Short Circuit 321: A Tale of Two Prisons

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SPEAKERS

Ben Field, Michel Paradis, Anthony Sanders

A **Anthony Sanders** 00:24

Hello, and welcome to 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, April 19, 2024. It is a special episode because we have a special guest that we are very excited to bring to you today. First though, I'm going to introduce a regular guest who we're very happy to have back, and that's my colleague at the Institute for Justice, Ben Field. So Ben, welcome back to Short Circuit.

B **Ben Field** 00:55

Thank you. Very, very happy to be here.

A **Anthony Sanders** 00:57

And Ben will be talking about a case a little later that has to do with religious liberty and Texas prisons. Very familiar territory for us here on Short Circuit to go back to the Texas prison system, but that'll be a little later. First, I'm very excited to introduce our special guest. He is Michel Paradis. He is an attorney at the Curtis firm in New York City. He is also a professor at Columbia Law. He has done all kinds of things. We are only going to scratch the surface of his expertise today. He has worked for the U.S. Department of Defense on various matters. He's the author of the book "Last Mission to Tokyo." And he's also, I just learned today, an expert and has a degree in artificial intelligence and large language models. Pretty current stuff, which Short Circuit listeners will know. We have talked about it a bit in the recent past. And he put all that together and did something entirely different, which was author an amicus brief for us, it was on behalf of a few law professors, in our case *Gonzalez* that's at the Supreme Court, the First Amendment retaliation case that my colleague Anya Bidwell argued last month. So putting all that together, we said we need to get Michel on Short Circuit. And so I reached out, and he selected a fun case for us to hear today about national security issues. But first, Michel, welcome.

M Michel Paradis 02:32

Thank you very much. I'm very glad to be on. And you did my CV well, although when I got my Ph.D., which was well over a decade now, had you said to someone that you're working on artificial intelligence, it would have been about the equivalent of saying I'm working on like alien biology on Mars or something like that. Like it would not have been a serious topic. So it's been very interesting and bizarre, to some extent, to watch this subject that I could bore people to tears with more than a decade and a half ago all of a sudden become the hottest topic.

A Anthony Sanders 03:02

Have you had that phenomenon where you know something, and no one ever wants to talk to you? And then people look you up and the phone starts ringing because of something you said 10 years ago, essentially?

M Michel Paradis 03:14

Yeah, it's exactly like that. I remember going to cocktail parties and telling people ... You know, people casually go, what's your Ph.D. on? And I'd be like oh, well, I'm teaching a computer how to take the SATs. And they would sort of just like stare blankly at me for a little while and then look over my shoulder to see who else is interesting to talk to. And now, again, just hearing people talk about large language models and natural language programming and tokenization and all of these things that are now hot buzzwords, to see that just become common currency again is, at best, ironic from my standpoint and kind of weird and funny.

A Anthony Sanders 03:53

Well, one thing that they probably would have heard about at a cocktail party is Guantanamo Bay. And there's an effort to get some documents related to that place. So what's going on with that in the D.C. Circuit?

M Michel Paradis 04:09

Sure. So the case that I kind of brought to talk about today is a case called *Connell v. Central Intelligence Agency*. And it was brought ... James Connell is an attorney for one of the accused 9/11 plotters who've been pending prosecution in Guantanamo since 2008, if I recall. And that trial, you know, anyone who follows that knows that that is the *Jarndyce v. Jarndyce* of the 21st century. It's a trial that never seems to get any closer to concluding. And one of the main issues that has bedeviled that prosecution from the beginning is the fact that James Connell's client, as well as a number of the other Guantanamo detainees were previously held by the CIA in the so-called black sites, which were essentially secret prisons that the Central Intelligence Agency operated around the world, outside the oversight of Congress and outside the oversight of all sorts of things, where enhanced interrogation techniques were used. If you type enhanced interrogation into Microsoft Word, it will autocorrect that to torture. Sort of an

