed the case for failure to state a claim. And it also dismissed, I think, six of the defendants, which were foreign entities for lack of personal jurisdiction. So this goes up to the DC Circuit, which reverses. The panel is Judge Pillard, Judge Edwards, and Judge Wilkins. Yes. And Judge Pillard wrote the opinion, it's over 60 pages. So I will, I think just pick a couple of highlights of the holdings. So the claims are under the Anti-Terrorist Act, which provides a private cause of action in tort for injuries arising from international acts of terrorism. So one of the things that the defendants have argued is that this particular terrorist group is not a designated terrorist organization in the United States and therefore doesn't trigger liability under the Anti-Terrorist Act. What the DC Circuit said was, well, they're very closely intertwined with Hezbollah, which is a designated terrorist organization and therefore that qualifies. The other big issue was proximate causation. So the defendants have argued that the ministry was a intermediary that broke the chain of causation between the payment of the kickbacks and the actual terrorist acts. The DC Circuit rejects that argument, again says these are two sides of the same coin, the Ministry and the terrorist group. An interesting kind of twist there is that the plaintiffs have alleged both direct liability and secondary liability. So secondary liability probably makes sense from what I've said right, like aiding and abetting the terrorist group. They also have a claim for direct liability, which is the what the defendants did was an act of terrorism. The district court didn't actually reach that question because it held no proximate causation. And the DC Circuit panel was like, we're not going to decide that either. We're sending that back to the district court in the first instance. So I think those were the -- Oh, and then there was this question of whether the defendants knew that the money was being used for the terrorist acts. And Judge Pillard's opinion essentially says there was all sorts of it was widely publicized, it was in the news, these are sophisticated organizations that would have picked up on that. And then for personal jurisdiction, it had to do with whether these foreign defendants, whether their claims arose out of or related to their conduct in the United States. And the DC Circuit said, yes. So the DC Circuit reversed to now there is anen banc -- I think two en banc -- petitions pending. And the court ordered a response. And the response briefs were filed almost a month ago. So it's interesting. You know, we'll see whether they're going to ultimately grant the en banc petitions or whether the someone's preparing it dissent from the denial en banc. We'll see.

A Anya Bidwell 41:10

There are interesting things like this idea of Ministry of Health, right, that these organizations, they're going to the Ministry of Health, and they're making contracts with the Ministry of Health, and they're providing these medical supplies to the Ministry of Health. What do you guys make of this argument that the court makes that, essentially, Ministry of Health is this al-Sadr organization? That seems kind of, you know, the United States government itself was also doing business with the Ministry of Health. Right. But But the court actually is not taking judicial notice of that, and kind of is saying that, even though it was Ministry of Health, we really think it was this al-Sadr organization, that that these companies were doing business with?

P Paul Clement 41:59

So I mean, I think that's, you know, one of the problems when you consider this case, based on the allegations. I mean, Kelsi made a point of saying at this point in the litigation, you're doing

this based on the allegations. And if you take the allegation, seriously, that this Ministry of Health is controlled by a terrorist group, then a lot of the rest of the analysis seems like it flows pretty directly from that. Now, that's a big allegation. Heck of a thing to prove. But at the motion to dismiss stage, it is what it is. And it's one of the things that makes this case, I think, a little different from most of these cases that arise in similar contexts. But we talked about cases that could arise only in the DC Circuit. This is a case that could arise in other circuits, because other circuits have dealt with these ATS cases, ATA cases, and what is it, JASTA is the statute that Congress passed to make it slightly easier to bring these claims. But a lot of the other claims involved banks that processed transactions and the question is whether they knew they were processing them for a terrorist group, or just individuals. Facebook and Twitter and Google have all been sued. Because -- imagine that -- social networking -- even among terrorists. Most of these cases, the typical dynamic is that you just provided a service to a group, maybe almost like unwittingly. And I think that's what makes this case interesting from an allegation standpoint, if they can prove it, is the allegations sort of have the defendants kind of much closer to the actual action, than I think one of the typical one of these cases.

K Kelsi Brown Corkran 43:52

Yeah, I think that's right, in particularly if this case gets to discovery, and we'll see right. The en banc petition is pending. I'm sure there'll be a Supreme Court cert petition after that. But it seems like the sort of case where the whole game is going to be discovery. What actually comes out? Does it turn out that the relationship is as close as the allegation suggests? Is that even closer? Who knows? So I think that remains to be seen whether that has any traction.

