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SPEAKERS

Anthony Sanders, Sean Marotta, Diana Simpson

A

Anthony Sanders 00:25

Shew me then whether there be more to come than is past, or more past than is to come. What is past I know, but what is for to come I know not. Well, that was a couple verses from 2 Esdras, which is in most traditions is apocrypha from the Bible. And we're going to be talking about a dissent which has an uncanny similarity with some of those words, 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, June 16, 2023. It'll be out for you to listen to in a few days. We have a special guest here on Short Circuit today that I'm very excited to introduce in a moment. First, I just like to say we continue to get some great feedback on my book, Baby Ninth Amendments: How Americans Embraced Unenumerated Rights and Why It Matters. Thank you so much in the audience, if you've clicked because it's completely free, click to download my book and read it. Or if you actually paid for a paper copy, thank you very much. One thing I will pitch is, if you have read it, and you liked it, feel free to go to Amazon and give a five star rating or even a review of the book, and that would greatly enhance its visibility. So thank you everyone who has enjoyed the book so far. But you're going to enjoy this show even more. So first of all, I'm going to introduce back to the show for the first time in a while an old fan favorite, Diana Simpson, my colleague here at the Institute for Justice. So Diana, welcome back to Short Circuit.

D

Diana Simpson 02:15

Thanks so much, Anthony.

A

Anthony Sanders 02:17

So Diana is going to be talking about a series of Second Amendment cases in a little bit, and then a very short dissent. Not the shortest in history, but very short, but very noteworthy. And then before that, though, we're going to be talking about a case with one of the founding members, although I guess it was kind of accidental, of Appellate Twitter. So we try not to delve into Twitter minutia too much on the show, because I know most listeners actually, you know,

aren't on Twitter all the time, let alone Appellate Twitter as it's called, but I know a core of our audience is into that stuff, and is going to be very excited for the guests that we have. And that is Sean Marotta. Sean, welcome to Short Circuit.

S Sean Marotta 03:14

Thanks so much for having me.

A Anthony Sanders 03:15

So Sean is a Partner at Hogan Lovells, and he is a big time appellate attorney. He's got some big time shots, or thoughts, and maybe some shots on a case from the Eleventh Circuit that we'll be talking about today, where there's a what you is often called by our friend David Lat, a bench slap. But he also is going to share with us a little bit of the origin story of Appellate Twitter. So every year around this time, there's this photo that goes around of a few appellate lawyers, one of whom is our old friend, Evan Bernick, used to work at the Center for Judicial Engagement. And they got together for some, I don't know, a happy hour or lunch at one time, and then, as they say, this photo went viral. So Sean, what was the story behind that get together?

S Sean Marotta 04:11

Yeah, so our friend Jason Steed, who's on Twitter, was in town in Washington DC for I think for a conference of some sort. So he put out into the ether, you know, would love to meet some people from Twitter for lunch while I'm in town. And we organized, you know, sort of a gathering of appellate people informally at a place called Hill Country Barbecue in downtown DC, which is mostly famous for the fact that you can split up your check really easily, which makes it helpful when you have a bunch of people going and some of them are government lawyers who can't have you pay for their lunch. And as we were tweeting about it, and we took a picture at the end of it, which also created the tradition that when two Appellate Twitter people meet, you generally have to take a photo of some sort or else it didn't really happen. And then our friend, Raffi Melkonian, from Texas who is called the dean of Appellate Twitter because he is the first person on record to use the hashtag, quote tweeted it with saying that it looks like the DC part of Appellate Twitter is having a gathering, we provincials will be jealous from afar, that is a paraphrase. And I don't think anyone really realized that at the time that he had created a movement, but he had, and I think the use of the hashtag kind of picked up from there, and the rest, as they say, is history. So I have on my calendar every year on June 8th that we need to celebrate Appellate Twitter day, the first recorded use of the hashtag. And, you know, as I always say, when I tell the story, we actually owe a lot of debt to Legal Writing Twitter, which were a lot of legal writing professors at various schools, we sort of built on their excellent work that they've done in the space ahead of time, and then kind of took it over for our own for our own devices. But yeah, it was it was the beginning of a great community and one that I still really enjoy up to this day.

A Anthony Sanders 06:02

So the thing that surprises me is that I was on Twitter before that, but I didn't do a lot with it

So the thing that surprises me is that I was on Twitter before that, but I didn't do a lot with it. But I do, I mean, of course, there were lawyers before that, talking about law stuff, sharing information. It's just, is it that that hashtag simply didn't exist before then or did that, you think in some way, that hashtag kind of brought people into conversation more than they had before on, you know, legal stuff.

