Short Circuit 312: The Power of FERC

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SPEAKERS

Dan Knepper, Anthony Sanders, Bobbi Taylor

A Anthony Sanders 00:24

"Yet Clare's sharp questions must I shun; must separate Constance from the nun, oh, what a tangled web we weave, when first we practice to deceive! A Palmer too, no wonder why I felt rebuked beneath his eye: I might have known there was but one whose look could quell Lord Marmion." Well, some of you listeners, in fact, all of you, will recognize a couple of those lines that I just spoke about tangled webs of deception. But probably very few of you, in fact including me until I researched this, know that those lines actually are from this full length poem, book length poem, by Sir Walter Scott about Lord Marmion. He was a deceitful courtier of Henry VIII, who tried to use a deceitful nun to win the hand of a lady he desired. Now, we will learn today of a twisted tale in the 6th Circuit about perhaps some tangled webs of deception going on at the Federal Energy Regulatory Commission. Now, were the 6th Circuit judges, the Palmers (a Palmer is a pilgrim to the Holy Land, as stated in that poem), who uncovered this deception at this place we know and love as FERC. Well, we're going to learn about that 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 Wednesday, February 21, 2024. So we got a little FERC coming on in a bit. And after that, we're going to get to some of our bread and butter: qualified immunity. Joining me today for these tales from the 6th Circuit and the 3rd Circuit are IJ's own Bobbi Taylor and Dan Knepper. Welcome to Short Circuit.

D Dan Knepper 02:36

Thanks, Anthony.

B Bobbi Taylor 02:37

Thanks, Anthony. Happy to be here.

A Anthony Sanders 02:39

Now, Dan is our general counsel. And some of you may remember him from a past podcast where he talked about insurance. We bring him on for two things: insurance and FERC. I mean, two of the most exciting areas of law you can imagine. Maybe one day we'll do another area with him. So I'm excited to talk about this case, and it involves separation of powers. There's a lot going on in this 6th Circuit case in a bit. However, first, we have a little bit of reader mail to catch up on. I got this email a couple of weeks ago from a listener who enjoyed our O'Scannlain O'Rama episode that had our friends David Lat and Dan Sullivan, who both clerked for Judge O'Scannlain and worked in the Pioneer Courthouse in Portland, Oregon. So this listener says two weeks ago, I listened to Short Circuit episode 205, which is actually going back a couple years, in which the 10th Circuit's library courtroom in Denver won the award for the most beautiful Federal Circuit courthouse, and some of you may remember that little competition we did a couple years ago. So he says they won the award over my local 9th Circuit Portland building, the Pioneer Courthouse, but then, because he was interested because of our episode in the Pioneer Courthouse, he did a self-guided tour while listening to the episode O'Scannlain O'Rama. He says he did not see Judge O'Scannlain, but he did see his office, and he visited the library. So with all that said, and with the 10th Circuit's library in mind ... If you listeners don't know, it's just a courtroom like a lot of others in the Federal Circuit Court of Appeals, but it's actually like a library, so as you're arguing, you see all these books, you know, surrounding you on the shelves. It's very pretty. And so his question is does anyone actually use the Federal Reporter and the Federal Supplement (which are district record opinions found throughout the building in federal courthouses)? Now, I'm guessing the books like, you know, in a public place, in a hallway, no one actually uses. Those are for show. But in the actual courtrooms or in the actual chambers, does anyone pull those books off the shelves anymore and look at cases? Or is it purely something people do online now? I gotta say, I think anyone my age and younger, which includes Dan by just a smidgen of a year, does not do that. There may be some older folks, some older, you know, Johnson administration appointed judges out there who still do that. Maybe some younger than that, but I'm wondering, Dan especially, you know, in your younger days when you first started at a firm, were there older partners who still would legitimately, you know, look at the old case reporters?

D Dan Knepper 05:51

So, I recall people grabbing the annual versions of the CFR, right? And so it's not quite the same, but the CFR would come out every year, and people would actually use those. I don't recall anybody doing good old fashion like bookcase research ever. I don't remember seeing that. But Anthony, if I may, I have an aside.

A Anthony Sanders 06:16

Okay.

