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SPEAKERS

Kirby Thomas West, Anthony Sanders, Marin Levy

A Anthony Sanders 00:07

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 Wednesday, May 11, 2022. There is still time for our our Forum on the Michigan Constitution and judicial engagement, which is coming up on Friday, May 20 2022. So if you live in the state of Michigan and you'd like to come see IJ in person, meet a few IJ attorneys, learn from some other lawyers and scholars about the Michigan Constitution and state constitutions generally, please come join us. You'll get a free lunch, the whole event is free. It's at the Inn at St. John's in Plymouth, Michigan, Friday, May 20. And there's a link in the show notes for you to get details and RSVP. But today, we're talking about the federal courts, both a case from the Second Circuit and the Ninth Circuit like we normally do, but also more broadly, what the lower federal courts are all about, how they work, questions of that nature. First, I'd like to introduce, though, my colleague, Kirby Thomas West. Kirby is rejoining us on Short Circuit and will talk about a case from the Second Circuit soon. Kirby, welcome back.

K Kirby Thomas West 01:27

Thanks, Anthony.

A Anthony Sanders 01:29

But today, our special guest, that we are honored to have with us, is Professor Marin Levy of Duke University School of Law. Now, I think, more than anybody else the last couple of years, Marin has done the most to educate the public about what the lower federal courts are all about, where they come from, some stories about judges and lawyers who practice before those courts, and take some of the veil of mystery off of these courts that we talk about on Short Circuit all the time and that we have in our newsletter and that all kinds of people read the news from, but, like, what really makes them tick, how do they work? And through a series of threads on Twitter, she has marvelously educated all of us about a whole bunch of stuff that that even people like me had no idea it was how things were. Also, she's written a number of

scholarly articles about the federal courts and other subjects. And so it was well past time for us to invite her on the show. And we're so happy to have her with us today. Professor Levy, welcome to Short Circuit.

M Marin Levy 02:47

Oh, my gosh, thank you so much for having me and that all too generous introduction. I feel like I'm blushing. And we should just stop right now. I should just leave. There's nothing that can top that.

A Anthony Sanders 02:56

Well, our technology on this kind of Zoom-like call we're on doesn't allow me to see blushing. So I don't think we have to worry about that. We'll get to your Twitter threads in a little bit. But you've been a law professor for a little while now. You've written all kinds of articles about the ins and outs of the federal courts, like how the chief judge works. A lot of our listeners might not know every circuit has their own chief. It's like a rotating position, and they kind of run things. Stuff like that. What draws you to those areas? And why are they so interesting to you?

M Marin Levy 03:38

Yeah, oh, that's such a great question. So whenever I think about things like this, I'm like, we need an origin story, right? It's always about the origin story. So I first got interested in what we might call the field of judicial administration when I was a law clerk. And I'm not going to say when that was because that's too too many years ago.

A Anthony Sanders 03:58

I think it was after I was a law clerk.

M Marin Levy 04:01

Well, then we're all good, right? We're all good. So I'll never forget, I was clerking on the Second Circuit. And for those of us who clerked, those first few weeks, you're terrified, right? You have no idea what's going on. The learning curve is so steep. But it was just at the moment when I was beginning to think I had a handle on things. I remember walking into chambers one day, and there was this huge stack of folders that I hadn't seen before. And so I panicked, right? I was like, what is all of this? And then I was told, Oh, you don't have to worry about that. That's not for the law clerks. Those are the non-argument cases. And so my first reaction was relief, right? I was like, okay, great. I don't have to worry. Those are the non-argument cases. But then pretty quickly, my next question was, okay, but like, what's a non-argument case? Right? Like, what are we even talking about here? And so it's through that experience that I learned, you know, the majority of cases that the courts of appeals don't actually go to oral argument, don't result in published presidential opinions. I didn't even know that, despite the

fact that I had gone to law school at that point and even practiced for a little bit. And so then I just became really fascinated in how the courts operate behind the scenes. Right? So who's making the call about which cases go to argument and which ones don't? And for that matter, huh, isn't it kind of funny that sometimes we have panels where there's somebody from a different court who's actually sitting by designation, like, well, what's that about? And who decides who's going to come visit? Right? And, as you said, we have chief judges in the mix. So who picks those chiefs and what are the responsibilities? So pretty quickly, I just developed this real curiosity in how the courts function. And that basically set up what became ultimately a research agenda. And I've been having a lot of fun with it ever since.

