

# Short Circuit 230

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## SPEAKERS

Andrew Fleischman, Anthony Sanders, Alexa Gervasi

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### A Anthony Sanders 00:24

Hello, welcome to Short Circuit, your podcast on the federal courts of appeals. I'm your host Anthony Sanders, director of the Institute for Justice's Center for Judicial Engagement. We're recording this on Thursday, July 28 2022. And today is a very special day because we are going to be speaking with a very special guest and a dear friend of IJ, who I will introduce to all of you in a moment. But first I'll introduce a very good friend of mine at IJ. And that's Alexa Gervasi, IJ Attorney. Alexa, welcome back to Short Circuit.

### A Alexa Gervasi 01:03

Hey, thanks, Anthony.

### A Anthony Sanders 01:05

So Alexa is going to be talking about a case from the Fifth Circuit in a little bit. But first, we're gonna go to the 11th circuit. And that's because we have a lawyer who practices in the 11th circuit specifically in Georgia in Atlanta. He has appeared on Short Circuit before in Short Circuit Live at the University of Georgia, which was the last live show we did before the pandemic back in February of 2020. And he has also been on a production of the Center for Judicial Engagement when we had a forum in Atlanta earlier this year on the Georgia Constitution. And he is Andrew Fleischman, who is a successful Atlanta appellate attorney at Ross and Pines. He handles numerous criminal appeals is a wealth of information on on Georgia criminal law and constitutional law, and a graduate of Georgia State University College of Law. Andrew, welcome to Short Circuit.

### A Andrew Fleischman 02:16

Hey, thanks for having me on.

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Anthony Sanders 02:18

So Andrew is going to talk about a very rare kind of a unicorn type of case at the 11th circuit, which is the court found that a prosecutor did not have absolute immunity when sued. So Andrew, tell us about this and a little bit about the court where this prosecutor was working.

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Andrew Fleischman 02:40

Okay, so Fulton County is it's the sort of county where if you mentioned you got a case out of there, the other person immediately has like a sigh of recognition like you're going through a hard time. It's in the middle of Atlanta.

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Anthony Sanders 02:51

And I used to practice in Cook County, Illinois. So I know that very well, by the way.

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Andrew Fleischman 02:56

It's just that sort of city court thing that you have. So it's a place with a big old backlog of cases where things happen, and no one can explain what's happening or why. And here's another case of that, because there's a taxicab driver who gets robbed. And he is not sure whether he's going to come to court. So he is letting the prosecutor know, hey, I've got some medical problems. I'm not sure if you'd be able to make it. But you know what he pulls through. And he makes it to court and he testifies. Unfortunately for him, because he explained his medical problems, the prosecutor asked the judge to put up a warrant to bring him in. That will be enforced if doesn't show up. And she never dismisses it. So what happened to this poor guy is that he testifies. His case is over. He is a victim of a crime. And he is arrested and put in jail for six days for not appearing for a court appearance he'd actually shown up for. So what's the issue in this case? Anything that's part of the prosecutors job is given absolute immunity. So for instance, if a prosecutor boldly lies to a jury, absolute immunity. If a prosecutor does anything that is part of their duties, there's now way to sue them. Not because the statute says so but because the Supreme Court says so. And we're still not entirely sure why other than that it would be very disruptive if we held them to account. So what are the 11th circuit have to decide? Well, dismissing a bench warrant in a case like this is not a part of the prosecutors duties, really. It's just sort of like an administrative, you know, just it's like putting something in the mail except it's easier. And because it's so administrative. It's so far from what the prosecutors really doing. They went ahead and said, No, you don't get absolute immunity here. So one of those rare unicorn cases where we said the prosecutor doesn't even get to qualified immunity. This is just we're going to talk about whether you could have done this simple ministerial task and you didn't.

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Anthony Sanders 04:49

Is this a common kind of screw up in your experience in Fulton County?