S

Sean Marotta 06:34

I think it sort of coincided with an uptick of lawyers on Twitter. I mean, I did some stories, oh gosh, or was right around when my oldest son was born around six years ago, where Appellate Twitter, or just what appellate lawyers on Twitter was taking off. And I think it also coincided with a lot more courts starting to livestream their oral arguments or make recordings more available. And it also coincided with the Trump administration at the beginning of the Trump administration, you had a lot of, I'll use the technical term, banana pants stuff going on, and people were rushing to the courts to put a stop to it. And you had a bunch of regular people that wanted to know about what was going on. And you know, it used to be you had to listen to the talking heads on MSNBC, or CNN, or Fox, which were basically uniformly retired prosecutors. But yet on Twitter, there was access to this group of people who actually knew a lot about the federal appellate courts. And so rather than having to listen to, you know, this retired prosecutor that really didn't know much about how, say the Ninth Circuit, did things in the Muslim travel ban, you had live commentary being provided by true appellate experts who knew these things, and I think that really drew a lot of people in, and it drew a lot of people into conversation, and it kind of continued. And then you also saw, you know, a lot of the legal educators who were already in the space pick it up as well. I mean, for several years, I ran with my friend, Rachel Gurvich, a hashtag we called Practice Tuesday, where we would talk about, you know, what's your advice and tips, generally, for newer lawyers? And that was great. And it just sort of created a community. But I think it was a mix of Trump administration, people wanting to know things, Twitter taking off, and a bunch of people in conversation that really created a great mix for Appellate Twitter to get going.

A

Anthony Sanders 08:16

Yeah. Well, if there's one great thing to come out of that banana pants days, as you call it, it would be this community of Appellate Twitter. There's plenty of awful things on Twitter, but Appellate Twitter, I think, has been has been a great bonus. I have to say like, there were cases early in my legal career going on, where you still the only way to find out what happened if it's not in some major news story was to like reach out to the lawyers who were actually in the courtroom. And that, it's like, that almost sounds like the Stone Age these days because there's so much information out there and you can you can find out what's going on with the case. Well, what's going on with one case in the Eleventh Circuit is that government lawyers, which does not happen very often, really got something handed to them, which us at the Institute for Justice are sometimes very happy to see. We weren't involved in this case, but Sean, tell us what was the legal strategy of the CFPB and why did it not work out for them?

S

Sean Marotta 09:26

Yeah, so this was the Consumer Financial Protection Bureau v. Brown and, you know, one thing we talked about Twitter is you get the sort of coolest decisions, and this was one that I found from a guy, Gabriel Malor on Twitter. And when I was thinking about what I was gonna bring

from a guy, Gabriel Malor on Twitter. And when I was thinking about what I was gonna bring this week, I'm like, oh, this is the one because it sort of brings everything that you love, which is: the government getting benched slapped, a little bit of civil procedure, and again, the government getting bench slapped. So what happened here was that the Consumer Financial Protection Bureau brought a civil enforcement action against 18 defendants saying that they had aided and abetted a fraudulent debt collection scheme by collecting money and being various service providers for debt collectors that were allegedly engaging in scammy things. And so one of the key issues in the case was whether the service providers knew what the scammy debt collectors were doing. And so, as you do if you're a defense attorney, they said, Alright, we'd like to take the CFPB's deposition, and we'd like to do it by Federal Rule of Civil Procedure 30(b)(6), which says that if the other party is a organization, you can make them designate someone that is going to testify on behalf of the organization. So the idea is that you sit somebody in the chair and you say, You are the Consumer Financial Protection Bureau, you are the mouthpiece of the Consumer Financial Protection Bureau, and your answers are given, such as you are the Consumer Financial Protection Bureau. And this isn't limited to the government, it often happens with corporate defendants all the time. So you know, Ford Motor Company or Acme Corporation, they have to find somebody who can come answer these questions. And so as the CFPB does what most defendants are many defendants do in this circumstance, and they say, Well, you know, we don't want to give this deposition because it's overly broad and you intrude on our various privileges that we have, such as the law enforcement privilege and work product and a whole bunch of other things because the topics that they were given, and one thing that makes the rule 30(b)(6) deposition different is that you have to give a list of topics you want to explore, so they can find the right person to testify and to prepare them. They were what we would call "contention topics". In other words, what do you contend are the facts that support your argument that we knew what was going on? What are your facts that support the contention that we were involved with this? And although I will greatly enjoy the schadenfreude of the CFPB getting smacked, I will say, responding to contention interrogatories is hard, because they're kind of legally, right? They're just saying, what are your facts that support this particular theory, and that's really more what lawyers do, not what your fact witnesses do. And I will say, speaking as a corporate defense litigator myself, we really don't like contention interrogatories, so we try to avoid them if we can. So I at least find, I at least have a small bit of sympathy for the CFPB in that respect. And also, this was a big investigation. So the fear that you stick somebody in the witness chair, they don't mention something, and you've scuttled your case, because these depositions aren't supposed to be a memory contest. But yet, when you have one person that has to synthesize a lot of information, it can be hard. So the problem is, is that the district court said, No, you've got to go give this deposition and it limited it somewhat. But rather than taking their lumps and doing their best, the CFPB decided to do the following. They were going to, what they did was, apparently, is they typed up hundreds of pages of notes for their witness, and they handed the witness the notes, and when the attorney for the defendants ask a question, the witness apparently went to a spot in the notes and just started reading. And from the opinion, it appears to basically have been a filibuster where like, if the witness started on page 30 of the notes, he was going to read the page about 120. And when the defense attorney taking the deposition kind of objected on the ground that the answer was wildly discursive and nonresponsive, they said, Don't worry, just keep listening. Maybe you'll get an answer in there somewhere. So as you might imagine, the defense counsel was not particularly pleased and went back to the district judge and said, What are they doing? And the district judge said, Look, you do have to answer the questions, but it makes sense that you have to have notes in front of you because we're not expecting anybody to hold this in their head. But there's a difference between referring to your notes and just reading the notes. You need to give more "human touch" was the phrase that the district judge used. You had to give more answers that sounded

