

# Short Circuit 310: Opening the Vaults

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## SUMMARY KEYWORDS

Snitko v. United States of America, Rupp v. City of Buffalo

## SPEAKERS

Anthony Sanders, Katrin Marquez, Rob Frommer

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### A Anthony Sanders 00:24

"For gangland aficionados, it was almost as good as the Super Bowl. On April 21, 1986, nearly 30 million viewers tuned in to The Mystery of Al Capone's Vaults, a live primetime excavation hosted by Geraldo Rivera that promised to dig deep into the catacombs of the criminal's hotel hideout on Chicago's South Side. For two hours, Rivera shouted over power tools, ignited dynamite, took target practice with a machine gun, and teased the possibility of finding money, weapons, or the decayed corpses of Capone's rivals." Many of you of a certain age, that is mine and older, may remember that. That is the opening of a great article from a few years ago on Mental Floss that we'll link to in the show notes about the famous episode of Geraldo Rivera opening quote, Capone's vaults. I say quote because, actually, it probably was not Capone's vault, and there was nothing inside. I think a little of the spirit of what Geraldo had was in the back of the mind of the FBI when, recently, just a few years ago, they opened a bunch of vaults in Los Angeles. Unfortunately, this time, there wasn't just dirt and bottles inside, but lots of property owned by completely innocent people who then had to struggle for quite a long time and involve the Institute for Justice to get their property back. And we're going to be talking about a recent ruling that took the FBI to task over its Capone-like tactics in that episode today on Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Friday, February 9, 2024. We'll be talking about that case from the 9th Circuit and also another recent example of abuse by the police on a very different level. And that's a case from the 2nd Circuit. Joining me to discuss these two cases are two Institute for Justice attorneys, Rob Frommer and Katrin Marquez. Welcome back to both of you.

### K Katrin Marquez 02:54

Thank you.

### R Rob Frommer 02:55

Thank you for having me back.

A

Anthony Sanders 02:57

Now, Katrin, you are blessedly of an age where you would have absolutely no memory, nor could you, of Capone's vault, but Rob, we were talking earlier a little bit about this.

R

Rob Frommer 03:10

Why are you doing this to me, man?

A

Anthony Sanders 03:13

I remember it being ... I was like almost 10, and I was so excited about this Capone thing. I don't know how I heard about it. And I went to a friend's house and like we had all these snacks, and it was this big deal. And then it was just such a letdown at the end. Do you remember? Did you watch the show?

R

Rob Frommer 03:31

I don't remember if I watched the show. If I did, I blocked it out as a bad memory. But I do recall all the hype, and people were just going on and on about oh, what could be inside? And it turned out to be a big old nothing burger.

A

Anthony Sanders 03:44

Exactly. Yeah. Well, I guess unfortunately, in some ways, or fortunately, in some ways, when the FBI did what you're about to tell us about, it was not a nothing burger (what was inside So before we turn back to Rob and that case that he is an attorney on, we have a couple of housekeeping matters. Some of you may be surprised that we have a couple Institute for Justice attorneys on this week because last week and the week before that, I had previewed that this week, we'd have a couple special guests like we had last week with David Lat and Dan Sullivan. And those special guests are coming. However, some weather-related delays have intervened. And so that's why that episode is now going to be next week. Also, one other housekeeping matter. So I hope some of you enjoyed our Robert Burns themed episode from a couple of weeks ago, our Burns night special, where we did talk about law, but we also had some of the poetry of the Scottish poet Robert Burns. And we ended with a discussion of an old case that's kind of famous if you take torts in law school about a bottling plant and a mouse in a bottle of Coca-Cola, and then we ended with the Burns poem To a Mouse. Well, after that episode aired, I got the most interesting email I think I've ever received from a listener. So I'll just read a little bit to you. Here's what the listener says, "As I was listening to the latest Short Circuit episode about a mouse found in a cola bottle in Mississippi, I was sorting out some bones I had found in a bottle. Small mammals often get caught in discarded bottles that I find by the roadside. They get in, perhaps lured by something tasty they smell in there, but then they can't get out. They decompose, and I get to find the bones. I suppose the same thing must have happened at the bottling plant involved in the case you discuss." Then the listener goes

