Short Circuit 243

Mon, Oct 31, 2022 9:36AM 57:19

SUMMARY KEYWORDS

qualified immunity, judge, case, marijuana, circuit, court, clerks, law, question, majority, dissent, judges, panel, opinion, schedule, alex, argued, doctrine, torts, appendix

SPEAKERS

Maaren Shah, Patrick Jaicomo, Alex Reinert, Bruce Green

P **Patrick Jaicomo** 00:26

Hello and welcome to Short Circuit Live in New York City. I'm your host, Patrick Jaicamo. I'm a senior attorney at the Institute for Justice filling in for my colleague and friend, Anya Bidwell, who is truly irreplaceable, so please bear with me. We're recording tonight from The Mezzanine a beautiful event space just feet from Wall Street, perhaps fittings since the Second Circuit by virtue of its location in Manhattan has its fair share of massive financial litigation. But we won't bore you with that, I promise. We have quite a fascinating selection of cases for you and an amazing panel to discuss them. It is my pleasure to introduce them to you tonight. First, Maaren Shah is a partner at the one and only Quinn Emanuel, a firm with a legendary reputation among law students dreaming about and living in fear of life as a high intensity litigator. Maaren is a seasoned trial lawyer with extensive experience handling complex commercial disputes. She leads the firm's art litigation practice and it's insurance practice and has published chapters and an acclaimed textbook on business and commercial litigation in federal courts. Maaren clerked for the Honorable Robert D. Sack on the Second Circuit, and she's a visiting faculty member at Stanford Law School. Welcome, Maaren.

M **Maaren Shah** 01:45

Thank you, Patrick. Nice to be here.

P **Patrick Jaicomo** 01:48

Second, Bruce Green is the Louis Stein Chair at Fordham Law School where he directs the Louis Stein Center for Law and Ethics. He teaches and writes primarily in the areas of legal ethics and criminal law. His recent articles include, Who Should Police; the politicization of DOJ in the Notre Dame Journal of Law, Ethics and Public Policy. Victims Rights from a Restorative Perspective in the Ohio State Journal of Criminal Law and Punishment Without Process Victim; Impact Proceedings for Dead Defendants in Fordham Law Review. Over his career, Bruce has also taken on a number of public service engagements, including as associate counsel in the office

of the Iran Contra prosecutor. Bruce also served as chief appellate attorney in the Southern District of New York. He was a judicial law clerk to Supreme Court Justice Thurgood Marshall and Second Circuit Judge James L. Oakes. Welcome Bruce.

B Bruce Green 02:42

Thank you so much, Patrick.

P Patrick Jaicomo 02:44

Finally, Alex Reinert is the Max Freund professor of litigation and advocacy at Cardozo Law School, and its director at the Center for Rights and Justice. Alex teaches and conducts research in the areas of civil procedure, constitutional law, criminal law, federal courts and the law of prisons and jails. His articles have appeared in numerous prestigious publications with a lot of recent scholarship focusing on qualified immunity. His recent paper in the California Law Review is about qualified immunity's flawed foundation. And I'm hoping we can talk about that a little more later. He's also conducted the most comprehensive study of qualified immunity on appeal. Alex has cases in the Second Circuit and the Supreme Court. He argued Ashcroft versus Iqbal. Alex clerked for the honorable Harry T. Edwards of the DC Circuit Court of Appeals and then with the United States Supreme Court Justice Stephen G. Breyer. Welcome, Alex.

A Alex Reinert 03:39

Thanks, Patrick. It's great to be here.

P Patrick Jaicomo 03:40

So since we are in the Second Circuit, most of our discussion will be in that context. So I want to ask everyone on this panel about their experience in the Second Circuit, but first, I think we need to give the audience just a bit of an overview on the circuit. The Second Circuit covers three states, Connecticut, Vermont and New York. The court sits in Manhattan and is considered one of the most prestigious and influential in the country. The court has had its fair share of legendary judges, including Judge Learned Hand who served on the court from 1921 to 1964. And Judge Henry Friendly, Chief Justice Roberts' former boss, on the court from 1959 to 1986. Justice Sonia Sotomayor on the Supreme Court served as a judge on the Second Circuit before her appointment to the Supreme Court, and who can forget Judge Guido Calabresi, to whom we will return later in the program. There are 13 active seats in the Second Circuit, all of which are presently filled -- six by Republican appointees and seven by Democratic appointees. But enough of me talking, let's put our panelists on the spot. Maaren, can I begin with you?

M Maaren Shah 04:47

Of course.

P Patrick Jaicomo 04:49

What was it like to clerk for Judge Sack who, just like Judge Calabresi currently, has senior status but is still very active on the bench.