interesting application of large language models all by itself. And so one of the issues that Connell thinks is relevant and important, given the fact that his client is subject to the death penalty if he's convicted, is the fact that confessions that the gentlemen on trial made to non-CIA personnel, FBI interrogators, after they arrived in Guantanamo in 2006 and 2007 are going to be used as evidence in their prosecution. And so one of the arguments that they have attempted to make is that when they were transferred publicly by the Bush administration to Guantanamo and then interrogated by the so-called Clean Team, that the interrogations were, in fact, just a continuation of their enhanced interrogation in the black sites by the CIA. And one of the arguments that Connell, I think, is trying to pursue, I don't know exactly, but my assumption just from the nature of these cases, one of the arguments he's trying to pursue is that Guantanamo, certainly in the period from about 2006 to 2007, right after all of these high-value detainees, as they're called, or the CIA detainees were taken there by the Bush administration, that the CIA was essentially still in what was described as operational control of the prison. So even though sort of superficially they're being held by the Department of Defense and interrogated superficially by the Justice Department, really it's the CIA operating and running everything from behind the scenes. And where he gets that from leads to this, I think, really interesting FOIA case that is bubbling up and was just argued in the D.C. Circuit a few weeks ago. If you remember, a decade ago now, the Senate intelligence committee issued a report on the CIA's torture program, the black site program. And one of the things that gets mentioned in the report, referencing some Central Intelligence Agency documents, is that the CIA maintained operational control over Guantanamo for at least a period after they were first moved there in 2006. And so Connell grabbed on to this particular revelation in the Senate intelligence committee report and filed a FOIA request with the Central Intelligence Agency saying, can you please turn over all documents that demonstrate or relate to the CIA's "operational control over Guantanamo"? Then there was a little bit of back and forth, I think, in an effort to clarify that request. And ultimately, what the CIA did though was hand over, I think, two or three documents or two highly redacted documents and one document that was simply identified but not turned over. And they issued what's called a Glomar response. I don't quite know how much your listeners are familiar with FOIA litigation, but Glomar is the neither confirm nor deny answer that federal agencies can give when requests for information, typically relating to national security, will implicate national security concerns simply by answering whether or not documents exist.

A Anthony Sanders 08:47

And is that from a case called Glomar?

M Michel Paradis 08:49

The case's name, I think, is something like *Jones* or something simple like that. The actual name Glomar itself comes from a ship, which is actually a fascinating story all by itself, if you want a good yawn, where the Russian Soviets at the time had a submarine that sank in the Pacific Ocean, and they couldn't find it. And so there was this sort of mad dash, this race, in the 1960s to try and figure out where this submarine had sunk to. And unbeknownst to the Soviets, the United States had in fact identified the location of the submarine and ultimately contracted with, I think, Howard Hughes to send a deep sea exploratory vessel called the Glomar Explorer on what was presented to the world or publicly made to look as if it was like an oil exploration

mission, but in reality, was essentially a giant barge that had been modified with a crane inside of it to reach down deep into the ocean floor to scoop up this Soviet submarine into the belly of the Glomar Explorer.

A Anthony Sanders 10:05

This sounds like crazier than "The Hunt for Red October," which is made up.

M Michel Paradis 10:09

This is crazier than "The Hunt for Red October." Yeah, like just the fact that Howard Hughes is involved makes it crazier than "The Hunt for Red October." So this is a great sort of intelligence, you know, caper from the 1960s, news of which eventually was broken by some investigative reporters. And so individuals attempted to get government documents relating to this Glomar Explorer operation, and the CIA responded that if we respond that we don't have documents, we'll be lying, right? But if we respond that we do have documents, that in itself will confirm that this operation existed. And the operation itself, the very existence of this operation was classified. And so ordinarily, again, I don't want to do too much FOIA 101. But normally, when you do a FOIA request, even when the government is going to withhold documents, they'll give you something called a *Vaughn* index. And that *Vaughn* index is basically a list of all the documents the government has, sometimes with short descriptions of what they are and then either sort of an indication that the document will be turned over or an invocation of the various exemptions that FOIA has for when the government can withhold documents. And one of those exemptions is essentially national security related. And then there's a third FOIA exemption that relates to any document that can be held by law, which is broadly interpreted to also include the ability to withhold classified national security information. And so ultimately, the D.C. Circuit in this case involving the Glomar Explorer says yes, the CIA can basically, instead of issuing a *Vaughn* index, say we neither confirm nor deny that documents relating to the subject matter that you've presented to us or are seeking documents on exist. Because if we simply identify the existence of documents, that in turn will release national security information that we're trying to protect. And so Glomar has, for obvious reasons, been, you know, a pretty powerful tool in the government's toolbox when it comes to trying to withhold information, particularly national security related information, from disclosure because it saves them certainly the time and hassle of having to compile a *Vaughn* index. And particular agencies such as the CIA who treat basically everything they do as national security matters or national state secrets, it gives them the ability to just say we neither confirm nor deny that anything you're asking for exists in the first place. And so that creates sort of maximal secrecy around their operations. There are, however, two exceptions to the Glomar response where the Glomar response is not generally permissible. One is when, in one way or another, the agency has already publicly acknowledged either the program itself or the documents that are to be sought. It's essentially a waiver type of argument. And then, related to that, although very underdeveloped, is the idea that even where the agency itself hasn't disclosed the existence of what's being withheld, if there is enough that you can make an evidentiary showing to say that the declaration that there's something that we'll neither confirm nor deny is just so implausible as to ... Are we allowed to swear on the show? I'm not sure.