A

Anthony Sanders 05:50

And one thing I think that people maybe take away from watching the federal courts is that, of course, we often discuss about dysfunction in government, federal agencies who are out of control, as our libertarian friends like to say, that's true in state government, as well, all this criticism about how government functions. And of course, we here at the Center for Judicial Engagement, critique judges all the time for not doing what they're supposed to do and engaging with the Constitution and all of that. But at the same time, I will say, I think most of us would say, on the whole federal courts work a lot better than other aspects of the government, whether it's, you know, pick your favorite federal agency or your local city hall. From seeing how they function from the detail that you've gone in, well, first of all, do you think that's true? And what makes courts a little bit more, I guess, functional when it comes to the other branches of government?

M

Marin Levy 07:02

Oh, yeah. So this is a great question. So based on my experience studying courts as institutions and then, of course, the folks who run them as actual individuals, I would say that's absolutely right. So just as a side note, I should say, so my main mode of research is to conduct interviews, right? So the way that I learned about courts is to actually meet with these folks, all these different judicial actors, so judges, clerks of court, staff attorneys, and my experience from that looking at circuits all across the country is I think, for the most part, people really are taking these jobs very seriously and are trying really hard to get it right. Which is not to say that people always do and, of course, there's an important function for folks like us to critique them. But I think, you know, there's something different when people step into the role of the court, right? They see their job as special in some way, as different from simply, you know, a policymaker, you know, somebody who's elected, who's just trying to reach certain outcomes. I just don't think that's what most judges think of themselves as doing. And that kind of role morality I actually think can play a really important role in terms of, you know, how they carry out their function. So this is a way of saying I absolutely think that, for the most part, those folks who are part of our judiciary are setting themselves apart in a meaningful way from those folks in other branches of government.

A

Anthony Sanders 08:30

What would you say are a couple things that maybe most lawyers, and certainly also the general public, don't know about the lower federal courts that they should know?

M

Marin Levy 08:42

Oh, my gosh, where to begin? Right? Where to begin with something like that? Something that I find totally fascinating is that the courts are so different from each other. Right? So we say the lower federal courts, we say, the courts of appeals, as if they are this kind of uniform body. And in fact they are actually really unique. Now, some of those differences that we're going to see in how the courts function stem from things that seem kind of obvious once you say them, right? Like the First Circuit is really small and the Ninth Circuit is really big. So the Ninth Circuit has, if we're talking about including senior judges in addition to actives, like five times as many judges as the First. So of course that's going to affect the way that the court operates, right? Geography also plays a big role in that. If you encompass multiple states, multiple timezones, it's just going to operate in a different way than a very tiny circuit. That said, something that I think is so interesting is that the circuits over time have developed their own norms. So in the Second Circuit, it just became really important at a certain point to hold oral argument in as many cases as possible, like that was seen as a value of that court. And I think that was because of a few key players, a few key chief judges. So even pro se litigants could come in and have their time in court. Now, that might not mean much more than five minutes, say, but the thought was, you're gonna get your day in court. Other circuits have very different values. So the Fourth Circuit, in contrast, has said, you know, efficiency is something that's really important to them. So that means having fewer oral arguments overall, but they turn cases out pretty quickly. So those kinds of things I actually just think of as being really fascinating, that these courts run very differently as institutions. Some of those can be for, again, what we might think of as obvious reasons, once you say them, but they're also value judgments that are happening kind of behind the scenes. And I think that is, again, just totally fascinating.

A

Anthony Sanders 10:39

Do you think in that way there's a lot of value of litigants or litigators who focus on a particular circuit, versus, you know, an appellate lawyer who flies all over the country and in different circuits?

