ShortCircuit289

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Anthony Sanders, 0:26

"Individual freedom finds tangible expression in property rights." Those stirring words, you might say Justice Kennedy-esque words, were written 30 years ago by Justice Anthony Kennedy. It's a phrase that we often quote here at the Institute for Justice in our property rights cases because it is indeed true that individual freedom finds tangible expression in property rights. Well, I'm very pleased to say that a couple of federal courts of appeals agreed with us recently in a couple of victories for our clients, and we're going to be talking about those victories today, about property rights here on Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagements at the Institute for Justice. We're recording this on Friday, September 15th, 2023. I will introduce our two litigators about their two cases in a moment. First, a couple previews for those of you who might be interested in seeing the Center for Judicial Engagement when we're on the road, I'm going to talk to you about a few events coming up, most of which I believe are open to the public, if we happen to be in your neck of the woods. First of all, my colleagues Justin Pearson and Josh Windham will be doing our annual Supreme Court preview next week -- so just a couple of days after this episode comes out -- at the University of North Carolina on September 18th.

And then there's a couple more events, similar events, Supreme Court previews, that'll be at other schools in that area; there at Wake Forest the day after that, and then the day after that (next Wednesday) they will be at Duke. Now I will be talking about the book *Baby Ninth Amendments* that some of you listeners may be familiar with now. And if you've read the book and want to ask me some questions about or just want to come say hi and say you like Short Circuit, then you can find me at a few different events in the coming weeks. So, on Tuesday, September 19th I'll be in Madison, Wisconsin. I'll be speaking at lunch talk at the law school, and then in the evening there's an event at the Madison Club. And you can see all these events on our webpage for the book, which I will put a link to in the show notes. Both of those events are co-sponsored by the Federalist Society and the University of Wisconsin State Democracy Research Initiative. Then in October I will be in the New York City area at Pace Law School, midday on October 18th. And then Seton Hall, where I will be joined by Judge Paul Matey of the Third Circuit on October 19th. Then I'll be in Austin, Texas on October 25th. And November 8th, I'll be speaking at Georgetown Law at their center for the Constitution on their series on new books about constitutional law. So again, find those details on the website, I'd love to see it and hear what you think (or don't think) about Short Circuit while we're on the road. But what I think about today's episode is that I am honored to have on two property rights experts to talk about their

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victories on property rights. I'm joined by two familiar voices to our listeners, Wesley Hottot and Bob McNamara. Welcome gentlemen.

It's great to be back.

Well, Wesley, you have been toilin in the streets and parking lots of Wayne County, Michigan (that's Detroit, for those of you not familiar with the area) about people's cars and a nasty habit they have of taking them away. And we got some great news from the Sixth Circuit couple of weeks ago. So take it away.

Wesley Hottot, 4:29

Yeah, this is Ingram vs Wayne County, Michigan. For those who want to look it up it's the Sixth Circuit's 22 12 62 case. And in it, the panel unanimously holds that people have a right when their vehicles are seized to a hearing in front of some sort of neutral arbiter presumably a judge within two weeks of the time of the seizure. And it may sound like a modest right, but this ruling is huge for a couple of reasons. One, since the late 2000s we've been involved in other people's cases and advocating for the Supreme Court to take up the issue of when a prompt post seizure hearing is necessary. And the Supreme Court has come close before, most notably in 2009 in the case of Alvarez vs. Smith out of Chicago. That case got mooted. And, you know, in the decades since we've been diligently pursuing these cases, in the lower courts; there's now an entrenched split, which the Sixth Circuit now joins the Second as having the most aggressive protection for people's vehicles. The Second Circuit case I'm thinking of, is Krimstock vs Kelly. At the time that was decided, Justice Sotomayor was on that court and wrote that opinion. And there it was New York City, where she said that because of the importance of peoples' vehicles, which you know, now that I'm saying it out loud, is perhaps decreased in New York, but who knows what the factual circumstances were. But because vehicles are important to people, you had to have a hearing within roughly a week of the seizure. Here we get two weeks, and the Supreme Court -- this is the me bearing the headline, I suppose -- is set to consider this next fall. They have argument I believe it's October 30th of this year; in any event, it's in the midst of the early part of next term. So sometime next year, we're finally going to get an answer from the justices as to when a vehicle seizure gives rise to this right and when that hearing before a neutral arbiter has to take place.