on to say that he's not a lawyer, but he enjoys the podcast, and keep up the good work. And we thank him very much for those kind words. Now, I know what everyone's thinking. That is really weird. What is this guy talking about? Well, it did sound pretty weird, didn't it? But, in fact, this listener is an amateur paleontologist and naturalist. So part of what he does is he, you know, puts bones together. That's what paleontologists do when they dig it out of the ground, and a naturalist would do the same thing. So if you're studying small mammals and their bones, it turns out an excellent place to get a full set of bones, you know, that a predator hasn't taken part of them away, is in a bottle by the roadside. So that's what he does as part of this business. I get it. And then, in addition to that, we learned that yeah, mice get in the bottles, and they can't get out. And it kind of, you know, makes me think, yeah, I think the court came to the right result in that case, and it probably was the bottling company's fault that the wee, small beastie was found in the bottle. So, that aside, we are now going to move back to the vaults business and what Rob has to say about the FBI. So take it away, Mr. Frommer.

R

**Rob Frommer 07:23**

Thank you very much, Anthony. As you mentioned, this started occurring back in 2021. The FBI had been focused on a business called U.S. Private Vaults. And it had done some investigations of individuals there but decided it wanted to take down the business itself. And it applied for a seizure warrant to do that. Now, of course, there are hundreds of boxes at this place. And the FBI said in its warrant application, well, we understand we're going to end up with custody of what's in these boxes, but we're just going to inventory it. We're just going to identify the owners, and we're just going to give it back. And the judge said okay and gave them the warrant based on those promises. They execute the warrant, ripping open 800 plus boxes, finding guns, money, gold, jewels. And it turns out that a few months later, the federal government tries to forfeit over \$100 million in cash, gold, and jewels. And we were representing a group of plaintiffs, we brought suit, and we were able to stop the forfeitures of our clients' property. And then we started asking questions. And it turned out that prior to ever applying for the warrant, the FBI had already decided it was going to try to civilly forfeit, or permanently keep, everything in everyone's box worth more than \$5,000. We pointed this out to the district court, but the district court said that what the government had done was perfectly constitutional. It said it conducted what's known as an inventory search. And it said that because the sole reason it conducted the search wasn't to search for evidence of crimes, that it was perfectly permissible. And it also said well, of course they thought, they knew, that they were going to run into some criminal property here, so they didn't exceed the scope of the warrant. The warrant said, promised, they wouldn't conduct a criminal search and seizure. They didn't do that, said the district court. So we take this case up to the 9th Circuit, and just a few weeks ago, we got a decision from the 9th Circuit, 3-0 decision, completely reversing the district court. And to say that the panel was sort of incensed by what the FBI did here was an understatement. During the oral argument, they called the conduct egregious and abusive, and they could liken that to the writs of assistance that sparked the American Revolution and, you know, the Fourth Amendment.

A

**Anthony Sanders 09:59**

When the judge mentions writs of assistance, you know that the government's not going to do well.