D Dan Knepper 06:18

So a couple of years ago, in like 2018 or 19, a longtime friend of IJ that was a practicing attorney had decided to reduce, he was a sole practitioner, kind of his footprint and that kind of stuff. And he had, at the time, a complete set of Supreme Court Reporters. And he said, I just

can't bear to part with these, right? Can you find them a home? And I said, you bet. And we're talking like they were in great condition, the volumes with the beautiful bindings and all that kind of stuff. Lightly used. And at the time, this was a valuable resource. But to your point, like not a whole lot of people use them anymore, right? So I got those, started making phone calls when the pandemic hit. And Anthony, I couldn't find law libraries, no prison libraries. Nobody was able to take receipt of this donation. We ended up using them for around the office and that type of stuff, which I think is a perfectly fine use and that type of thing. But no one was even willing to take receipt of this donation.

A Anthony Sanders 07:25

Wow. And that's Supreme Court Reporters.

D Dan Knepper 07:29

And that was Supreme Court ... And it was a complete set. It was gorgeous.

A Anthony Sanders 07:32

Geez.

D Dan Knepper 07:33

But that was the extent. Nobody does that type of research anymore.

A Anthony Sanders 07:36

Bobbi, I'm curious. In law school, did they teach you how to use the paper reporters or the Shepard System?

B Bobbi Taylor 07:45

They did not.

A Anthony Sanders 07:46

Because they still ... When Dan and I were in law school, at least at my law school, we still learned that. And I think the only time I actually did that was when I was taught how to do it in first year legal writing.

B Bobbi Taylor 07:57

They show you where the books are, but you're not really using them. It's all Westlaw, Lexis.

A Anthony Sanders 08:05

Well, I'm sure there are some folks out there, maybe lawyers for old times sake or who just never wanted to get round to a computer, who still read them. And God bless you if you're doing it, seriously. God bless you if you're doing that, but I can't say it's a thing I do. But one thing I do is read the courts of appeals' online as they come out. And when this one came out, I knew it was something special. And I turn to our friend, Dan Knepper. So Dan, what's the tangled web at the Federal Energy Regulatory Commission?

D Dan Knepper 08:43

So we're in the 6th Circuit for this one. It's the *Electric Power Supply Association v. FERC*. It was argued in October 2023. And it was handed down, the decision was handed down, on December 21, 2023, which was the Thursday before Christmas when all the big news breaks. The question presented in this case was did the chairman of FERC exceed the authority, his authority, in moving from voluntary remand of a rate-making challenge that had been appealed to the D.C. Circuit without support of other members of the Commission? So basically, in a nutshell, the FERC has several commissioners, the number varies depending upon appointees, and it's up to five. And rather than get an order from the Commission, the chairman of FERC just sent the D.C. Circuit a note, the Circuit Court of Appeals a note, that said send this one back. That note happened to look, taste, smell, and feel exactly like a note that had been exactly what had been decided by the Commission itself. And the D.C. Circuit Court of Appeals said, sure, this is ordinary course. Here you go. And they went back to FERC, and the underlying decisions all changed materially upon voluntary remand. And whether that was appropriate is what the 6th Circuit had to decide. So I'm going to dive into the facts on this. And it's electricity regulation. And it's complicated. And there's acronyms everywhere. So I'm going to do my best. But one of the things I thought about when I studied this case was to keep the timeline in mind, right? Because even though all these things were going on, there was an awful lot happening outside of this proceeding that I think merits paying attention to while this unfolds. So the PJM was an intervenor in the case. It was a PJM rate-making case. So PJM is what's called a regional transmission organization. And the general gist of it is that in order for electricity to flow and get to the places where it needs to go, it goes from one generator, one utility, to another utility, except that it doesn't. So you have these regional transmission organizations that help to manage that electricity as it goes from one place to another. This allows, rather than having a utility, it to build as many generating facilities as it would need to meet its peak demand, right? Like the court talks about, we just get used to when we turn on a light switch, the lights turn on, right? But in August, on a hot day in the District of Columbia, right, like that electricity is gotta be generated from somewhere, rather than having all that electricity be generated by the local utility, who would only need those facilities, you know, in August and maybe, you know, September. Whenever there's peak load, you can borrow excess generation capacity from other utilities, other generating facilities all over the place. And managing that is what PJM does. So PJM has to do a couple things to do that. They have to forecast demand; they have to identify the generating resources. They do a lot of things, but they also maintain reserves. So if something bad happens, PJM can make a phone call, and the generating capacity that's needed to meet those demands is available to it. And that issue there, that question of maintaining reserves, is the actual source of the dispute in this case. So