like they were coming from a person even if they were relying on notes to some extent. And they go into a second deposition, and the CFPB does the exact same thing. They sit the witness down, defense attorney ask a question, and the guy just starts reading. And, in fact, that he would have read for another couple dozen pages had the parties not stipulated that if you were allowed to, you would keep reading all of this, and we'll just enter the notes in the record instead.

A

Anthony Sanders 14:51

Which kind of defeats the point of a deposition.

D

Diana Simpson 14:53

That seems fair. I mean, the thing that's like wild to me, or one of the things, there are many wild things in this decision, is that the witness took 300 hours to prepare for this. That is two months of full time work. I prepare my witnesses extensively for deposition. I don't even come close to 300 hours, I don't know anyone who comes close to 300 hours, and then to have them use all of that preparation to sit down and just read for page on page after page after page like I, I'm just baffled by this whole approach.

S

Sean Marotta 14:53

It does, it does. And even worse, even though this witness claimed to have prepared for 300 hours, when defense counsel said, Well, what exculpatory facts do you have? You know, did your investigation find anything that suggests we didn't know? He said, No, I didn't really see anything. And that was it. That was the only, that was the only thing they would say. So they go back to the district judge, and sure enough, the court says, Yeah, we're gonna go ahead and dismiss the CFPB's claims as litigation misconduct. And CFPB appealed to the Eleventh Circuit, and the Eleventh Circuit said, Yeah, that's ridiculous, CFPB, like. And I think the first line of the opinion is terrific, and I think is what drew all of us to it. And it will be quoted many times. "The Consumer Financial Protection Bureau is not exempt from the rules of discovery." And I think that will warm the heart of libertarian and various other civil rights litigators everywhere, that says, Yes, the same rules of discovery that apply to everybody else, also apply to the government. And when you don't comply with those rules of discovery, you got to take your lumps, and here it was a pretty strong sanction that the court found was not an abuse of discretion. You know, like I said at the beginning, I do have a little bit of sympathy for the breadth and what they had to do, but yet at the same time, the rest of us litigators suck it up and do our best when we get these kinds of orders. You know, the problem was not moving for protective order, the problem was not trying to limit the scope. The problem was that when your objections are overruled, you can't just say no thanks. And yet, that seems to be what the government did in this particular case. Another weird parallel here, however, is that when I read this case, there was another case out of the DC District Court, where a lawyer representing a private company basically did the same thing with the notes and the reading, and it sunk the appointment of the Securities and Exchange Commission's first Director of Enforcement because she was appointed, then it came out that she had engaged in similar litigation misconduct, and she stepped down because it was going to be a big tempest when it

came out. So if you take one practice tip from this, it is you can't prepare your Rule 30(b)(6) witnesses to just read a bunch of notes, you actually have to try to have them answer the questions.

