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SPEAKERS

Kirby Thomas West, Anthony Sanders, Aliza Shatzman

- 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 Friday, June 10, 2022. We're going to be talking about a couple cases today dealing with immunities, one we're very familiar with and one which is very new to the podcast, but is an extremely important topic. And we have a very special guest to talk about that topic. The case we'll talk about later has to do with qualified immunity, something listeners are very familiar with. And presenting that case from the Fifth Circuit will be my colleague, Kirby Thomas West. Kirby, welcome to Short Circuit.
- K** Kirby Thomas West 00:53
Thanks so much for having me back.
- A** Anthony Sanders 00:54
And our very special guest today is Aliza Shatzman. Aliza, whose name I have trouble pronouncing, like a lot of people I run into, has accomplished a great deal just three years out of law school and way more than I ever did at that point. She clerked for a judge in a story that she will tell us about in a little bit. But she has also started a new organization called the Legal Accountability Project, whose mission is to help clerks who have a bad experience in their clerkship. There has been a lot in the news the last couple of years that you may have heard if you're part of the legal community about harassment in judicial chambers. Most people, of course, have a wonderful time as a clerk and have a good relationship with their judge. But unfortunately, that is not always the case. And Aliza is trying to address that and, with her friends at the Legal Accountability Project, trying to make that better. She recently published an article in the UCLA Journal of Gender & Law called "Untouchable Judges: What I've Learned About Harassment in the Judiciary, and What We Can Do to Stop It." She's also done a number

of different things and her full story was recently discussed on our friend Brian Frye's podcast Ipse Dixit. And so we'll put a link up to that in the show notes and her article and a couple other materials that people can look at. But she also is going to present a case that the Fourth Circuit recently ruled on that talks about all these issues, and why she is advocating for new federal legislation that can put the employees of the Article Three branch on the same footing as the rest of employees in government. So Aliza, welcome to Short Circuit. Thank you so much for coming on and congratulations on your new Legal Accountability Project.

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Aliza Shatzman 02:56

Thanks for having me on the show.

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Anthony Sanders 02:59

So, tell us a little bit about why you got involved in these issues. And then we can talk a little bit about what you're going to do in your organization and in this Fourth Circuit case.

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Aliza Shatzman 03:14

Yeah, so as you mentioned, I am the president and co-founder of the Legal Accountability Project. We are a new nonprofit seeking to ensure that as many law clerks as possible have a positive clerkship experience while extending support and resources to those who do not. I came to this work based on my personal experience with harassment and retaliation by a former judge for whom I clerked. So I decided to serve as a law clerk during the 2019-2020 term in D.C. Superior Court, which is D.C.'s local trial court, because I wanted to be a homicide prosecutor in the D.C. US Attorney's Office and D.C. AUSAs appear before D.C. superior court judges. Unfortunately, pretty much just weeks into the clerkship, I began to experience gender discrimination and harassment by the judge for whom I clerked. He told me I was bossy and aggressive and nasty and a disappointment. On days when I was scheduled to be in court with him, he would kick me out of the courtroom and tell me I made him uncomfortable, and he just felt more comfortable with my male co-clerk. This was pretty much just devastating. I mean, the day I found out I passed the D.C. bar, he called me into his inner chambers, got in my face and said, "You're bossy and I know bossy because my wife is bossy." And I just remember like goodness, crying in the courthouse bathroom, crying myself to sleep at night. I just wanted to be reassigned to a different judge, trying to stick it out for the rest of the clerkship because I needed a year of experience to be eligible to apply to the prosecutor's office. We eventually transitioned to remote work during the pandemic, moved back to Philly to stay with my parents. The judge basically ignored me for six weeks before he called me up in late April, told me he was ending my clerkship early because I made them uncomfortable and lacked respect for him, but he didn't want to get into it. And then he hung up on me So I called D.C. court's HR, and they told me there was nothing they could do because HR doesn't regulate judges. They said, didn't I know that I was an at-will employee and they said judges and law clerks have a unique relationship. So it took me about a year to get back on my feet after that. I moved back to D.C., I secured my dream job in the D.C. US Attorney's Office as a Special Assistant US Attorney. I was two weeks into basic training in July of 2021 when I got some pretty devastating news. They told me the judge had made negative statements about me during my background investigation, that I wouldn't be able to obtain a security clearance and that my job offer was

