ShortCircuit240

Fri, Oct 07, 2022 7:55AM 52:56

SUMMARY KEYWORDS

ninth circuit, case, sentencing, circuit, law, clerk, court, judge, courthouse, first amendment, called, speech, sue, state, people, younger, conversion therapy, supreme court, issue, district court

SPEAKERS

Anthony Sanders, David Lat, Audience, Mike Yaeger

A **Anthony Sanders** 00:25

Hello and welcome to Short

A **Audience** 00:27

Circuit.

A **Anthony Sanders** 00:28

That's right. It's Short Circuit Live from Columbia Law School in Morningside Heights, Manhattan, New York. It is so exciting that we're here for the first time at Columbia doing Short Circuit Live. We have a number of Columbia Law students here today to hear from our illustrious panel, which I'll introduce in just a moment. But first, I want to say that this is actually not just one, but one of two Short Circuit Lives we're going to have on the island of Manhattan, just this month in October 2022. Later this month, on Wednesday, October 26, we have a Short Circuit Live open to the general public that evening. It's at a place called The Mezzanine in the financial district. And so you can RSVP for that on our webpage. And I'll put a link up in the show notes. So any podcast listeners can do that. Again the general public is welcome. We're going to have some local professors and lawyers talk about the Second Circuit. That will be a focus on the Second Circuit. And so anyone can come and for the Columbia students lucky enough to come today, you guys can do a doubleheader in October for Short Circuit. So we're very excited that we're having this tour of New York City this year. But today here at Columbia, the students and some of those listening on the podcast, who perhaps couldn't make it today, might like to know that we have clerkships at the Institute for Justice, which is where I work, a nonprofit public interest libertarian law firm. They are clerkships for the summer where we pay our students. They're called a Dave Kennedy Summer Fellow. And we also have fellowships for recent grads to work for a year or two for IJ litigating for liberty. And if you're interested in any of those programs, please check out our careers page on our website. But much more exciting are our guests here today. Now first, we have a man who I'm sure he gets this a lot. He really does need no introduction. His name is David Lat. He is a best selling

novelist, founder of Above the Law. He also had an anonymous blog, which is my favorite part about him called Underneath their Robes with Article Three groupie who made an appearance on Twitter last night. So I don't know if we're gonna get more of Article Three in the future, but I hope so. And he clerked, which we're going to be talking about in a little bit, for Judge O'Scannlain on the Ninth Circuit and has done many different things and now puts out an incredible newsletter, Original Jurisdiction, which I subscribe to and all of you should, too, for all the latest legal news. He also went to a certain law school that I'm not going to mention quite yet. Now another man who went to the same law school is Mike Yaeger. So Mike is a practitioner here in New York City for Carlton Fields. He focuses on government investigations, white collar defense, cybersecurity and related compliance. He clerked for Justice -- for Judge, orry, I was trying not to do that Judge Alito, back before he got his promotion. So when Alito was on the Third Circuit, that's where Mike clerked and he also clerked for Judge Pollack in the Southern District of New York, US District Court. And Mike also is a founder of an outfit called Empirical Justice. It is a sentencing consultancy. And it has a database of one and a half million sentences, federal sentences. Sentences are often something that's very hard to find. It's not like you know, there's that all the cases represent all the sentences that you find on Westlaw, and so he can help people with that, particularly judges and others who are practitioners who are focused on sentencing. And he's going to be talking about a case about sentencing later today. So I said that both of these gentleman went to the same law school. Now it's not Columbia, right? It's a regional school. It's a little north of here. Luckily, it's in the New York City region. I think it's mostly famous because the brother of an ancestor of mine is who it's named after. But I of course, I'm talking about the very easy to spell Yale Law School. It used to be a good place to get a clerkship from. But apparently that's been changing just a little bit. But first, I thought we'd open up that you guys were lucky enough, despite your roots, to get clerkships, one on the Ninth Circuit, one on the Third Circuit, and then Mike even had a little time in the Second Circuit at the district court level. Talk about a little bit about your your clerkship days, but more how you think maybe clerking on those circuits has changed over the years. We're at a school here, Columbia where students clerk all over the place, and some I'm sure will end up at the Ninth Circuit and the end the Third Circuit. So give me maybe some of your reflections. We'll start with David.

D David Lat 05:59

So I think clerking for the Ninth Circuit is a ton of fun, especially if you like gossip and drama as I do. It tends to be one of the most colorful, wacky courts in the country. For years, it was known as a liberal bastion. The late Rush Limbaugh would refer to it as the Ninth Circus. Another conservative commentator would call it the nutty ninth. We just learned from a recent book, one of many this cottage industry of Trump books, the one by Peter Baker and Susan Glasser that Trump called the Ninth Circuit, quote, a complete and total disaster, close quote, and directed then DHS Secretary Kirstjen Nielsen to quote, cancel it, and draft a bill to, quote, get rid of the effing judges, close quote. Actually, interestingly enough, even though Trump's ideas often have no constitutional basis, this actually would have been okay. Because if you look at Article Three of the Supreme Court, the only court that's provided for and required by the Constitution is the Supreme Court. So if Congress did decide to abolish the Ninth Circuit, I guess it could, although that never happened. It would be a pity because it is a very fun, interesting clerk of court to clerk for a clerk there in 99-2000, when, in some ways, the left of the Ninth Circuit was in its heyday and its prime, you had judges liberal lions, like Harry Pregerson in and Stephen Reinhardt, who were really huge forces to be reckoned with on that court. My judge, Judge O'Scannlain, who I'm actually going to see tomorrow. He's having his every five years judicial reunion slash law clerk reunion. My judge was one of the few