A Anthony Sanders 17:49

I wonder if that played into some of the sanctions to tell you the truth, because that is so implausible. I mean, you could, you can work 300 hours on a case. And maybe that's what they were claiming, as you know, doing all the stuff on the case, and then that, you know, roll that into preparing for the deposition. But if you're just reading from notes that obviously weren't just prepared by you, I'm sure the other team of attorneys were helping on that, you're not spending 300 hours. Diana, you've had some run ins with 30(b)(6) and governmental entities in the past, I know, more than once. I know that this kind of ostentatiousness. Sorry mispronounce, is not uncommon amongst governmental entities. But this kind of like, reading from notes thing is is a bit new to me. Have you run across it before?

D Diana Simpson 18:46

No, you know, and so to credit all of the opposing counsel that I've had in my cases, I've never seen anything like this. And I've done a bunch of 30(b)(6) depositions over the years, and I think they're actually quite useful because you don't have to worry about someone saying, "Well, I'm not sure" because the witness binds the entity, and that is it. And so their answers are the answers of that entity. And so, you know, I've certainly had fights over what the deposition notice entails or the contention interrogatories or contention topics, which as the attorney for the plaintiff, I do use those sometimes, Sean, and I think I perhaps like them a bit more than the defense counsel might. You know, I don't always, but they are appropriate sometimes. So I just, I've never seen a deponent behave anything like this, so I guess props to my opposing counsel for behaving normally. Behaving as one should, I guess, in court, I think the Eleventh Circuit made quite clear that what the CFPB has done here is just totally unacceptable. And one other thing that like really struck me as just a ridiculous position to take. At the very end, the CFPB argues that dismissal was improper because the defendants were not prejudiced by its conduct. What world do they live in? Presumably, the defendants were paying for their attorneys, and this would have entailed an enormous amount of work on behalf of their attorneys. Not just sitting through depositions that are essentially worthless, but also filing a motion to compel and then filing, you know, all like these subsequent motions, and then having a telephonic hearing with the judge, and then filing a motion for sanctions. Like, that all costs a lot of money in terms of time, and so, I would imagine that this was actually quite expensive and quite frustrating to be a defendant in one of these types of cases. And then for the government to be like, Oh, it's fine. Don't worry about it. It was not fine.

A Anthony Sanders 20:41

And then apart from just not knowing the answers to the questions they're asking, which is the heart of this whole darn case, it sounds like. One value I see on that this opinion actually is pretty basic, which is, there is not a lot, what from my limited experience when I've been in the same situation about trying to do a 30(b)(6) of a government defendant. There is not a lot of case law on 30(b)(6)s of governmental entities. And I have seen, I don't think it's held up in the

cases I was involved with, but I have seen government defense counsel, who of course, will argue a lot of things, argue that 30(b)(6) does not apply to the government. But the government's just kind of different. It's got the sovereign status, and so you know, whatever level you're talking about, especially, especially maybe the state or state board. And so, if you're doing a 30(b)(6), you just can't do that. You can talk to the director, or whoever's in charge of the department you're suing about, but 30(b)(6) just isn't a thing. And that there's no hint of that, in this opinion, that that actually is a winning argument.

D

Diana Simpson 21:51

I mean, the language of 30(b)(6) uses the phrase "a governmental agency" as an entity to whom the rule applies, and so, woe be the government entity that argues that it is not that.

A

Anthony Sanders 22:05

Yeah, I don't remember exactly what the argument is, but it's like, you know, it's some or not others or some have a special status. I mean, this is the federal government, so.

S

Sean Marotta 22:15

I mean, at least for the board and stuff, you could say, Look, you know, we've got eight people who serve like, you know, a weekend every quarter, and how in the world are we going to figure out what was in the minds of the board when it's, you know, eight people who kind of come together and vote their own, their own facts. And I will say here, you know, the government wasn't saying it doesn't apply to us, 30(b)(6). They were saying, Well, you know, you're basically asking for law enforcement to come in and, you know, talk about their investigation, and, you know, fine, whatever. You're defense counsel, you don't want to do it. But when that gets overruled, suck it up, buttercup. And I think the other thing I love about this opinion is just sort of the palpable frustration that the Eleventh Circuit had. There's a footnote where they say, we reproduce only one of, only a few of many, many examples. So if you are outraged by what you read in the opinion, just realize, that is but a sampling.

A

Anthony Sanders 23:11

Yeah, I love the language that Judge Branch uses in this opinion, and it definitely can be a learning exercise just to read through it, and the understatement that she has in there at times. Well, there was also some understatement in the Eighth Circuit in a dissent but, some I don't know if it's an overstatement, but not at all an understatement in the majority opinion, and a few other opinions about the Second Amendment and felons recently. So Diana, please synthesize for us what's going on on that issue, and then why Judge Stras of the Eighth Circuit had so little to say.