M Maaren Shah 04:56

He is very active and always has been and actually I'm pleased that the opinion I'll be discussing tonight is is one of his, which I always enjoy. You know, it was a really wonderful experience, as I think many clerks will probably tell you. The Second Circuit, at least during my time there, was a very collegial court, both within the chambers between the judge in the law clerks, in between chambers between the judges and clerks. As we all know, it's down here in I guess, what you might call federal, you know, judiciary square, to have a throwback reference to DC. It used to be, at least when I was there, in the same building as the Southern District. It's down here with the New York State courts as well, City Hall, the prosecutor's offices, federal and state. And so you really kind of get to know everybody in this ecosystem, which is quite impressive. And you know, something that was really notable about my time there, I suppose, is that my year the judge had four clerks, one of whom he adopted from Sonia Sotomayor's chambers around the time that she was elevated to the Supreme Court. We were all very close, both among each other in with the judge, you know, I keep in close touch with the judge today, I was emailing with him last week for his birthday. I know his family and his wife quite well, he knows my family, my kids. It really was a quite a special informative experience, both personally and professionally. And I would say a little known piece of inside baseball, I suppose, which is exemplary of the circuit is that they all tend to call each other by acronyms, their initials, right. So Robert D Sack is RDS. Robert A. Katzmann is RAK and so on. And so the judges call each other that way. They refer to each other that way. They call their clerks by by their initials as well. So you have to very quickly learn everybody's acronym to know who anybody's talking about in the court. But I think that exemplifies kind of the spirit of collegiality that the judges have with each other. And that was really a hallmark of my time on the circuit.

P Patrick Jaicomo 07:16

Did the clerks use those acronyms for each other or the judges?

M Maaren Shah 07:19

Yes. Still to this day.

P Patrick Jaicomo 07:23

Well, if you're not saying judge first then it must be pretty collegial.

M Maaren Shah 07:26

It definitely is.

P Patrick Jaicomo 07:28

Bruce, you clerked for Judge Oakes a few years before Maaren was on was clerking on the court I think.

B Bruce Green 07:34

Before she was in elementary school.

P Patrick Jaicomo 07:38

Could you tell us about the influence that he still has on you and your experience working for him?

B Bruce Green 07:44

Well, I you know, first of all, it was my first job out of law school. So and I still think it's the best job one could possibly have at both school. And a lot of my experience was similar to Maaren's and some of it was different. He was sitting in Vermont. Vermont has traditionally had just one court of appeals judge. He had actually clerked for the Court of Appeals judge on the Learned Hand court when he was out of Harvard, and which made him feel even more, you know, you're talking about collegiality, but he felt this connection going back decades to the court. And I think his love of the court partly grew out of that. And so it wasn't, you know, you talk about the ecosystem in New York. And I do think if you're a law clerk in New York, you get to know the judges, and the judges' law clerks in a way. We come down one week a month. And we would have lunch with the law clerks for the other judges, both district and court of appeals judges, but otherwise, we didn't really have that much interaction with the other judges. But we had an amazing amount of interaction with Judge Oakes, JLO, because we were in Brattleboro, Vermont. And he had lunch with us a couple of times a week. And his secretaries came along, and one of his secretaries, Cynthia Fairchild had been with him since he was in law practice. He had been in a two person practice in Brattleboro. And she was still taking notes, shorthand, and then typing up the opinions. And one thing that I think was a little different about Judge Oakes was that he wrote his own opinions. And, you know, you could say whatever you want about the Second Circuit judges, but the truth is, when I was clerking, at least the law clerks were doing the first draft and having a lot of input. And when I was clerking for Justice Marshall, the same was true. But he was very old school. And so he would take the memos, bench memos and the briefs. And he would dictate the opinion to Cynthia and she would type it out and then we would edit it. So that was a little different. But I kind of you know, was terrified the following year when I was clerking for Justice Marshall. Because Judge Oakes only let us each write one opinion. The last sitting we each got an opinion where we got to do the first draft. And, you know, all of a sudden, I was gonna be put in this position where I actually had to write these opinions. But in any event, the biggest thing I learned from him, honestly, was not about the law so much, but about how to treat people within law practice. He had been a politician. He was state attorney general. He knew the names of everybody. He treated everybody the same no matter who they were. And he was unbelievably civil. And, you know, he referred to his law clerks as the children of my intellect. And we were like, you know, part of his family, we were

part of the extended family, we had reunions regularly. I'm still in touch with his wife, it was athird wife. And so she's my age. And it set me on a course where, when I try to mentor my students and work with younger people, I think about the judge. When I think about the respect he showed to everybody, including pro se litigants, you know, I think about the importance of treating people civilly, you know, within the law, they may win, they may lose, but you have to treat them respectfully. So in any event, I should stop. But it was obviously, I think you could probably get the sense of very meaningful experience from it.

P Patrick Jaicomo 11:26

Absolutely. Thank you so much, Alex, you clerked for a DC Circuit judge and then on the Supreme Court. But you have argued quite a few cases in the Second Circuit. What has your experience been like? And what do you think makes the Second Circuit stand out from the others?

A Alex Reinert 11:41

Well, so for sure, the judges are always prepared. There's no question about that. And every case, I've argued, has stretched well beyond the time that was allotted to it. So I think almost every argument I've had has gone at least an hour. Now, you know, when you're talking about arguing Iqbal, we argued Iqbal in the Second Circuit before it went up to the Supreme Court, you can understand why that goes for an hour. But I had a case in the last year that was a case out at Rikers involving an incarcerated person who had not received adequate medical care. That case went on for an hour too. So maybe it's just me. But they go on, they go on for a while. And also, maybe it's just me, but almost every one of my cases has prompted separate opinions. In fact, the first case I ever argued, I lost, of course, 3-0, but each judge felt compelled to write about why I should lose. They couldn't quite agree about why I should lose, but they all agreed I should lose. And so I think it's the intellectual sort of atmosphere of the circuit. You see it when you argue the case's. The curiosity, the willingness to hear you out. So that's my that's my perception. That's my experience, having argued there multiple times.