Bob McNamara, 7:00

And I mean, the thing that gets me about this issue is that it's sort of this perfect marriage of originalism and practicality; like you can make originalist arguments about how seizures were treated at the founding, but also on the flip side, it's just such an intensely practically important issue. It sounds like "Wait a minute, they can seize your car and not have to explain themselves for a week, for two weeks?" And like the underlying reality on the ground before these courts got involved and before kind of all of this litigation, was that they would seize peoples' cars for months, without ever, ever explaining to anybody why they thought it was a good idea, why they thought they had the right to do that. And like

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that's the Sotomayor opinion, in Krimstock, right? That is radically life altering for people. If you're one of the majority of Americans who doesn't have the spare cash on hand to just buy a new car because they stole the one you're driving, like you can't get to work, you're getting fired, your kids aren't getting to school – and the idea that they can do that for nine months, and at the end of the nine months, go to a judge and say “Oh, oops, we did this by mistake” is nuts. And yet there are circuits where that's the law.

Wesley Hottot, 8:13

I appreciate Bob's expression of outrage. Sometimes I feel like a doctor that, you know, is looking inside of the guts of things so much that it doesn't look gross to me anymore. But he's right. I mean, our clients waited a minimum of six months before they had the first possible opportunity to go before a judge. And it's important to emphasize really how modest it is what we're asking for; we're not saying that you have to release people's cars within two weeks, we're saying that you have to justify the seizure before a neutral person, a judge, and if you can meet the minimum constitutional standard of probable cause to hold it (usually for the purpose of a forfeiture proceeding, the full legal process of taking the car) then the government can keep it. But a person at least has the safety valve where they can go in and say, like what happened to our client Stephanie Wilson, “My car was literally seized because I was told I was in the wrong neighborhood.”

Bob McNamara, 9:17
This is one of the things that really strikes me about IJ litigation, is like how long have you been litigating Ingram, Wesley? When did you file this case?

Wesley Hottot, 9:27

February 21.

Bob McNamara, 9:28
So two years of litigation and you get this momentous ruling. And I feel like when you describe it to most people, they're just like “Oh, yeah, that's that's obvious. Like of course they have to do that.” But you guys have no idea what used to happen, you don't know how hard this was.

Anthony Sanders, 9:44

Wesley, tell us a bit about you know, the system that Detroit has and this whole “You can get your car if you pay cash and if you don't, it's there forever.”

Wesley Hottot, 9:53

Yeah, this is one of the things that struck the panel is being "off" and very questionable. So Wayne county and the city of Detroit both have aggressive vehicle seizure programs, and they have several tools at their disposal. The City of Detroit has ordinances for blight for example, that when you are I hear "blight" we think of like decaying decrepit homes or something like that. But they but they use that ordinance to cover really anything unsundry that you wouldn't want having around -- like people trolling for prostitution, or doing drugs on the street or, you know, loitering in a place where they're not supposed to loiter -- and they'll seize vehicles for those sorts of things. Now, if we look at Wayne County, they enforce Michigan law. And Michigan has this strange, overbroad confusing system where they have three different statutes at least, one of which is ominously called the "Omnibus Forfeiture Act," it's effectively like, if you can't find another way to see something, here's a bucket. And we have many sustained credible reports over the years of people essentially being told "get out of your car, we're seizing it, you shouldn't be here." And on top of that, I mean, the justifications provided in court are things like Stephanie Wilson, our client, picked up a person who was alleged to have been high on drugs at that time; there were no drugs in the car, there was no allegation that he was selling drugs, it's just she picked up someone who they thought was high, therefore her car was seized and detained for two years before we ultimately got it back. And when they seize vehicles, for reasons, sometimes serious but more often questionable like this, you then have to wait a minimum of three days before you can talk with the government about what the justification is and what the next steps are. But if you don't act within 20 days, that 17-day window after three days, your car's automatically forfeited -- you'll never see it again, it's been abandoned. If you do act, typically, what you have to do is go to a DMV-like window, where you talk to a clerk behind what appears to be bulletproof glass. And they tell you that you have two options: You can abandon the car if you want, or you can pay a set fee of $900 the first time it happens, $1,800 the second and $2700 the third. So it's this like incremental fee scale, regardless of what it is you are alleged to have done. And your car can be released. The third and final option is you can wait. You can wait for prosecutors to start as forfeiture proceedings against you, and that way, we have demonstrated with extensive evidence is a minimum of six months, sometimes longer -- a year, 18 months or longer. And not for reasons like the parties are agreeing to these delays. No, if you do want to contest your forfeiture, the county makes you go to a series of what they call pretrial conferences, which suggests there's going to be a judge and we're making progress. But in fact, it's a meeting with prosecutors, and no one else, there's no neutral person there, at which they pressure you to pay what they call the redemption fee. And so one of the things that rankled the Sixth Circuit panel it seems like, was that you could have used your car and admitted that you were using it for the purpose of picking up prostitutes. Or like Stephanie, you could have just been giving a friend a ride. And either way you could pay this redemption fee and get your car back. But if you couldn't afford to pay the redemption fee, or you knew you had done nothing wrong and didn't think you needed to pay anything to get your car back, you were going to wait a minimum of six months. And you know that that has been the status quo in Wayne County for at least the last five years.