D

Diana Simpson 23:54

Sure. So what's underlying these cases, they're a string of cases challenging this federal ban on basically people with felony convictions from possessing a gun, and so 18 U.S.C. Â§ 922(g)(1)

basically people with felony convictions from possessing a gun, and so 18 U.S.C. ş 922(g)(1) prohibits all people with convictions that are subject to more than one year's imprisonment, from possessing guns for the rest of their lives. And so, this is typically just called the felon-in-possession ban, and it's pretty common, and you see a lot of federal criminal cases kind of relying on this where people are convicted under the felon-in-possession ban, as opposed to other other crimes. And so we have two cases that came out of the Eighth Circuit recently that are kind of inextricably intertwined here. And so the first one is called Jackson and it was issued on June 2. And so Minneapolis officers found a nine millimeter on Edell Jackson, who had twice been convicted of selling drugs. And so this led to a conviction of being a felon-in-possession, and he was sentenced to nine years in prison. He then challenged that conviction, arguing that the statute is now unconstitutional following the Supreme Court's decision in Bruen because his drug offenses were nonviolent, and so he was not more dangerous than your typical law abiding citizen, and so he should be able to possess a gun. So the Eighth Circuit flat out rejects this. The panel is Judges Colloton, Smith, and Benton, and Judge Colloton was the one who wrote the decision. And so the Court basically goes through and cites the language of the Supreme Court's recent gun cases, so Heller, McDonald and Bruen. Those cases all end up having suggestions in there that the felon-in-possession ban remains constitutional. And, "given these assurances by the Supreme Court, and the history that supports them, we conclude that there is no need for felony-by-felony litigation regarding the constitutionality of" this statute. So this is wild to me, because in a single sentence, the Eighth Circuit has now foreclosed all as applied challenges to the law based on the conviction. And so it basically just says that that 922(g)(1) is constitutional, regardless of the felony you were convicted of. And so the Court kind of looks to the the panel decision and the Third Circuit's case of range, which I'll talk about in a second, where they do a kind of quick historical review of how the right to bear arms was subject to restrictions, including bans on possession by certain groups of people, including Catholics and people who committed nonviolent offenses. And so the Court concludes that because legislatures traditionally disqualified these entire categories of people from possessing guns, that section 922(g)(1) is constitutional. And so Judge Smith writes a separate opinion, concurring in the judgment only. He doesn't explain why he doesn't join the opinion in full, and so we're just left to speculate. But then that leads to the Eighth Circuit's decision in Cunningham, which has some even even more fun speculation that we can get into. And so Cunningham was issued on June 13, and Sylvester Cunningham was arrested for possessing a firearm along with 13 baggies of cocaine at a Cedar Rapids Walmart. And he had had two previous felony convictions, a DUI and a felon-in-possession conviction. And so following this Walmart arrest, he was convicted yet again of being a felon-in-possession and he was sentenced to seven years in prison. So he challenges his conviction, arguing the same thing that Jackson had argued that the statute is unconstitutional because his previous convictions were not violent. And so the Eight Circuit rejects this, and the panel is Judges Colloton, Wollman, and Stras, and Judge Colloton wrote this decision. So that means Judge Colloton wrote both Cunningham and Jackson. And so this this one is much shorter than Jackson. The Court immediately rejects Cunningham's claim, saying that it was foreclosed by Jackson "where we concluded that there is no need for felony-by-felony determinations regarding the constitutionality of the statute as applied to a particular defendant." There's no other analysis. It's just flat out there are no more as applied challenges based on the conviction in the Eighth Circuit, and so Judge Stras dissents, and if you'll bear with me, it's an important dissent. So I'm going to read the entirety of it aloud. "I dissent. More to come. See United States v. Jackson." So that's it. The case was argued in September of 2022, so this decision took almost nine months to come out. So I'm, I find it really curious how limited Judges Stras' dissent was. Why he didn't write a lengthier dissent? And so I'll say that I checked PACER this morning.

A

Anthony Sanders 28:35

It was a busy nine months for him, I'm sure.