P Paul Clement 44:20

And the thing about these suits that are frankly, I think, hard from the defendants perspective, is nobody wakes up in the morning, wanting to even be alleged to be aiding and abetting Hezbollah or some of these other terrorist organizations. So the suits if they can get past the motion to dismiss stage create huge settlement pressures, even if there isn't that much there in discovery. And yet, it's hard to deny that Congress has passed statutes to make it easier to bring these claims. So it is a situation -- I had one of these cases for a financial institution five or six years ago. And they're hard cases.I mean obviously no lawyer is going to make the allegations unless they feel like they can prove their case. But it's it's relatively easy to allege cooperation to a degree that satisfies aiding and abetting. And once you do that, boy this is not a dynamic that any any any major corporation wants to be dealing with.

K Kelsi Brown Corkran 45:23

Although I'll say on the flip side, also, this case strikes me as unusual in the sense that the plaintiffs are so well resourced, and were able through kind of pulling public documents to provide as much detail as I did in the complaint. Most of the time when you have plaintiffs bringing -- you know, I do civil rights lawsuits -- to be able to pass, to survive the the pleading standard -- Anya is nodding because she does the same, a lot of the same work I do -- to get past the pleading standard before you've had a chance to do any discovery is incredibly

difficult. So I you know, there I think there are hardships on both sides. And then you have you know, a case like this where you've got so many highly paid lawyers on both sides, it starts to look very different.

P **Paul Clement** 46:08

Well, plainly if you file a 500 page complaint, you've read Twombly.

A **Anya Bidwell** 46:15

Yeah, I was just going to tell IJers out there. We are always so proud of our complaints that, you know, have a lot of pages of allegations in them. Yeah, this one is that. One question I had, that's kind of to the side, there is an amicus brief by members of the Senate talking about the aiding and abetting statute. I don't see that very often. And it's a bipartisan group, including somebody like Sheldon Whitehouse and Marco Rubio. How much import does a court give to an amicus brief like that? They are members of the Senate, but they are not the Senate itself, right. Is it is it even worth -- often in our cases, we think, you know, the Westfall Act, would wouldn't it be nice to get an amicus brief from Chuck Grassley? But that's really not -- it's senators saying what they think now, but it's not really reading into congressional intent, for example.

K **Kelsi Brown Corkran** 47:19

I mean, I think I well written bipartisan, amicus briefs always get attention. And I'm sure all of the amicus briefs in this case were closely read. But this is also, again, as Paul was saying, the DC Circuit is so sophisticated. This is a very sophisticated panel of judges. I doubt that they were that influenced by anything other than the arguments. I mean, they're fully capable of processing and critically thinking about the arguments made by the parties.

P **Paul Clement** 47:47

Look, lots of judges say that everyone's textualists now. So if if you have a amicus brief from members of Congress that tries to do post, post, post, post post legislative history, I don't think that's gonna get -- it's not going to move the needle at all. But on the other hand, if the senators are able to, sort of, first of all, just showing up and being bipartisan is going to have a certain impact. And then if the argument in the brief, as Kelsi is saying, is a persuasive argument, it will be taken into account and given respectful consideration. But I think I almost feel like if you have one of those amicus briefs, you almost have to be careful to avoid the trap of making it seem like you're backfilling the Congressional Record or something because most of the judges aren't going to pay attention to what was in the Congressional Record contemporaneously. And they're going to have their guard up for anything that sort of smacks of post hoc legislative history. So you do have to be careful with those briefs.

L **Lisa Blatt** 48:52

And my only comment is I thought the petitions for rehearing were very well done. Very

And my only comment is I thought the petitions for rehearing were very well done. Very compelling.

P Paul Clement 49:02

Concise too. We'll you had a word count.

A Anya Bidwell 49:08

With that then Lisa, let's go to you and talk about Jibril versus Mayorkas.