R

**Rob Frommer 10:04**

Yeah, exactly. And what the panel really tried to do at the oral argument and in the opinion was trying to find ways of how to say that this, what the FBI did here, was wrong, without imperiling the entire inventory doctrine. What it focused on was an important part of the case where the FBI ... As part of the inventory doctrine, you're supposed to use what's known as standardized procedures. And that's supposed to be so that officers don't have discretion, and they're only doing the things that are meant for an inventory search in order to keep people safe, keep property safe, prevent accusations of theft. But it turned out that the FBI didn't consult their standardized policies. In fact, they had drafted up their own, as my colleague Rob Johnson says, bespoke one time only good policies. And those policies very squarely said go search for evidence of crime, of drug crime, of evidence that would support forfeiture of this property. And they said look, when you're writing special instructions to tell people how to conduct the search, you can't say that this is just a standardized inventory. And so the panel said based on that alone, this was impermissible. But two of the judges went further and said well, the government said that it wasn't conducting a criminal search and seizure here. And the warrant expressly forbade that. And two judges went on to say, objectively looking at the evidence, this is exactly what happened. Again, I mentioned those specialized instructions where they told agents to note like the condition of cash. They told people to run all the cash they found in front of drug dogs. They had agents take care to preserve fingerprints for evidence. And what the court said, what two of the three panel members said, is that this is objective evidence that you were looking for evidence of crimes. You were looking for evidence to support your forfeiture efforts, something that the warrant explicitly said that you shouldn't do. And so two judges also said the FBI violated everyone's rights, the rights of hundreds of people because of that as well. And, ultimately, what we're asking, what we're seeking here ... Thankfully, all of our clients got their property back. And all we are seeking is just an order telling the FBI to destroy the records in their system because think about it. Let's say you have a safe deposit box, and you get your stuff back. That's great. But now the FBI has a complete record of everything that you had in your box, and it's in its evidence database and kept in there forever. How would you feel? So, thankfully, the court was more than happy to grant that relief. In fact, at oral argument, it kept asking what else can we do? And I said ... I didn't say, but we said like to make a very loud and clear statement because this is the camel's nose under the tent. If the FBI is able to do this and collect over \$100 million in civil forfeiture proceeds, they'll just view this as a test run for the next time. And thankfully, the 9th Circuit, in no uncertain terms, said that shouldn't ever happen again.

A

**Anthony Sanders 13:32**

And why couldn't you ask for more in this particular case, Rob?

R

**Rob Frommer 13:37**

Well, in this particular case, our class was defined as people who had their property taken and had gotten their property back from the FBI. So the district court actually limited our class to only people who got their property back. So there's lots of people stuck in the system. There are people who are still fighting forfeiture cases based off this. There are people who are being criminally investigated based on the FBI's violation of their Fourth Amendment rights. So having

this remedy for our clients is important, but it's also important that the FBI be held to account because if these actions ... If they think they have the power to do this and no one stops them, then they'll continue to do this to other people going forward.

A

Anthony Sanders 14:27

Katrin, have you ever had your property in a safe deposit box?

K

Katrin Marquez 14:31

I have not. I'm not that fancy. I don't have anything of value. But actually, reading this case, one of the things that probably isn't legally important but just really caught my attention was how the FBI just assumed no person would have a non-criminal reason to keep something in a safe deposit box that wasn't in a bank, even though banks fill up and sometimes, there are waiting lists.

R

Rob Frommer 14:56

And that's exactly what the clients told us over and over again. The reason they went to U.S. Private Vaults often was because the bank had a waiting list. They didn't have any boxes available. And U.S. Private Vaults was a convenient place. It turns out that this situation actually happened across the pond, a very similar situation about a decade ago, a little over a decade ago, where police in London raided a nest of safe deposit boxes. And just like here, they thought, oh, everyone in there is a bunch of criminals. And it turned out no, a bunch of them were people like Holocaust survivors and other people who are trying to, you know, just have a secure place to store their property.

A

Anthony Sanders 15:35

One thing that's super disturbing to me that maybe the court didn't focus on, maybe because it didn't have to as much as they could, is that I get, okay, they argued that this is an inventory search, even though it obviously wasn't. And they were just looking to see and itemize everyone's belongings because they knew that, you know, people would come looking for them, and they didn't want to be accused of stealing any of it, but then they try to forfeit it all. Doesn't just the fact that they then put it into civil forfeiture mean that this is nothing close to an inventory search because I would think in like a normal situation where you have an inventory of say, you know, someone's brought in who was arrested and had something with them or a car is towed after you arrest someone, and then they ... Because that's really where it comes from, right, is a case, I think, where they inventory the contents of a car to make sure it's not stolen, and then, oh, they find something in the car. That if you're doing that you would then keep the property until maybe no one claims it a long time from now and then you say it's abandoned and forfeit it way. That wasn't what was going on here. So isn't that itself just complete proof that this is not an inventory search?