conservatives on that court. But the court has really evolved. And right now it's a very different court. As those Cadillac ads say, this is not your father's Ninth Circuit. It is now about 16-13. Democratic appointees still predominate, but it is a much more closely divided court than before. And the conservatives, especially the Trump appointees, are not wallflowers. We have some very outspoken judges there like Lawrence VanDyke, Kenneth Lee, and one judge who I would urge you to keep an eye on my friend Patrick Bumatay, like me, he's another fellow gay Filipino from the tri state area. And he is only 44. And he's making a name for himself with some very vigorous, high profile opinions. Oh, and he's, he's gay, and he's Asian. And so and he also went to the same college and law school with a certain Governor DeSantis. So in a DeSantis administration, I could see Patrick being a very strong nominee, because as I mentioned, he's gay and he's Asian, and yet he's super, super conservative, and given DeSantis, his penchant for owning the libs, wouldn't it be great to put up a gay Filipino to be the first openly gay first Asian American, and yet he's like to the right of Attila the Hun. So anyway, keep an eye on Patrick. He's only 44. But he could be going places in the right administration.

A Anthony Sanders 08:41

What are his diversity statistics again?

D David Lat 08:46

Oh, he's gay. He's Asian American. And he's also a dad, actually, he has two adorable daughters. So he has a very compelling personal story, son of immigrants, yada, yada. So anyway, he's definitely somebody to watch. The Ninth Circuit, as I mentioned, is becoming more centrist. A lot of the Obama appointees were also fairly moderate. But I predict that the Ninth Circuit could be returning to its far left form, because some of President Biden's nominees I predict are going to be pretty far left. A lot of this has to do with the demise of the judicial filibuster in 2013, which meant that both parties now don't need a couple of votes from the other side. If they have the 50 or 51 votes, they can push through their nominees, no matter how liberal or how conservative as long as, say Joe Manchin goes along. So I think the Biden nominees are going to move that court back towards the left. In recent years, the Ninth Circuit has given up its crown as the perennial most reversed circuit. But last term it actually did reclaim it and went 0 for 12 before SCOTUS. And with the new Biden appointees and the conservative Supreme Court that record may continue, but stay tuned. If anyone wants to talk about Ninth Circuit clerkships. I'm always happy to chat you can reach me at DavidLat@substack.com. Thanks for the kind plug for my newsletter, Anthony. If any of you want free subscriptions, I'm all about that for law students just email me subject line comp sub and I'll give you a complimentary subscription. So anyway, thanks. And I look forward to the conversation.

A Anthony Sanders 10:07

So Mike, we heard about 0 for 12 from the Ninth Circuit. The Third Circuit does it bat, you know, in this kind of what the Mets have been doing lately average or, or how's it looking?

M Mike Yaeger 10:18

Well, I mean, the Third Circuit is not as colorful or distinct in that way as the Ninth Circuit, which I've always thought of as like a mini state legislature. I mean, when you try to have an en banc, and you can't actually have an en banc, you know, have a very, you have a very weird beast. Just like the First Circuit almost has an en banc on every panel. And so the nature of the law is just going to be more cohesive. Just as a random thing I was a year ahead of Patrick Bumatay in college, he's a good guy. So big fan. Clerking on the Third Circuit, I mean, one of the most fun things about it was I was in Newark, and we would have to go down to Philadelphia for sittings. And so we get our act together 45 days ahead of time, and you can get a really nice hotel room on the federal rate, if you wait at the last minute, can't do it. But if you've done it right, you've done all of your work before the hearing, and you work hard to get it done before the sitting. And then you know, you're working, but you can go out for dinner every night and hang out with your friends and you're staying in the same hotel. And you do that about six times a year. It's pretty fun. I also had a taste of the Second Circuit, because Milton Pollack was the senior judge who sat by designation four times, so actually was part of four different sittings on the Second Circuit. And Sotomayor was on the Second Circuit at that time. So it was an interesting kind of piece of it. An appellate clerkship, I don't think it's changed that much, honestly, it's a pretty monastic thing. The district court is kind of rough and tumble, and you will see very different kinds of things. In the appellate court, it's kind of academic job. It's an interesting, wonderful thing, you get to be a generalist. I guess one plug for the Third Circuit is Delaware's in it. And so we did get some very interesting corporate issues every once in a while. And that was that was really cool to see something with great lawyering on both sides being fought that way. It really gave you an appreciation for the difference between law school and practice. Because sometimes as a clerk, you can sit there and go, Oh, who could write this? And then you see this other thing and you go, wow, I cannot do that. And it, it is a wonderful thing. You do learn. It's not hard to sell people on clerkships as a general rule.