M

Marin Levy 10:55

Yeah. So there can be. I mean, I certainly think it's helpful to know the rules of the game in any given circuit. And in fact, one of the things I'm doing right now is writing a book with the great Judge Jon O. Newman of the Second Circuit, which is all about documenting the different practices and local rules of these courts. But in addition to it, I think, being key for litigators, I think it's really important for the judges themselves and for the court officials. I will never forget, talking to a clerk of court now several years ago. And she said, you know, what we don't know about our sister circuits far exceeds what we do now. You know, they're so busy running their own institutions, it's hard for them to then be fully up to date on all of the different practices of the other courts. And I think if they had the time, and the the space, it would actually be great to have more of an exchange between those folks, because then you can realize, oh, this Court has been doing this the following way. Maybe that's something that we should adopt ourselves.

A

Anthony Sanders 11:57

I love that you mentioned your co-author Judge Newman, because we mentioned an old article of his a few months back when we were talking about the correct pronunciation of en banc, which he's devoted some attention to, and I know you have devoted some attention to on Twitter. So, Marin did a deep dive on her experience in tweeting out the federal judiciary on her home podcast at Duke, and we'll put a link up to that podcast in the show notes if anyone really wants to go deep on the on the Twitter stuff. But for those who don't know, it was about a year and a half ago, two years ago, you just started tweeting about the lower federal courts and these crazy stories. It reminded me a little bit about actually my predecessor. Sheldon Gilbert, when he had my job did this series for a while called Courting History about weird wild stories in the past, but yours were particularly on the lower federal courts and kind of how they function and lawyers and all that who were involved in there. So very, very summarily, how did you get into it? And like, what kept you making these late night threads that just, I think, brighten people's nights when they check Twitter before they go to bed and like, oh my gosh, here's this wonderful story and not, you know, all the claptrap that I'm used to seeing.

M

Marin Levy 13:32

Okay, I'm blushing again. So the way that I think about it is the pandemic set in and some people acquired puppies and other people learned how to bake. I, alas, am no baker. And I ended up writing about courts, right, like, what on earth started that? So I think you can tell based on my own research, I love courts and I love studying them. I love studying the judges. And so this all began a few years back, I would be in the middle of researching something and come across a tidbit that I thought was fascinating. And I'd just send that out to the universe. But then particularly again, during the onset of the pandemic, I just got involved in a little bit more storytelling. when on the nights that felt so bleak. It just seemed like wouldn't it be great to hear a story that was positive into the first person who did something, the first woman to clerk on the Supreme Court, let's say just something that was a little bit inspiring? And I had so much fun doing it that I kept it up. And amazingly, people have been very kind in the reception of it. You know, all it takes is a little bit of encouragement from somebody online, and then you think, Okay, well, now I have to do it, you know, next week, and then it really began to build on itself because people would say, Hey, have you thought about doing a thread on say this court or this person? And if somebody asks, I have a hard time saying no, so it's like I have my own research agenda now but just on Twitter, the various threads that I'm going to be including soon enough.

A

Anthony Sanders 15:06

Any upcoming that we should be waiting for? Want to give any hints?

M

Marin Levy 15:11

Oh, yes. So I try to do them, like around various milestones or if things kind of feel seasonally appropriate. I mean, that's such an odd thing to think about. Certainly, as an academic, we don't tend to think in those terms. But right now, with graduation, I feel compelled to share some really great stories about, say the first women who graduated from law school, the first lawyers. We have an amazing person, the first female attorney in the US, Arabella Mansfield,

who has a birthday coming up on May 23. So she will be getting her own thread that day. So I love those kinds of things, right? When you can tie history to, again, milestones, particular anniversaries, or if it feels like there's just something happening in the news where that could be relevant. But yeah, I like to share those stories, particularly because they feel a little bit more upbeat. And in the current climate, I feel like we can't get enough of it.

K

Kirby Thomas West 16:11

That is so true. So I'm a recent follow because I'm just an infrequent Twitter user. But in advance of this on Anthony's recommendation, I've caught up with some of your threads. And I think the storytelling aspect of it is so great, especially for lawyers, because I think we have a tendency, especially in law school but even kind of early in my career as a litigator, of thinking of courts as kind of law machines, where you put in the facts, you put in your arguments about the law, and then you get this thing that pops out at the end. But I think it's so important for people to remember that judges are people and the people who work in courts are people and for litigators appearing before courts to know just that humanizing element of this is an institution made of people with unique experiences that affect how they view the world and how they'll view your case and the law is just such a important thing to remember. And yet doing it in such a compelling way through your storytelling. I've really enjoyed that as well.