L Lisa Blatt 49:14

Yeah, so I have a fun one. But I have notes. This is Jibril versus Mayorkas. This is a decision written by, authored by Judge Edwards and signed by Judges Henderson and Walker. And this one, I think, relates more than the other cases to all of us. This is about when we fly. The FBI has a database that apparently two types. There's the no fly list when you are not allowed on the plane. And there's a selectee list which basically is a terrorist watch list. And you don't know if you're on it, but some people get something which I've never seen, which suggest I'm not on this watch list that says S S S S, which stands for secondary screening, security selection. But the government won't tell you what that means, but it's on your boarding pass. So we have the Jibrils and their story is quite moving. They're a married couple with adult children and one minor child. And the reason why I'm telling you this is because the court finds it's very significant. They traveled to the Middle East a lot because that's where their family is. And their religion actually requires them to regularly travel to Saudi Arabia. And that becomes important later. So in 2008, they had a nightmare trip, as you can just sort of -- you could have written this. They had SSSS written on their boarding pass, and they were searched for three hours, I guess, before their flight took off. They were all pat down, including the minor child. They missed their flights coming home. The agents threw away all the things that they had bought from, I guess it was Jordan. They didn't offer this poor child food and separated the child from their parents. And there's this wonderful line in there saying, and the record does not reflect that anyone was asked whether they had any medication they needed to take. I mean, the judges really felt for them. So they get back and file -- and this just all sounds, I'm going to use the word Kafkaesque a lot -- they file a complaint in something called the traveler redress inquiry program. And the response back from the government is just classic. It's we can neither confirm nor deny that you're on this list. But we have made any corrections that may have been necessary. It's just amazing. So they sue for a couple of Fourth Amendment claims and due process claim and an administrative procedure act claim. And the trial court dismissed, which I found a little bit startling, for lack of standing. So this was a resounding win for the plaintiffs, the court said in almost slightly sarcastic that it was reasonable to infer from what had happened to them, that they were actually on this. They were on this no fly -- terrorist watch list, and that they were on the SSSS list and would still be on it. And then where they got really mad is saying they obviously have future travel plans. And the government hasn't told them they're not on this list. And at oral argument, they said there was a suggestion that this couple or their children just try another flight and see what happens. And the court didn't like that. And the court said whether that suggestion was meant to be a tongue in cheek quip or simply a heartless argument, it makes no sense. The whole point was to prevent harm. So they're allowed to seek relief, including revisions to this traveler redress program. And why this

is such a neat case is because it's this bipartisan panel, and it's really kind of man of the people. And this is wonderful. Yay for Americans. But it ends on the most Kafkaesque note imaginable. So it literally says the following. We note because selectee status constitutes sensitive national security information, revisions to the traveler redress inquiry program may not exist that would allow the Jibrils to discover whether they are ever were on the selected list. So I don't know what that means. I hope that one of you will enlighten me. But I can only imagine what the government and the parties are thinking they won, but they have to go back. And they were just told you have standing because it's redressable. But in the end, we have to point out, the government's probably never going to tell you one way or the other what's going on here. So I don't know. Neat opinion. But maybe if you have a SSSS on your boarding pass, I would be careful. Get to the airport early.

A Anya Bidwell 53:30

Yeah, we had two clients in IJ cases that got in similar situation. One, Gerardo Serrano versus CBP. He was crossing the border in his truck, United States Mexico border, and then Anthonia Nwaorie versus CBP. She was a US citizen who was traveling to Nigeria. And that's exactly what she got, she got this SSSS. And in both cases, we filed TRIP applications. And we got the exact same responses, as the response the panel is discussing here, which is, you know, we can neither confirm nor deny. But we didn't receive --

L Lisa Blatt 54:13

They did say to the child. One of them one of the family members didn't get a response, but the child's got back got a response. It said, your experience may have been misidentification. So my sense of this is this was a long rendition of the treatment. And it was like if you're gonna deal with these people, they had not sued for damages. Your the regulations require that the parent not to be separated from the child and not to be interrogated, and they just blew it at every stage. And so I think the the court was a little bit miffed and saying, you know, if you're going to be doing this, at least try to run a railroad with some sensitivity.

A Anya Bidwell 54:54

Yeah. And do you find the court's Article III standing analysis persuasive because the government, you know, in their briefs, they kept saying, the Jibrils they have no plans, you know, for traveling in the future.

L Lisa Blatt 55:09

Well it's frivolous except for the court ends with it might not be addressable. Yes. But the notion that they didn't suffer injury, in fact, and aren't going to fly again was preposterous. And remember at one point, the government said, but it didn't happen all the other times you went to Jordan. And the court sort of sarcastically says, maybe you were put on the watch list before you went on your 2018 trip. I mean, it was just I think they had about had it with bad arguments that day in court.