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Anthony Sanders, 14:28

Is that in Michigan statutes, that there can be these hearings without a judge and that if you don't show up you're automatically forfeited? Or is that just that's just kind of how the prosecutors view things?

Wesley Hottot, 14:48

It's a bit of both. As I said, the Michigan statutes are sort of disconnected -- there's a number of different paths depending on the circumstances, different procedures apply… But no, Wayne County has a unique system in that the redemption fee system and this pretrial conference system is something that I don't think exists anywhere else in Michigan, or possibly in the country. The pretrial conference thing happens under the auspices of a judge, one judge, of the local county civil court, who apparently handles all forfeiture cases but takes no active role in them.

Anthony Sanders, 15:38

So he/she does what the prosecutors tell him or her to do.

Wesley Hottot, 15:41

Yes, apparently, or you know, I mean, they've just set up this procedure that works administratively. And it's not that the judge is being bossed by the prosecutors, it's that him or her, they're just not aware of how this works.

Bob McNamara, 15:59
I appreciate that there's just a fee schedule -- that's how you can tell they're serious about fighting crime, right? That's what we do with bank robbery, like, if you rob a bank it's just $900, and if you murder someone, it's $900. Because you know, everybody gets one for free. Like it's just so obviously a ransom scheme. But it was gratifying to see the panel actually get mad at that. It just wasn't quite the issue; it's a due process case, but the panel nonetheless was kind of like, wait a minute, guys, this looks a lot more like ransom than it looks like crime busting.

Wesley Hottot, 16:30

Well, I'm not sure they would have said anything if the government hadn't from the beginning to the end sanctimoniously insisted that they were protecting children and, and vulnerable people from johns and drug users and the like. It's being beat over the head with the supposedly moral high ground by them that I think led the panel to be like "Okay, let's get real about what's happening here. This is a revenue raising program where you target some of the weakest people in society."

Anthony Sanders, 17:02

So the majority opinion by Judge Bush was that because of the way things were, tremendous victory says that you have to have a hearing within two weeks to try to get your car back. But for one judge, that wasn't good enough. So what happened there in the concurrence?

Wesley Hottot, 17:23

Yeah, I was surprised at the argument that both Judge Bush and Judge Thapar were pointed about wanting a deadline for this hearing. And Judge Thapar said, I think correctly, that there's benefits to a bright line rule that everyone knows and recognizes -- a deadline. And they both press me for what that deadline is, and I've never had this happen before where I asked for something and the court went even further. I eventually had to admit to them that I thought the constitutionally required deadline based on the cases out there was at most 30 days. And Judge Bush and the unanimous panel came to the conclusion as we said of two weeks, and they did quite a good job of providing historical support for that. Judge Thapar writes a separate concurrence insisting that the hearing should take place within 48 hours. So I think the cases best support this idea of 30 days…

Bob McNamara, 18:33
Not anymore.