A Anthony Sanders 12:48

Any any drama while were you there in the third? I mean it does include New Jersey.

M Mike Yaeger 12:54

Well we didn't have any Bridgegate issues. Judge Chertoff left in the middle of the clerkship. He had been the head of Homeland Security back when that was new. And so that changed things. A guy who was really a very smart, capable guy leaving pretty quickly, relatively speaking for that kind of position. And few years later, the late Judge Becker, the great Judge Becker passed away. So in many ways, and with Alito getting elevated, a lot of the personnel is changed. Some very good new judges, Judge Bibas, the professor who I mean, I love his scholarship, and I've enjoyed a few of his opinions. So you know, less the gossip. I guess the one story I will tell was my first day of the clerkship. I'm walking up to the Newark courthouse, and a Rolls Royce rolls in. And I'm getting a tour from the outgoing clerks. I say, oh, it's Rolls Royce. Man steps out. I said, Who's that? And the outgoing clerk says that's Sharpe, James, the mayor of Newark, stepping out of this Rolls Royce. And I said, Oh, what was his job before he was mayor? He said, I think he was a gym teacher. I said, Okay. And that was my introduction to Newark. I later found out there was an entire floor of the US Attorney's Office dedicated to investigating

Sharpe James eventually they got it and you know, and I was a federal prosecutor an AUSA in the Eastern District of New York. And so looking back years later on that experience, I could sort of envision what was going on on that floor tracking that Rolls Royce.

A **Anthony Sanders** 14:47

I have to ask, David, was that during your time at the US Attorney's Office?

D **David Lat** 14:54

Gosh I'm trying to remember what years were you there Mike?

M **Mike Yaeger** 14:56

I was there 04 to 05.

D **David Lat** 15:00

Yeah we actually overlapped, we, Mike and I would take the shuttle van from the courthouse to the Newark train station because Newark for those of you who know it's not exactly the safest place, especially after dark. So no that I that was during my time, although I didn't work on any Sharpe James matters.

A **Anthony Sanders** 15:15

Okay, well, then we don't have to worry about any confidentiality. Well, I asked both of the gentlemen for a case they'd like to present and but for unknown reasons both happened to be in the Ninth Circuit. So my home circuit where I live now is the Eighth Circuit. I live in Minnesota. And so we'll get to that at the end. But first, we're gonna start out out west with a case that funnily enough that David selected, but that I must say, and we probably will hear about, my colleagues at the Institute for Justice filed an amicus brief in at one point and it's a Tingley vs. Ferguson. So tell us a bit about this case.

D **David Lat** 15:55

Sure. Before I get to that I just before Patrick kills me, I do want to say the quip about him being to the right of Attila the Hun was just a joke, any Democratic members of the Senate Judiciary Committee in the year 2028, or whatever it is, please don't quote me on that. So anyway, Tingley vs. Ferguson. This is a case that was decided by

A **Anthony Sanders** 16:12

But they can quote the Filipino and the ...

D David Lat 16:14

Yes. I think that will actually be kind of put in their faces. But anyway, Tingley versus Ferguson is a case that was decided by a panel of the Ninth Circuit last month. And it presents a super interesting, important and controversial issue on which there is now a circuit split. So I could see this case going up to the Supreme Court someday. And the issue is whether a state can ban quote, unquote, conversion therapy, which is psychological therapy that seeks to change a person's sexual orientation or gender identity, consistent with the First Amendment. And there's something like 20-plus states that have bans on conversion therapy. In Tingley, the panel affirmed the district court's dismissal of this challenge of to a Washington state law that bans conversion therapy. More specifically, it disciplines any state-licensed health care providers who provide conversion therapy to minors, namely, people under 18. Now, the law does have some carve outs that are worth noting. First, I mentioned the age, you can provide conversion therapy to people who are over 18 in the state of Washington. It only applies to actual therapy, so not speech about or related to the therapy. So if you wrote an op ed as a psychologist saying, I think the ban on conversion therapy is wrong, that would be fine. Also, it does not ban referrals. So if you wanted to refer a patient to some out-of-state health care provider who does do conversion therapy, you can do that too. And then the third thing is, and this is an important one for purposes of the religion claim here, it exempts counselling under the auspices of a church or other religious organization, provided that the people who are doing that are not licensed health care providers. So if you're a priest, and you're a rabbi, and you want to try and persuade one of your congregants to not be gay or not be transgender, you are free to do that. This law doesn't run afoul of that. So the plaintiff in this case is a fellow by the name of Tingley, who has been a marriage and family therapist for more than 20 years, licensed by the state of Washington. And he has practiced conversion therapy in the past. And he challenged this law as violating both the free speech and free exercise clauses of the First Amendment. The district court rejected the challenge, the Ninth Circuit affirmed. The Ninth Circuit began with a really short discussion of standing, and whether he has the ability to sue over this law. And that was actually a pretty quick discussion, because he clearly does have standing here. Standing tends to be relaxed in the First Amendment context. There's essentially a doctrine that you can kind of hold your tongue and still sue if you've been chilled or deterred from saying the thing you want to say by some law. And also, he already did it in the past. And he's indicated that he wants to do it again in the future. And then another aspect of the standing analysis is sometimes if a government says, well, we're not really going to enforce that maybe the standing might be harder to find. But here, Washington has given no indication of dropping this law. And in fact, they're in court defending it. So Tingley clearly has standing. So then the court look at the merits and actually dispose of the two things that are easier to dispose of first. First, he mounted a Free Exercise Clause challenge saying, Look, I'm a Christian therapist, and this is burdening my free exercise of religion. But this was easily disposed of because as long as this Supreme Court case that probably many of you are familiar with called Employment Division v. Smith is still good law. This claim doesn't really fly because Smith basically says that there's no constitutional problem with a valid and neutral law of general applicability. What does that mean? It doesn't mean that for example, I can get around laws against I don't know murder by saying it's my religion to murder people because the law against murder was not passed to burden any religion. It's facially neutral towards religion, etc. Here Are the law against conversion therapy, it's facially neutral. They weren't trying to go after religion. They just are trying to go after conversion therapy because of all this evidence about the damage it can do to some of its young recipients. So it's not really a free exercise issue. By the way, for those of you who are Supreme Court nerds and heck, you're here watching a live