M

Marin Levy 17:09

Oh, thank you. So I fully agree with all of that. And I, I think, too, there's something valuable in these stories where somebody is putting themselves on the line, right? Like they're really sticking their neck out for somebody else. So one of my favorite threads recently was one about the first woman to clerk for the great Justice Brennan. That's, of course, now Judge Marsha Berzon on the Ninth Circuit. So we talk about an amazing first female clerk. But the reason she was able to secure that clerkship was because somebody who knew her who had clerked for Justice Brennan wrote to the justice and said, You really need to take her. And in fact, you haven't been hiring women. And that's a problem. He was willing to say this to his own justice, even though that could have been quite problematic for him. And so those stories, too, when you think about who are the change agents, who are the people who were helping to make something happen, even though it wasn't for their own personal gain? I love putting those stories out there too.

A

Anthony Sanders 18:07

Okay, last question, one of the most important: What is your favorite federal courtroom in the circuit courts of appeals? I understand you might be Second Circuit biased.

M

Marin Levy 18:22

I was just gonna say, I hate to admit any sort of bias. But I love the Second Circuit. I mean, I love it so much. And so I think I have to go with the ceremonial courtroom from the Second Circuit.

A

Anthony Sanders 18:34

It has an overview of the Hudson River or something, is that right?

M

Marin Levy 18:37

That might be right. I'm not actually entirely sure of that. I just think about walking into that room and just the space. And this is where I get a little bit overly sentimental. I mean, I just think about the people on that court, Henry Friendly, Learned Hand, and they have busts of the two of them. So anyway, that one has to be the one I pick.

A

Anthony Sanders 19:00

Well, we had a competition a few months ago,. Well, it wasn't much of a competition. It was a selection process with nominations of what was the most beautiful courtroom in the federal circuit courts. And it was a close one, but our selection committee came up with the library courtroom in the 10th Circuit in Denver. But the Second Circuit did come up.

M

Marin Levy 19:24

Was it like an honorable mention? We need something right, like, we need to walk away with some kind of prize?

A

Anthony Sanders 19:29

The seconf was the Fifth Circuit en banc.

M

Marin Levy 19:32

Oh, I want to like petition for rehearing or something. Or maybe I'm gonna seek cert here. I don't know.

A

Anthony Sanders 19:38

You need to intervene and file for cert. So we'll come up with a process for that. Or maybe just somebody throw a common law writ in there. But before we do that, speaking of the Second Circuit, Kirby, someone who you wouldn't expect just had a victory there.

K

Kirby Thomas West 20:01

Oh, yes. In the case in the Second Circuit. I thought you were referencing something else. I'm like is this an IJ case that I'm supposed to talk about?

A

Anthony Sanders 20:08

No, we're not complicated.