D

Diana Simpson 28:37

Busy nine months, yeah. I mean, to be fair, this would be a really challenging opinion to write. It would take I think, a lot of research and to the extent that you're doing historical analysis, the way that the Supreme Court has indicated the statute should be analyzed under, but so I checked PACER this morning, and neither Jackson nor Cunningham have had petitions for rehearing filed yet. And so Jackson got an extension for his petition for rehearing, and so that's now due July 14. So presumably, we will be seeing a petition for rehearing soon, and I suppose we'll be getting an opinion from Judge Stras then, I don't know. It's, it's puzzling. So we then have the en banc Third Circuit's decision in range and this case is in a different posture than the other two, which were appeals of criminal convictions. But in this one, Bryan Range filed a civil case, a declaratory relief action, in federal court, challenging section 922(g)(1) as it applies to him. And so, this case was issued on June 6 by the en banc Third Circuit and it goes the opposite direction of the Eighth Circuit decisions. So in 1995, Range pleaded guilty to fraudulently obtaining about $2,500 in food stamps by understating his income on the food stamp application. And so he was trying to for his family, he had a wife and three kids on a $9 an hour job and finding that it was coming up short. He ended up being sentenced to probation and restitution. He's not had any other serious convictions since then, and he certainly served his his time on probation and paid back everything that he had. And so this conviction was classified as a misdemeanor under state law, but it was punishable by up to five years imprisonment. And so that upper level on the imprisonment makes it qualify as a felony for purposes of the section 922(g)(1). And so Mr. Range had tried to buy guns a few times, but he had been rejected. And so he wants to own a rifle to hunt and a shotgun to defend himself at home. And so I just wanted to take a second to pause before we get into the actual analysis here, and talk about how important client choice is. And Brian Range seems to be like the absolute best possible plaintiff for a challenge to 922. He's not a bad criminal, he's not selling, you know, he's not caught with like 13 baggies of cocaine, like.

A

Anthony Sanders 31:01

He's Jean Valjean. He's like, he stole a loaf of bread, and then he gets his rights taken away for life.

D

Diana Simpson 31:09

No violence, an incredibly sympathetic story. A very narrow crime a long time ago, you know, whatever can be said about his past. It's been, what, almost 30 years and he's not had any serious convictions since then. Like some, some parking and minor traffic stuff, but who among us doesn't. So anyway, so the panel had upheld the law against him. And so the Court ended up hearing it en banc, and found that the law was unconstitutional as applied to Range. So Judge Hardiman wrote the majority opinion, and this was really an application of Bruen to a restriction on guns. And so the court framed the post Bruen inquiry as two steps. Question one: does the text of the Second Amendment apply to a person and their conduct? And step two: if so, the government then bears the burden to prove that the regulation is part of the historical tradition

that delimits the outer bounds of the right to keep and bear arms. And so under that first prong, the court pretty quickly determines that Range is one of the people who have Second Amendment rights. The government said no because he, because the right only extends to law abiding and responsible citizens, and once he was convicted, he is no longer part of the people that are protected by the Second Amendment. And so one of the reasons that the Court rejects that is that other constitutional provisions reference "the people" and for Range to be included in "the people" would theoretically mean that it would apply to all of them. And so if he's going to be excluded from "the people" in the Second Amendment, then that would suggest that he would need to be excluded from the people in the First Amendment and the Fourth Amendment and other constitutional provisions. And that just doesn't make a lot of sense. And so ultimately, the Court ends up rejecting the government's claim that only law abiding, responsible citizens are protected, because that ends up giving the legislature too much power to manipulate a constitutional right by choosing a label. And so the Court then moves past it. They also agree that that his conduct is part of the Second Amendment, what it's meant to cover. And so the Court then moves on to prong two. And so has the government justified its application to Range consistent with the nation's historical tradition of firearm regulation? And so the court does an interesting thing. It goes through the statutory history, which I hadn't been familiar with before this. And so the earliest version of this felon-in-possession statute is from 1938, and it applied only to violent crimes like murder, rape, kidnapping, burglary, those kinds of things. And so, is that even long standing enough? 1938? Dubious. You know, Bruen focused on Founding Era and Reconstruction Era sources. But Range wouldn't have been a prohibited person then. And so federal law didn't exclude Range from the ability to possess a gun until 1961 when the law was amended to generally prohibit people convicted of crimes punishable by more than a year imprisonment. And so the court says this just isn't enough. You know, this law was passed 170 years after the Second Amendment's ratification, and nearly a century after the Fourteenth Amendment's ratification. So the government points to even earlier history, and now they're getting into a part of history that is perhaps a little darker, where the governments were disarming groups that they distrusted. So Loyalists, Native Americans, Quakers, Catholics and Blacks.

A

Anthony Sanders 34:32

Why were Quakers disarmed, by the way? They don't have arms.