A Anthony Sanders 13:53

Yes, trigger warning, but go ahead.

M Michel Paradis 13:56

Trigger warning. Yeah, I'm gonna put the "E" on the podcast right now. But to basically say that, you know, the plausible deniability becomes bullshit, and everyone knows it. And so Connell's argument, which I think is really interesting and fascinating, essentially tries to hit both exceptions. One is that the CIA, by providing the documents to the Senate, essentially, if nothing else, disclosed the existence of this relationship, this operational relationship, whatever operational control might be, to Guantanamo in the period after they were taken technically out of CIA custody and given over to the DOD. And even if that doesn't count as like a full on waiver, which is actually a pretty high standard to hit under existing D.C. Circuit law, that the idea that the Central Intelligence Agency can sort of deny that it had some significant relationship in the operations of Guantanamo in the 2006-2008 period has just been, you know, belied by so many credible public official sources that a Glomar response is no longer credible, right? And because that dissent is no longer credible, they have to now provide a *Vaughn* index, right, a list of the documents they have. That doesn't mean they have to give those documents over, but it does mean that they can no longer pretend that the information just doesn't exist one way or another. To sort of cut to the chase of how this litigation seems to be going, so Connell loses in the district court. The district court is pretty, pretty dismissive of the arguments and takes a pretty robust, pretty muscular reading of the waiver rule and more or less says that unless the CIA agrees specifically that these particular documents exist, then you really don't get through.

A Anthony Sanders 15:49

It seems essentially that it's just too vague, this public information, to allow you to open the door to get to the next level. Is that read correct?

M Michel Paradis 15:58

Basically, yeah. You know, it's a combination of Connell's arguments make sense, but, or even if they don't make sense, they're not specific enough to say that this specific document that the CIA has is Glomar, right? So it does or doesn't exist; they don't have to turn it over, because they haven't specifically said this document exists. They've said a handful of other documents exist, and those were turned over. But, you know, anything else beyond those, they haven't essentially waived the Glomar privilege, if you want to think about it that way. The district court didn't really address what's called the Flores argument, which is the argument that, you know, that the claim of secrecy has to be plausible before ... You can defeat a Glomar response by showing that the claim neither exists or doesn't exist is implausible, right? If it clearly exists based on extrinsic evidence, the CIA can no longer just, or any government agents can no longer sort of throw up Glomar as a, you know, go away. And the district court really didn't engage on that. Represented by the ACLU, they just argued this case in the D.C. Circuit a few weeks ago. And it's available to those who might want listen to it on a podcast that I've hosted for many years called Audio Arguendo. It's on all your happy podcast apps, Spotify.

A Anthony Sanders 17:23

We'll put a link in the show notes too, to that feed.

M Michel Paradis 17:26

Yeah, that's great. It's, you know, for people who listen to this podcast, you'll probably enjoy it. It's not me talking, don't worry. It's just unedited arguments of oral arguments from the circuit courts. We get international arguments in there as well from the ICJ, most recently, Supreme Court, old Supreme Court arguments, and stuff like that. So the *Connell* argument is up on the Audio Arguendo podcast, if you want to listen to it. Connell was represented by the ACLU who's done a number of these cases, as you might imagine, including against the CIA. And the argument, I think, went a lot better for Connell than you might have expected reading the district court opinion. The judges on the court ... Judge Childs presided and Judge Garcia both had a lot of pretty pointed questions for the government. Less on this waiver point that we talked about before. I think everyone more or less kind of assumes that waiver is probably a bridge too far. But on this idea that is it still plausible for the CIA to say there's no documents relating to CIA operations in Guantanamo, and this is the last thing I'll say about it before we kind of discuss it more, a big piece of that was a case the Supreme Court decided a few years ago called *Zubaydah*, which dealt with another CIA detainee who was held in the black sites and who was attempting to get evidence from a former CIA interrogator. The Supreme Court ultimately upheld an invocation of state secrets privilege, but it had a lot of very broad language in that decision that undermined the idea that the CIA gets sort of carte blanche in declaring things completely off limits from judicial inspection. And while not directly a FOIA case, a lot of the issues seem to overlap sufficiently, if nothing else on the facts. It seems to give at least Judge Childs a lot of pause that, you know, the CIA might not be able to treat Glomar as quite the blank check that it sometimes seems like it is.