K

Kirby Thomas West 20:11

Yes. So this case, *Cornelio vs. Connecticut* out of the Second Circuit, is about registered sex offender. So not the most sympathetic of plaintiffs. But he brought a challenge to two different provisions for sex offenders in Connecticut. One is a disclosure requirement that says you have to report any email address or other electronic communication identifier, so anything basically that you use to identify yourself online, to the sex offender registry unit in Connecticut, and the other provision was a residence verification provision, where every 90 days you have to return within 10 days a piece of mail that you receive to let them know you haven't moved and your residence is the same as what you have on file. And, Mr. Cornelio brought these claims pro se and he challenged the disclosure requirement most relevantly for kind of what we'll be discussing under the First Amendment and said it, you know, it was stifling his speech under the First Amendment. He challenged the residence verification under the Ex Post Facto Clause of Article 1. This one we probably won't talk about, because it was a pretty straightforward application. The district court got it right. It was just this law passed before you committed any of your offenses. So it wasn't an ex post facto law. So that was the Second Circuit said properly dismissed by the District Court. And then interestingly, there was also a malicious prosecution element of the officer who brought the charge for his failure to update his email addresses that she had, you know, prosecuted him just because she didn't like him and was kind of harassing him. The district court dismissed all the claims, and the district court said that it had applied intermediate scrutiny to the First Amendment claim. But on appeal the Second Circuit, although it did affirm the dismissal of the malicious prosecution claim and the ex post facto law claim, the Second Circuit said basically, that the district court, though it said it applied to intermediate scrutiny, hadn't actually really applied intermediate scrutiny to the First Amendment claim. And it didn't say what level of scrutiny was proper, whether intermediate or strict scrutiny, but it said even under intermediate scrutiny in the Second Circuit's view, he did plausibly state a claim that his First Amendment rights were violated by the disclosure requirement. And the discussion of how the district court applied intermediate scrutiny I thought was pretty interesting, because the court said, basically, the district court came up with reasons that the government might have had to justify this law. And the Second Circuit said, You might be able to do that under rational basis review, but under intermediate scrutiny, the government has to actually show that the law is advancing important government interests and that it's not burdening substantially more speech than necessary. So that's the narrowly tailored aspect of intermediate scrutiny. And with regard to advancing important government interests, of course, there is an important government interest in protecting children and avoiding, you know, kids being groomed by sexual predators online. But the government didn't really show that the law was doing this in the record. And in fact, the record didn't even show that the database they had compiled had ever actually been used at all, so that they were doing anything with this kind of information. And even if it had been able to show that the court said that it plausibly imposed extra unnecessary burden just by the chilling effect of having kind of this blanket requirement for all sexual offenders that they have to do this. They might not be willing to speak online and also that they would never be able to kind of anonymously speak online, which courts have said is an important, you know, protected First Amendment right to be able to speak anonymously. And so the court said, you know, there is a plausible First Amendment

claim here, and that the district court had got it wrong. With regard to the malicious prosecution claim, the officer got qualified immunity. The Second Circuit says if it is a First Amendment violation, it wasn't clearly established at the time, but also kind of highlights how difficult it is to bring malicious prosecution cases because the court even noted that, you know, this guy had been kind of targeted for other kinds of ticky tack violations of the law. They seem to have a very contentious relationship with the sex offender registry unit and this officer in particular, but if there is, you know, plausibly probable cause and you know, there is no clearly established law saying that they did something wrong. There's really nothing that he could have done anyway. But something that came up in the malicious prosecution element of it, which was interesting, is the way that the officer found out that he had violated this reporting requirement is because he used a different email address to email the sexual offender registry unit. And you might think, Gosh, that's really dumb. You know, you're using an email address that you haven't disclosed. But his argument was, I use this email address to communicate with you. How is that not disclosing that I use this email address? And so that was part of his argument of, you know, I didn't even commit this offense, because I use this email address communicate with you. How is that not a disclosure of it? But anyway, the First Amendment angle is really the most interesting thing from this case and really interesting that the court took it so seriously, and required actual evidence from the government about the interest that was being advanced and how narrowly tailored the law was. And I think this is important, particularly in a case like this, where there is such an unsympathetic plaintiff. Because the whole point of the First Amendment is that it applies to everybody. And if you can pick and choose who gets these rights, then they're not particularly durable or important. And I think it's good that the court was able to take this very kind of reasoned and critical analysis, even with a plaintiff who, you know, people might feel a little icked out by.

A

Anthony Sanders 26:34
Morin, your thoughts?

M

Marin Levy 26:37

I mean, I'm gonna go with Kirby here. And just, I mean, it's amazing that the the court, actually, I think, came out with this decision. And it'll be interesting to see what happens next. I mean, if they were really to say that there was a problem with this sort of registry system, obviously, that has a pretty wide reaching impact. So for my money, I'm curious to see what happens next at the district court.

A

Anthony Sanders 27:01

Yeah, and I think two things really helped this plaintiff here. One is that he was pro se. And I think judgment actually, in the author of that opinion, bent a little over backwards for him because of his pro se status, as often does happen in these kinds of cases, and often doesn't, of course, but if there's some sympathy there, they get a little bit extra if someone is pro se, but also that his offense was in 2003. And at least in the record so far, it doesn't seem like he's really offended since then. So this may be someone who, you know, whatever it was that he did in 2003 and is on the registry is a much more sympathetic sexual offender registrant than you can often get. And so maybe that in some kind of as applied analysis is going to help him when

it comes to the merits, but wouldn't help him, because it sounds like the government hasn't done really the work of digging into the facts and showing look, We actually do use this for this kind of sexual deviant when when they commit these certain crimes, and even can be years later, and here's the statistics. Or maybe it's as bad as it makes it out here that this is just like a black hole where email addresses and Twitter handles go in there. No one ever looks at them.