P Patrick Jaicomo 13:04

Great, thanks. But let's stick with you. And we're going to move into the discussion of the cases, all of which are of course Second Circuit decisions that were issued recently. So could you introduce McKinney versus City of Middletown?

A Alex Reinert 13:17

Sure, the McKinney is a case involving excessive force. Mr. McKinney was arrested by officers of the Middletown Police Department in Connecticut for attempting to rob a Subway. And he had consumed alcohol and various psychiatric medications and some some drugs and was in some distress. And following his arrest, he was placed in a holding cell and then displayed some concerning behavior to the officers: covering the cell camera with toilet paper, trying to engage in self harm. And the officers decided to transfer him out of that cell. And that's really where the conflict started. The officers, before they decided to transfer him, brought a canine to the

scene. McKinney said he wouldn't leave and when the defendants, the officers who were sued, opened the door, McKinney resisted as conceded by McKinney. And then the officers escalated their use of force: used batons, used tasers, used the canine immediately. And eventually, McKinney was significantly injured as a result of this use of force. Indeed, they didn't release the dog from Mr. McKinney until he was in handcuffs even though he had stopped resisting at that point. And so he sued for excessive force. And this is a case that had been up to the circuit once and the circuit had reversed a grant of summary judgment. And in that reversal had said a reasonable jury can find that the use of force here was unreasonable but didn't address qualified immunity. And so went back to the district court on qualified immunity and the district court granted summary judgment on qualified immunity and it went back up to the circuit again. Now, one thing that happened was the oral argument was before Katzmann, Menashi and Calabresi. Judge Katzmann sadly died and Judge Raggi took his place, which if anyone knows the circuit knows that that changes, frankly, the complexion of the panel. And so the panel, over a dissent by Judge Calabresi, affirmed the decision to dismiss the case on qualified immunity grounds. And for those of us who know what qualified immunity means there's really two inquiries. One is what was the clearly established law? Second, did the officers behave reasonably in light of the clearly established law? And probably the most critical part of the court's opinion was to say it wasn't clearly established that it was unconstitutional to use canine force after Mr. McKinney ceased actively resisting. And this is where the court says, Well, yes, there was case law saying that it's unconstitutional to initiate the use of force against someone who's not resisting. That's different from case law that says it's unconstitutional to continue using force after someone stopped resisting. This is the classic problem and qualified immunity of trying to figure out exactly what it means when you say law is clearly established and how specific the right has to be and how specific the case law has to be. And this is an example of a panel very strictly applying those rules to say, we need a case on point. You don't have a case on point. Even though you have cases involving use of force and use of canine force, you don't have a case involving use of canine force on these particular facts. And of course, Judge Calabresi he dissented and in his dissent really issued a broadside against qualified immunity, citing some of my scholarship, citing some of Will Baude's scholarship, some of Joanna Schwartz's scholarship and saying we need to do away with this doctrine while recognizing that as a appeals court, he really lacked the authority to do away with a doctrine. It really was a plea to the Supreme Court or to Congress. So that's essentially what happened in the case.

P Patrick Jaicomo 17:19

Yeah, so one of the things that I thought was interesting, and I wanted to ask the panel about is one of the criticisms that Judge Calabresi makes in his dissent is that the panel here is essentially bound by the law of the case from the earlier decision saying, No, there's at least a question of fact, as far as whether there was a constitutional violation here. And Judge Calabresi says that he interprets the majority's opinion here as essentially using qualified immunity to get around the fact that it can't say that there was no constitutional violation. And so I was hoping you could speak to the way that qualified immunity essentially allows courts to avoid addressing constitutional merits.

A Alex Reinert 18:02

Yeah, sure. I mean this is an unusual case in that normally, when qualified immunity comes up, if we know that the law isn't clearly established, the court can just address that question, rather

than addressing whether or not the conduct violated the law in the first place. And this is a failing of qualified immunity, it means the law doesn't develop. But in this case, because the panel had found already that the conduct as alleged a reasonable jury could find that it was a violation of the Constitution. The new panel was bound by that. And indeed, in a way Judge Calabresi is, I'll call it a judo move, right? He says, this is a quote, I can't help but notice that the majority at times seems to doubt that the use of force it describes was really unreasonable. In other words, they seem to be wanting to revisit what the original panel said, but they can't. And so then he says, and so it would seem, from now on in our circuit, that the use of force described by the majority, a calibrated escalation in response to resistance in the close confines of a holding cell is unconstitutionally excessive. That would be a remarkable holding, he says, and might well for purposes of qualified immunity, be a new and unexpected one. So he's trying to turn -- he's doing what he can in this dissent -- to turn the majority's reasoning against them to say, well, at least you've now said, as a matter of clearly established law, a calibrated escalation in response to resistance now is clearly unconstitutional. But it speaks to the problem you've identified, which is in general qualified immunity interferes with the development of the law in the future.

P Patrick Jaicomo 19:42

Yeah, I mean, I think this has been something that's an interesting observation that's been obviously true. Last term I think we saw two summary reversals by the Supreme Court in qualified immunity cases involving excessive force claims, and both of them struck me in a similar way to the majority here as situations where the court could have just said there's no constitutional violation under the Fourth Amendment because the force was reasonable, but instead they dispose of the cases using qualified immunity. And as Judge Calabresi points out that means that the law hardly develops at all, if it does, indeed develop. To the rest of the panel, does that trouble you from a constitutional advancement standpoint?