R

Rob Frommer 16:58

Well, I think that is part of what the two justices were, or judges, were focused on when they said that they had conducted a criminal search. I think the fact that we got the FBI on the record to admit that they had, before they even opened a box ... Remember, they didn't know who these people were. They didn't know what, if anything, they had done wrong. The FBI admitted that before they even cracked open the first box, they'd already decided to take everything that was worth more than \$5,000. And why \$5,000? Because that's the amount at which they begin to make money. So, in other words, they're gonna steal everything they could as long as they'd make money on the deal.

A

Anthony Sanders 17:34

Now, is that because for the feds to do a forfeiture action, and say it's only 2,000 bucks, it's just not worth it to them in turn?

R

Rob Frommer 17:44

That's exactly right. The FBI testified under oath that, you know, the FBI policy is that, and this is across a lot of federal agencies, the minimum is about \$5,000 because if you do less than, smaller amounts, just like you said, you run a risk of losing money on the deal.

A

Anthony Sanders 18:03

So you mentioned that this is just one part of what IJ is doing in this whole situation. I could use stronger language there. Tell us a little bit about those other cases and where they're at.

R

Rob Frommer 18:17

Sure. Yeah, as you might expect, when you bust open, you know, over 800 safe deposit boxes, you cause a lot of problems, and people's lives were thrown upside down. One of our clients in another case was a box renter named Linda Martin. She and her husband were saving money for a down payment on a house, and the government took her money and tried to forfeit it. And she got ... because when they send you a notice, like I was mentioning, it doesn't say what you did wrong because the dirty secret is they don't know what you did wrong. And she got this form, didn't know how to respond, and got stuck in the administrative forfeiture system where she had been stuck for multiple years until we filed a case on her behalf. And what we're arguing is that look at the basic element of due process: just this idea of notice. You have to tell me why you're doing something to me, so I can effectively respond to it. And the FBI notices don't have any of that information. And in the first case, we were able to help our named plaintiffs get their property back using that argument. So now, Linda is representing an entire nationwide class of people saying that if the FBI can't tell me what I did wrong, what they think I did wrong, they shouldn't be able to keep my stuff. And then we have two other cases. Remember, the government here in U.S. Private Vaults was told, oh, we're just going to keep this stuff safe. We're just gonna, you know, inventory and keep it safe so it can be returned. Well, that didn't work out so much. It turns out that they lost a number of people's property. Lost or who knows what. One of them is two of our clients from our first case where \$2,000 of

theirs went missing. But probably more consequential is our case on behalf of Don Mellein. He's a retiree, L.A. County retiree, and he kept his retirement savings in gold coins. Those all went missing after the U.S. Private Vaults raid. And then he brought suit. And they said, oh, your coins are missing. He brought suit, and then somehow, they magically found half of his coins, but said the others are gone. Somebody needs to be held to account. That's why we brought that case.

A

Anthony Sanders 20:42

Now, I know one thing that came up at the argument ... And we don't usually do this, but we will put a link to the oral argument in the show notes because it's one stellar oral argument that our friend Rob, Rob Johnson, had. The judges kept asking is there anything else we can do for you? And one thing Rob couldn't really ask for was to have damages because of, basically, almost pretty much the death of the *Bivens* doctrine, which we've talked about here on the show many times. And that's the doctrine that you can get damages from federal officials when they violate your rights. How is any kind of *Bivens* claim or something like that, you know, intertwined with what you guys still have going?

R

Rob Frommer 21:31

Yeah, when we're trying to get people's stuff back, trying to get the FBI to account ... In our cases for Don and for our other clients where they lost property, we have really assembled a kitchen sink of arguments. And it's not usually what we do, but what we're trying to point out here is like we have what's known as the Federal Torts Claims Act, we have the California Bane Act, we have implied bailments, we have takings. We've said look, whatever, however you want to name it, what they did here, you know, they owe these people for what they did here. And if you're telling me that none of these avenues are viable, if *Bivens* isn't viable, FTCA isn't viable, nothing's viable, then that system you've constructed itself violates due process because after all, the basis of the Constitution is a right isn't a right if it doesn't have a remedy. And that's what we're just trying to push forward here.