when it maintains reserves, like PJM does so, I understand there to be tranches. Step one, if your largest generator collapses for some reason, you have a big plant out there that generating its own electricity, they are able to replace that generating capacity within 15 minutes. And they pay an amount to make that happen. And then there's other blips in what's going on in the generating world. They have other types of reserves that are available to meet lesser interruptions than if one of the big generating units goes offline for some reason. So the price cap for the big reserve, the big generator, if the big generator goes offline, the price cap is $850 per megawatt hour. Now, over time, the markets have evolved, and regulators are involved in all aspects of it: in the prices at which other generators had to offer the price into the market, their electricity in the market changed, and so on. It basically doubled to $2,000 per megawatt hour. This change in that price may have led PJM to believe that it needed to be able to bid more for these emergency reserves, and it currently was allowed to do so because, otherwise, it might have difficulty obtaining the reserves it needs in a time of crisis, right? And so it went to FERC, because FERC needs to prove its rates, and said, hey, let's take that number to $2,000 per megawatt hour. And then they have some other thoughts about what to do with it, the lesser tranche of electricity, what they can do and what they can bid into that space. Now, in practice, Anthony, like the court is clear. PJM often paid $0 per megawatt hour for the reserves because already generating plants weren't really necessarily generating at maximum capacity. A plant might be able to generate 100 megawatts, we'll say, and it's only generating 50 at the time. And so if PJM needs more, it can get more from that additional 50.

A Anthony Sanders 14:36

And that plant is just happy to produce that electricity.

D Dan Knepper 14:39

That's right. That's right. And it's relatively easy to do. But PJM didn't believe that that was sustainable over time. Like they couldn't count on idle generation to be able to meet those demands, and so it wanted to be able to increase the price that it was able to bid for, should it have to go into market to get that electricity. And man, is this technical and complicated already, right? So stepping back for a minute, the issue in this case is PJM; who is responsible for maintaining a reliable energy supply in Pennsylvania, New Jersey, Maryland, 10 other states, and the District of Columbia; right, they wanted to be able to bid more for their energy than they were currently allowed to do in case of emergency. And that was the question that went to FERC because that's what FERC does is they say that's okay, or that's not okay. So, March of 2019, PJM makes this rate request. And February of 2020, or sorry, May of 2020, FERC agrees with PJM. And the new rates are set to go into effect in May of 2022. There is a vigorous dissent in May of 2020 by Commissioner Glick because everything gets litigated and relitigated in rate-making cases. There was a request for rehearing. The rehearing was denied in November of 2020, and it was promptly appealed to the D.C. Circuit Court of Appeals, where FERC's decision to allow these price caps, for PJM to bid more for these price caps for these reserves, was going to be decided in the D.C. Circuit Court of Appeals. So in August of 2021, so a couple, not quite eight months maybe before the new rates sort of go into effect, FERC sought voluntary remand to reconsider about 10 prior decisions, including this one, and I wasn't able to track down all 10 of those decisions as I was prepping for this. But I was able to track down some, and there were a lot of PJM rate-making cases in them, including one of them that had a degree of notoriety called the minimum offer price rule, right? The minimum offer price rule was another one where Commissioner Greg had dissented pretty vigorously, and the root of that case was whether generators who receive subsidies from the state for their generation should be allowed, should be able, to use that subsidy to discount their auction price when they put their electricity out to bid or if they shouldn't be allowed to take that subsidy into effect, and they should have to bid something closer to what it actually costs to generate the electricity. Or more simply understood, Anthony, like should solar and wind generators when they generate electricity be able to offer at a discount because they're receiving money in return for generating green electricity?