taping of Short Circuit. So surely you are. The 303 Creative Case, this is the case about the Colorado website designer who doesn't want to do web pages for gay couples. This is going up to the Supreme Court on a First Amendment challenge. Interestingly enough, it is only going up on the free speech issue. There was also a free exercise claim in 303 Creative but they actually did not grant cert on that issue. So unlike the masterpiece cake shop from a few years ago, which some of you might remember involving a Christian baker who didn't want to bake cakes for gay couples, this is only going to be a speech issue in 303 Creative. It's not going to be a religion issue. And same thing here in Tingley versus Ferguson, I don't really think that the Free Exercise issue is super, super significant. He also launched a vagueness challenge, basically saying, Well, this law doesn't give adequate notice as to what violates it. But I think we all know kind of what conversion therapy is. And clearly he's in court. He's worried about running afoul of this law. He's done conversion therapy in the past. So his vagueness claim, I don't know what this law prohibits, didn't really fly either. So the real issue is the free speech issue. And turning to that the Ninth Circuit relied on a past precedent of its of its own, a 2014 case called Pickup v. Brown, which upheld a pretty much identical California law. So normally, you would think game-set-match. They upheld this prior California law isn't that really over? But as often is the case when there's the Ninth Circuit involved, there was a subsequent Supreme Court case, which is an acronym, I'm just going to call it NIFLA, that sort of undermined a lot of the key tenets of Pickup v. Brown. Pickup v. Brown tried to come up with this professional speech doctrine where they were trying to say, well, if it's speech by licensed professionals, it's subject to less First Amendment scrutiny. It can be kind of more relaxed, the Pickup court tried to say there's this spectrum between pure speech and pure professional conduct. And maybe in this intermediate ground of speech related to professional conduct, there's reduced First Amendment scrutiny. But the Supreme Court basically said no dice speech is speech, even if it's by professionals. So the question, or one of the key questions in this Tingley case is whether or not Pickup is still good law after the Supreme Court's decision in NIFLA. And what the Ninth Circuit panel here did say is, yes, it is because even under NIFLA states can regulate conduct, even if it incidentally involves speech. And they're saying here that given conversion therapy, it's not really speech, its conduct, it can be regulated. For example, if I call in a threat, a bomb threat to Columbia Law School or something, I am using words, I'm using my voice, I'm using speech. But really a threat is a kind of action. This is sort of like, for those of you who study this type of thing like performatives, you know, actions that are really conducted through words, you know, they're still actions. So they're basically saying, Look, this kind of conversion therapy is still conduct, it can be regulated. And then the other thing that was in the NIFLA case was, there was this narrow exception that they didn't really kind of outline, but left for a future case about regulating speech subject to a long tradition of restriction, and that speech might get less scrutiny too. And in this panel they kind of had as a backup holding that professional speech by healthcare providers within state boundaries could also fall under this backup position as well. I'm gonna let Anthony talk about the IJ brief, but I'll just give you a very sort of quick synopsis of it. It's a very interesting, very well done brief. And IJ actually does not take an opinion on whether or not this law should be upheld. But it does argue that Pickup v. Brown is really no longer good law after NIFLA. And speech is speech. And you can't have a special analysis for professional conduct. It's still speech, and it's still subject to generally strict scrutiny under the First Amendment. So I'll flip it back to you, Anthony.