M Maaren Shah 20:26

Yeah, I mean, I think it is something that is troubling. And this, you know, this is an area for me, which is somewhat outside my wheelhouse. Although, Alex and Patrick gave me a good tutorial on qualified immunity before this panel, which is fascinating. So I'm very interested in it now. It is certainly a doctrine of judicial efficiency and prudence to dispose of cases at the threshold procedural gating issue, and not at the merits, if you can avoid reaching the merits. And I do think federal court judges are quite sensitive to that. The Second Circuit is very sensitive to that, and I think very prudent in not trying to, in most cases, overreach and address questions on the merits, which may not be essential to the resolution of the issue if there is a threshold procedural question. That seems to me to be the dynamic that's at play, oftentimes in these qualified immunity cases from my limited admitted exposure to them. And something that I think is interesting here, as Alex points out, because that's something that Judge Calabresi is clearly, you know, railing against to a degree in the limited fashion that he can given the procedural posture of the case. And it's one of the reasons I found this case, really fascinating, not just on the merits, but in terms of what it reveals about the Second Circuit. Because I think it's showing you two things that are quite typical of the circuit. The first is that this is a Judge Calabresi special. He is, as many of us know, somewhat left leaning to say the least. But more importantly, you know, very thoughtful and very strong minded and not remotely afraid to break away from the majority and write dissents. And I think you'll see that kind of, you know,

strongly held opinion and prolific writing style in two of tje decisions we're discussing tonight. Between the three cases, he's written four separate opinions, one majority opinion and concurrence to his own majority opinion. Right. And here, he has dissented and not only dissented but then written a separate appendix in which he says, quite thoughtfully and carefully, I'm dissenting on the legal merits of the question at issue but by the way, if I could just throw out some dicta here, I think this doctrine is completely bogus and I think it should be eradicated, which I think is very interesting. And the other interesting thing about this decision is, as Alex also noted, is just as Calabresi, is quite pointed in saying, you know, among other regrets that he has over the death of Judge Katzmann one seems to be that he suggests that Katzmann would have joined his majority opinion had he remained on the panel. And that too, I think, is telling about the circuit, because although it's not a very politicized court, generally speaking, the constitution of the panel does often matter. The judicial temperaments and judicial orientations of the panels here can be quite outcome determinative in certain cases. And I think you're seeing a reflection of that here.

P Patrick Jaicomo 23:48

Yeah, I'm glad you mentioned both those things, in particular, this appendix argument, because it obviously occasion to section in the majorities brief, where they offer a fairly muscular defensive, qualified immunity. I mean, at this point, even the Supreme Court, when it applies qualified immunity and actually comments on the doctrine itself, will concede, you know, this is a made up doctrine that's not based on the common law. And here we see the the panel majority kind of try to rehabilitate it a little bit, which was interesting. And Alex since your work was cited by Judge Calabresi, what do you think about the arguments made by the majority here that qualified immunity has a foundation in the common law?

A Alex Reinert 24:27

Well, I think the problem with the majority's argument is it neglects two pieces that I tried to excavate in my article. One is that to the extent qualified immunity is a doctrine of statutory interpretation, the mode and the canon of statutory interpretation that the Court used to create qualified immunity just is unrecognizable when one looks at that canon in the context in which the 1871 Civil Rights Act was enacted. So specifically, the Supreme Court bases qualified immunity on this candidate of construction that says we we disfavor implied repeals of the common law. But when you actually look into how that cannon was applied, from the Founding to Reconstruction, it was never applied to, to imply a defense in a statutorily created right, like the 1871 Civil Rights Act. So there's lots of other problems with how the Supreme Court has used the derogation cannon in the qualified immunity context. But that's the main problem that I don't think the majority grapples with. And then there's the part of the article that I write about, which is there was language in the 1871 Act that again, specifically said there shall be liability, notwithstanding any state law, custom, etc, to the contrary. And since the basis for the common law immunity doctrine that the Court initially recognized when it adopted qualified immunity in 1967 was state law, you can't ignore that language, if you're really going to be true to what the Reconstruction Congress was trying to accomplish. And then when you put that in the context of all of the evidence that we have about what the Reconstruction Congress was trying to do with the 1871 Civil Rights Act, it's really hard to justify under any textualist or originalist or purpousivist interpretation of Section 1983. Pick your approach to interpreting statutes, right? It's incredibly hard to justify a qualified immunity doctrine.

P Patrick Jaicomo 26:36

Great, let's move from one mechanism that government officials use to get out of accountability to another. And Bruce, can you tell us a little bit about Jean Carroll versus Donald Trump?