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**Andrew Fleischman 04:58**

Yeah, this sort of thing happens quite a bit. So it is just pretty routine for people, for instance, to be arrested after they've already resolved cases. Sometimes cases get indicted by mistake. That's happened to me more than once, where a prosecutor says I'll definitely dismiss this. Don't worry about it. Then next week there's an indictment, and they don't know how it happened. It is just such a big office, with so much stuff going on that it's like nobody talks to anybody else. And these things slip through the cracks. So this absolute immunity finding is actually probably a fairly big deal for Fulton because it will provide an incentive to try to fix those things. You know, the Supreme Court has said that there's no deterrent effect from stopping negligence, right. They had that case that dealt with a guy who, I think it was Herring, he got pulled over because they had bad records on whether he had a warrant. And it's like we couldn't possibly enforce this against the state, because negligently enforcing records is not the sort of thing that would improve with liability. But in fact, imposing some liability for these screw ups is a way to encourage the Fulton County District Attorney's office to start fixing this problem, having a central clearinghouse and maybe even vertical prosecution -- having one person handling all aspects of the case. So they can address this stuff. In short, it's common, it's a problem, and hopefully this case will help move them towards resolving that problem.

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**Anthony Sanders 06:16**

Alexa, you have looked for similar unicorns? In your own work? What were your thoughts on this?

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**Alexa Gervasi 06:25**

Yeah, I am incredibly jealous, I think was my first thought that like, Oh, I wish that I was the attorney on this case so much. It's exciting. It's encouraging. Yeah, I think it's wonderful, right? They're not they're not enough adjectives and adverbs to describe how important this case is? Because there are so many things that prosecutors do that they're like, no, no, that's in your discretion. Like, if we were to penalize you for doing that, how would you do your job? If we slapped you on the hand for falsifying evidence, how could you possibly be a prosecutor? And so to see the courts taking these claims seriously and holding prosecutors to account a little bit? This is truly a monumental decision that, you know, hopefully, is going to -- so for instance, Judge Ho in the Fifth Circuit, he has recently called out prosecutorial immunity at and said, I don't even know if this is legitimate as a constitutional matter. And so we see this kind of swelling, the swelling tide that that I'm very excited about. And it's meaningful, it could be really important for protecting people from bad prosecutors.

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**Andrew Fleischman 07:55**

And it's important to note in this constitutional discussion that at the time of the Founding, professional prosecutors were not really a thing. They're pretty rare and maybe only in the biggest cities. And so most cases were brought by private citizens to grand juries. I mean, Georgia still has a statute, 17-11-4, that allows you to go after a prosecutor if they bring a really weak case to a grand jury against you. But what they mean by that is private citizens. So

it's interesting that we have this idea that once we professionalize the role, we could no longer impose liability on it. When states created so many remedies for bad prosecutions before we professionalized it. It just, it doesn't make sense to me. But it makes sense to the Supreme Court. And that's what matters.

A Anthony Sanders 08:35

And for those of you interested in the winding road of how we got to absolute immunity for just about everything that that prosecutors do, our colleague John Ross talked about all that in an episode of Bound by Oath from last season, our sister podcast, and we'll put a link up to that in the in the show notes. Andrew, I'm just curious, you've represented so many criminal defendants in Georgia, have you ever contemplated or suggested to someone that they take, you know, after their case is all done that they they file a civil lawsuit against the prosecutor? Is it just not even something that that any criminal defense attorney even worries about?

A Andrew Fleischman 09:20

It's not. I've exonerated four people in Georgia. And in every single case, they asked whether they should sue the prosecutor. And every case I said there's really no point. You know, each of these cases dealt with lying to the jury or holding back on important evidence, or just bringing an absolutely insane case that should have never been brought and yet there's no potential liability. I did have Lara Bazelon on helped me file a bar complaint against the prosecutor who lied to a jury. Nothing ever came of it because the statute of limitations had run. The guy had been in prison for five years at the time when we reversed his case. So by the time we filed the bar complaint because the prosecutor lied to the jury to make an improper argument. She told the jury that he never spoke to police. And so they should hold that against him. He'd actually spoken to police and gotten that confession suppressed.

A Anthony Sanders 10:08

Wow.

A Andrew Fleischman 10:09

But no, no remedy because the statute of limitations had passed. So long story short, no. Generally speaking, I tell clients, there's no point ever going after the state. The most we can do is go to the General Assembly and ask them to compensate us, though Georgia is one of only 13 states that has no compensation for exonerated people unless they pass a law in your client's name. We had a bill we were proposing this year to try to fix that. But instead, we got a new one about trans girl athletes and the scourge of I guess all four of them potentially being too good at volleyball.