being revoked. So at that point, I filed a complaint with the D.C. Commission on Judicial Disabilities and Tenure, which is the regulatory body for D.C. judges. I hired attorneys and in the summer and fall of 2021, I participated in the investigation into the now former judge. We were partway through the investigation when I found out he was on administrative leave pending an investigation into other misconduct at the time he filed the negative reference about me, but the D.C. USA I was never alerted of this. I eventually saw the negative reference through settlement negotiations, private negotiations through my attorneys in October of 2021. And it was outrageous and misleading. But by then the damage had been done. And there's really nothing the former judge can do to repair the damage he's done to my life. But I am just trying to turn what happened to me, a terrible experience, in something positive so future generations of clerks don't go through what I went through. So we were partway through the investigation, I guess, late July 2021, when I became aware of the proposed Judiciary Accountability Act, that's legislation that would extend Title VII protections to federal Judiciary employees, which is law clerks, and also to federal public defenders, who are also currently exempt from Title VII, meaning these folks can't sue and seek damages for harm done to their careers, reputations and their future earning potential. So I spoke with House and Senate offices involved in JAA drafting and stayed in touch with them. And then when a House Judiciary hearing was held on the Judiciary Accountability Act, or JAA, in March of 2022, I submitted a statement for the record for that. Caryn Strickland, who's the former PD whose case I'm going to discuss in a little bit, she testified at that hearing. And then in the weeks following that I was speaking with some friends, including my now co-founder, Matt Goodman, about ways that I could further my advocacy work, and eventually the Legal Accountability Project was born. And then we officially launched on June 1.

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Anthony Sanders 07:44

Yeah, what an adventure. I mean, it's terrible what happened to you, but what a way to turn that into something that is, I think, so needed to so many people, we've learned many more than a lot of us in the legal world ever knew.

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Aliza Shatzman 08:00

Definitely. I mean, for people who hear my story and think it's particularly outrageous, my point is that it's not rare. There are state and federal clerks in courthouses across the country being harassed every day, and they will never speak publicly, they'll message me privately and confide in me. And sometimes they'll ask for resources and support. But it's an enormously difficult situation, because there's just a huge power disparity between any judge, whether state or federal, Senate-confirmed or not, and these fresh out of law school clerks. And when I'm talking to larger audiences, I try to really emphasize this enormous power disparity that makes it so exceedingly difficult to speak out, even in the face of outrageous mistreatment.

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Anthony Sanders 08:37

And I think the case you're about to discuss really exemplifies that, because, whatever legislation is needed, whatever should be done, it seems like there should be something more for these employees than what was available to this woman. So feel free now to tell us about

that her story, *Strickland v. United States*. And, you know, if you're one of these employees, what remedies are available to you if something legitimately bad happens in your employment?

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Aliza Shatzman 09:11

Yeah, so Caryn Strickland is a former Assistant Federal Public Defender in the Western District of North Carolina. Becoming a PD was her dream job. She did three clerkships before she started in the public defender's office in August of 2017. At the time she started, it was in her employment agreement that she could seek a promotion from the title of research and writing attorney, where she started, to the title of Assistant Federal Public Defender. So unfortunately, beginning pretty early in her job, she began to face harassment and ultimately stalking by the First Assistant, which is one of the most powerful public defenders in that office. He would send her creepy texts and emails. He was described by colleagues as lustful and obsessive. He forced her to go on what he called shadowing activities with him, to the exclusion of her actual cases to which she was assigned. She cried at work. She eventually transitioned to telework or she left early so she could avoid him. It kind of came to a head in May of 2018, when she was at a mentoring lunch with the First Assistant. And she mentioned to him that she was interested in seeking her promotion to Federal Assistant Public Defender. So they leave the lunch and a couple hours later, she receives this creepy email from him, saying, Hey, you know, you're aiming high trying to get this promotion. But I mean, I require pay for stay, smiley face, which is a quid pro quo sexual harassment. So at that point, she sought assistance from the federal employment office. They told her that this sounded like textbook sexual harassment, but that the only remedy available to her would be the employee dispute resolution or EDR plan, and that was stacked in favor of management. So she was probably better off seeking a different job. So she did start to look for a job as a Fourth Circuit appellate clerk, thinking that that would kind of preserve her reputation if she had to leave the office. She did initiate EDR proceedings. At the time, the EDR plan required counseling, so she started to file for counseling. And then she filed for mediation, which launched an investigation. At that point, it became clear to her, and I should back up and say, her problematic interactions were not only with the First Assistant. The Federal Defender is the most powerful person in the office, that's the Federal Public Defender for the Western District of North Carolina. And at some point, she confided in him, reluctantly, and he basically dismissed her concerns. He said, I understand where the First Assistant is coming from. He's the kind of person who doesn't understand sexual harassment. So she kind of realized pretty early on that seeking assistance....