A

Anthony Sanders 22:28

Well, we will keep abreast of developments in U.S. Private Vaults, and maybe we'll have another opinion to talk about at one time here on Short Circuit. We're now gonna go to a very different level of government abuse, but it is a most interesting one. And that is Buffalo, New York, in the 2nd Circuit. So the case is *Rupp v. City of Buffalo*. And Katrin, tell us what happened to Mr. Rupp one night when he was crossing the road.

K

Katrin Marquez 23:05

Something not that fun. So it's December of 2016, so this was a while ago, Mr. Rupp goes to dinner with his wife. Everything is good during dinner, but in order to leave the restaurant, they need to cross the street to the parking lot of the restaurant. And as they're doing that, they noticed that there is an oncoming car with the headlights off. They're able to cross safely, but they notice that two more women are crossing, and they don't appear to have seen the



oncoming car. Fortunately, the car is able to stop before hitting either of the women, but it's not a great situation. It's Buffalo, New York, it's December, and it's 8:30 p.m. I think it's safe to say it's pretty dark out there. So, again, not the safest situation. As it turns out, the car was a car being driven by an officer in the Buffalo Police Department. It is a police car. But Mr. Rupp does not know this at the time, and he sees the car and the fact that even though the car managed to stop before hitting the women, once it continued, it kept its headlights off. So he screams out (and parents, I warn you an expletive is coming, so turn your children's ears away just for a second) ... But he yells out, "Turn on your [head]lights, asshole." At that point, the car turns around and goes into the parking lot where Mr. Rupp and his wife are. That's when Mr. Rupp realizes that the car is a police car, and it's being driven by an officer. And the officer tells him you could get arrested for that, for yelling out. And Rupp says well, you are violating the law. You're driving around with no headlights on. It is a dangerous situation. You could have hit those women. And I mean, I don't know if this is a fact, but I imagine the officer wasn't very happy to be told that, and so he comes out of the car. He starts arguing with Mr. Rupp. Sometime later, two other officers arrive: Officer Parisi and Lieutenant Giallella. But these other two officers arrive, and Rupp continues to argue with them. As it turns out, Rupp is an attorney, so he's quite familiar with the law. And points out that McAlister, the officer that was driving, was violating the law by having his headlights turned off when it's nighttime and it's dark. And he also says just because you're a police officer doesn't mean you're exempt from the general traffic laws. You can't just do this. This goes on for a little while. Eventually, the three officers confer together, and they chat. The lieutenant ends up giving Mr. Rupp a citation that McAlister signed for violating Buffalo's noise prohibition, then 11 months later, because apparently that's how long it takes to do this, there's a full hearing on the charges against Rupp. And Rupp is found not guilty, and the charges against him are dismissed. So those are the undisputed facts. There's some arguments between essentially Rupp and his wife and Officer McAlister about how dangerous the entire situation was. According to Rupp and his wife, it was a potentially fatal near-accident. Rupp says that the cop car only stopped about two feet away from the women. His wife says he was mere inches away from the women. Officer McAlister doesn't specify a distance, but he seems to almost blame the women for the near-accident by saying they like rushed out into the street, which well, they couldn't see your car. The headlights were off. Not that weird. And so, eventually, Rupp, for reasons we'll find out later, decides to bring a lawsuit making a series of claims. The ones that are most relevant for our discussion today are a First Amendment retaliation claim, a malicious prosecution claim, and a false arrest claim. So this claim makes its way through the court system, and it gets to summary judgment. For you non-lawyers, at summary judgment, the district court, which is the trial court, is not allowed to make factual determinations. It can only make legal determinations. So it can't weigh evidence to decide what party it thinks is telling the truth or not, but if you look at the decision of the district court in this case, it kind of sounds like that's exactly what they did. The judge is just kind of like, I trust McAllister, not so much Rupp. And so it goes up on appeal to the 2nd Circuit, and the 2nd Circuit correctly (in my view) decides no, this is not okay. This is not the correct application of the summary judgment standard. You have weighed the evidence in favor of the officers, and you haven't really looked at whether Rupp could convince a jury of his version of events. And this case is interesting for a number of reasons. First, I think it's great that the 2nd Circuit is being really engaged and not letting the district court get away with doing what it wants with the facts. But second, it also addresses some issues that affect a lot of our work. So it has to do with First Amendment retaliation, which unfortunately, we deal with a lot here at IJ. And it also has issues of probable cause, which obviously matter for Fourth Amendment determinations. So I'm going to try to give a quick summary. So with the First Amendment, the circuit court, the court of appeals, first explains that there are three things that Rupp needs to show to be able to make his claim. He needs to show that he has a right that was protected by the First Amendment, that the defendant's actions were motivated or substantially caused by