A Anthony Sanders 10:42

Yes, well, the Georgia Legislature has its own priorities. And I guess that's what the good people of Georgia are stuck with for now. But if people want to know a little bit more about

people of Georgia are stuck with for now. But if people want to know a little bit more about Lara's very good work, you mentioned Lara Bazelon, in trying to get the bar to police prosecutors, which they are absolutely inept at doing. We talked about that in an episode of Bound by Oath as well. And she's one of our guests. And so we'll put a link up to that. Well, absolute immunity sounds pretty bad. It's absolute. Except when you can find a way around it in a situation where it doesn't apply, like the case that we just talked about. Now, listeners will be more familiar with qualified immunity. And as the first word implies, it's not quite absolute, although sometimes it feels pretty darn close. But here in a case from the Fifth Circuit with some facts that that really outrage you. We're going to hear about a time when qualified immunity did not apply. So Alexa, what's what's the latest in gosh, you could do a whole line of Short Circuit episodes about the latest in qualified immunity from the Fifth Circuit. So this is the very latest chapter. What's going on?

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Alexa Gervasi 12:09

Yes. So as you know, all across the nation, we have this just really glorious thing called private prisons, for profit prisons, there's no problems there, obviously. So a private prison in Louisiana. Let's call out its name, Richwood Correctional Center. They get a new inmate, a new detainee, Erie Moore. He was arrested for disturbing the peace, obviously a terrible crime that somebody should go away for a long, long time for. And the prison staff decided to put him in a quote unquote, lockdown cell. Which it's usually used for people who need to cool down or they need to sober up like there's a particular reason to put them in the cell. Moore didn't fit the bill, but officers put him in there anyway. And they put him in there with a quote unquote, combative detainee, and turns out combative, he was, they get into a couple of fist fights. And the next day, the combative detainee, White is his last name. He was having a problem. He was apparently having a seizure, there was blood around his mouth. So officers go in to look at him. And they give Moore some verbal commands, and Moore ignores those commands. We don't know -- the opinion doesn't tell us what that means. But it certainly doesn't seem like he was swinging at officers or anything, right. He's just ignoring the officers what they were telling him to do. So the officers pepper sprayed him, and they struck him in the back of the head hard enough to knock him to the ground. Then the next day, the officers come up with a plan to quote unquote, extract Moore from the cell. And again, it's unclear why they need a plan to extract Moore. It doesn't seem like he's done anything threatening to the officers. But nonetheless, these four officers come up with a plan. So the first enters the cell, and without warning, just pepper spray blazing in Moore's face. Then they grab their own gas masks, and they storm the cell. One officer grabs him and starts to carry him out of the cell door. And he's like, You know what, not what I want to do and pivots and slams Moore to the ground hits his head. Then they put them in a prone position, hog tie him essentially, and start carrying him out. But these officers are at best clumsy and drop Moore to the ground where he hits his head again. Then they carry him to this very special corner of the prison called the four way. So the four way is a 12 square foot corner at the facility that cameras do not reach. It's the only blind spot in the prison without cameras. And it's pretty well known that this corner is used to gain compliance if needed. So they take him in to the four away. And he's out of camera view for two hours. Plaintiffs claim that Moore was beaten and peppered sprayed for hours pretty relentlessly. There's some testimony from guards saying that they heard other guards bragging about beating him to his death and finishing him in the four way. And so after these two hours, they take Moore out of the four way, he's not unresponsive, but when they like rub their knuckles over his chest, which is something you can do to make sure people are still breathing, he's breathing, he's groaning, whatever, no harm, no foul. So deputies later come to retrieve Moore because of this incident that's happened with white and they find him unconscious.