D

Diana Simpson 34:37

There you go. They wouldn't give a loyalty, loyalty oath to the United States. So because they would not do that, the government said "you do not deserve guns". And so, you know, perhaps there's a redressability issue there if they wouldn't pick one up anyway, but I will not opine upon the extent of Quakers' beliefs because I don't know them. But In any event, the same Founding Era felons were facing death, including crimes for forgery and horse theft. But that doesn't suggest that like this particular punishment of a lifetime disarmament is historically rooted, because felons, if they weren't killed for, you know, horse theft or whatever, they weren't forever barred from owning a gun. They were able to repurchase arms after they successfully completed their sentence. And so there was no indication that people were forever barred from guns, whether they served a sentence or whether their weapon was forfeited, they were able to get guns back later. And so ultimately, the Third Circuit says the government fails to meet its burden as applied to Range. And so this sparks a number of concurrences and

dissents, talking about whether this holding is limited, or whether it's super broad. And so, Judge Krause's dissent is probably the longest one, and it goes into the history, and it finds that the history supports the constitutionality of the statute, and that this particular statute does the most work to combat gun violence in the country. And it is the keystone of the background check system. So where are we today, we now have this pretty significant circuit split between the Eighth and the Third Circuit as to whether the felon-in-possession gun ban is, is constitutional or not. And so in the Third Circuit, it's unconstitutional, at least for one person. And the Eighth Circuit, Range wouldn't even be able to raise such a claim, he would be barred by it. So it's an interesting split. I imagine there will be more litigation to follow, either in these cases or subsequent ones after that.

A

Anthony Sanders 36:42

Sean, what's your thoughts on either felons in the 18th century or more to come?

S

Sean Marotta 36:49

You know, I think what's going to be what's really interesting is what kind of fractures that these cases show in some of the old school and new school conservative legal movements. You know, if you sort of want to, I think, broadly overgeneralize that there was an older school conservative legal movement that was very law and order, and therefore, I think was very likely to uphold these laws, because, look, these are bad guys. Bad guys don't get their rights, so why in the world should you should possess a gun after you've broken the law? And now, I think you have this sort of newer, liberty-focused orientation to the Second Amendment that is catching on more, and we're seeing it more, I think, in the Third Circuit. Of course, what's also interesting about the split between these cases is they arise in different civil and criminal contexts. You know, in the criminal cases, you have, typically felons-in-possession are bad dudes who did other bad stuff, but it's easier to prove that he's a felon-in-possession than perhaps some of the other bad stuff he did. You know, it's easier to prove that he was a felon, and he was holding a gun, as opposed to, was he a gang member? Or did he so do some other bad things that you suspect him of doing, but maybe can't quite pin down? So when you have cases come up through the criminal system, you kind of feel skeezy when you let them go, because it's a bad dude. On the other hand, in the civil cases where you can pick your client, and you know, as Diana was saying, you can, you pick some wonderful people, it's a lot easier, I think, to push the law the way you want. It also kind of shows the interesting, the criminal cases do, the interesting alliance between public defenders, who are probably not intellectually or politically oriented, maybe towards gun liberty, but are now seeing that these cases are an opportunity for their clients, quite frankly. So you're gonna see a lot more come through, you know, it's sort of a weird alliance between gun rights supporters and public defenders, and how they're going to work together and how that's going to turn out. Last thing that I think is interesting, and this is super nerdy, is it sure also shows us I think the connection between the categorical approach that we see in things like the Armed Criminal Career Act, and the fact-sensitive approach. You know, in things like sentencing enhancements, we've lived in this world where you say, you don't look at the facts of a particular case. You just say, is this particular felony of a certain type? And I think what we're seeing in the Eighth Circuit is more of like a categorical approach, which just says, Look, you're a felon. That's it. And the Third Circuit that says, Well, hey, let's look. You know, what's a little more nuanced than that, as crazy ex

girlfriend used to say. And as a result, you're looking at more of the facts and who this guy is. And I think that is just sort of an existing, sort of fracture or fault line in criminal law that we're now seeing imported over to the gun right area.

A Anthony Sanders 39:42

Well, I have nothing to add on Second Amendment history and splits in the conservative movement. All that, I think you guys have spoken very eloquently on it. I'm interested in this "more to come" from Judge Stras' dissent. I am confused by it as other legal watchers are, but I wonder if, so if you, if you're going to dissent like that, it's because you have more to say. There must be other cases coming up through the Eighth Circuit, I would think that of of, you know, defendants making the same argument. Maybe they're not making it very well. Maybe they're not making it the same way as in these couple of cases, but maybe he's saving it for that. I don't think there's an en banc pending that I that I know of, so I don't know if he's saving it for that. But I guess I, the most confusing thing is if you have more to come, if you have more to say, especially in the case that's been pending for nine months, it doesn't make a difference like what case you put that, that scholarly research in your dissent in? Or would you save it for a different posture because it's going to have more of a bang for your buck there? I guess that's what I'm confused about is we'll probably learn soon when we see more of what Judge Stras, used to be Justice Stras, has to say, but it you know, it opens kind of this issue of if you have multiple cases in the same judge, which kind of case do you pull the trigger on? And I don't quite get why you would you would wait for the next one.