B Ben Field 19:31

Yeah, so I guess my reaction to this was, I guess, you know, it seems so implausible to say that the CIA has nothing to do with Gitmo. You know, there's this Senate report saying they do. Like, we all know that Guantanamo Bay exists. That's not like a secret explorer ship that, you know, nobody knows whether the CIA is running it or not. Guantanamo exists, and the CIA has some relation to it. And so, you know, it just seems completely implausible to me that there isn't anything. But I guess the flip side is if they, you know, provided this index and it said, oh, there are actually 10,000 responsive documents, that would be a pretty strong indication that they had operational control just by the volume of information, even if they didn't disclose any of the documents. So I was just curious, like one, how do you weigh those considerations, and did the court actually grapple with that? Because the district court just seemed to bat this away and say the CIA can do whatever it wants. And secondly, given that it's pretty obvious the CIA had some relevance, like why are they fighting this? I can understand why they would want to, you know, hold some documents back, but why can't they just acknowledge this fact that everybody seems to kind of know?

M Michel Paradis 20:45

The second question, I don't know, right? You'd have to ask the CIA what they're still protecting

specifically or why they're being cagey. But I think part of it, just to be 100% fair to the CIA, is they treat everything they do as classified. And they have deep just institutional interests in not essentially involuntarily just declassifying anything that they've done, especially when it was previously classified at very high top secret levels, like their operations in Guantanamo and the black sites were. But no, I think it's a really tricky case, actually, for all the reasons you said, right? There is a certain like ... I think that's a great point about how many, if they issue a *Vaughn* index and it's like 50,000 pages long or something like that, right? Quantity is quality at that point. And, you know, we could just think about it ... It's almost metadata, right? Like that's a lot of responsive documents to suggest a much deeper level of CIA involvement than perhaps they've publicly acknowledged. And maybe they see that as a problem or not. So it's a really tricky case. But I think the trickiest case for both sides is the level of generality, right? The CIA wants everything to be at the tightest possible, narrowest lowest level of generality. So you have to identify document by document really why this document?You know, the very existence of this document should no longer be precluded, but at the highest possible level of generality there, like all CIA operations in Guantanamo, right? That does seem like a very high level of generality. That could be precisely the problem, as you pointed out, and so figuring out how to draw that line of what is precise enough, what has the government really disclosed, what does the public really know about CIA activities to make certain CIA denials, you know, plausible or not is a tricky question. And it's actually one of the reasons I think the argument lasted like 40 minutes, right? It was quite a long argument, as these go, because it's actually a difficult case for both sides.

A Anthony Sanders 22:51

I have a question just about the nature of these records. It kind of seems like the chink in the armor that is allowing this argument to be made was a reference in footnote 977 to this document, which itself is in a footnote to this memo. I mean, that sounds like a book. What is the nature of these documents that they've actually seen? And are they usually, you know, incredibly heavily redacted? And in some of these footnotes, you can tell what's going on and some you can't, or what is generally involved in this kind of FOIA production?

M Michel Paradis 23:35

Sure. So yeah, I think they released two documents pursuant to this request and objected to release another under a FOIA exemption. One was the itinerary that the CIA director ... the CIA director's like travel itinerary for a tour of Guantanamo in December of 2006, so soon after the CIA detainees were delivered there. And that was heavily redacted. And then another was a memorandum of agreement between the CIA and the DOD on the handling of the detainees that were being handed over, also heavily, heavily redacted. Although sort of selectively redacted to sort of say DOD is now taking custody. Everything else is redacted. And you know, there you go. So that's what's been handed over so far, because, I think those two documents were actually explicitly the ones referenced in that footnote or adjacent enough to it. What kind of documents could there be otherwise? It's hard to know, right? Like thinking about these cases more generally, not this specific case, right, you might have cable traffic. That's kind of the most common type of document you're gonna see out of the intelligence agencies, just like it would be with the State Department, right? Because a lot of official policy gets made essentially through communications that are, you know, cables as opposed to emails, but cables. There could be emails as well between various components. There could be notes of meetings or minutes of meetings between CIA and DOD and DOJ and the White House, right?

That would be hardly unusual, but it could very well exist here, certainly meetings of the DNI, the Director of National Intelligence. So it could add up. Maybe not quite to 50,000 pages, but you know, it could add up pretty quickly to a lot of documents if the question is what kind of operational control, as the term is, did the CIA exercise in Guantanamo during that period?

A Anthony Sanders 25:37

By the way, these days, what does a cable actually look like? Because I'm sure even the State Department doesn't use Morse code anymore.

M Michel Paradis 25:44

Yeah, they look like emails. Yeah, depending on the agency, it looks like an email. There's lots of headers on it. And for some reason, they still get written in all caps just for ... I don't know why.

A Anthony Sanders 25:59

Well, they look, you know, very secretive, I guess if it's all caps.

M Michel Paradis 26:03

They do, they look like they're up to something for sure.