K Kirby Thomas West 28:30

Yeah, and it's interesting, I think the court says at one point that the normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it, which is obviously true. And I think an important point, but also just kind of not the case with sexual offenders. And this kind of registry requirements and other requirements on sexual offenders that continue long after they've served their time for whatever crime it is, and often, you know, crimes that you wouldn't expect to have these kind of lasting impacts on one's life can end you up on these lists. And so I do think it's an area where I agree with Professor Levy, I'm interested to see what happens with this case next, but I think there's probably a lot of other, you know, similar developments in the law that we'll continue to see as courts kind of work through how much is this okay, and how much is this not okay.

A Anthony Sanders 29:21

Well, we didn't do this intentionally. But unfortunately, both cases this week involve sexual predators of some kind. So we're off to the Ninth Circuit now with Marin. We've selected this case, not because, again, of the type of crime involved, but because it's a weird example of how you might get some law without even meeting to get some law.

M Marin Levy 29:48

Yeah, so this case has gotten a lot of attention. So let's just dive right in. So, of course, we're talking about United States v. Rosenow. This is coming to us from the Ninth Circuit And I should say quite interestingly, it was actually argued all the way back in June of 2021. But the opinion didn't get filed until the end of April, April 27. And Orin Kerr, of course, a famous Fourth Amendment scholar, noted before the case was filed and before the opinion was filed that it was taking some time. And so there were some questions about what that could mean. And so now let's talk about the opinion as it was filed, and then we'll get into the controversy. So I should warn folks who are listening the facts in this one are little bit hard to take. So the defendant in this case was convicted on one count of attempted sexual exploitation of a child, that's in violation of 18 USC Section 2251 C for those keeping track at home, and then one count of possession of sexually explicit images of children. And that's in violation of 18 USC Section 2252 (a)(4)(b). So the basic story here is we have a defendant who goes to the Philippines, where he's engaged in what the court refers to as sex tourism involving minors. Okay, so you might be wondering, at this point, where did the legal issues start to come into play? Well, the defendant arranged his various illegal activities through online message services provided by both Yahoo and then Facebook. And in fact, his activities came to light because Yahoo had been investigating different accounts that it suspected were involved in child exploitation. So the government then issues various preservation requests and subpoenas to these different companies. And this is where the major legal issues come into play. So the

defendant ends up arguing that he had a right to privacy in that digital data and that the government's preservation requests and subpoenas, which were submitted without a warrant, violated the Fourth Amendment. So in other words, his contention was that the collection of his data constituted an unconstitutional warrantless seizure. Okay. So the Ninth Circuit then holds that it wasn't, and this is really where the controversy begins. So the court says, in a very short passage in what is otherwise a pretty lengthy opinion, that a seizure requires some meaningful interference with an individual's possessory interest in his property. So the court says, here, the preservation requests did not meaningfully interfere with the defendant's interests in his digital data, because they did not prevent him from accessing his account. And then the court went on to say, it's also worth noting that the defendant consented to the companies honoring preservation requests from law enforcement under their terms of use. Okay, so I made a reference before to Orin Kerr, again, noted Fourth Amendment scholar, so he had a great Twitter thread on this. And he began with the words, holy crap. He said, I apologize. Apologies for my language, I'm just going to start quoting Orin Kerr.

A

Anthony Sanders 33:05

We've had far worse on this show.