A Anthony Sanders 18:01

Right. So essentially, it's do they have to set the subsidy aside and compete on, you know, as you might say, a free market without the subsidy with other energy producers? Or do they get the benefit of that?

D Dan Knepper 18:17

That's right. That's right. That's right. So in that instance, those who are in favor of green energy were disappointed by FERC's decision. And this was another one, and this one attracted some coverage in the wider world outside of electricity use. So I picked on it here. But this one was also accompanied by a vigorous dissent from Commissioner Glick and was another one of the cases that was pulled back on voluntary remand, and this would have been in August 2021.

A Anthony Sanders 18:52

And so, Dan, the voluntary remand thing, just to make sure listeners get that part, is essentially the FERC, the Commission, is the respondent. And the appellants, the people appealing, are like you might call them pro renewable energy. So they're appealing. FERC is then, you know, on the defense, but then they say, oh, okay, we'll remand and reconsider, and then maybe you guys who are opposed to us on this appeal will be satisfied with that. And we don't have to do all this stuff at the D.C. Circuit. And of course, they're gonna say, okay, great, remanded. Maybe, you know, we don't have to worry about what the judges will say. And is that essentially what's going on?

D Dan Knepper 19:36

Yeah. Yeah. And in the court, the appeals courts, as I understand, are happy to give these cases back, right? And you know, it clears the docket, and it's not going to necessarily be a decisive turn in one way or another. It's going to say hey, something has come up, something has changed, we have become aware of somebody. We want, as an agency, we want to take a second look at this proceeding before it goes up to the courts on appeal. So our case on the reserve price, along with several other cases, sought voluntary remand. The D.C. Circuit sent it back happily to FERC, where it would reconsider these decisions. And in our case, in particular, FERC changed course pretty much altogether, said PJM had provided insufficient evidence to support the rate change, and restricted it to $850, the price it previously was. And then all of these matters proceeded in due course at the FERC after the FERC made its decision, reconsideration, etc. I believe it was toward the end of 2021, but I'm not positive about that. One of the other commissioners dissented from one of these decisions. His name is Danly, and Danly and Glick were kind of foils to each other. They both believed very strongly in kind of FERC policy and those matters, and their views were rarely compatible with each other. But it was in this dissent that Danly issued where he disclosed for the first time that maybe FERC hadn't necessarily asked for the voluntary remand, but maybe it was just the new chairman, Glick, who sent that note over to the courts. And then this appeal followed, right? So we had a little bit of news getting broken. That's why the argument hadn't come up before is because all the other participants were unaware that this request for voluntary remand was not an order of the Commission or from the Commission itself, but instead just from the pen of the new chairman. And this isn't really how things were supposed to go. So we're in the 6th Circuit, not the D.C. Circuit Court of Appeals.

A Anthony Sanders 22:02

Why are we in the D.C. Circuit now?

D Dan Knepper 22:04

We're in the 6th Circuit now.

A Anthony Sanders 22:06

I'm sorry ... Why is the appeal going a different route? Is that just because this is just one of the energy companies who was involved before, and they're based there, so that's why this appeal goes that way?

D Dan Knepper 22:19

I'm not actually sure why they picked the 6th Circuit, as opposed to the D.C. Circuit. I don't know that one. I looked a little bit and didn't find a good answer. It could be as simple as homefield advantage.

A Anthony Sanders 22:37

Yeah.

D Dan Knepper 22:38

Right. But I'm not entirely sure. So now that this issue is teed up in the 6th Circuit, the 6th Circuit has to make a decision as to whether or not you need a quorum or an order of the Commission or if the chairman could just do this all by himself. And I gotta tell you, it didn't take them long. The court looked at the statute, it looked at practice, it looked at examples of all the other things that FERC does. And then very kind of quickly, they just said hey, no, this is impermissible. It looked at FERC's arguments for why this would be okay, and dare I say, it dispatched them.

A Anthony Sanders 23:31

Very nice.