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Anthony Sanders 11:57

That's not usually an excuse.

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Aliza Shatzman 12:01

But I think it's common in these cases is that that's what the response is, you defend your colleagues before you assist the mistreated employee. So she kind of realized that she was not going to be able to get assistance through her office. But when she initiated these EDR proceedings, she then discovered that the Federal Defender was going to be in charge of the investigation. He was the one who appointed the mediator. And she was also told he was going to be the final decision maker, which to an outside observer sounds like it'd be a conflict of

interest if you are complaining about the Federal Defender and the First Assistant and the person you're complaining about is also the decision maker. Well, that's going to create a conflict. So she sought to have the Federal Defender removed from the investigatory chain, and that request was denied. And she kind of ran it up the chain to the Fourth Circuit executive, to the chief judge of the Fourth Circuit, and she was just not receiving any relief through the EDR plan. So eventually, she did transition out of the office in March of 2019. She took an appellate clerkship position in the Fourth Circuit. And she later found out that the First Assistant and the Federal Defender and some of her colleagues were kind of circulating rumors about her that she that she was making up the harassment so she could be reassigned to a different office or get a clerkship when she just no longer felt comfortable in the office. So that was basically constructive discharge in March of 2019, when she no longer felt that she could be in her office. So about a year later, in March 2020, she filed suit, and she raised several constitutional claims. And this is where this case kind of ties into the advocacy work I'm doing. Miss Strickland could not sue under Title VII of the Civil Rights Act of 1964, which is our landmark anti-discrimination law that protects folks like Ms. Strickland from harassment and retaliation in the workplace.

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Anthony Sanders 13:48

And it applies to the executive branch employees in the federal government and even Congress now.

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Aliza Shatzman 13:54

It does, as of 1995 through two separate laws, yes, staffers in Congress, staffers in the executive branch are protected by Title VII. It's literally just the judicial branch and these federal defender's offices that are exempt. So Miss Strickland could not sue under Title VII. She did raise some interesting constitutional claims. She raised a Fifth Amendment due process claim, arguing that she had a liberty interest in pursuing her career path and that she had a property interest in a workplace free from harassment and also a property interest in having her claims resolved through the EDR plan. And she challenged the EDR plan both facially, so as written that it was fundamentally unfair, and that the process as applied to her was unfair. She also raised an equal protection argument that she had an interest in a workplace free from harassment, and she raised some Section 1985 and 1986 claims, which is a conspiracy to violate your civil rights, between the First Assistant and the Federal Defender. So she sued in the Western District of North Carolina, and her claims were dismissed by the district courts in December of 2020. And then when they appealed the following year, she sought, through an inter-circuit reassignment, to have judges outside the Fourth Circuit hear the case. And that's because, in addition to suing the people who are directly involved in her EDR claim, which is the Federal Defender and the Chief Judge and the Circuit Executive, she also sued some larger judiciary officials, the Fourth Circuit, the Judicial Conference, and the AO. So the Fourth Circuit heard this case a couple months ago and then ruled recently and Mary Beck Briscoe from the 10th Circuit wrote the opinion in the Fourth Circuit. And so the case was reversed in parts and affirmed in part, so some of Ms. Strickland's claims can move forward. The court held that her Fifth Amendment due process claims can move forward, that she does have a property interests in a workplace free from harassment, and also that the EDR plan was fundamentally unfair as applied to her, but facially not. And they rejected her liberty interest claims, that she does not have a liberty interest in pursuing her career path. They also held that her equal

protection claim to a workplace free from discrimination and harassment did survive the motion to dismiss. And I realized that I also forgot to mention one of the most important things for this podcast, which is that when the claims were dismissed in the district courts, that the claims were dismissed under the theory of sovereign immunity, which is that a plaintiff cannot sue the government. So the Fourth Circuit also addressed those claims, and they said that the sovereign immunity claims do survive the motion to dismiss as to the claims for prospective relief, so Miss Strickland can seek reassignment to a new position as a federal defender, or front pay, which the circuit has held is different from a damages claim. Sovereign immunity only applies to her claim for back pay. So it was an exciting ruling. Ms. Strickland still has a long way to go., but yeah.