A Anthony Sanders 23:59

Yeah. Thanks. Thanks, Dave. That was a really good overview of that case. And regular listeners to Short Circuit will know, just last week, we talked about a pending cert petition that my colleagues have at the at the US Supreme Court from the Eleventh Circuit, which also went

the at least in our case, went the other way, in how NIFLA applies to giving advice. And that that case involves, for those who didn't listen to that episode, that that case involves giving advice about your diet. So in Florida, they have a law that you need to be licensed to say, you know, advise someone to eat their greens, essentially. California, funnily enough, doesn't have that law. And there aren't people you know, choking on greens in California for some reason. So the argument is that NIFLA applies to giving advice -- now that that can mean that the advice is regulated. It can even mean that the law would ban this type of conversion therapy to minors that's involved in Washington. But it still gets the protection of the First Amendment. It doesn't go all the way to the rational basis test. And our brief that we filed in the in the Ninth Circuit in the Tingley case, just talks about all the the different cases that are doing this under NIFLA. The Eleventh Circuit case, our case actually came out after we found that brief. There's even it seems an internal split in the Eleventh Circuit on this point. And so this is going to hopefully be resolved soon. And I think it would be best for the Court to do it in a case where you don't have these heavy other issues going on about, you know, probably the worst set of facts you can imagine, for in terms of sympathetic cases is, is this case about conversion therapy to minors. Now, we make the point in our brief that if the Court held that there could be no First Amendment protection to the opposite kind of law, a law that prevents like -- they have a law and I'm not going to describe it entirely correctly, but in Arkansas -- that prevents you from say, giving teens helpful advice about if they're if they're confused about their identity and want to go talk to a counselor who you know, is fine with, say someone identifying as trans when they're a team. It would ban that kind of speech too. And so it's not just, you know, a one-side thing. The First Amendment protects everybody. And we shouldn't try and get around it through the kind of hocus pocus, distinguishing of this this old case, which is essentially I think, what the Ninth Circuit did. Mike has not got a word in.

M Mike Yaeger 26:46

Yeah, well, I'm picking up on that thread in particular, I mean, the thing that really struck me about Tingley is the way in which professional licensing can allow state governments to abrogate the First Amendment. And people may not realize how much licensing there is. People think of lawyers, and they think of doctors. There are states that force interior decorators to be licensed. Hair braiders, not barbers mind, you hair braiders. And, at a certain point, this becomes a way in which they can say, well, this speech that you have is actually conduct. I mean, you know, Thomas Friedman, famously always talks to cab drivers, like maybe their regulation will prevent him from writing new columns, I don't know. But there is a way in which this just doesn't have an obvious endpoint, because licensing is not a small problem at the state level.

A Anthony Sanders 27:51

Yeah. And I think also, what you're getting at Mike there is that the reasoning is once your licensed, say once you're licensed as a medical doctor, to you know, how you use a scalpel, which no one is claiming his speech, then we can regulate everything else, including all of your speech. And in the wake of NIFLA, a lot of circuits have seen that that's not actually correct. So the Fifth Circuit in another case we had, the Institute for Justice, after NIFLA found that the First Amendment applied to a client of ours who's a veterinarian who just wanted to give advice about pets, through zoom, or through online and or through written correspondence. And they said yes, even though you know, the overall licensing structure for say, operating on a pet you

need a license for that, within that license, it's not a First Amendment free zone. And that seems kind of to be what the Ninth Circuit is getting at here. And, and I just don't don't think it holds water. Another thing that doesn't hold water is federal sentencing policy. So we're going to open that up and with this really interesting case that I as a non federal criminal lawyer only followed so much, but I still found it very interesting, especially in light of recent legislation. And that's the United States versus Chen.

M Mike Yaeger 29:09

Yes. So, United States against Chen, which just was issued a couple of weeks ago in September, is a federal sentencing case and a compassionate release case. And I just want to take a little bit of a moment to sort of set up what compassionate release is. So 1984 is a huge year in federal sentencing. Appellate review of federal sentencing is created. Before then it basically doesn't exist. Okay. There's a difference between appeals from trials with evidence issues and jury charges -- and sentencing. Appellate review of federal sentences is created in 84. The sentencing guidelines are created, that's the big one. And federal parole is eliminated. So just to remind you of what parole is just think of the movie The Shawshank Redemption, with Morgan's character Red who goes -- Morgan Freeman sorry -- his character, Red, goes in front of the parole board, and shows his rehabilitation. And finally they let him out. You get the sense that he's gone in front of them many times before. When federal parole existed, federal prisoners typically served 45% of their sentences. After parole was eliminated, federal prisoners serve at least 85%. Okay, they can only get a max of 15% off for good behavior. And it's much more of a straightforward calculation. This is Oh, the time you get is the time you actually serve kind of idea. But notice the amount of actual time in prison is almost doubled just because of that change. And on top of that, the guidelines raised the length of sentences across the board. They say a few areas. But if you look closely, the areas that they raised it in comprise an enormous percentage of the federal docket: drugs, white collar crime, goes down the list. Okay. So there's no parole. But there's also a statute created allowing for compassionate release. Compassionate release is much more limited than parole. Okay, the Bureau of Prisons, the BOP, can file a motion for compassionate release with the district court. Just the Bureau of Prisons. This is how it was back in in 84. How can you get it? Well, not many ways. First of all, one way to get compassionate release is if you are 70 years old or older, have spent 30 or more years in prison, and you're not dangerous. So really just Morgan Freeman's character Red and older than Freeman was at the time of the movie. Okay. So the other piece is if there are extraordinary and compelling circumstances, and that gets defined by the Sentencing Commission, because it also has to be that all of this stuff is in line with the policies of the Sentencing Commission, and they issue, something that defines the extraordinary and compelling circumstances. Basically, they reduce it to medical conditions and family circumstances. Okay. This is rare that people actually got this. How rare? Well, just citing some stats that I believe are derived from the BOP itself. From 2013 to 2017, the BOP had 5400 requests for compassionate release, they granted just 312. So about 6%. Of those 312 prisoners, 266 died in custody before they were released. So 85% of the winners died in custody. Not much of a remedy. Compassionate release gets an overhaul in 2018 when the First Step Act is signed into law. Now, defendants are allowed to file motions for compassionate release when requests are denied by the BOP, or when the BOP simply fails to respond within 30 days. Okay. This was not an unthinking amendment of the law. I think their legislative history will show and in the historical context and the text of it, it was not minor to add the new entity that can make a motion, the defendant. So my own view, tipping my hand here, I don't think that's very procedural, or purely procedural. Okay. This brings us to Mr. Chen, who made a compassionate release motion. Howard Chen was charged with conspiracy to traffic drugs,