D Dan Knepper 23:32

Thank you. But then we get to the tough part of this case. And the tough part is remedy, right? So because now we're just before Christmas in 2023, the original decisions from FERC had been made and then appealed years before that, and nothing had stood still in any of the remanded cases. And so what do you do here? And the 6th Circuit basically said like, you know what, we're going to send this back to FERC. We're going to vacate that part of FERC's order claiming the chairman had authority to do this on his own. And we're going to leave the rest in place, and we're going to let FERC kind of decide whether they need to make any corrections or clean anything up on its own. So all they really said is chairman, tsk tsk. Now, go clean up your own mess, right? And the dissent did not say no, this was appropriate, the chairman can do this. The dissent said, agreed, that the chairman absolutely can't do this. But how is this possibly the remedy here, right? Like this is both a substantive and a procedural fault. Like this needs to go back to the time where ... Everything that has happened since that point in time needs to be thrown out. And the dissent talked about how there were other mechanisms available to FERC if they couldn't get, you know, the commissioners to do the right things, but they're all harder, right? Like there are ways that FERC could have managed this. They did not. Instead, the chairman kind of went rogue, and now, in order to clean this up, we have to do more, or we ought to do more than just vacate that one part of the FERC order, right? Now, I did some research. I looked around. I tried to fix that. And my sense on this is that part of the problem is that it was so widespread. What happened with the voluntary remand wasn't limited to our case. That so much time had passed, and so many other things had happened in these various dockets, not just this one, that to kind of reset the clock for two years was a bigger thing than the court here might have been willing to try and attempt to do.

A Anthony Sanders 25:59

It's the old putting the horse back in the barn problem, right?

D Dan Knepper 26:02

That's right. That's right. But to me, I thought the dissent had the better of the argument. This was, you know, if you think about it for even a minute, you know, this was one person who spoke without authority for the Commission to a federal court, and then pulled 10 different proceedings back and proceeded to make different rulings as the makeup of the Commission changed and whatnot, on all of those underlying matters. And that seemed to me to be something that maybe the court should have found a remedy for, appreciating that that would have been very difficult or created some mess in some spaces.

A Anthony Sanders 26:49

Bobbi, my knowledge of the Federal Energy Regulatory Commission is basically what Dan has told me today. Plus, I had an unsuccessful interview with them once in law school, and I learned a couple tidbits from that. If you have any more knowledge than me, I'd be curious about your take of the case.

B Bobbi Taylor 27:10

My knowledge is limited to this case. But I have to say that I was wondering as I was reading it what else was going on here? I know they mentioned that there was an administration change, and the Commission basically turned over with the administration change. And is it really that simple that this Chairman Glick just found himself in charge now and wanted to enact policies that furthered, you know, a more green energy agenda? Or did he have it in for this PJM?

D Dan Knepper 27:39

So that's a great question. And I looked into it. I can answer it a little bit. So prior to Glick becoming chairman, there was a person other than his foil, other than his nemesis. Danly was not chairman. And that person Trump fired on the night of the election in 2020 as results were coming in, and he appointed Danly, the nemesis, as chairman of FERC. And then Biden was able to appoint a couple of other commissioners, and it did flip the makeup of the Commission. And he also appointed Glick to chair. Chairman Glick had a piece in Politico written about him that named him Biden's most effective green warrior, I believe is what they called him. And Glick's term was set to expire, and President Biden tried to get him appointed for another term. And that nomination was blocked by Senator Manchin because Glick wasn't just active in the energy, electricity space, but also proposed some changes, some policies for pipelines that were not appreciated by the senator from West Virginia. And so I think that, you know, there might have been some ... I don't want to step into what people were thinking. I don't want to impugn any like lack of integrity thing, you know. I bet Chairman Glick thought PJM was not founded in its rate request, right? I mean, I don't doubt that. There is a definite theme in the rulings and policies and things like that that have come out of FERC over the last year and a half or so.

A Anthony Sanders 29:51

Dan, to be a bit charitable here, one reading I had of the case is that, yes, it does seem ... I mean, definitely just the chairman acted alone. In the past, this has been a Commission decision whether to ask for voluntary remand in one of these cases. It does seem like Judge Sutton's probably right about the reading of the statute. But could he have been thinking at this point people on his side controlled the Commission, so if he had had a vote of the Commission as to whether to do voluntary remand, he would have gotten it? This really is just a paperwork thing. And maybe they would have remanded, you know, not until the next time they were able to meet, but it didn't change anything, even in the short run, let alone the long run.