K Kelsi Brown Corkran 55:36

Yeah. I so I think as Lisa said, it's notable that this panel here -- you have Judge Edwards wrote the opinion, and then judge Henderson and Judge Walker, I think, you know, even though it's a it's primarily a standing decision, it's also an administrative law decision, in the sense that right, this is an appeal of an agency decision. And going back to your point, Anya about the expertise of the DC Circuit, I think this reflects the value of having a court that sees so many of these administrative law cases. Because they get so many data points, they have a level of expertise and competence, that when agencies are actually doing things that are outside the scope of their discretion, they don't hesitate to say, no, absolutely not. This is ridiculous. And to push back when the Justice Department -- this was defended by my old office, civil appellate, and often those cases begin with all sorts of, you know, no jurisdiction, no standing, no cause of action. Right. Everything you can say, before you get to the merits of the argument. And so I think I think the case proceeded pretty typically for an administrative law dispute that's being litigated by the Justice Department. And so I think it's refreshing. I think, also, you see that the inclination or the competence of the DC Circuit judges in overturning agency decisions or pushing back on agencies isn't ideological. I mean, the judges across the ideological spectrum will do that when they think it's necessary. And I agree with Lisa, that this is obviously a case where it was necessary. Hopefully, they're able to get some sort of relief at some point.

P Paul Clement 57:20

And I think that's a really important point, because you alluded to this. There are a number of these APA cases, as a litigant, you have the opportunity to challenge agency action, either in the DC Circuit, or in the regional court of appeals where the company is based or the like. And the reason that a lot of people take the choice of the DC Circuit is precisely because of this sophistication and repeat player. Because if you're a regional court of appeals, and you're not used to the civil appellate playbook, where there are six different jurisdictional doctrines before you even get to the merits, and you're not routinely hearing arguments about ripeness, and exhaustion, and standing and the like, it's easy to sort of lose your case on one of those thresholds. And then when you get to the merits -- if you take Chevron and arbitrary and capricious review seriously, or at face value maybe -- that's a pretty good set of doctrines for the government. But if you're in front of judges, who are seeing, like a dozen FERC cases every year, and they know, like this opinion is like a D minus, like this is not FERC's best work. They're going to be inclined to reverse the agency in that situation, where a regional circuit that might see one FERC case in a blue moon, I think is going to be much more instinctively of the view that this energy regulation stuff is super complicated. And there are a bunch of cases that say we often defer. So we defer. So I do think this repeat player sophistication, kind of by on a bipartisan basis is a real key to why so many of these APA cases end up in the DC Circuit, even when the litigants have choice of going somewhere else.

L Lisa Blatt 59:16

Yeah, I often tell clients when I've had actually, realizing all these cases now I've had in the DC Circuit, and I've never been able to tell a client anything about the panel. I'm just like the panel doesn't matter. These are strictly administrative law cases. And the same was true when I was

in government. I was the Medicare and Medicaid assistant for 13 years. It was all DC Circuit cases. And just really, it had almost nothing to do with the panel you drew because they were all just so administrative law based. Just the politics didn't seem to matter.

P **Paul Clement** 59:48

I had a case a number of years ago in the DC Circuit against the government. It was a Medicaid case. And at one point in the argument, one of the judges asked the government lawyer what this accounting error that we had pointed out would cost the government. And the government lawyer's response, which I'll never forget, was well, I'm not sure the exact number, but it starts with a B. And that's the kind of answer that I think would have phased a lot of other judges. But the judges on the DC Circuit were like, Okay. I mean, it's an administrative law case, if you blew it, you blew it. A lot of money in this program. So if it ends up being a billion dollar mistake, so be it. And I think that's the attitude that as a challenger you're looking for in a court when you bring an APA challenge.

A **Anya Bidwell** 1:00:39

Well, I think we came full circle from where we started, why DC circuit has its own path and goes its own way. Thank you so very much for coming to Short Circuit Live for doing this panel with us. It's been an honor and a pleasure.

K **Kelsi Brown Corkran** 1:00:54

Thank you for having us. This was great.

P **Paul Clement** 1:00:56

Yeah, this has been great.