A Anthony Sanders 26:06

One last question. You mentioned two of the judges. Who was the third judge on the panel? Do you remember?

M Michel Paradis 26:11

Ginsburg, Judge Ginsburg. So the argument was presided over by Judge Childs, Garcia, and Ginsburg, who's now a senior judge. So two Biden appointees, Garcia is a pretty new appointee. Childs is also a pretty new appointee. And then Judge Ginsburg has obviously been on the court since the 70s or the 80s.

A Anthony Sanders 26:32

Right. Yeah, Reagan appointee. He always has interesting things to say. So we'll see how that shakes out.

M Michel Paradis 26:40

Yeah, he was pretty active with the argument as well. Not as active as Garcia and Childs were, but he definitely jumped in a few times.

A Anthony Sanders 26:50

Well, that will be great to watch. I'm sure when that case comes out, it will be newsletter worthy for our Short Circuit newsletter. But now, we're going to turn on Short Circuit to the 5th Circuit. And Ben, this is interesting in a lot of ways, this opinion, a religious liberty case about prisoners where the prisoner wins. We have a per curiam decision, even though it doesn't seem, you know, odd or different than your run of the mill 5th Circuit opinion. And then we have a decision against prison officials, strong decision, and concurrence by Judge Oldham, of all folks, who is usually thought of as a law and order type of guy. So what's going on here?

B Ben Field 27:40

Yeah, so it's a case, as he said, a religious liberty case that has to do with a statute, the Religious Land Use and Institutionalized Persons Act, which people tend to say as RLUIPA. So acronyms can be annoying, but at least they're a little bit easier to say than having to create a name for something like RLUIPA. But that's what we have. And what RLUIPA says is that for land use decisions or for people who are in prison and if they're receiving federal funds, that the government has to be particularly solicitous of religious liberty. And they can't, if somebody says, you know, I want to practice my religion, the government has to have a compelling reason to stop them. And they have to narrowly tailor their response to make sure that they're serving that compelling interest. And so, in this case, we have a Muslim inmate in the Texas Department of Criminal Justice system. And there are three different things that he wants to do that he alleges that the prison system isn't letting him do. So the first is for weekly prayers. He needs to shower beforehand to ritually clean himself, and without getting into the details, let's just say that the typical shower situation of the Texas prisons is not conducive to ritual cleansing.

A Anthony Sanders 29:06

I don't think of spiritual experience when I think of prison showers.

B Ben Field 29:10

No. So he says if I'm forced to shower with the other inmates, it is not appropriate for being able to pray afterwards. The second has to do with daily prayer, so you know, famously the five daily prayers that observant Muslims do. He said that he's like in this cramped space, so it's just not possible for him physically to do the prayers and also that he's stuck around inmates who will yell at him or threaten him for practicing his religion, which impedes his ability to do that. And finally, he says that he needs to engage in Quranic studies, practice taleem. And the prison hasn't had taleem services for years, saying that, well, you need to have an outside volunteer, but then the prison doesn't actually find any outside volunteers. And so he brings these three claims. The district court granted summary judgment to the prison on everything.