his exercise of that right, and that the defendant's actions caused him some injury. Here, the focus is on the first one of those questions, which is whether his speech, the yelling with an expletive, is protected First Amendment speech. The district court has said no, because he didn't know he was a cop, so it really wasn't about a public issue. He was just mad. The 2nd Circuit says no, a reasonable jury could say that this was an issue of public concern. The First Amendment protects speech that is of public concern, and that includes speech that implicates public health and safety. What Rupp yelled out concerned public health and safety. He was concerned that a pedestrian could be hit or even killed because someone is driving in an unsafe manner and isn't visible in the middle of the night and recognize that whether or not Rupp knew that McAlister was an officer when he yelled isn't actually what's relevant here. What's really relevant is, hey, driving in an irresponsible manner is dangerous for the public. So I thought that analysis was right on point. But, like I said, here, the court cared a lot about the fact that the district court had made factual determinations in favor of McAlister when that's not its role. So it pointed out that the district court questioned Rupp's credibility, which it can't do at summary judgment. That it inferred that Rupp's speech didn't implicate a public concern because, really, he was only concerned about his own safety. It can't do that at summary judgment. And it also focused on the fact that Rupp cursed to say, well, it's not like really protected speech. But if you look at the totality of his statement, yes, he cursed, but everything that preceded it was about driving in an irresponsible manner. So that's the First Amendment part of the analysis, which I think is completely correct. There's also the other major issue in the appeal about probable cause because each of Rupp's claims for First Amendment retaliation, false arrest, and malicious prosecution could be defeated if the officers had probable cause for the arrest. So then, here, the court has to consider was there probable cause? And similarly to the First Amendment analysis, it finds that the district court made factual determinations in favor of McAlister that it did not have the right to do, and it focuses on two issues. The first one is that the Buffalo noise ordinance that is the basis for the citation prohibits noise that is unreasonable, but here, a jury could determine that Rupp yelling out was reasonable. Why? Because he was urging a driver to turn on his headlights after he saw what he believed to be a potentially fatal near-accident and that he needed to yell loudly enough for the driver to be able to hear him. So the fact that he was loud doesn't mean the noise was unreasonable, it just was part of what he was doing. And also, the fact that he included an expletive did not change the fact that it might be reasonable under the circumstances. And that's a question for a jury, not for the court. It also focused on the fact that the district court looked at the wrong time for its probable cause analysis. The probable cause determination is supposed to be at the time of the arrest. But, here, the court had focused on what McAlister had been thinking when he was driving. But that wasn't what mattered. By the time they issued the citation, the officers had already conferred. They had already talked. They already knew that the reason Rob had yelled out was because he thought McAlister was going to hit the two women. So there was a number of issues there. Within the probable cause analysis, the appeals court also looked at arguable probable cause, which has to do with my old nemesis qualified immunity because even if you don't have probable cause, if there's a qualified immunity argument, sometimes an officer can still be shielded from liability if he had arguable probable cause, which means a reasonable officer could have believed his actions to be lawful. The court of appeals again looks at the disputed facts and says sorry, district court. You got it wrong. It's not really reasonable to assume that a cop who is not driving for any reason, he's not on a self mission, can just drive in the dark without headlights on. So the 2nd Circuit opinion, I think, is a bit of a bench slap to the district court judge. I mean, sorry district court judge, but I don't think, here, you really did what you were supposed to do. Again, there's a lot of weighing of the facts in a way that you cannot do at summary judgment. So I think the 2nd Circuit got it right in

determining that no, this needs to go to a jury. There's a lot of issues here. And it's a troubling case, for reasons even apart from the particular facts in this case. Turns out, there may be a pattern of misbehavior here.