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Kirby Thomas West 17:02

I have a question, Aliza, that I was hoping you could talk about a little bit, which is, so obviously, you know, it's great that some of her claims survived. But what would it have looked like if she and you in your case had instead had the protections of Title VII available to you? What would that process look like of instead of bringing these constitutional claims way later? And obviously, she still has a long battle ahead of her in this case. What does it look like if Title VII is extended to protect people in this situation?

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Aliza Shatzman 17:32

Sure. So Title Seven is an excellent piece of legislation, because there's just so much precedent from which litigants can draw. They would still have to go through the EEOC. So you file a charge with the EEOC, and they review it, and then you receive a right to sue letter and then you could proceed from there. I mean, the interesting thing about the judiciary Accountability Act is that it would extend Title VII protections, but I think it also extends some other important protections. So employment litigation is no one's first choice, while it's absolutely necessary for folks who are harassed and retaliated against and need to seek damages for harm done to their careers and reputations. The Judiciary Accountability Act would also do some other things. It would standardize some of these EDR plans and internal complaint processes. So someone like myself or someone like Ms. Strickland could have also used the Judiciary Accountability Act in a standardized EDR plan to seek relief internally.

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Anthony Sanders 18:31

I thought one interesting thing from the case, I mean, there's so much going on in this case, and, you know, aside from the whole problem of these offices and harassment, there's all kinds of federal court stuff going on that. if you're into those issues, you'll enjoy. Although it is 118 pages, I warn everyone before jumping in. So interesting that front pay is not considered damages in these types of suit, at least in the Fourth Circuit, which is something that I hadn't run up before. For everyone who's done the dance, as we do at IJ with the whole Bivens doctrine and qualified immunity about how getting prospective relief, like an injunction, that is much more simple usually then getting damages. And I know sometimes in some types of litigation where you have, say, a constructive trust or you're dealing with an estate case, you can have essentially money but it's not considered damages. So you don't have to get into the damages sinkhole. But it's interesting that front pay is kind of an exception to that and that

leaves people with a bit of a remedy where we're in a world now, especially with what the Supreme Court said earlier this week about Bivens cases, that is increasingly vanishing when it comes to relief looking backwards. Kirby, as someone who does litigate a lot of these immunities cases, did you see signs of hope? You know, more broadly from what the Fourth Circuit said?

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Kirby Thomas West 20:17

I suppose so, but it might just be in comparison to, as you mentioned, I was going to talk about the Egbert case a little bit too, of just the vanishingly vanishing availability of Bivens claims as of that opinion issued this week. So maybe anything compared to that decision, which was fresh in my mind, looks absolutely fantastic from an immunity and accountability situation, and that she is able to proceed forward with some of her claims. Yeah, so some signs of hope from the Fourth Circuit.

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Anthony Sanders 20:47

Yeah. Well, Aliza, I think that this does give some signs of hope. But of course, she had to do this in a way that Title Seven would give a much more straightforward path, it sounds. I'm a former employment lawyer, so I know that that itself is no cakewalk, but at least it treats people a bit differently. Any one thing else you'd like to add about this issue?

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Aliza Shatzman 21:19

I mean, I think that Miss Strickland's case really brings these issues back into the news in an important way. I mean, I think it's outrageous that so many Judiciary employees, over 30,000 Judiciary employees, including law clerks and public defenders, are just exempt from Title VII, meaning they have no good remedy when they are harassed by the most powerful members of our profession, whether that's a lifetime federal judge, or whether that is the Federal Defender, the most powerful person in your office. I mean, the judiciary Accountability Act is not a perfect piece of legislation, but it would begin to address some of these issues. And I mean, I think of this as not just a civil rights issue, but a workplace justice issue, and a courts and democracy issue. I mean, these are young people just starting out their careers, and the idea that we are just driving them from the profession due to harassment and discrimination and retaliation is just so unfortunate. It's really also a bipartisan issue. I mean, both Democratic and Republican judicial appointees harass their clerks, both progressive and conservative clerks face harassment and mistreatment. And it's just such an important issue. And I just hope it's in the fore of legislators minds as they're going into the fall. This issue needs to be addressed. We can't keep pushing it off. We can't only address it when there's a flashy court case or a flashy House Judiciary hearing. It needs sustained support here.