D Diana Simpson 41:29

So point one, excellent use of the gun joke. That tied in nicely. So, so good job on that, but point, point two. So there's not a current petition for rehearing pending. Jackson got an extension for for his petition. And so that's now due in July. You know, Cunningham hasn't asked for one yet, but the decision just came out a couple of days ago. So I don't know what the full court is going to do. I don't know if Judge Colloton's opinions kind of align with the rest of the Eighth Circuit's position on this. I imagine there's something coming. It's just, it's so strange to me to have, you know, a case pending for nine months, and then to just issue "I dissent. More to come" and then the citation is to another decision for which Judge Stras was not on the panel, and currently is not pending. It suggests to me that there is a discussion that they will be taking it en banc, perhaps some back channel discussion about that. But that's pure speculation. I have no basis for that either.

A Anthony Sanders 42:32

You know, the other thought is, I think the Eighth Circuit has this, but I can't be sure, but I think all circuits have this. That a you know, a judge can call for en banc review or at least consideration, even if there's no petition that's filed. So it could be he's going to do that, and maybe already has done that in the Jackson case, and it just hasn't shown up yet. Because I don't know often, you know, that doesn't show up till they actually have a decision on en banc. And so this is a way of you know, telegraphing that that's happening, although they have asked for more time too, so maybe both sides are asking for en banc.

S Sean Marotta 43:10

I mean, I agree with that. I think the possibility is that there was a call for sua sponte en banc consideration in the first case. You know, maybe the second case was getting pushed out kind of over his desire to hold it until they were able to do en banc proceedings on the first case, but you know, they wanted to get it out. So that's why he dropped in that placeholder rather than having to rush out maybe what's going to be his epic dissent. Fervent denial rehearing en banc or what maybe when he hopes to be an en banc opinion. So, I think that's probably the most likely suspect. That there was sua sponte en banc rehearing proceedings going on in the background, so we will see. It was an interesting, it was an interesting placeholder.

D Diana Simpson 43:11

Ooh, maybe Judge Stras wanted it to come out with such a quick dissent to show, you know. Maybe he held it on his own because, you know, if you can show that like this is happening to multiple defendants without any consideration, you know, with his categorical approaches, as Sean described it, then, you know, maybe that's kind of part of his ammo for the en banc consideration.

A Anthony Sanders 44:17

Yeah. Especially if the circuit split, which kind of happened just before either of these cases came out. Am I right about that, or?

D Diana Simpson 44:27

It came in between.

A Anthony Sanders 44:28

Oh my goodness.

D Diana Simpson 44:29

So the Eighth Circuit issued Jackson on June 2, the Third Circuit issued its en banc decision in Range on June 6, and then the Eighth Circuit released Cunningham on June 13. And so, Jackson had relied on the panel decision in Range and it specifically said, en banc, you know, it's pending en banc. And so, you know, perhaps they were a little quick to push out Jackson so that they could at least rely on it before what ended up happening with that decision being pulled.

A Anthony Sanders 44:57

Well, Sean, have you ever seen a dissent before that said, like, I'm going to tell you, but but not yet?

S

Sean Marotta 45:04

You know, very occasionally you will see that in a case where they need to keep it moving, they will say, "we're issuing this opinion, dissent to come later". But that tends to be when the dissent writer is a slow one, but I've never seen sort of this, you know, cinematic approach to dissenting, let's put it that way. The cliffhanger approach to dissenting.

A

Anthony Sanders 45:27

Yeah, I've seen that where a court needs the rule quickly. And I mean, the Supreme Court has done that in some maybe not the most proud moments of its history in the past where it rules, and then it says we'll tell you more at a later date. Well, you will, our listeners, will hear more at a later date from Short Circuit. But for today, I want to thank Sean immensely for coming on our show. We've been following him for years and a colleague of ours used to work for Sean and has fond memories of those days, so it's it's great we finally can get him on the show. And for Diana, and thank you both for coming on Short Circuit, and best of luck to you.

S

Sean Marotta 46:11

Thanks for having me.

D

Diana Simpson 46:12

Thanks, Anthony.

A

Anthony Sanders 46:13

And to everyone else, in the meantime, I would ask, that you get engaged.