At the time, he was pro se. So he was representing himself, which is pretty common for prisoner lawsuits, but when it goes up to the 5th Circuit, he's appointed counsel. And as you said, Anthony, he just wins across the board. And I think that listeners to the podcast ... you know, we talk about tiers of scrutiny a lot, and we talk about judicial engagement. And this case really shows what it means for courts to be engaged and what the difference is between low levels of scrutiny and higher level of scrutiny. Because it's easy to imagine a situation like this where the prison comes in and says, look, there's just so many safety issues and security issues that you have to give us, you know, discretion to do what we need to do. But here, you see a court actually digging in and saying, well, did you consider the alternatives and giving real weight to his religious liberty claims, and I think it's quite powerful to see what happens when that's the case. So the first thing that the court looks into is this showering situation, and they say, look, at the very least, there's a fact dispute on how big a burden this is. But he's certainly made a plausible allegation that prisoners around him are making it impossible for him to clean himself in the way that he needs to for these services. And then they also point out that like, look, he has presented evidence that other types of prisoners, so for instance, those who volunteer to be janitors or kitchen staff, they get to shower separately, so why can't he? And just, you know, on its face, it seems sort of implausible that they couldn't just give this guy like an extra two minutes before everybody else gets into the shower to do his ritual cleansing. And so they say, you know, at the very least, the district court needs to give a closer look to this. And when it comes to the prayer space, you know, the prison asserts that actually there is enough space, but at the very least, it's a fact dispute. You know, he's got allegations in there explaining in detail why there's just not enough space between beds, that there's not enough space between the bed and the ceiling for him to actually be able to stand and then to kneel and pray as is required. He's got evidence of, you know, other inmates threatening him. And at the very least, you know, there's a tailoring problem of whether this really is the least restrictive means that the prison has to maintain order. You know, they point out that Orthodox Jewish inmates are given private time in the chapel, so it raises the question why he can't be given that time, why he couldn't simply be assigned to another Muslim roommate so that they'd be able to pray safely together without having a bunch of people threatening them. Those all seem like reasonable questions that the prison should be able to answer before the court just enters judgment for it. And then the last is the access to religious programming. And this is sort of an interesting one, because it's a problem of the 5th Circuit's own making because there used to be a consent decree in place that required prisons to provide this kind of religious instruction for Muslim inmates. The 5th Circuit vacated it a few years ago saying that it was more stringent than the law actually required, and I think the judges probably had the assumption that, you know, the prisons would go back and provide some alternative. But it turns out that like in the three years since it's been vacated, they just haven't provided this instruction at all. And they haven't tried to find instructors. And so what this prisoner says is like, look, the prison is able to provide these services for Jewish inmates, the prison used to be able to provide these services until this consent order was vacated, and even if, for some reason, it's necessary to have these outside volunteers come in to lead the services, well, you know, even if you can't find volunteer, why can't you, for instance, like just get us a DVD with people giving Quranic instruction? That seems pretty straightforward and pretty easy. And the court said, yeah, those all do seem like less restrictive alternatives than just banning Quranic studies altogether. So it says, you know, you need to go back and give it another look. And so those claims were under the statutory regime of RLUIPA. But he interestingly also had an Establishment Clause claim essentially saying, you know, there's an establishment problem going on here, because Christian inmates and Jewish inmates are just categorically treated better. So he had these examples of Jewish inmates getting the exact same kind of things that he wanted, and so it raises the question why is the state favoring other religions? And Texas has a program, it sounds like, to house inmates who want to be in a more religious setting, but

at least as this prisoner alleges, it is highly Christian and discriminates against non-Christians and requires profession of Christian belief. And, you know, the court says that it's hard to get more establishment than when you're in prison and the only way to get access to a benefit is to profess a particular religion. So the court also asked them to take another look, but as you said, Anthony, I think the real action in this opinion is Judge Oldham's concurrence. And I think to understand this, you need to know a little bit of history of religious liberty litigation. So before 1990, the Free Exercise Clause had a higher level of scrutiny, and it was kind of inconsistently applied. But there were cases, for instance, like Amish people who didn't want to send their children to state schools who were able to make out religious liberty claims against compulsory attendance laws, and it had this higher level of constitutional scrutiny that we often think about with First Amendment rights. But then, in 1990, the war on drugs came into conflict with religious liberty. And sadly, as in so many other circumstances, the war on drugs prevailed.

A **Anthony Sanders** 36:24

The war on peyote.

M **Michel Paradis** 36:26

Exactly.

B **Ben Field** 36:27

So Justice Scalia wrote this now infamous opinion called *Employment Division v. Smith* where he essentially said, look, you know, these Native American religious practitioners use peyote, they got fired, then they wanted to get unemployment benefits, and the state wouldn't give it to them. And he said, well, the law against drugs isn't targeted specifically at religion, and so as long as it's a generally applicable law, a neutral law of general applicability I think is the phrase, then you're not going to get any ability to assert a Free Exercise Clause claim, and you're just going to get rational basis review. Congress was outraged by this, and they passed the law, which also has a fun short form. It's RFRA, the Religious Freedom Restoration Act, which said, no, we're gonna go back to the strict scrutiny that existed before. The Supreme Court struck down that law as it applied to the states and said Congress can impose this restriction on federal programs, but they can't impose it directly against state governments. And then Congress responded to that with RLUIPA where they got the hook of, well, if you're taking federal money, then we're going to reimpose this heightened strict scrutiny on you.

A **Anthony Sanders** 37:44

It's only for prisons and land use, and I can't remember why that is.