Wesley Hottot, 18:35

the Supreme Court and Culley vs Marshall. That at the time of the founding, luminaries like Alexander Hamilton were insisting that people had a right to quickly challenge custom seizures and the kinds of civil forfeitures that we're dealing with here. Even though we think of that time as the government having the power of seizing at will anything that it wants, in fact, there have been restraints since the 1790s on the sovereign power to seize property and just hold it. And that bears emphasis we're not insisting that these things be released or the cases thrown out or anything like that, we're insisting on what everyone I think instinctually recognizes as the constitutional minimum: A probable cause to believe that a crime has occurred that justifies binding the property over for trial. You know, this is a problem, incidentally, that we're confronting in the context of incarceration right now, too, right with all of the bail debate. But finally, I think people are getting serious about what the Constitution has always said, and what the founding generation thought was super important for a reason.

Anthony Sanders, 20:08

And an interesting move I thought that Judge Thapar made was that he does go into this originalist debate that also Judge Bush does, but then he also just has a really practical answer, which is it's that old case that says that you have to release an arrested suspect unless you charge him within 48 hours, and say look, if that can work for people that can work for cars. Of course people are more important than cars, but in thinking of the process and how people will really need a car, we're not just talking

about some random piece of property here, that you can get this done within 48 hours and so if it's good enough for one, it's good enough for the other.

Wesley Hottot, 20:53

Yeah. And you remind me of one of the sort of philosophically interesting things being batted around here that the government keeps saying is “Well, the rules here cannot be as strict as they are for incarceration.” Because just like you said, Anthony, people are more important than cars. But when you when you think about that argument, it's like hold on a minute – no , property is also important. And as the Supreme Court has many times said, some property is more important than others. Now, you can disagree with that if you'd like but for example, the home has a lot of special protections. And the side of cases that we're talking about, including the Sixth Circuit's decision in Ingram, they recognize that, particularly in the harsh Michigan winter, a person might need a car to get to their job or to take their kid to school or to get groceries. And that the government has to have a weighty reason for depriving someone of that for months at a time.

Anthony Sanders, 21:57

I can hear some of our urbanist friends or friends over at that group Strong Town saying that, you know, the government has mandated it to some extent we live in these neighborhoods where you have to have a car in order to practically live there. And yet at the flip side of it, they can take your car away and give you no process.

Bob McNamara, 22:14

Well, it's just that it's the least persuasive way to denigrate property rights to say things like, “well, people are more important than cars”…because they're taking these cars from people, and that's why we care. It’s not like “Oh, man, they're these junked cars and they're cubing them and that's a crime against the car,” like it's human beings who are suffering the real consequences of having their property taken away, and that's what matters.

Anthony Sanders, 22:38

That’s well said. Well, something in addition to cars that human beings dearly love, some more than others, are books. Now I like a good book as much as anyone else, I'm increasingly an eBook kind of person. I'm very happy that my book, for example, is available for free online if you guys are interested out there. But you know, some people still print physical books, and Bob, it seems that physical books are property, too. And can you tell me a little bit about that?

Bob McNamara, 23:12

You just wanted to talk about this case, you could pitch your book, didn't you?

Anthony Sanders, 23:16

Pretty much. I was happy when the opinion came out anyway.

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Bob McNamara, 23:19

Yeah, so our second case is another IJ case, it's Valancourt Books, LLC vs Merrick Garland. And the Valancourt case holds that when the government takes your property, it's a taking. It's another one of those IJ cases that once you win, everybody in the media coverage and the academic debate over this case has been like oh yeah, that's obvious, that’s clear. But it took five years of litigation to get the obvious clear result. And the case centers, as the name implies, around Valancourt Books, which is a small publishing company in Richmond run by James Jenkins and his husband. And essentially what they do by and large is revive forgotten gothic literature; they find books that have fallen out of print, they re-edit them, they lay them out, they have like a forward or some footnotes that explained like “Oh, to people at the time, this would be a reference to that thing everybody knew had just happened.” And they make them available, and they print them on demand. They have a print on demand vendor, so the book doesn't exist until someone orders it. Someone orders it, their vendor prints a beautifully bound copy. And they're a niche publisher, you know, they're not Random House, but they're successful -- people love them, they're doing important work for people who love these books. And they got a threat letter from the United States Copyright Office informing them that because they had published some 341 books without providing copies of those books to the federal government, they were subject to fines – fines that could have stretched into the high five figures or the l ow six figures. And James Jenkins, before he started his publishing company, was a lawyer. So he's a smart guy, and he's a tough guy.