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Anthony Sanders 22:42

I think that's a great point, that it's not any one ideology. There are sinners all amongst us. And we need to try and address that. Well, Kirby, we have other sinners, some of which work in prisons and do not treat those who are in their care very well. So tell us about this story from

the Fifth Circuit. And although what happened to the fellow in the case is irreversible, it at least gives us a little sign of hope about trying to defeat qualified immunity.

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Kirby Thomas West 23:19

Yeah, absolutely. So it is, as you said, it's a tragic case, but does provide us some good qualified immunity news, which, as listeners of Short Circuit know, is often in short supply. So this is a case out of the Fifth Circuit called *Sims v. Griffin*. And it is authored by former Justice, current Judge Don Willett. And in this case, Judge Willett lays out in the introduction really powerfully the story of what happened to Steven Qualls, who was a 28-year-old who shortly after he had been booked into jail, died of a drug overdose. And he had been in a hospital for his drug addiction and he was ultimately discharged from the hospital, refused to leave. The hospital called the police, and they came and took him away, arrested him and booked him. Between the time that he left the hospital and he was booked, he apparently ingested a bag of narcotics, which immediately began to have an effect when he was booked into the jail. They were unable to basically do the full booking interview, they were unable to get him into the normal clothes he would be in in jail because he was basically incoherent. They put him in a detox cell. And over the next 34 hours, his condition just continued to deteriorate and Judge Willett tells us how he yelled for help 62 times; he cried out in pain 70 times. He vomited multiple times and it was obvious to the officers that he had done drugs because he actually vomited up small parts of a bag of drugs. And although they did intervene to clean his cell at one point and to, you know, talk to him, they, in spite of him expressly asking to be taken to the hospital and saying he was in a lot of pain, they provided him no medical care and did not call EMTs, didn't move him to the hospital. When they finally went to his cell after he had been there for 34 hours, he was dead on the floor. And one of the officers who was there said, this is a quote from the opinion, "I should have looked, but you know, oh well." So this is just brutally sad, and, you know, really terrible facts. His mother brought a case against the officers who were involved, who of course asserted qualified immunity. The district court denied them that and they denied their summary judgment motion. They said there's genuine issues of material facts on the claims that the officers were deliberately indifferent to his medical needs but that the law on that was clearly established. And as longtime Short Circuit listeners know, this is the game in qualified immunity, right? You have to first say, did the defendant violate the plaintiffs constitutional rights? And then the second question, which is where all the action is, is if they did, were those rights clearly established at the time of the violation? And Judge Willett on the Fifth Circuit affirmed the district court's denial of summary judgment. And they say, yes, these rights were clearly established. They point to a case by an earlier case out of the Fifth Circuit where an individual had chest pains and had a history of cardiac issues and was denied medical care and the officers were deliberately indifferent to his need for medical care. So this is analogous to that. The officer should have known that you cannot be deliberately indifferent to providing medical care to someone who's in dire need of it, and that, you know, these these claims can go forward.

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Kirby Thomas West 27:10

I thought it was interesting, two little details out of this case. One is that Judge Willet notes in a footnote that Quall's mother, who brought the case, actually preserves the issue that qualified immunity is a judge-made doctrine that has no basis in the law and should be overturned. And he said, basically, you know, that's above our pay grade here at the circuit court, but noted.