R

Rob Frommer 35:33

Anthony, I don't know if you did this on purpose, intentionally, but I'm noticing a strong theme running through today's cases. It seems to be district courts playing real fast and loose with, you know, the record facts and reality, and then appellate courts having to come in and clean up the mess. Here, it seemed that the district court did everything in its power to excuse the officers, including the idea about like that the basis of this was what McAlister personally was thinking in his head at the time. Why do you think the district court was bending over backwards so much in the case like this?

K

Katrin Marquez 36:20

Because he didn't want to have to go to trial, and it's much easier to get rid of a case earlier on in the process.

R

Rob Frommer 36:26

Yeah, well, that is pretty common. After 15 years of litigation, I have noticed one universal condition, which is that if people can avoid work, they will.

A

Anthony Sanders 36:37

You know, we talk, of course, at the Center for Judicial Engagement all the time about judicial engagement versus judicial abdication. And, to some extent, judicial abdication can be judges just not wanting to rule against the government because they don't believe that the Constitution requires them to do so or whatever it is, but a lot of it is also just human nature. That this is an easy case to get off your docket if you just read the facts one way. And a lot of these suits against police officers are taken off the docket for funny jurisdictional reasons like qualified immunity, and this is another one to throw on the pile, when what actually happened here in the analysis is pretty egregious kind of evidence 101 or civil procedure 101 behavior.

R

Rob Frommer 37:27

I mean, to be honest, at the end of the day, this was nothing more than like contempt of cop. I mean, McAlister ... You know, oh, how dare a plebe challenge me. It just reminded me ... I have to be honest, as I read the opinion, all through it, I'm just seeing Cartman from South Park going, "Respect my authority."

A

Anthony Sanders 37:57

Pretty much.

R

Rob Frommer 38:00

But I mean, most people don't actually, you know, fight things like this. And it doesn't sound like Rupp is in it for some big pay day. What's going on?

K

Katrin Marquez 38:13

I mean, there's a lot going on. But even before we get to Rupp, specifically, I think it's important to realize that Rupp is an attorney. He's able to fight this. I think a lot of people wouldn't be able to recognize their rights in this case at all. So the fact that he even realizes, hey, there's an issue here that matters is important because I think a lot of, and not just cops, but government officials can get away with a lot of bad behavior because a lot of people don't realize what rights they have and what rights they don't have. Now, Rupp, as it turns out, is kind of awesome. So he originally was not going to bring this case. He thought it was a little bit silly. I'll be honest, when I first read the facts, I was like, it's a little bit silly, but it's important. As it turns out, he agrees it's important because sometime later, he found out that officers in this same department had been involved in an altercation that actually ended up being fatal. In fact, I believe some of these exact same officers were part of the altercation that ended up being fatal. Something I didn't include in my review of the facts because it wasn't specifically relevant to what we're discussing is that the day after this happened, he actually sent a letter to the department explaining I'm really concerned with what's going on here. These officers really don't seem to be doing their job properly. As it turns out, he was right for the same reasons I just said. The same officers were involved in a fatal incident, and he realized, no, I need to bring a case because clearly, no one's being held accountable here. There is a bad culture amongst the officers that they can get away with whatever they want, and they need better training on how to deal with the public. So it's, again, it's funny because the case itself sounds a little bit silly. But when you realize first, even this case could have been really dangerous. The officer could have hit the women. But even apart from that, there's just a much larger structural issue going on here.

R

Rob Frommer 40:22

Well, there's a million ways this could have gone even worse, like the accident. What if after McAlister got out and started confronting Rupp and it escalated, you know, into violence? I agree. The hardest thing about being a public interest litigator, and Anthony, Katrin, I know you both share this, is finding people who are brave enough to stand up and challenge, you know, the government's actions because you can only change the world by standing up and saying this isn't right. So thank you, Mr. Rupp, wherever you are out there.