Anthony Sanders, 25:07

He graduated from law school with me at the University of Minnesota, same year.

Bob McNamara, 25:11

That's true, he was a classmate of Anthony Sanders. So clearly the greatest class in the history of the University of Minnesota. And he says, like, wait a minute, like, what are you talking about? And the Copyright Office says these are these are copyrighted books and we're entitled to have free copies of them. And he says what do you mean, I haven't registered my copyright, but these are old books, like they were written hundreds of years ago. And also, I don't have $100,000 to give you. And the Copyright Office stuck to their guns, that because he had published books with new material, and their position was even those footnotes count as new material, he owed copies to the government. And the demand is based in kind of this weird quirk of federal law; because at the founding, if you wanted to copyright something you had to provide a copy of the copyrighted work to the federal government, you had to file it actually in federal district court, and that was how you obtained copyright as a property right. But that's not how copyright works anymore -- copyright now is automatic. As soon as you write something down, as soon as you fix an idea in any tangible form, that is instantly copyrighted. But the deposit requirement just kind of stayed in the law, that if something was copyrighted, you had to deposit it with the federal government. Which now meant that if you publish a book with a new idea in it, you owe the federal government something. And that seems to James and it seemed to us like that's taking. The government's just demanding your stuff without giving you anything in exchange, and the government can't do that -- that's what the takings clause means. It's all well and good if the federal government wants books, but these books are for sale on Amazon, and the government can pay for them like anybody else. And it took five solid years of litigation of the government resisting that insanely

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obvious conclusion. And the thing I like about the opinion is it does walk through every argument the government raised and they got kind of increasingly spurious as the case went on. But the government said that this isn't a taking because copyright's a good thing -- you get to enjoy the copyright, you benefit from the copyright -- and so you owe us your boo. To which we pointed out and the panel agrees, you could say the same thing about not being murdered -- not being murdered is great, and the police helped me not be murdered and so I owe the police my wallet. And that's not how the takings clause works; if they want to take specific property, they have to give you something specific for that specific property -- it has to be a trade. And there's no trade here, as the court recognizes. And this sounds like kind of a funny, quirky law, right? Like, we have a two-man publishing house in Richmond, and they're taking on the federal government. But this was big business for the federal government, to the tune of tens of millions of dollars a year in books being seized, absolutely free of charge, and usually on the backs of small publishers. Because if you want to sue somebody for copyright infringement, as I'm sure Anthony Sanders will when people start stealing his book, you have to register your copyright. Registering your copyright requires you to provide a copy to the federal government, just like copyright registration always has, and in exchange, you get this legally enforceable copyright.

Anthony Sanders, 28:31

it, can I then enforce it against what they've already done? Or is it only prospective?

Bob McNamara, 28:42

So you only get damages from when it's registered. Which is actually like low key why a lot of people in kind of the content creation industry are afraid of angering the copyright office, because the worst thing they can do to you, if you're a big content creator is just be really slow processing your copyright registration. Like maybe you just wait six months to process that registration and then by the way, that movie you made can just be pirated for those six months -- good luck. So registration is a trade, right? I want this legally enforceable, right, I want to be able to go into court and I'll trade you a book for it. But the way federal law worked was, if you didn't want that, if you say that's not a good trade for me -- Valancourt's not going to hire a lawyer, they're not going to start suing people for stealing their books -- that's not a good trade for them. They say great; if you don't want the trade, you need to give us the book for nothing. We'll trade you for it, or you can give it to us for nothing. And that is the system that the Department of Justice has spent the past five years defending (and understandably, it gives the government tens of millions of dollars in free stuff) that the panel opinion just roundly rejects at long last.

Anthony Sanders, 29:50

Now we get into other issues, but I'm curious – I saw from people who I think like books, maybe like IJ but don't really get how the system works, they said things like "Well, I can see where the government's coming from because then we get the books in the library of Congress, and then the American people can get copies of the books if they go to the library." But my understanding is it's not like all of these books go straight on the shelves at a public library, right?