M

Marin Levy 33:07

Oh, good. Okay, so I won't blush with that. So he said, "The Ninth Circuit just held, in a single sentence, in a precedential opinion, that Internet content preservation isn't a seizure, and the terms of service eliminate all internet privacy. Lordy," that's how he kept it off. Right. So I'm just gonna keep quoting Orin here, because I don't think I can improve upon his analysis. So as he said, "Literally, that's it. No analysis, no citing anything, no discussion, and just a single sentence. And so now, under Ninth Circuit law, the government is free to order everyone's entire internet account copied and held for it with no cause at all, at any time, for no reason." So you might be wondering to yourself, this is now me talking, not Orin, how such a thing could have happened. So now we're back to Orin. And he said, "This is basically the nightmare. There's a major issue, but it's raised in passing by counsel that has no idea what it has. And then the Federal Court of Appeals has no idea what it has. And in passing the court decides a major issue, perhaps having no idea of its importance." And so as he said, look, "to be clear if the court had actually taken this on and showed a real sign that it understood the arguments and concluded that yes, the government is always free to copy your private data because you still have your own copy, that would be one thing," right, as he said, look "stunning and jaw dropping, but so it goes." But then as he said, "this has the feel of a case where the defendant raised 20 issues, including a bunch in passing, and no one understood, hey, wait, this one raised in passing rate here is 100 times more far reaching than anything else in the case." So then making this all even more shocking, what Orin goes on to say is that given that the Second Circuit went en banc in a recent case, which had held that copying is a seizure, but that's an issue that the en banc court didn't reach, what we're seeing now from the Ninth Circuit is the only federal appellate precedent on this foundational question, and it's coming to us in a single sentence. And, you know, lots of folks have been commenting on this. There's a great blog post up right now on Brookings, which says this is on the terms of service part of this, like the Ninth Circuit appears to be saying that after clicking the word agree to online terms of service, we're no longer entitled to any expectation that the data in our account, whether we're talking about emails, chat histories, DMs, other sensitive files, will remain

private, right? Because the terms of service told us that's what we're giving up. So stepping back, I really don't say this lightly, but I have to think, given the magnitude of the issues that we're talking about here and their pretty perfunctory treatment in this otherwise lengthy opinion, that, as Orin suggested, the court just did not realize what it was taking on. Though I have to suspect given all the public outcry that it probably has a pretty good sense now. So that's the case in a nutshell. And I think what it tees up are really interesting questions about what the court could do from here on out to kind of fix this problem, if it is indeed a problem. And I'm happy to talk about that.

K

Kirby Thomas West 36:19

Yet something I think that's interesting is thinking back to the Second Circuit case we just discussed. You know, the Second Circuit is saying, you know, it might not be okay for you to have this disclosure requirement for sex offenders, where they have to tell you their email addresses and everything. But I mean, if I understand it correctly, under this Ninth Circuit rule about preservation, the state of Connecticut could say, Well, if you're a sexual sex offender, we're going to preserve everything you do online, and just hold on to that. And, you know, we'll see what happens if we need to access that later, or something like that, which seems so much broader, but would be potentially fine under this rule?

M

Marin Levy 36:59

Right, I mean, this opinion, I think, is seen as having pretty massive implications, which is part of the reason why folks think it has to have been a mistake, right? That the panel just didn't quite appreciate what it had on its hands. And, you know, again, to be sympathetic to the panel, lots of issues were getting raised here, some in passing, so one could understand how potentially something is overlooked. I mean, this happens, of course, from time to time. As we've been talking about, judges are people too. And happily, there are institutional fixes to this kind of thing, which I think we should talk about, because I think a lot of people are looking out now to see what is the court going to do next?

A

Anthony Sanders 37:39

Well, and so there's, there's two big things going on here. One is the actual Fourth Amendment law, which, you know, is what Orrin was focused on. And that is absolutely a big deal. And, you know, I mean, I see it as the equivalent of if the government comes in and photocopies your papers, and then leaves them and then has a copy of like all your bank records, that's no problem, because you know, you still have your physical copy. The complication here, of course, is the third party provider and Yahoo and Facebook and how that relates. And we have got, you know, emerging law in that area and the Carpenter case from a few terms ago about, you know, how the Fourth Amendment extends to those kinds of situations. And so that's its own crazy bucket that the Ninth Circuit didn't seem to engage with for whatever reason. But then, on top of that is this question of courts making very consequential law, when they don't know they're making consequential law, and I agree that is, of course, a problem. And I would be shocked, just like Orin was at something like that happening in an area I cared about. But I'm going to give a little bit of a devil's advocate here. And I'm curious what both of you think of it. A lot of times when we when we look at the common law process, and I recognize this as a