specifically MDMA pills. There were firearms found in his house. So that's possession but not brandishing. And other than juvenile offenses, Chen had no prior criminal history. Criminal history matters a lot under the sentencing guidelines. Okay. Chen was convicted after trial. Six drug related counts, the number of counts kind of doesn't matter on that one. But he had two counts of possession of a firearm in furtherance of drug trafficking. Title 18, US Code section 924(c), and the two counts of the 924(c)'s really matters. The first count carried a mandatory minimum five years. But the second count, for the same thing has a mandatory minimum of 25 years. Okay. Back in 1993, the Supreme Court ruled that this 25 year mandatory minimum for a second or subsequent quote unquote conviction can apply in a single indictment. If you got multiple 924(c) counts in a single indictment, you can still get that 25 year bump for second or subsequent conviction. Okay. So prosecutors could stack 924(c)s. And that was the rule even when a defendant had never been charged with a 924(c) before. In 2008, Chen is sentenced to 48 months on the drug counts, that's four years, 60 months for the first 924(c), that's five, and 300 months for the second 924(c), that's 25 years. That's a total of 408 months or 35 years. 10 years after sentencing. He's obviously still in. Section 403, the First Step Act gets rid of stacking in the same amount indictment. Okay, so that's gone now legislatively. Now the 25 year enhancement triggered by 924(c) conviction occurs only after that 924(c), the first one has become final. But Section 4039(a) of the First Step Act, the piece of the statute that did it, is not retroactive. Okay. So can Chen still benefit from this? Because he's already been sentenced, obviously, he's hanging around in prison. Now, if he were sentenced today, he would only be sentenced to nine years, 108 months, nine years, not 35. Is that extraordinary and compelling? quote, unquote. Okay. So I'd say the question presented is when Congress has changed the sentencing law, but has said the change is not retroactive. Can a district court consider the change when ruling on a compassionate release motion? The District Court says no, this Ninth Circuit said yes. In doing so it joined a very large split. This is going to go to the Supreme Court. The Ninth Circuit joined the First, Fourth and Tenth circuits. On the other side, we've got the Third, Sixth, Seventh and Eighth. I think that leaves the Fifth, Eleventh, DC and Second.

A Anthony Sanders 36:14

That's pretty big split. David in your time in the US District Attorney's Office in New Jersey with your your old boss, Chris Christie, was there stacking? Are you a former stacker?

M Mike Yaeger 36:15

It's a pretty big split. There are a lot of sentencing cases. This ends up being a huge part of the docket. And again, it didn't exist before 84. Kind of interesting. Okay, so why does the Ninth Circuit do that? They say, look, there's no statute that prohibits district courts from considering non retroactive changes in sentencing. There's nothing that says you cannot do it. Okay. Also, crucially, the Sentencing Commission's policy statement on this only mentions motions by the BOP, not motions by the defendant. It literally says, this US sentencing guideline, 1b1.13 for those interested, upon motion of the director of prisons under -- and then it gives the compassionate release statute. Okay. And then the commentary says, a reduction under this policy statement may be granted only upon motion of the director of the BOP. And so the Ninth Circuit goes, aha, this isn't an applicable policy statement. And applicable is a key word there. Okay, great. Here's the thing. The sentencing commission didn't have a full complement of commissioners for several years, sort of a national bipartisan disgrace. We now have it back.

They could issue a statement now, that could affect this litigation. But right now, it's not out there. All right. That's one thing the circuit says is we're not precluded from this. Another thing, the second thing, is when a sentencing change is retroactive, says the Ninth Circuit, it's a different issue from whether it's extraordinary and compelling. Retroactive means automatic resentencing, boom, you get resentenced. Here, this is a case by case analysis, the court can consider it with other factors. You still have to exhaust the BOP procedures. And the court has discretion to evaluate on a case-by-case basis. I find this actually fairly compelling. It may seem kind of technical. And by the way, it's not like the word retroactive actually appears in 403. But it's sort of understood to mean it isn't retroactive. But I find this compelling, I'll end it on this. And this is what I think an advocate pushing this in the Supreme Court should try to weave into this argument. There are many ways that a guy like Chen could lose. What if he had a category three criminal history under the guidelines? The judge might say, well, you know what, you really have a big criminal history. So even though this was all in one indictment, I'm not gonna give you a break on this. What if, even though his 924(c)s were in one indictment, what if the facts and one of those two counts was two years apart? Let's say it was a 924(c) possession in 2004 and a 924(c) possession in 2006. That might be a reason that the judge might not grant it. In other words, give some substance to this not being automatic. Okay, because at the end of the day, if there's one thing I have learned, as a practitioner of federal criminal law, both as a prosecutor and as a defense lawyer, if the defendant needs every other defendant to win in order for him to win, he's going to lose. In fact, in order for a federal defendant to win, it should be that every one else is going to lose. It has to be that this is a ticket good for one ride only, Your Honor. You rule in this case, it has no implications for anyone else locked up. Single best way to get a win on a criminal issue. So in general, they need to show all the ways in which this isn't automatic.