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Bob McNamara, 30:25

No, and that's one of the amazing things I learned in the course of litigating this case, is like, the first response of course, is: Sure, books are great. And it’s great to have public libraries and public libraries can buy those books – that’s what tax dollars are for. If the government thinks it’s important to have these books, the government can pay for them rather than putting all the burden on the publisher. But also, if you have a law that requires the deposit of every book in the United States, do you know what the Library of Congress doesn’t want? Every book published in the United States. And so the way it works is, there are people at the copyright office (or there were, who knows what their job will be now) whose job was just to kind of scour the internet looking for books that had not been deposited that should have been deposited, and not necessarily books that the library wanted. Like, these guys weren't divided up by subject matter expertise – they divided up the publishers alphabetically. So like “This team takes A, this team takes the N’s”, and they just demanded books. A lot of books were sent to the library, either just in response to the law or response to demands. Some of those landed in the Library of Congress, but a huge number of them ended up either just given away or actually destroyed. And it came out in the course of this case that as a result of this program, the Library of Congress destroyed so many books every year that they could not give me a number -- they had no idea how many books came in under this program that just ended up trash.

Anthony Sanders, 31:50

Do they scan them?

Bob McNamara, 31:51

No, they have no idea. So if the book doesn't go in the library, they tried to trade it to a foreign library, if maybe a foreign library wants it. If the foreign library doesn't want it, it goes into this giant room (all of this is true) in like the basement of the Library of Congress where, if you're a congressional staffer you can go in for free and just take anything you want – you don't need to check it out, you just take anything you want. And if the book sits there for long enough and nobody takes it for free, it's trash. And they do not keep track of how much stuff they have to destroy because nobody wants it, even though federal law subjects you to fines for not getting it to them in the first place.

Anthony Sanders, 32:29

So “give us a book, or we fine you so we can throw it away.”

Bob McNamara, 32:35

Which actually, one of the things James Jenkins pointed out in response to this letter: there's a Library of Congress program, I think it’s called “Cataloguing and Collections” where you can promise them a copy of the book, and they'll give you a Library of Congress Control Number that maybe makes it easier to market your book to libraries or whatever. And James had done that early on; he got some early Library of Congress numbers for his first books, and then he kind of it was a pain to comply with the system and he stopped doing it because it was a pain to have to ship all these books to them. But some of those books were on their demand list. And he wrote back to them like, “I already gave you

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guys some of these books." And they said, "No, no, no, you gave those to us in exchange for the control number, you have to give them to us for free -- those don't count.

Anthony Sanders, 33:19

Wesley, do you like free books?

Wesley Hottot, 33:21

I don't like free books anymore because I'm surrounded by them all the time and looking for ways to get rid of them. I just I don't know if I'm a sentimentalist or what but I just can't part with the piles of college books I still have around that someday supposedly, I'm going to read.

Anthony Sanders, 33:36

Unlike the Library of Congress, you just hang on to them.

Bob McNamara, 33:40

The last time I moved, my wife made me throw out several different constitutional law case books that were at least 15 years out of date, that I have moved to at least like eight different residences.

Wesley Hottot, 33:54

Right, it's sort of like carrying water on a hike is the heaviest thing you have to worry about lugging -- books are the worst to have to move, especially when you have a lot of them.

Bob McNamara, 34:05

But it feels wrong to throw out books, which honestly is I think the thing that made me angriest in this case, is that there's this huge multimillion dollar federal program devoted to throwing away perfectly good books. And I was carting around old common law books, because I think it's morally wrong to destroy them.

Anthony Sanders, 34:21

So one reaction I had in raising this opinion, and in the more hysterical arguments it seemed like the DOJ had, is there's got to be a limit where the government lawyer needs to stop arguing for these

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fanciful arguments and give a little bit of background here to the listeners. There's this argument that you could actually disclaim copyright, and if you did that then they wouldn't ask for the copy of the book. But that whole idea about disclaiming your copyright never came up for our client in the course of this until we were well into the litigation and doesn't seem like it ever comes up for someone else. So you can tell it's just a convenient litigating position, and it's a litigating position, I thought, that doesn't make any sense and would never work in the real world. And so you start to wonder… like I get there's a zealous advocacy that all lawyers have of course, for their client, but when it's the government on the other side you would hope (we are IJ so maybe we're not so naïve) but you would hope that they take a position that makes some sense for the public interest, even if it in the grand scheme of things doesn't make a lot of sense. And I don't see any relationship between the position that they were taking in any public interest, and yet they kept beating on it. And I think this is just an example of how government attorneys, if you're listening, sometimes you need to think twice about the positions you're taking because you're not just a zealous advocate, you are actually in a different position than the run of the mill Tom, Dick and Harry, who's litigating in court.