Turns out he was comatose and he was suffering from a fractured skull. Moore never woke up. He eventually died from his injuries. Experts testified that the injuries must have occurred within the prison walls. It wasn't something that happened before he he entered prison. So of course, Moore's s survivors file suit against the individual officers, guards, against the prison, against the city. They're suing everyone. And one might say rightfully so. Nonetheless, the district court granted summary judgment to the officers for their deliberate indifference to his serious medical needs, and for actually causing Moore's death. On appeal, the Fifth Circuit authored by my very favorite judge, Judge Willett, mostly disagreed with the District Court. First, the court was like, you all had enough information to know that there was a serious medical problem after you beat him, and you did nothing about it. That's what we call deliberative difference. So summary judgment reversed. And then things get a little bit complicated when we talk about whether or not the officers actually caused Moore's death. Do you look at common law? Do you look at state tort law? The Fifth is like, well, we look at state tort law, but we're not bound by it unless we are and here we are. Basically, what this means is that the court was looking at whether or not the plaintiffs have to prove what actually caused Moore's death. And looking at Louisiana law and their own precedent, they say that they are reviewing whether, viewing all facts in the plaintiffs favor, the plaintiffs have shown that defendants actually caused Moore's death through their excessive force. And with the exception of one defendant, a nurse who wasn't involved in the actual beating, they conclude that the officers did. They caused death with their excessive force. And what's interesting here is that because they were acting as a unit -- so normally you'd have to say in a qualified immunity situation, Officer A did this. That was excessive force. Officer B did this. That was excessive force. But in this situation, the court says, Listen, you guys acted as a unit, you came together. And you said, this is what we're going to do. This is our plan. And so you because you are acting as a unit, we don't need to know what was the final blow and who delivered the final blow. All y'all are liable. And so they reverse the District Court on that claim as well. And also, they say, the private prison and the city are also on the hook because you clearly had a policy or custom of emptying cans of pepper spray on people just because it was fun, basically, of taking them to this corner and beating them senseless. And the warden knew that was happening, and the city didn't stop it. So you're also on the hook here. And of course, I I said nice things about Judge Ho earlier. So now I get to say other things about his dissent. And Judge Ho was like, Did you even read the record? We don't know who did what or why. Why did Moore slip into a coma? Why did he die? No one knows. It's tough to say. So basically, the district court was mostly right. And that's Judge Ho's dissent.

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Andrew Fleischman 19:48

You know, what strikes me about this is the difference in how easy it would be to prove criminal liability on these facts and the difficulty of getting civil relief. If you have five guys beating somebody and one guy maybe gets just one lick in at the end, you don't have to prove who did what. You show that they're party to a crime that they all sort of agreed to something and you get your conviction. Meanwhile, this case was 2015. And this poor guy's three kids have been trying to get relief since then. And they got the ruling on summary judgment in 2022. That is not swift and efficient justice.

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Alexa Gervasi 20:20

It is not. It's almost like there's a system that makes it nearly impossible to hold bad government actors accountable. And it's almost like it's designed that way.

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Andrew Fleischman 20:32

It's not just that, like the fact that there's no criminal liability here. As far as I know, no charges were brought. I mean, if you drag a man to a spot where there are no cameras, and then you beat and spray him until he dies, that is not a difficult criminal case to bring.

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Alexa Gervasi 20:46

You know, it's so interesting. It's something we see all the time. I was actually I had an interview yesterday with a reporter who -- we were talking about five or six different cases that are all similar to this. Officers beating people, officers pointing a gun at people. Officers just completely lying, like making up evidence to get people thrown in jail. And in each one, that reporter was like, Well, what is what are those officers doing now? And the answer in each one is oh, they're back at their desk, like or they're back on the field. They're they're still in their job. They there's been no no criminal penalties. They don't even really get reprimanded or lose their lose their jobs. It's just you're absolutely right. It seems like an open-shut case. You committed a crime, you assaulted and in fact murdered a man. And we're not going to do anything about it.

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Andrew Fleischman 21:36

There is an exception to that rule, though, because if a prosecutor is committed bad enough misconduct, you can be sure he'll be a judge. You know, it's pretty shocking. You know, it's so funny. You go to a prison in Georgia, they always have this wall of shame, which is almost always jailers who have banged inmates. It's almost all women who brought the little things or had sex with them on the wall of shame. Never the people who do excessive force, or leave someone to die because of medical neglect. It's being too nice to the prisoners that does it. In fact, I had a life without parole case where the state used the fact that a guard had raped an inmate as evidence that he was incorrigible. That he'd allowed it to happen. Anyway, that's Georgia for you.