D David Lat 40:09

I did appellate work. So I was just trying to keep these things affirmed. But stacking was allowed back then because it was absolutely -- In terms of my take on this case, I actually, I was kind of hoping for like a disagreement. But I actually kind of agree with Mike. And I'll kind of say why. And I'm guessing maybe from the audience and the organization sponsoring this, maybe some of you will be sympathetic. I think that if you're a textualist. And if you like holding the feet of Congress and the Sentencing Commission to the fire, you have to hold them to what they do, not what oh, they meant to have done or they should have done or the purpose of this. Because I think that if you look at the purpose, and if you look at kind of what they probably would have done, if they had thought about this issue, they probably would have said no retroactivity in the compassionate release context. Because it's kind of like making an end run kind of like sneaking around the prohibition that this thing is not supposed to be retroactive. And if they had actually thought about this, they probably would have said no. But they hadn't thought about it. And they didn't say it in there. And so therefore, I think they, you know, the government here should be out of luck. And if the commission wants to revisit something, or if Congress wants to revisit something, great, but right now, I have to say, I think I'm on the side of the Ninth Circuit here.

M Mike Yaeger 41:21

I would also just point out that in some situations, stacking 924(c)s was actually DOJ policy. So in no way do I think that's a swipe against individual AUSAs who had to do that. We don't want individual line prosecutors deciding that they're going to make policy at that level. This was the

policy, and there are quite a few judges who were quite annoyed that they were in this position of having to apply those mandatory minimums. This sort of thing comes up all the time. And I guess the last thing I'll say on this is, is David's point about textualism, I think is very well taken. The people who will probably resist this more, are worried that someone is playing a game, that this is motivated reasoning, and they think sentences are too long. And so this is a misreading of the statute. And I think there are some arguments on their side for their interpretation. Ultimately, I don't think it carries the day. If the Sentencing Commission were to issue a policy statement that could complicate things. And, you know, textualism is a virtue too, because at the end of the day, the way that you limit the Justice Department, is by making them stick with the law as written. So if we abandon that kind of thing, it will often not go in the direction of individual criminal defendants.

A Anthony Sanders 42:47

Well, from that, we're going to actually turn to a self identified textualist. And that is a Judge Stras on the Eighth Circuit. And the case I will talk about briefly here at the end in, again, my home circuit, although this case comes from the eastern district of Missouri. It is Courthouse News Service versus Gilmer. Now, this is not an opinion about the First Amendment, but the underlying case is about the First Amendment. Courthouse News Service is what the title says it is. It reports on on rulings in the courthouses across the country. And they're in Missouri, apparently,

D David Lat 43:30

I think it's Missour-uh. Isn't it? Anyone from there?

M Mike Yaeger 43:36

I don't think people like us are allowed to say that. I don't think I've earned a Missour-uh.

A Anthony Sanders 43:42

From Iowa North, it's Missouri.

M Mike Yaeger 43:47

As a native New Yorker, I'm just faking.

A Anthony Sanders 43:48

The Eighth Circuit has its own office in St. Paul. And so that's kind of what I'm identifying with. So in Missouri, that the state courts there, they had a practice of having summaries of new complaints that were filed, and they would put them out the same day. And this was, you know, like the pre electronic filing way of doing it was they put them out the same day. And