Bob McNamara, 36:10

constitutional case like this. Because in the trial court they made this argument that “Oh, well Vallencourt doesn't have to deposit books, it could just abandon its copyright.” You're allowed to file what's called a “Notice of Abandonment” with the copyright office. It costs -- I forget what the fee was to file it at the time -- it was like a couple hundred dollars. And then the notice of abandonment would mean you don't have to deposit anymore. And said "That doesn't make any sense, guys. Like first of all, it doesn't make any sense to say I can avoid this fine by paying $200, which is the same amount as the fine. But also, your own guidebook says you don't take any position on whether filing one of these notices has any legal effect at all. There's nothing that says this gets us out of the deposit requirement, much less that it gets me out of it for something I published 15 years ago, where my obligation started running 15 years ago, like this is crazy.” But the trial court bid on it and said “No, you can abandon your copyright, you can file this thing and pay this fee.” And then on appeal, they changed their position. And they said “Whoa, whoa, we never meant that you had to actually file something. You can just abandon your copyright -- you can take an overt act and abandon your copyright.”

Anthony Sanders, 37:34

Like in your heart?

Bob McNamara, 37:36

Well, you just have to publicly abandon the copyright, and that will be enough. And there's an amicus brief actually from copyright scholars from Bryant vs Rosen saying like “This isn't how it works, guys, like this is absolutely not the law. No one in the copyright world thinks you're describing it correctly.” And then in oral argument, they change their position again, and they say “Look, we didn't mean you had to publicly abandon your property, you don't have to do anything. It's just that when you got the threat letter, when you got the email, you could have just replied and said, ‘Oh, no, I abandon the copyright.’” And in oral argument the panel kind of asked “How would anyone in the world know that

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Vallencourt had abandoned its copyright in an email to you? Do they FOIA that?" And it was just like this constantly moving target of attempting to say "No, no, no. We threatened you with $100,000 in fines, but you could have easily and costlessly escaped from those fines in a way it took us five years to think of, but that you, small publisher, should have instantly realized, 'Oh, this is how I escape.'" And it's gratifying actually to see the opinion not bite on that; you sometimes get the feeling that there are judges who are open to kind of any escape hatch that makes the case go away. And the panel just very forthrightly says you can't expect Vallencourt to know about something that you made up at oral argument five years after you threatened them. And so the scheme didn't work, but it's why it's so difficult to get these momentous legal rulings that feel so obvious in hindsight. Because it is almost impossible to actually pin the government down on even what it's doing to your client or what it's actually done.

Anthony Sanders, 39:21

Yeah, I really appreciated Chief Judge Srinivasan going after that position, because it gets a little monotonous actually in reading this opinion near the end. Like there's one layer after another in this argument and he's really trying to pin them down saying "You argue this, you argue this, you argue this -- and none of it makes sense."

Bob McNamara, 39:47

Because our argument was at bottom so simple -- it's just "When the government takes your stuff it's a taking" they threw up an absurd number of roadblocks trying to just get out of that basic tautology. And it was a lot to slog through in the briefs. And it's incredibly gratifying to see a panel that's actually willing to take the slog. Like, "Okay, you've made up 17 different reasons why I can't reach this simple constitutional argument. Let's just take them in order, because none of them make sense."

Wesley Hottot, 40:20

Yeah, that's impressive. It doesn't always happen that way, right?

Anthony Sanders, 40:23

Well, I will throw up no more roadblocks to your busy litigators' time. So, thank you for joining us today to talk a little property rights victory. And in the future, we're going to have even more momentous episodes, a couple about the Supreme Court in the next couple of weeks, so please stick with us for those. And then in two or three weeks, we're going to have a Short Circuit live with a very special guest, but I'm not going to spill the beans on anything more than that for the moment. But in the meantime, I want all of you to get engaged.

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