A

Anthony Sanders 40:56

And there's a article that Rob found in the Buffalo News about the background of this case, and we'll put a link in the show notes to that story. I assumed when reading it, but it seems like it's not in the record anyway, that this officer must have been on some kind of covert mission.

Because I know that is something that police do sometimes is you will drive down the street with your headlights off if you're, you know, on a stakeout or something like that. He seemed to be just driving around with his headlights off.

K

Katrin Marquez 41:32

Yeah, I was confused by that too. And then I got to the end of the opinion, and it sort of obliquely mentioned, oh, he just had to move the car from one place to another. I was like, wait, what is happening here? He wasn't really doing anything. The car just needed to be moved from one location to another, so why he thought driving around without headlights on makes no sense to me. I'm hoping I'm missing something because otherwise, it's just insanity.

R

Rob Frommer 41:59

I mean, we've all had that, especially if it's one of the new cars. I mean, I've had times where I've started driving my car down the street and not turned the lights on. The difference is that when somebody pointed that out at me, I didn't, you know, try to exercise my power over them.

A

Anthony Sanders 42:15

Well, and it seems he comes to this stop when he almost hits these women. Then he turns his lights on, and then he turns them off again.

K

Katrin Marquez 42:22

Yeah, he flashes them.

R

Rob Frommer 42:26

I think what it is is that he's engaging his brights, and if you bring on your brights, I think that's a separate system than your headlights. So you think you would at least realize they're off. You would think a lot of things. But, then again, if there had been a lot of thinking, we wouldn't be talking about this case now.

A

Anthony Sanders 42:45

Good point. One final point that some listeners have probably realized, but I'll point out for everyone is this a very similar legal situation to what IJ has at the Supreme Court right now. And we now know the argument date will be Wednesday, March 20, where our colleague, Anya Bidwell, will be arguing at the Supreme Court on behalf of our client, Sylvia Gonzalez, about how she was retaliated against with an arrest to punish her for First Amendment protected activity in Texas. It's a very different situation, and I think we've talked about it on the show before, so we don't need to go into it today. But the interesting parallel is the question there is

if you are arrested and there was probable cause for your arrest, it is very hard to then later go, even if you're not convicted and you're found innocent or whatever, it's very hard to go back and then have a lawsuit because that probable cause kind of immunizes the officers who did the arrest. Here, the court said that wasn't even there. In Sylvia's case, they did say there was probable cause and based it on this earlier case from a couple years ago that immunizes the officers, but we're arguing that it doesn't really make sense in her case. And so where is that line is what's going on in that case at the Supreme Court. And this is a similar First Amendment retaliation type of setup going on in this case.

K

Katrin Marquez 44:28

I just wanted to give a little shout out to IJ's non-litigation teams because relevant to all of this, our strategic research team just did an amazing study on qualified immunity that had a lot of interesting findings. I recommend it to everyone. But it actually had a finding that's very interesting to this particular conversation because it found that, I believe, one in five federal appeals where qualified immunity is argued have a First Amendment claim of some sort. And a lot of those are actually First Amendment retaliation claims where there wasn't any sort of split-second decision where cops really were in a tough spot and had to decide what to do. It's intentional retaliation. I think it's really important to look at that study because, I mean, if you listen to this podcast, you probably know a lot about qualified immunity, but a lot of people don't. And I think a lot of the discussion we've had about it ignores that there's this entire array of cases where qualified immunity is used to get out of liability for really troubling situations.

A

Anthony Sanders 45:39

Yeah, we will put a link to that report also in the show notes, and as we've said many times on the show, qualified immunity is not about split-second decisions. That's the underlying, substantive right that enters into whether it was reasonable or not for an officer to act in that way. But even if you think it is, often it's not even about some split-second decision that an officer is making. It's a calculated use of public resources to do something else, such as retaliate against people for asserting their First Amendment rights. So thanks, Katrin, for that note about the report, and thank you for your presentation of that case. Rob, thank you for telling us about your ongoing saga in Los Angeles and the 9th Circuit, and maybe we'll hear more about that in the future. And next week, looking forward to presenting to all of you are our special guests, but in the meantime, I would ask that all of you get engaged.