Courthouse News would go up and be able to report on new complaints, so not rulings, but new complaints that were filed. Well, they went to a new system where that you had e-filing and then they would still do the summaries. But for whatever reason internally, it wouldn't come out for like sometimes a week. And Courthouse News didn't like this because they couldn't get the same day or next day reporting. And so they sued and said this is a violation of the First Amendment's guarantee of freedom of the press. Now, we won't get into the merits of that or not. It's a fascinating subject, the press clause. It doesn't get a lot of play these days, but we'd love to talk about that some other time. But the problem is they sued the court staff. Now what was the last case where court staff were sued? Well, you may remember, it's kind of old news now, I guess in light of the Dobbs case. But there was that case from Texas, from last year when Roe v. Wade was still good law where there was a law, it's still on the books in Texas, where any private citizen who is not a government official could sue someone about an abortion. But the problem was, there was no state action other than the state courts where you would file this lawsuit. And so the state clerks were part of the parties who were sued. And the Supreme Court, as you may remember, last fall, said that you there was no jurisdiction to sue those state court clerks, and basically it was because of sovereign immunity, this misguided doctrine in our day and age that you cannot sue the government unless it gives you permission. Now, there's way around that this case from 1908 called Ex Parte Young where you sue for prospective relief. So an injunction or a declaratory judgment against a government official because the legal fiction is, Judge Stras says, is that you're suing that official not so much the government. Cuz you're just trying to prevent that official from doing what they want to do because it's unconstitutional. Well, the issue here is is what this these court staff are doing. Is it like the taking of the complaints in the Texas case? Or is it something else? And Judge Stras, who is again textualist, originalist. He's a former Thomas clerk. He was on the Minnesota Supreme Court for a long time. So he knows a lot about how state courts work. He took, I think a lot of people could learn a lot from what he did in this case, because he took a non maximalist view of sovereign immunity, and yet a very fair view and said, Look, these courthouse staff when they're writing summaries, I mean, whatever you think of the underlying First Amendment claim, in a footnote, I think he kind of indicates he doesn't think a lot about this freedom of the press claim in this case. But if you just take what they do, they're not doing the kinds of things that in Ex Parte Young was said, Well, you can't sue about that. And then was essentially reaffirmed as they saw it by the Supreme Court last year in the in the Texas case. He's saying this is something else. This is like if you'd sue the governor about some policy. And so there's no sovereign immunity attaches. But that's not the craziest thing. I think about this case, the sovereign immunity part. It's that then the district court also threw out this case because of Younger abstention. Now, a lot of listeners right now are rolling their eyes because we're once again, talking about Younger abstention. We had a fantastic 50th anniversary observance, I should say, of the case, Younger versus Harris, which is a case you'll read about in federal courts if you're in law school, and we don't need to belabor again here. We had it last year with my colleague, Sam Gedge and Fred Smith from Emory University, who has written some fantastic work on the subject. And then we had another Younger case a few months ago in which I impersonated Captain Ahab, to kind of chide Sam, because he's so into Younger that I think it's kind of his white white whale. Anyway, this is a non Sam Gedge episode where we're talking about Younger. But that the district court said, Well, this is like Younger versus Harris, because that's where there's like a pending prosecution that's actually going on. Like the kinds Mike and David used to bring, and then you go -- except in state court -- and then you go to federal court, and you try to enjoin that prosecution because you think it's unconstitutional. And Judge Stras says, Look, this isn't Younger, this is just clerk staff, you know, writing stuff, how does Younger get into this? And again, it is a non maximalist view of this procedural barrier to not let it metastasize even more than it has, and and to be fair to the underlying litigants, even though he doesn't think much of their claims. And I think this goes

back actually to the first case, we talked about, Tingley, that you can't judge can't let the underlying merits of the claim they're talking about go to the procedural aspects or the aspects about what standard of review to apply. You get that out of the way, and then you get to the merits. And maybe the standard of review is going to influence that. Maybe not. Maybe the facts are so bad that you know the government's even going to win under that standard review. Or maybe you get to the the underlying issue, even though you think it's silly that they're suing about state court administration, and they're going to lose even though the judge thinks well, this is a lousy lawsuit. How do I get it off my docket. Oh, we have sovereign immunity. We have Younger abstention. You know, they could use standing. There's any number of ways that federal judges have to get cases out of their courtroom. And it's very refreshing when people are fair, even someone like Judge Stras, who on a lot of other issues, maybe wouldn't see eye to eye with what we always do at IJ. To say, Look, this is I'm not going to expand this precedent just to get this case off of my docket.

M Mike Yaeger 50:28

I gotta tell you, I was just really impressed by the opinion. And for those who are in fed courts, this is a great primer on some huge cases, Ex Parte Young, Younger against Harris. So no critique. I thought Courthouse News was really very well done.

D David Lat 50:48

I agree. I also think Judge Stras got it right here. I think one of the issues here is often these doctrines about federal courts not getting involved in the work of state courts have to do with issues of comity, the so called respect between federal and state courts, and not meddling in a judicial proceeding of another sovereign. But here, this is actually a matter of court administration. The clerk's office was delaying the release of these complaints by a week or more, while they quote unquote, processed the complaints. And Courthouse News, which is a very useful service, they want -- they're kind of like TMZ, they want to report the thing hot off the presses, this just was filed. And here, you're having to wait one or two weeks. I could see from, again, the perspective of a journalist or a media person. So maybe I'm biased, but I can see why Courthouse News will be upset. And I can see how this policy is problematic. And again, it's not a state judicial decision, which I think is what we're worried about federal officials interfering with. It's a matter of administration. What if a state adopted a policy saying well, we're not going to let people of a certain race come into our courthouse, obviously, you should be able to challenge that. I think, again, here, there's no other judicial proceeding. It's just a policy that somebody objects to on constitutional grounds. And I think the objection should be allowed to go forward, whether you ultimately agree with it or not.

A Anthony Sanders 52:03

True example, I would say, of judicial engagement. Well, I'd like to thank everyone for coming today. And I'd like to thank the Columbia Federalist Society again for hosting us. And we will see some of you in a few weeks on October 26 again in New York City, so we're very excited again to have this doubleheader here this month, especially when the longest drought in

baseball playoff current history has been solved by my Seattle Mariners. So we're very excited about that, at least at Short Circuit HQ. And I also would like everyone to remember to get engaged.