B Bruce Green 26:48

Sure. This a case that people probably read a little about in the newspaper. Judge Calabresi says this case is about torts and not Trump. But I think it's kind of about Trump. And it's also about statutory interpretation. So there's 80 pages of opinions altogether. Judge Calabresi's majority opinion is 57 pages. As Maaren notes, his concurrence to his majority opinion, is three more pages. And then there's a 20 page dissent by Denny Chin. So I have 80 pages and five minutes. I can't do the math, but I'm probably gonna skip a few pages. So Jean Carroll, wrote a book in 2019, accusing Donald Trump of rape in a department store dressing room around a quarter century earlier. And Donald Trump, who was president at the time, I'm assuming he needs no introduction, held a press conference and did some social media stuff, denying that he had raped Ms. Carroll and also accusing her of lying. And so she filed the defamation action. And this implicated two statutes, two federal statutes and raised two questions of statutory interpretation and one question of state tort law. The statute ,the first statute was the 1988 Westfall Act, which provides that torts by certain government employees and officials when they commit them, they will be immune from tort liability personally, if they did the acts within the scope of their office or employment. And in that case, the action will be against the federal government rather than against them individually. So the idea is on one hand to relieve federal government employees and officers personally of the anxiety and the expense of having to defend themselves when they've committed torts in the course of their work. But on the other hand to provide some compensation, a pretty deep pocket. The US government mints money, probably good for a judgment. So the problem here is that for most torts, if it gets kicked to the federal government, then they'll defend the case and they'll pay a judgment. For defamation what you look to is the Federal Tort Claims Act, and Federal Tort Claims Act provides that there's no defamation actions against the federal government. And so the effect here if the Westfall Act applies, is that Donald Trump will be personally immune, but on the other hand, the government can't be sued either. And so in this situation, if the Westfall Act applies, the plaintiff Ms. Carroll is out of court.

P Patrick Jaicomo 30:06

Jim Pfander calls this Westfall shuffle. So you've got this situation where someone sues a federal official for a tort, the United States government says they were working for us, so you have to sue us instead. But oh, by the way, you can't sue us because it falls into an exception.

B Bruce Green 30:23

And the process is that the Attorney General comes in and certifies that this act was done by a federal official in the course of their work. And not surprisingly, the Attorney General of the United States under the Trump administration came in and filed that certification. So the first

question is, is he an officer of the government who's covered? And this takes up a lot of pages of both the majority and the dissent. The district judge had said he's not because -- it's just too exhausting for me to explain honestly.

P Patrick Jaicomo 31:02

It's a very philosophical exercise of statutory interpretation.

B Bruce Green 31:06

I thought the most Calabresi the thing he does is he cites a paper that he wrote 61 years before about about torts and frolic and detour. It would be good for my first year students in their legislative interpretation course. There's a lot of pages devoted to -- even though the President isn't explicitly included, and it refers to departments and he's not in a department. The word includes is in the definition. And so the non inclusion doesn't exclude him because the word includes is inclusive. That's probably more than you want to know already. But the majority says the Act applies to the president, even though the President isn't explicitly included, largely because, after engaging in this whole extensive statutory interpretation thing, they say, well, it ends up turning on what the word employee meant back in 1988. And an employee is somebody who works for other people. Donald Trump works for the US government, blah, blah, blah. The dissenting judge, Judge Chin says, That's not what I think employee means. It's somebody who's under the control of others. He's out of control. Well, that's my gloss. He's not under the control, he is the boss. And so he's not an employee. So but the next question then becomes, was he acting in the course of his employment? And according to prior Supreme Court decisions, that even though that's a phrase within the statute, you look to the law of the state, the respondeat superior law of the state, and everyone here agreed for whatever reason that the DC law applied. And so the question was, what is DC law say about whether defamation committed in a press conference is when your professional employee as a precedent? Well, of course, that's a question of first and hopefully last impression. There haven't been a lot of presidents who've engaged in defamation in the course of press conferences. And so what the dissenting judge says is, of course, you know, under however you interpret that in DC law, no president isn' employed for the purpose of defaming people at a press conference, particularly people who are accusing them of wrongdoing in the course of their personal lives prior to being president. We gotta send this back for trial. The majority and Judge Calabresi spends another, like 30 or 40 pages on this. Basically, he says, Well, if it was clear, we would resolve it, but it's not clear. And in the course of this, I don't think he cites you Alex, but he does cite himself in three different opinions. And I have to say in my articles I always cite myself a lot, too. So it's probably only fair. But the point was, you know, whether someone's doing something in the course of their work, you could view it in two different ways. The traditional way, you know, he wasn't the more modern way he doesn't really say he was. So I don't know why they go through the whole interpretation.

A Alex Reinert 34:30

They go through that whole thing. This long disquisition on the DC court of appeals case law, and I couldn't tell I mean if either it's justifying this first ever certification from the Second Circuit to the DC Court of Appeal. Right. It's first time they've ever done it right.

M Maaren Shah 34:43

That's how I took it, yes.

A Alex Reinert 34:46

Or to sort of to suggest an answer. You didn't take it as to suggest an answer to the question? Because it felt like it was skewed a little bit.

M Maaren Shah 34:53

Yeah. I kind of took it as as a full throated justification for we're not punting and uncomfortable issue. We want to have a long roadmap that justifies certification to a different court. Now it's your problem.

P Patrick Jaicomo 35:05

Yeah, there were a lot of twists and turns because Judge Calabresi goes through every single decision for the DC Court of Appeals, and then a bunch from the DC Circuit. He says, Well, on the one hand, this, on the other hand, that -- just goes back and forth, and back and forth.

B Bruce Green 35:19

They say they're applying this test. But when you read the explanation, it looks like that test. And of course, the DC Circuit doesn't really count, because it's really the DC equivalent of the state law. But nevertheless, maybe it has some insight and who cares? certifying the question, and then the concurrence, because he then writes, well, I probably shouldn't be writing this and you don't really have to pay attention to it. But keep in mind that the reason for the modern rule, which expands employer liability is so that the employer will will internalize the cost. They're the ones who could avoid the risk, they should pay the cost, but it works just the opposite here. Because under the Federal Tort Claims Act, there's no defamation action against the government. So rather than having the government internalize the cost, you're putting it back on the defamed individual. And I'm not saying that matters. I'm not saying you should think about it. Why is he writing?