D Dan Knepper 30:42

That might be right, Anthony. One of the things that the court made clear in its opinion that I think cuts against that is that it was a question as to whether PJM timely raised its arguments, right? Because the voluntary remand had occurred so much earlier, right? Before this came to light.

A Anthony Sanders 31:06

Right.

D Dan Knepper 31:07

And I wonder what type of back-and-forth there would have been if the Commission had sought voluntary remand at the time, right? Presumably, if it's a paperwork thing, then this lawsuit would have just been filed quicker, right, or something along those lines. But it seemed to me that as much as it was maybe to ease the paperwork, there was definitely a sneakiness about it that the court didn't like.

A Anthony Sanders 31:40

Well, we will leave any more sneakiness with FERC to another day, but very much appreciate Dan taking us through that tangled web of energy regulation and in a little bit of separation of powers. We're now going to move to the 3rd Circuit where we have something a bit more straightforward for folks to wrap their heads around. And that is police exercising their powers in a way that violates clearly established law. So Bobbi, take us to the story of an unwelcome visit to a house one night.

B Bobbi Taylor 32:21

Yes, this is out of the 3rd Circuit. This is the home of Richard and Ada Anglemeyer. They live in Bangor Township, Pennsylvania, which is near the Poconos. And the district court opinion indicates that they live on 60 acres of land. And in addition to the main house, there are several structures, so we're talking about kind of a compound in the middle of nowhere. So Richard and Ada are 77 and 76. And they live in the home with several family members, including their sons, Jeffrey and Mark, and their son-in-law, Joseph. Mark, who is 52 years old, is suspected of dealing methamphetamines out of one of the premises on the property. So at 6 A.M. on February 23, 2018, the Pennsylvania State Police decide that they're going to send 43 officers to this home to essentially affect a raid, and they're looking for Mark and the drugs that he is suspected of selling. Home at the time are 77 year old Richard and 76 year old Ada, their son, Jeffrey, and their son-in-law, Joseph. Mark is not home. Richard, the husband, is asleep in the living room at the time. He's 77 years old. He's awoken by lights outside. Knowing that they live in a rural area, he thinks is there a fire? What's going on? He walks to the window and looks outside. When he looks outside, the officers see him and realize that their operation may be compromised. So at that point, they stormed the house. So starting with Richard, he's the first person they encounter. When they open the door, Richard is in the process of walking out of the door, so they meet him in the living room. An officer shines a flashlight into his eyes. All indications are that Richard is complying. They haven't said anything to him yet, and they just approach him and strike him in the head with the flashlight, grabbing his neck, forcing him to the ground, causing him to hit his head on the fireplace, rendering him briefly unconscious and tearing something in his knee. He needed surgery. Next is Ada. They encounter Ada. She was sleeping in the first floor bedroom, and she's 76 years old. They say that she's a woman of small stature. She was dressed only in a nightgown. She wakes up, and she steps outside into the hallway, where she is met with the shield of one of the officers. Officer Painter smacks Ada in the face with a shield, causing her to fall backwards. She breaks several teeth and a vertebrae. And the facts as alleged are that Officer Painter gave no warning and no instructions

to Ada before he struck her. Next is Jeffrey. Facts indicate that Jeffrey was also sleeping in the living room next to his father. When he woke up to the commotion of the police raiding his house, he walked into the kitchen to try to figure out what was going on. When he got to the kitchen, an Officer McGarvey shouted at him to get down. And before he could comply, Officer McGarvey clotheslined him and forced him to the ground. Another officer put his boot on Jeffrey's neck, zip-tied him, pulled him up by the zip-ties, shoved him in a chair. At this point, he notices, " My parents are badly injured. Can someone call for an ambulance?" And he is slapped in the face and repeatedly punched.

A Anthony Sanders 36:08

Seems like these cops kind of have one MO, like one trick they just kind of use over and over again.