B **Ben Field** 37:50

Right. I guess those were the two areas ... So like prisons, you can see why it kind of makes sense. Like people are in prison, so if the state doesn't give them access to their ability to practice, they won't be able to. And land use, I think, was focused around the fact that people

practice, they won't be able to. And land use, I think, was focused around the fact that people like couldn't build churches or religious institutions in places that zoning laws were getting in the way. And so against that background, Judge Oldham writes his opinion, and he says two different things. The first thing is, guys, strict scrutiny means strict scrutiny. And Texas prisons or prisons throughout the 5th Circuit, you need to treat religious liberty seriously. And this is different from people who are just out in the world, you know, when it comes to ... The government doesn't have, for the most part, if you're just a free citizen, any obligation to go out of its way to make it possible for you to practice your religion, but it's just completely different in prison, because everything that a prisoner does is at the whim of the prison. And therefore, for a prisoner to be able to exercise his religious freedom, the prison needs to be actively involved in supporting that. And, you know, he has some harsh words for the government's lawyers here where they essentially just said, oh, well, other inmates are harassing this guy; that's not our fault. Or, you know, the shower is not working great, but, you know, we can't make everybody behave in the shower. Or it's not our fault that people aren't volunteering to teach these Quranic studies classes. It's not our problem. And Judge Oldham says these are the prison's problems, because Congress required the prison to take affirmative steps to protect the prisoners' religious exercise. And then the second thing he says is that 5th Circuit law in this area is just a total mess. And it's kind of a function of how the Supreme Court has interpreted RLUIPA. So, right after RLUIPA, there was a case called *Qatar* where the Supreme Court suggested in what Judge Oldham characterizes as dicta that actually, RLUIPA is pretty deferential to prisons. But, in the last several years, the Supreme Court has been much stricter. So starting with a case called *Holt v. Hobbs* in 2015 and then in a case called *Ramirez* from 2022, the Supreme Court said no, RLUIPA means strict scrutiny; strict scrutiny applies. But, over the course of those 20 years, there's sort of 5th Circuit precedent on both sides of that, taking both of those different approaches. And so Judge Oldham says, well, we're doing the right one here, and Supreme Court case law is pretty clear that doing strict scrutiny is what's required. But there's this other line of cases. And this is a particular problem in the prison context, because as we were discussing before, lots of these people are pro se. And so they don't necessarily have the most sophisticated legal argumentation that they can bring to sort of say, okay, the 5th Circuit used to say this, but the Supreme Court has since intervened, and new, more recent 5th Circuit precedent is more in line with what I'm saying. Instead, you end up with a situation where the government has the far more competent counsel, and they just cherry pick the old cases that are much more deferential ...

A Anthony Sanders 41:07

Plus this is the Texas Attorney General's Office, which is rather notroious for being bulldog litigators.

B Ben Field 41:13

Right. And, you know, Judge Oldham is kind enough, I guess, to relegate it to a footnote, but he does point out that the government did exactly that in this case and only cited the pre-*Holt v. Hobbs* case law, rather than dealing seriously with the more protective cases. And so I think it's both a shot across the bow to the Texas prison system and the Attorney General's Office to be more honest with the district courts. And then at the end, he also expressly says, you know, essentially a threat. If you aren't doing that, we should take this en banc and just make it clear that religious liberty is the rule of the day in Texas prisons.

A Anthony Sanders 41:55

So Michel, I'm curious of your thoughts. Texas prisons aren't quite Guantanamo Bay, but you know maybe in some ways, they're quite similar. Do you have thoughts about weighing religious liberty and then the interest that the prison has?

M Michel Paradis 42:12

Yeah, you know, certainly in Guantanamo, it's a recurrent interest, although it's probably much more like the Christian prisoners in the Texas jails or in the Texas prisons, just because the religious complexion of the detainee population is pretty monolithic. And so, you know, the prison has done a lot over, certainly in latter years, right, certainly over the past 10 years, to provide accommodations for religious practices. One of the big ones that has been controversial in Guantanamo a while ago was the prison, one of the prison commanders, changed the policy on the handling of detainees by female guards. And so if you're a devout Muslim, there's a lot of sensitivity to obviously, sort of intersex contact. And so there, you know, it became a real issue because you'd have female guards essentially manhandling Muslim prisoners, and therefore, they wouldn't go and meet with lawyers or go to court. And that was creating its own sort of obstacles. Eventually, people tried to litigate that. It became a mess all by itself. But it was resolved, ultimately, just administratively because there are plenty of guards to do the handling without creating all these religious issues. But it is always, certainly in Guantanamo, it's been sort of a recurring context. But I imagine in the prison context too that it's very tricky. And I'd be interested in your thoughts on it too, Ben, having spent a lot of time looking at these cases, because, you know, religious practices can be really quite specific to individuals and quite diverse. And, you know, while I'm not sympathetic in this case, in the least, to the Texas prison system, there is inevitably going to be tension between what individuals feel as a matter of sort of religious practicing. Conscience is demanded and what a prison, who's always going to look pretty askance at any request from a prisoner for anything, is going to accommodate. So it's interesting. This decision seems very clear, but it does sort of point to a pretty interesting gray area between the ordinary deference that's just almost absolute in the prison context and these religious claims, for which a lot of deference increasingly is given by the courts.