M Maaren Shah 36:17

Don't think about the pink elephant in the room.

A Alex Reinert 36:18

I have deemed it appropriate to point to the existence of this recurring and troublesome question which the DC Court of Appeals is, of course, totally free to ignore.

P Patrick Jaicomo 36:28

Yeah, I mean, it's interesting, because in the dissent, you have this statement that says, the President is in no respect the servant of a master. And that's the discussion of this issue of whether the President is an employee under the Federal Tort Claims Act. But it obviously goes to this sort of more policy driven question of scope of employment that Judge Calabresi talking about, because if there's no master to correct the problem, then this whole internalization concept doesn't really work very well doesn't.

M Maaren Shah 36:57

Yeah, I thought that was a really interesting part of the dissent as well, because you know, if you read through the dissent, and as Bruce says, you know, the majority opinion plus concurrence, take some 50 odd pages. And they go through this long judicial history of various doctrines and statutory interpretation. One thing they really don't grapple with, which I thought was quite interesting that Judge Chin mentions at the end of his dissent, is, you know, putting aside the statutory interpretation about whether he's an employee or not, right, and putting aside the debate on the scope of respondeat superior liability under the DC law, whether it benefits the employer or whether it's within the scope of risk. One thing that's undeniable here is that at least some of former President Trump's statements in the press, we're clearly outside either of those definitions, right. And he points to, in particular, the one statement that he made that, quote, she's not my type, and says, you know, under any interpretation of DC law, you couldn't plausibly find this statement to be within the scope of anything, right. And that, if you take it to its logical conclusion should dispose of the of the issue, pretty conclusively. But the majority really doesn't grapple with it at all. And I thought that was a very interesting kind of trains passing in the night situation for a combined opinion of some 80 odd pages.

B Bruce Green 38:21

You know, both the opinions we've been talking about, turn a little bit on how you frame things. And so, you know, the AG's position is press conferences are within the scope of the president's -- I don't know that tweeter twittering is -- but press conferences are and therefore, whatever he says at the press conference. But that's like saying, pizza delivery is within the scope of the Pizza Hut guy's job and therefore beating up the person to whom you deliver the pizza is -- that doesn't make any sense to me. And in your opinion, also, it's similar, it's like, is the case about, you know, tasering, beating and having a dog mangle somebody who's in their pajamas in a jail cell and completely defenseless -- or does it make a distinction that it was a Doberman and not a Rottweiler? At what level of specificity,

A Alex Reinert 39:18

That's a situation in which the level of specificity when you scope it down, makes it harder to recover. And this is a situation where with the level of specificity as you scope it up, makes it harder to recover. Right. I mean, that's the interesting connection. I can't leave this case

without imploring who any law clerks to never write a footnote like footnote two, which is the cleaned up footnote which basically says, we're just going to assume every time you see a quote here, it may or may not omit citations or other material. It drives me crazy. So I can't

P Patrick Jaicomo 39:56

I flagged that and thought, you know, it would be a lot easier to write briefs if I could just say that at the outset.

A Alex Reinert 40:01

Just put a note -- Don't worry, I'm just basically approximating

P Patrick Jaicomo 40:06

I'll just paraphrase it all and just assume that it's accurate.

B Bruce Green 40:08

And also ignore Bluebook while we're at it. But so since we're talking about process and not the substance of this, so both these opinions also make me think the judges of the Second Circuit have too much time on their hands. Because why is Judge Calabresi doing this whole thing on a question that they're ultimately certifying to the DC Court of Appeals? And why in the other case is he writing this long appendix, but more so I would not blame him because he's a senior judge. And he can do whatever he wants with his time. But why is the judge in the majority who's an active judge, then taking on his appendix and writing a whole thing on? Like, is it that they all wish they were on the Supreme Court or the job is not interesting and they finally find an issue that they could talk about? Or do they have too many law clerks or too much time? I just I don't get it.

P Patrick Jaicomo 41:03

These are the questions I should have been asking. This is the behind the scenes stuff. So Maaren and Alex, tell us what is the secret here? Why is this happening?

M Maaren Shah 41:11

So my read at least of the McKinney case, and I also thought it was very interesting that the majority spent a lot of time addressing the appendix rather than the dissent. And, you know, given the questions around the composition of the panel that that Judge Calabresi called out in terms of the of the majority opinion, my read on that was that the majority to my mind, clearly thought that Judge Calabresi's dissent, and perhaps even the first panel's remand was an outcome oriented result. Meaning, you know, he has strong disagreement with the doctrine such that he back filled the legal questions to get to the result that he wanted to. That's the

read that I took of it. I think knowing his scholarship and his political orientation, it's not that surprising that that the court kind of, or the majority opinion, kind of looked through the legal analysis to the result on this one. And I think they were, I don't know, influenced by that in their treatment of their own majority opinion.