And also that Judge Willet does allude to briefly the fact that, you know, it has to either be clearly established at the time of violation or an obvious violation of constitutional rights. And I think this is an allusion to a case out of the Supreme Court two years ago, which was a really positive case in the qualified immunity world, *Taylor v. Riojas*, where the Supreme Court said, in a situation where a prisoner had been put in a cell covered with feces for, I think, four days or something, that it doesn't matter if there's clearly established law on whether or not putting someone in a feces covered cell violates their Eighth Amendment rights. That is obviously a violation of someone's Eighth Amendment rights and any reasonable officer should have known that. And so we don't get to that here. Because, as you know, the court says there was clearly established law on this. But I think just mentioning it, it seems like that kind of case to me, too. Yes, if someone is calling out for medical attention for 34 hours and their situation is continuing to worsen, you know, they have a history of drug abuse, there's a lot of evidence that they have recently taken a large amount of drugs, it should be fairly obvious that you need to intervene and provide medical assistance to that person who is in your custody. And while this is a great opinion, I think that matters, because you can really tell how this case could have come out a different way in a different court. So the famous qualified immunity example is a court found it wasn't a violation of clearly established law when police officers allowed a dog to bite someone who had surrendered by putting their hands up rather than surrendering by laying down flat on the ground, right?

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Anthony Sanders 29:23

Those were totally different.

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Kirby Thomas West 29:25

Right, totally different. So you can see how the court and the judge really makes a difference between whether or not something is clearly established for purposes of qualified immunity. And it's not that difficult to imagine a court saying, Oh, this case, this Easter case that the Fifth Circuit cited here, actually, that was an issue where it was a heart problem, and they knew he had, you know, a history of cardiac events and cardiac illnesses. And they didn't really talk to him during this, which is something that the officers argued here. We talked to him we cleaned up his cell. In that other case they didn't talk to him, which you think makes things actually worse, right? We knew how bad the situation was. But you can really see how someone would differentiate that. And it wouldn't be, you know, that would not be an outrageous thing in the world of QI cases to see them say, Oh, no, not clearly established. This is a drug addict, not somebody with heart disease, so, sorry, tough luck. But luckily, that was not the outcome here. And we do have positive news that these claims will go forward, and hopefully these officers will be held accountable.

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Anthony Sanders 30:30

Aliza, this is luckily something that you don't deal with in your organization, but I could see how qualified immunity could come up in some some kind of harassment case. Any thoughts on parallels between this and other kinds of immunities?



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Aliza Shatzman 30:50

Oh, that's I mean, that's a good question. Because I mean, in the Strickland case, there was immunity for the Judiciary officials because they are courts, but I mean, I think the Fifth Circuit case was an interesting one, because I don't tend to think we should abolish qualified immunity, necessarily. I think it does have a place for, you know, maybe it's the former aspiring prosecutor in me thinking for officers who are, you know, trying to do their jobs making split second decisions. So I think these fact patterns are always frustrating, because it shows you just how overused the qualified immunity doctrine is and how it can be abused. And I think in terms of government abuses, obviously there are enormous parallels between those types of fact patterns and fact patterns in the Judiciary where I'm not out there saying no one should clerk, that all judges are bad. I'm not saying those things at all. What I am saying is there are enormous you judicial abuses, enormous abuses of power happening. And I mean, judges should not just be immune from suit, they should not be immune from accountability. So definitely parallels.

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Anthony Sanders 31:56

Absolutely, I mean, you do not have to be someone who advocates say for abolishing the police to abolish qualified immunity. There's a huge middle ground there that we can all agree on. Well, thank you, Kirby for for presenting our latest good news from the Fifth Circuit. Often on Short Circuit, we talk about the latest bad news from the Fifth Circuit, but this and a couple others recently keep the roller coaster of watching the Fifth Circuit going up and down. But I'm glad we had an up one today. But most importantly, thank you Aliza, for coming on and telling your story. I hope a lot of people out there now that they know about your organization, if they need help, they have someone they can turn to and whether you're listening to this podcast like most people do in the next week or two and and you or someone you know maybe could use some help, or you're listening to it a year or two from now like I know a few of you guys oddly do where we'll see two downloads from an episode like 18 months ago. But God bless you if you are; if you're listening to this, then please feel free to to reach out to her because you found her that way. So thank you both again for coming. And I hope you have a lovely rest of June. You're both in D.C. where it's gets a bit uncomfortable this time of year, but nevertheless, thanks for coming on.

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Kirby Thomas West 33:25

Yeah. Thanks, Anthony.

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Anthony Sanders 33:27

And thanks all of you for listening, wherever you are, whatever the weather is in your June. And I hope that everyone gets engaged.