B Ben Field 44:36

Yeah, and I think that that is what motivated Justice Scalia's position in the *Smith* case where he was concerned that, you know, every Tom, Dick, and Harry would just come in and say, I want to break the law. I have some, you know, idiosyncratic religious thing.

A Anthony Sanders 44:52

The example that's always brought up is the Aztec who, you know, wants to do human sacrifice and you're not letting me with these murder laws.

B Ben Field 44:59

Right. Yeah, my lead foot on the interstate is a religious belief of mine that I should be able to fly as fast as the wind. But I think that this opinion is realistic about that. And I think what it's saying is, you know, it only means that the prison is always gonna lose, and the prisoner can just assert anything and win. But I think what it's saying is, we are actually going to look at reality, we're going to look at facts, and we're going to look at whether the prison has actually made a good faith effort to accommodate a sincere religious practice. And I think that the cases in the past suggest, because like, often, you can just look at another prisoner who's getting very similar treatment to what, you know, the claimant wants, and the prison never really explains the difference. So in that *Holt v. Hobbs* case, which was the one where the Supreme Court kind of changed its tune on this, it was another Muslim prisoner who wanted to keep a beard. And the prison said, well, if you keep a beard, you know, you might be able to hide contraband or razors in there, which facially sounds quite plausible, but then you actually look at the record, and he only wanted like a quarter inch beard. So you can't hide a lot in there. And it turned out that, you know, there's many African American men that have a skin condition that makes it difficult or painful to shave. And so the prison system at issue there already had an exemption from its general clean shaven requirement for lots of prisoners. And the court said, well, why don't you just, you know, let this guy into the same regulatory regime. And I think that, you know, this case, all three of the claims that this prisoner brought, he could point to a very, very easy thing for the court to do, like just buy a DVD of Quranic studies or point to other people who already got the treatment that he was asking for. And so I think, you know, if somebody says, oh, it's my religious belief that I should be able to walk around with a lock picking kit, I think the prison would be able to show that there was no way for them to accommodate that practice. But in the cases that are really going to have to be litigated, you know, the court should look at evidence. And obviously, that's a theme in all of IJ's cases that the court shouldn't just accept whatever the government says at face value but should actually, you know, at least apply common sense to say whether that makes sense.

A Anthony Sanders 47:29

I think that goes to show that so often, as we talk about in IJ cases and we've talked about on Short Circuit, although strict scrutiny is nice if you're the plaintiff's attorney, and of course, strict scrutiny helped this man here, really the difference is no scrutiny versus some scrutiny. And once you have some scrutiny and you actually have to look into the facts and what actually is going on and you realize that the beard is only a quarter inch long and all the rest of it, that's going to be enough, in most cases, to have a rational outcome that's going to help the plaintiff instead of the deference that we get in cases like where the rational basis test is applied.

M Michel Paradis 48:14

And it's really ... Can I actually add to that? Because I do think it is a question ultimately about whether or not the judiciary feels that it has a role, right, at the very bottom of it, and the parallel that easily jumps to mind certainly, like with *Holt*. But also these cases, the military context, the broader military context with military recruits and religious exemptions for military personnel's religious practices. You know, the famous case I'm sure you're all familiar with is *Goldman v. Weinberger* when the Supreme Court in the 80s said a Jewish Air Force psychologist couldn't wear a yamaka. But since RFRA, the lower courts of appeal, I don't think the Supreme Court's engaged on this at all, but the lower courts of appeal have read a fairly muscular, similar to RLUIPA in a way, equal protection or sort of a free exercise jurisprudence, even in the

military context. And in the context of the beard, it was exactly the same thing relating to sick recruits to the Marine Corps, where they also have, you know, essentially religious oriented grooming requirements that they were seeking exemption from. And again, the fact that there were medical exemptions for individuals ... I can't remember the skin condition, but the same issue was raised in that case, but what I think was ultimately decisive was that the court was not willing to accept the "it's the Marine Corps goddamnit" argument, which is very similar in some ways to the argument you see in prison condition cases where it's like, yeah, it's a prison. It seems to be the underlying theme. And so at least in the religious context, I feel like with both RLUIPA and RFRA, the courts have understood themselves to have greater permission to intervene in circumstances where, in every other context, the courts basically turn a blind eye to, you know, whatever rights are being asserted.

A Anthony Sanders 50:12

Well, we'll continue to see if we can have that blind eye not turned in other circumstances that we talk about here on Short Circuit. But for now, I'd like to say, Michel, thank you so much. I think we can call this episode maybe "A Tale of Two Prisons." And it's delightful to talk to you about about all of them. Ben, thank you as always, and thank all of you for listening. And we'll be back next week. But in the meantime, I hope that all of you get engaged.