A Alex Reinert 42:22

Yeah, it's interesting on that point, in particular, because in the appendix Judge Calabresi has, you know, almost a two pages long citation of all the other judges who have criticized qualified immunity. And there are a lot of big name conservatives, not only Justice Clarence Thomas, but you know, Judge Ho ind the Fifth Circuit, Judge Willett in the Fifth Circuit, and so on. I'll just add one other hypothesis, which is that a lot of judges have been criticizing qualified immunity in opinions, like Judge Calabrese, but in majority opinions. And a lot of judges who are identified as quote, unquote, conservative judges in other circuits have been criticizing qualified immunity for the same reasons that Judge Calabresi does it. And I think these two judges who also are conservative judges, maybe felt like that's not the only way to go. Here is a model for how you can write a defense of qualified immunity that accounts for some of the arguments that are being made by people like me, by Will Baude, Joanna Schwartz, etc.

B Bruce Green 43:23

So what does he need to do it?

P Patrick Jaicomo 43:25

That's a great question. Yeah. All right. Before we run out of time, we need to get to Maaren's case. So why don't you tell us about United States versus Amalfi and we can transition here to discussion of marijuana and rational basis review?

M Maaren Shah 43:38

Absolutely. Two things you thought would never go together, right?

P Patrick Jaicomo 43:42

That's IJ's wheelhouse.

M Maaren Shah 43:45

Maybe I should litigate like you guys litigate. So this is a decision written by Judge Sacks. I'm pleased to read it. And I think it is written in a very hallmark of his style, which is very eloquent. He doesn't use simple words. But he does manage to communicate a complicated topic very simply and efficiently, I think, which is something that I really took to heart in in clerking for him. So this is a criminal narcotics case, a narcotics conspiracy case, an affirmance from the

Western District of New York. It was not as divisive as the other two cases that we've discussed tonight. This is a unanimous majority opinion no dissent, no concurrence. And essentially the facts are pretty straightforward. Two brothers, the Green brothers were convicted of conspiracy to distribute marijuana, I think sentenced to two and four years respectively. The facts are not the interesting part. I think they their legal argument is the interesting part. This is very far outside my own wheelhouse, but I do think it's a real example of very smart, creative lawyering. So I'd like to read it. And what the case is essentially about is, you know, a dressed up administrative challenge that is transformed into a constitutional challenge. And that's an issue that the judges wrestle with as a threshold issue in the decision. And essentially what the Green brothers argued, is that -- so stepping back for a moment, they're convicted of narcotics conspiracy, conspiracy to distribute a controlled substance. And under the Controlled Substances Act, there are four schedules in declining degree of severity on which drugs are listed. Schedule One is the most severe, so to speak, the most dangerous drugs, and it lists marijuana on that schedule. And one of the statutory criteria for listing a drug on Schedule One is that it has no currently accepted medical use. Something that I'm sure a lot of people in today's day and age would debate still applies to marijuana. And so the Green brothers argued that the scheduling of marijuana on schedule one is unconstitutional, because there is no rational basis to conclude that it meets the statutory criteria, meaning there's no rational basis to conclude that it has no currently accepted medical use. That was their argument. And the judges take issue with that in the same way that the district court did. And the meat of the holding really revolves around whether, you know, kind of this somewhat tortured issue of whether technical noncompliance with the statute renders something unconstitutional. But before they get there, they they deal with two threshold issues, which I think are equally interesting. The first being whether there's a failure of jurisdiction, because this is essentially a dressed up administrative challenge, masquerading as a constitutional challenge. And the judges do, you know, I think, pretty plainly admit that the ordinary way to challenge the classification of a drug on the schedules is to go through the administrative process. And if you make an administrative challenge to the agency, and you lose, it goes straight to the circuit court, meaning that the district court would not have jurisdiction to hear it. So the government essentially argued that the district court was without jurisdiction to hear this. And the circuit court said no. Although the ordinary way for challenging the scheduling or rescheduling of a drug like marijuana would be an administrative challenge, this was nonetheless properly formulated as a constitutional challenge. So they're not mutually exclusive things. Just because it could have been done as an administrative challenge does not mean that it had to be done as an administrative challenge, and that the brothers had properly stated a constitutional claim however misguided. That's my editorializing of what they said, but it's pretty close. And one of the things that was, I think, notable in the panel's discussion of this was that they noted that the brothers were not asking them to reclassify marijuana on a different schedule. They were simply asking the court to strike marijuana from the schedules altogether as unconstitutionally placed on schedule one and leave it to the legislature to reschedule as and how appropriate. And I think that's one of the factors that that saved the jurisdictional infirmity. And, you know, frankly, another hallmark of pretty smart and creative lawyering. So I thought that was quite interesting.

P Patrick Jaicomo 48:57

Yeah, this, I mean, this definitely struck me as well as a case where we have nothing left to lose here. Like they caught us with our hand in the cookie jar, so let's make an interesting argument. And they definitely do that here. I wonder, I mean, this scheduling thing is itself a weird delegation process. And so you have Congress passing the Controlled Substances Act,

and initially scheduling things, but then it delegates that authority to the Attorney General who delegates it to the DEA, who is now in charge in the first instance of scheduling drugs. But marijuana has stayed there the whole time. And so do you think that this case might have been viewed differently if Congress hadn't set the schedule at all, but instead had delegated that authority entirely? And then, a year later the DEA had put marijuana in schedule one, or is that just completely outside the relevance of what we're dealing with?