B Bobbi Taylor 36:14

It does. It ends with Joseph. Joseph is upstairs. Now, he's 45, he's the son-in-law. So arguably, he's the one that maybe, arguably, they could mistake for their 52-year-old suspect. But they walk into his bedroom, they jump on the bed, they proceed to zip-tie him, pick him up, and throw him to the ground. So yeah, again, just they're doing the same thing to all of these people to try to subdue them. Mark's not home; they find no drugs in the home. And Mark is not charged with any crime as a result of this raid. So the four plaintiffs that were home and that were beaten by the police, they sue alleging an excessive force claim violation of the Fourth Amendment. Now the district court opinion at the Eastern District of Pennsylvania, and the 3rd Circuit says this in their opinion, the district court relies heavily on the officers' version of events and grants the officers summary judgment. The officers had moved for summary judgment, and what you're supposed to do on a summary judgment motion is take the facts in favor of the non-moving party. So by kind of siding with the officers, the district court made a mistake there. And it's interesting, if you read the district court's opinion, it is very deferential to the officers. It talks about how the officers testified to things, and the plaintiffs only alleged them. And it talks about how this family is known to be hostile to law enforcement. It is known that they have firearms in the home legally. But it just paints the picture very differently than the 3rd Circuit does when it tells the facts in a way that is very deferential to the officers. And in the district court, they only get to the first prong of the qualified immunity analysis, which is is there a violation of a constitutionally protected right? And while they agree that the Anglemeyers have a right to be free of excessive force, in the district court they say from the perspective of a reasonable officer, the force used was not excessive. That these officers were justified in doing what they did, because they had reason to believe that these people posed a threat. As to Jeffrey and Richard, because they can't allege with sufficient particularity which officers actually hit them, their claims fail. And all of the claims are dismissed by the district court. So the 3rd Circuit gets the claim on appeal. And what I like about this decision is that they really do a good job of engaging with the facts of the case. We say at IJ all the time that facts matter. And I think that the judge here really took that to heart. They talk about, first of all, the two prongs of the qualified immunity analysis. And to resolve the first prong, they go the opposite way of the district court, where they say that yes, the Anglemeyers have a right to be free of excessive force. And yes, the force here, at least a reasonable fact finder could find that the force here, was excessive. They go plaintiff by plaintiff, and they talk about how Ada is 76 years old, she's small, she's in a night gown, you haven't said anything to her yet, and

you're hitting her in the face. And they go through Richard's situation where, again, he's complying, he's following the flashlight with his eyes, and then, all of a sudden, he's hit in the face with the flashlight. In terms of Jeffrey, he is punched in the jaw and slapped in the face after he is zip-tied. So he's restrained; he doesn't pose a threat. And then same thing with Joseph. He's upstairs in the bed, and he's zip-tied and then thrown to the ground. So what the court says is that taking, you know, all of the facts, and even the disputed facts in terms of which officer struck Richard and which officer struck Jeffrey, those are questions for a jury, not to be resolved on summary judgment, and it was wrong to decide those facts in the officers' favor. But that's only the first prong. The second prong of the qualified immunity analysis is that not only do you have to find a violation of a constitutional right, you have to find that that right was clearly established at the time of the officer's conduct. And the way to do that is through prior case law. The precedent cases have to be sufficiently factually analogous to put a reasonable officer on notice that his conduct was unlawful. And the 3rd Circuit talks about the fact that, in order to be clearly established, the specificity of case law is especially important because the question needs to be beyond debate for these officers. Luckily, in the 3rd Circuit, there is a case that they found to be sufficiently analogous, although when we go through the facts, you'll see that I think, if they wanted to, they could have found some factual distinctions. But in *Couden v. Duffy*, it's a case out of Delaware, the police arrive, hunting down a suspected drug dealer. The police arrived to the home and see two doors down, a young male run into a different home, and they say that must be our suspect. He must be trying to flee. And they chase this man into the home, and they don't realize that this is just 14 year old Adam Couden who is dropped off by his mother and runs into the home to pick up his sister. So his mother gets to watch this happen. The officers storm into the house, grab Adam, throw him to the floor, press their knee into his back, pushed his head into the ground, and spray him with mace. And the court in *Couden* found that Adam was unarmed, there was no reason to suspect he was a threat, and that this force was unreasonable. I found it interesting that, you know, the 3rd Circuit here could have said, well, that was a 14 year old; this is a 76 year old. And that's just the kind of factual distinction that makes this not clearly established. But they didn't do that. They said that *Couden*'s rule is that it is unlawful for an officer to engage in serious bodily harm when the individual posed no danger and did not resist to attempt to flee and was not armed. So based on the precedent case law, the right to be free from this kind of excessive force was clearly established. And the Anglemeyers' claim gets to a jury, which I think is a really good decision for two reasons. One, in the world of qualified immunity, where in order to get a denial of qualified immunity you need clearly established case law, more cases that deny qualified immunity are better for just people in general. And then also, I really liked how the judge engaged with the facts and didn't just kind of take the officers' word for it as the district court had done.