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Anthony Sanders 22:22

Well, it sounds like Louisiana might not be too terribly different.

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Andrew Fleischman 22:27

It's is everywhere, right? Prisons are where you put people you want to forget about. And if you have to think too much about how they're treated, that's a lot of mental load for people you thought you already dealt with. So we ignore the problems. We don't charge people. And people have terrible food, we ban the cell phone that take pictures of that food. That's how we deal with it. God bless America.

A

Anthony Sanders 22:48

Now we've cleared that up. And now we've spoken about the the horrific story of that case. We're going to close with a little bonus here. So we have Andrew here. We reached out to Andrew because he is a criminal defense attorney in Georgia and has some thoughts about this. The case that he discussed about prosecutors in Fulton County, but he also knows, and has opinions about, other things going on in Fulton County. So you may have heard in the last couple of years, really, that the Fulton County Attorney is looking into perhaps prosecuting former President Trump for that infamous phone call and perhaps some other stuff that he made to the Georgia Secretary of State, to do with after the election in November 2020. And trying to trying to affect the outcome of that and the appointment of the electors from Georgia. Now, Andrew, has said some things on his Twitter account about how you all know that if this actually happens, the case would go to federal court, and that would throw a massive monkey wrench in everything. And people in DC and New York pontificating about this stuff have no idea what they're talking about. That really blows my mind that this could go to federal court. It doesn't blow my mind at all that people don't know what they're talking about. So while Andrew's here, I wanted to close with please explain what this is, how it would work, and what are people missing?

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Andrew Fleischman 24:28

Okay, so like with everything, this goes back to the War of 1812. The thing you have to bear in mind is that there were a bunch of embargoes against England that were very unpopular, that were hurting businesses in New England. And they started suing tariff and embargo agents for taking their goods that they imported. And that was creating a massive problem with trying to enforce this federal embargo, which is federal policy. So Congress passes a law that says if you're a federal agent, acting under color of federal law, you can remove your case to federal court where you'll get a fair hearing. And this kind of goes on for the next 100 years. We see it with all kinds of tariffs. We see it with Prohibition, we see revenue agents and other people getting sued for actions that they take under color federal law and then removing the case. There's one particularly vivid case from 1923 where they just straight up murder a guy and lie at the inquest and try to ask for federal removal for that. But Justice Taft says it's not really your job to murder people. So we're gonna let that stay at the state level. Okay, so now we're wondering why is Fulton County waiting to two, two and a half years to indict a case -- they normally indict stuff super fast -- when the basis of your case is a phone call you have a recording of and witnesses who have all gone on the news to describe what happened? What more do you need? Well, the issue here is that if you tried to sue the president of the United States and he has a colorable claim that he's acting under federal law. He's a federal officer.

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Anthony Sanders 25:46

And by sue, do you include criminally prosecute?

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Andrew Fleischman 25:50

Sorry, sue or prosecute. And you try to bring that claim. Well, he can move for removal. And if he has a colorable federal defense, which is not every defense. But if you're president, probably will be considered a colorable by the 11th Circuit, well, then that case gets removed, regardless



of whether you would prevail on that defense. Now, this doesn't always work. There's a case from like, 96, that that was some Post Office workers who ran a guy over in their truck and killed him. And there, they said, Well, yeah, you were acting under federal law, but there's no federal defense to running people over your truck. Here, by contrast, it's the president of United States, who is arguably enforcing some sort of law when he asked Brad Raffensperger, to please look into this, please check on this, you're gonna find some fraud. Like, I'm not saying he wins the day. But is there a colorable argument who's trying to enforce federal law in some way? Yeah, probably.

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Anthony Sanders 26:39

And is that true, even though the president, of course, normally doesn't enforce that law. It's the attorney general or the local district attorney who would enforce that law.