M Maaren Shah 49:49

I don't know. You know, technically I think it's probably outside the relevance. I don't know how influential that kind of differentiation in process would have been on the court. You know, it is interesting to note the decision goes through this that Congress apparently initially put marijuana on schedule one as some sort of tentative recommendation. But somehow it just stayed there. And you might conclude from that that, you know, times have changed and it should no longer be on it. But the decision does note that, you know, there have been many administrative challenges to the scheduling of marijuana on schedule one, some as recent I think as 2016 or 2018, right, where some of the laws around marijuana use and distribution had started to change. And I think it's fair to say public sentiment had changed by then. And the administrative petitions for rescheduling were rejected even then. And so, you know, it is kind of a interesting procedural history of how it ended up on there. But it seems to have withstood scrutiny in several different forms of attack even up to recent times.

P Patrick Jaicomo 51:01

Well, I'm glad you brought up scrutiny, because I do want to talk about rational basis here. But I have to point out that I'm not terribly surprised that in 2018, or whenever it was that the DEA itself didn't agree to move marijuana down or deschedule it. So I think there might be a bias there in play. But let's talk about the the impact that rational basis played here. I'll just read a quote here about how this interesting court doctrine works. Here, the circuit says: rational basis review asks not whether it is reasonable to conclude that the specific criteria in the statute have been met, but rather whether there is any conceivable basis that might support the classification. So do you think if the rational basis test wasn't the standard here, and we were just kind of weighing this in more of a 50-50 way that there's a potential the outcome would be different?

M Maaren Shah 51:54

Yes, I do. I don't know if that outcome would have been different necessarily at the circuit court versus in an administrative process. But I think the decision even notes, you know, even if this scheduling wouldn't and shouldn't have withstood challenge through an administrative petition, which properly challenges, I guess, the necessity of the scheduling on the scheduling criteria, that still doesn't mean it's unconstitutional under rational basis review. Now, had stricter scrutiny applied, would the would the circuit court have felt more free to get into the merits of that issue? Yes. I don't know if it would have been outcome determinative. But certainly, yes, you know, rational basis review is an extremely, extremely deferential standard. And that's what you see at play here clearly, you know what I mean. The opinion even notes, you know, that the Green brothers made kind of a half hearted attempt at stricter scrutiny in the district

court. And by the time they got to the appellate court, they put some footnote in saying like, we reserve the right to argue this and never did, because like, even they couldn't make that argument with a straight face.

B Bruce Green 53:00

Can I address that?

M Maaren Shah 53:01

Yes. Please.

B Bruce Green 53:02

You know, so they make an equal protection argument. And it's sort of mocked by the district judge who says, marijuana has no equal protection rights. Only people have equal protection rights. But and then they relegate to a footnote, the court about, you know, footnote eight, they failed to show that marijuana's inclusion on schedule one was motivated by discriminatory intent. So if I were a law clerk, I would you know, rather than spending my time on those other two opinions, writing the appendix about, you know, whatever. I would say, not me, because I'm in my 60s, but I would say, Are you kidding? Everybody knows that the history of cannabis regulation is racist. And all you have to do is Google marijuana, racism, and criminalization and you will find a ton of books written about how it was directed at you know, Mexicans who were bringing cannabis across the border and why do we regulate marijuana one way and alcohol another way. It was associated with jazz. And that what went all the way through to the 1970 Act that put it on schedule one. So maybe it still doesn't make out an equal protection claim, but still it's imbued with racism? Why aren't they talking about that as long as you're writing little appendices?

A Alex Reinert 54:38

As long as I still get my citation I'm good, Bruce, they can write about that.

P Patrick Jaicomo 54:41

You're right. I mean they do wave it away with almost no discussion at all in footnote two there. They say essentially, that the Green brother's racial classification arguments that marijuana scheduling was racially motivated and imposes an outsize burden on people of color failed because they could not establish the Congress acted with invidious discriminatory purpose. But there's there's no more discussion of that point even though it's like you said. It's been the subject of books and admissions by the Nixon White House staff and all sorts of other things like that.

B Bruce Green 55:11

B Bruce Green 55:11

And my other rational basis question is this. So they say, Well, we could posit reasons why you might put marijuana on the strictest schedule. But they don't say we could posit reasons why we would put marijuana on a schedule that's ostensibly of drugs that have no medical use. When half the states have legalized marijuana, medical marijuana, Congress won't fund the US government Justice Department to go after people for marijuana possession, and the Justice Department doesn't want to go after them. So why is the rational basis test about whether it's on the strictest schedule and not on the non medicinal use schedule? They don't really explain that.

M Maaren Shah 55:57

No, they don't at all. And I think they do they do kind of a dodge of that as well, I think, in terms of really crafting the opinion as a threshold procedural issue, where the constitutional answer to this question may be different than the administrative answer to this question. I think that's kind of how they dodge it. They seem to say, look, if you were to challenge this, again, through the administrative process, maybe you'd win because it does seem like it shouldn't be on that schedule, because it can't quite meet that one criteria. But that's not in our purview to decide because of this very deferential rational basis standard.

B Bruce Green 56:37

And that shows the difference between your judge and Judge Calabresi.

M Maaren Shah 56:40

Exactly.

B Bruce Green 56:41

Cause your judge did not write a concurrence to his own opinion.

M Maaren Shah 56:45

Correct.

P Patrick Jaicomo 56:46

If only. I think that's a great place to end here as we talk about the confusion created by the rational basis test. But I want to thank all of our panelists for being here today. This has been a great discussion and thank all of you who are listening to the podcast and who are listening here in person and remind you all to get engaged. Thank you.