A Anthony Sanders 44:04

Dan, did the actions of these police officers seem like a clearly established violation of law to you?

D Dan Knepper 44:11

It ought to be, right?

A Anthony Sanders 44:14

One would think.

D Dan Knepper 44:15

When you listen to the facts, the fact patterns in the facts of the case ... And Bobbi, I thought you made a really nice point of like, you know, making sure you take it in the perspective of the folks who suffered here. You know, I can't help but think of like the amount of time that had passed. You said that the gentleman needed surgery. You know, by the time the 3rd Circuit got done, like that had to be a couple of years that went by, right?

B Bobbi Taylor 44:46

Right. So this happened in 2018, the incident. And this was argued in September of 2023. And it was just decided or just filed last February or last week. So I mean, this is almost five years now.

A Anthony Sanders 44:59

And that's just to now get to a jury. So now they have to have the trial, and then there'll be an appeal, and God knows when they'll actually get compensated.

B Bobbi Taylor 45:09

Well, hopefully it'll go their way.

A Anthony Sanders 45:13

I really like your point about that prior case being a case that if the judges wanted to, they totally could have distinguished it. I mean, listeners may remember there was a slew of these qualified immunity cases that went to the Supreme Court about four years ago now that a lot of us thought the Court was going to take to really take on qualified immunity. And some of them were these crazy distinctions, such as a cop shot a dog, but the dog wasn't in the same kind of circumstance as another dog shooting case, and so it could distinguish those two. There was police brutality against someone who was lying down or I think was sitting up, but the prior case was the person was lying down, and so they distinguished it. And here, this was, I mean, you're right about someone running into a house who wasn't even the person they were looking for. These police officers knew these people would be in the house. They just, you know, brutalized them way beyond what was reasonable. But at least that's a distinction. And it was a child, it was a minor, and all of these people were not children. So they could have done it in all kinds of ways, but instead, you get the common sense distinction that you wish the Supreme Court would mandate courts to actually do which is, yeah, they beat this person up for no good reason, and you can't beat people up for no good reason.

B Bobbi Taylor 46:47

Well, and the other thing that's good about a case like this is it does have those kinds of facts that if the Supreme Court were looking for a good case to take up, you know, if the officers were to appeal this decision, I think that this might just have the anger-inducing facts that are needed to get the Justices to consider.

A Anthony Sanders 47:09

That's a good point. It is hard to root for the Supreme Court taking a case about qualified immunity, because usually, the rule is the plaintiffs lose when qualified immunity goes to the Supreme Court. Although there were a couple of exceptions a couple of terms ago that we have talked about before where there were some summary reversals where things just got way out of hand. And there was a signal to try to not be so literal about this type of adhering to precedent, but maybe times are going to change soon. We will see. Well, thank you both for this tour of FERC and qualified immunity. Dan, we will keep abreast of further developments in this area and this Shakespearean saga that's going on at the Commission. And when there is more news, perhaps we'll put the Dan signal out for you to come back.

D Dan Knepper 48:14

I look forward to it, and I'm happy to be here. Thanks, Anthony. Thanks, Bobbi.

B Bobbi Taylor 48:19

Thank you both.

A Anthony Sanders 48:20

Thank you both. And thank you all for listening. And until next time, I hope that all of you get engaged.