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Andrew Fleischman 26:46

Well, being on a frolic is not enough. There's a case from 1969, Morgan, that dealt with some federal prison officials who beat and pepper sprayed the hell out of a prisoner. This might sound familiar to you. And he sued. And they remove their case to federal court. The court said, well, even though you guys, you know, we're beating this guy and beating this guy almost to death. It's not part of your job. You were there at the prison as part of your duties. And that was part of what you did. You were enforcing federal law in a way. So similarly, President Trump is calling from the White House, most likely he's calling from his official phone. He's doing it, he will argue, in his capacity as President. And as long as you can make those claims with a straight face, regardless of what the record might show later on, it's colorable. Plus the optics, right. I mean, if you're the 11th circuit court of appeals, do you want to leave this in a state court of the opposite party of the president? A historic prosecution? Probably not. It reminds me a lot of what happened with Governor Perry in Texas where Houston tried to go after him, a Houston DA, for threatening things if people didn't pass laws, particularly, which is something that governors do all the time. That case got kicked. You don't necessarily want small local jurisdictions going after presidents on state claims. And courts are going to be very sensitive to that. Just as they would if somebody in West Texas went after Biden for whatever, sniffing a child's hair, whatever it is they're obsessed about on Facebook. You wouldn't want presidents getting disrupted in that way. And similarly, I would be surprised if courts were not find ways to remove those cases federally. So what is the removal statute that allows this? This is 28 USCS 1442. Which basically says that if it's criminal prosecution, United States or any agency thereof, or any officer of the United States, or official or individual capacity, acting under under color of law of such office claimed under any act of Congress for apprehension or punishment of criminals or the collection of revenue, he can move for removal. And this is again, a very old law stemming back from 1814, 1815, I believe, that's been modified since then, that is very broad. In fact, it's so broad that you sometimes see companies that are simply complying with federal regulations attempt to use federal removal to get out of a state court where they think that locals might be unfriendly. So say it is removed. You know, this prosecution actually happens, it's removed to federal court. Is it then, Does state procedure apply? Does does federal procedure apply? What the melange there? You're still bringing the state law claims. You're doing it under federal procedural rules. And what's worse is you're doing it with the Northern District of Georgia jury pool, not a Atlanta jury pool.

A Anthony Sanders 29:29  
I see.

A Andrew Fleischman 29:31  
The Northern District of Georgia includes Marjorie Taylor Greene voters, who are enthusiastic, enthusiastic critics of this prosecution, I would imagine and who would not be your ideal juror. So you bring it to federal court, get Northern District jurors, your chances of successfully prosecuting the case go way down. And that is why there has been hesitation to indict the case. Not just because we have this investigative grand jury, not just because of the press, but because once you get the federal court it just gets more complicated and more difficult in 100 different ways.

A Alexa Gervasi 30:02  
Yeah. But is it the alternative? So you're like, we go to federal court and it gets harder. So we're not going to indict. In which case, there's a 0% chance, right? Like, I don't know. If you're going to indict like, you just got to do it or you don't do it.

A Andrew Fleischman 30:19  
I think there's a delay in that the plan is to indict potentially, I believe at this point and indictment actually is going to happen. But delay it ....

A Anthony Sanders 30:26  
Oh really?

A Andrew Fleischman 30:27  
Yeah, I've changed my view on that in light of all this

A Anthony Sanders 30:29  
Prediction here, folks from Mr. Fleischman. So, why have you changed your view?

A Andrew Fleischman 30:35  
Basically, the evidence against Trump got a lot stronger. The January 6 stuff got worse, it's stayed in the news more, there's more incentive to do it. Public opinion has shifted more towards it. For those reasons, I really thought this was sort of an empty thing for a couple

years. Because the Brad Raffensperger call by itself was not great. Some of the other evidence has since gotten stronger. So you wouldn't necessarily be relying solely on that phone call. For instance, the recent emails in which a Trump official lawyer called these fake electors, these folks who had been -- so Georgia state claims are stronger than they were. And for that reason, I think indictment will eventually happen. It's not just about getting in the press. But yeah, there's going to be removed the federal court afterwards. And we will have to figure out who will be prosecuting the case at that point, and how they'll be doing it.

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Anthony Sanders 31:23

Well, on that bombshell, which you heard here on Short Circuit, we're going to leave it there. But we're going to thank Andrew very much for coming on, his second time on Short Circuit and we hope not the last. Same for Alexa, thanks for coming here today. Gone through a lot of areas of state and federal law, but I'm glad we got we were able to keep it in Fulton County some of the time. So thank you guys. Thank you. And to everyone else. Thanks for listening. And I hope that all of you get engaged.