constitutional case and a little bit different, but in the common law process courts rule on situations before them, they create rules, and often they are the product of the adjudication, they are not like, we are setting forth the law for the future like it legislature would do. That's the whole justification of the common law processes. That's just one case at a time and they say things and then those are used in future cases. And so can it be said that, although, you know, this looks pretty shocking, this is a rule about and it seems like a wrong rule in this one particular case, that the process of the court adjudication in future cases is going to deal with this and maybe it's a good thing that we have building blocks like this that then get used in future cases? Or is this just different? It's not like, you know, the evolution of torts in *Hadley v. Baxendale*, a famous case some people may remember from law school. This is more like, with modern constitutional law, it is more like courts creating rules, and they should know damn well what they're creating at that time.

M

Marin Levy 40:26

Yeah, I mean, I think it's a terrific question. And I think my answer is, unfortunately, that it's the latter. I mean, it'd be different if we were talking about a body of law where we could do things incrementally, right? Where you're kind of, you know, each case is a building block, and we're getting to somewhere, ultimately, and each step is pretty small, you know, typically, in that kind of scenario. Here, this feels like a wrecking ball.

A

Anthony Sanders 40:52

Well, it's like, a green light to what the government's doing.

M

Marin Levy 40:56

Right. So we'll maybe whatever that the opposite of the wrecking ball is. I mean, it's astonishing what the implications are for a case like this. And, again, I think the part that's most troubling is that there's very little indication that the court realized what it was doing. So had, as Orin says, had the court really taken this on and given it quite a few pages of treatment and really worked through the arguments and shown that, yes, it was intending this effect and here are the reasons why and here are the counter arguments and responses to those, you might not agree with where the court ultimately came out, but you would think, okay, you know, that's a view. And now the maybe the case goes en banc and you have some, I wouldn't say the majority of the Ninth Circuit, since that's not the way they're en bancs work. But you know, you might have the limited en banc in the Ninth Circuit then reverse or affirm. Three, this just doesn't feel like that, this doesn't feel like the kind of considered view of the court. This feels like there was an issue in passing that people didn't really appreciate. And so again, we get this major greenlight unintentionally.

A

Anthony Sanders 42:04

So the question that Oren touched on it in his thread is, is it law? Because of all those reasons you just gave, is there a way to say this actually isn't the law? It was just something a court said, and even though it was necessary for the case, we can't treat it as exactly the same thing

as a holding.

M

Marin Levy 42:24

Yeah, well, so I think part of what Orin was getting at there was the remedy. So this is really interesting, right? So what do you do now if you are a panel or if you're the parties and this is the position you're in? So one thought was, the court certainly is free to amend its own opinion. And so then the question is, well, how could it amend in this case? And I think, if I take Orin's point, one idea would be to say, actually, we consider this issue not really properly before us, right, that it wasn't properly briefed and argued, and so came up, I think, in the reply. And so we're actually just not going to reach it. So that would be one out. Now, obviously, that would be a bit awkward in the sense that everyone would appreciate what was really going on there. But at least in terms of where the law would be, that is one fix. The parties, of course, could also ask for the panel to rehear the case. That's another way to get at it. And then I think the the final backstop, short of going all the way to the Supreme Court, is to have the en banc court step in. And you know, the Ninth Circuit, of course, is very fairly liberal in its use of en bancs, certainly as compared to many of the other circuits. So I would think that if nothing else changes, that I would imagine a reasonable chance that the court as a whole would want to take this on.

A

Anthony Sanders 43:42

Well, we will see that we may know pretty soon about the future of *United States v. Rosenow*. But thank you so much, Marin, for coming on and talking about that case and talking about all the other cases and courts that you talk about.

M

Marin Levy 44:00

Oh, my pleasure. Really. Thank you. It was so much fun for me.

A

Anthony Sanders 44:03

And Kirby, thanks for coming on as well. Please watch Kirby at IJ and all the cases that she is litigating. We'll have her on again soon to talk about more cases from the federal courts of appeals. I hope to see some of you next week if you live in the state of Michigan to come to our Michigan State Forum. But in the meantime, I would ask that everyone get engaged.