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SPEAKERS

Anthony Sanders, Bob McNamara

A Anthony Sanders 00:25

The thing the time traveler held in his hand was a glittering metallic framework, scarcely larger than a small clock and very delicately made. There was ivory in it and some transparent crystalline substance. And now I must be explicit. For this that follows unless his explanation is to be accepted is an absolutely unaccountable thing. He took one of the small octagonal tables that were scattered about the room and set it in front of the fire with two legs on the hearth rug. On this table, he placed the mechanism. And that dear listeners is from the classic 1895 novel, The Time Machine by H.G. Wells. This is 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. Now, we're recording this on Monday, March 27, 2023. But we may be doing a little bit of time traveling because we're not exactly sure at this point if this episode is going out this week, so that'll be at the end of March 2023, or maybe in a week or two because we have some other projects going on right now. But I'm delighted, dear listeners, that you are listening to this episode, where we're going to talk about time travel. Now, not only did H.G. Wells theorize about time travel, but it appears last week that the Fifth Circuit, the United States Court of Appeals for the Fifth Circuit, attempted its own version of time travel by issuing an order that really should have gone out quite a long time before that. To have us sort this out and also talk about some property rights along the way is my colleague, Bob McNamara. Bob, welcome back to Short Circuit.

B Bob McNamara 02:26

It's good to be back. I've missed you terribly, Anthony.

A Anthony Sanders 02:29

Yes, it has been quite some time since we had Bob on the show. And I'm glad we can make that up with just a little episode we're gonna have today, just him and me. So he's going to talk about time travel, the Fifth Circuit, and property rights and the US Supreme Court and all kinds of fun things that I am thoroughly confused by. And then I am going to bring us on our own

little adventure through time, where we're going to go back thousands of years to ancient Anatolia and then bring it forward to the New York antiquities market and antiques market and talk about a little case that came out earlier this month involving the Republic of Turkey. So we got all that look forward to. First of all, we have a case now this is an IJ case. IJ is now involved, and on behalf of our clients, we just filed a petition for certiorari because we'd like a writ of certiorari at the US Supreme Court. It is DeVillier. Right, Bob? DeVillier v. State of Texas, again from the Fifth Circuit. It's about property rights. All the rest I'm going to leave the Bob because I don't really understand it. What's going on down in Texas, Bob and what's with the Fifth Circuit's adventures through time?

B Bob McNamara 04:00

What is with the Fifth Circuit's adventures through time? So DeVillier v. State of Texas didn't start out as an IJ case. I first ran across it a little bit before Thanksgiving of last year when one of our colleagues here at IJ just sent me an email on the day this opinion came out and said, I'm not a takings person, and I don't really have the grounding to know if something's weird about this, but this opinion looks weird, and you should read it. And the opinion does look weird because it's an opinion reversing a district court's denial of a motion to dismiss, and the entire analysis of the opinion consists of one sentence. I can read you the entire substantive part of the opinion right now.

A Anthony Sanders 04:42

I think that's a first on Short Circuit, read an entire opinion on the podcast.

B Bob McNamara 04:48

It's a full service podcast, Anthony Sanders. The entire legal analysis is just because we hold that the Fifth Amendment Takings Clause as applied to the states through the Fourteenth Amendment does not provide the right of action for takings claims against a state, we vacate the district court's decision and remand for further proceedings. And that's it. That's all they said. It reads like the conclusion to a 10 page opinion, but in fact, it's the entirety of this one paragraph opinion. And it's weird because the Supreme Court and other courts across the country have long held that the Takings Clause is different. The Takings Clause is what the Supreme Court calls self executing, because it's the only part of the Bill of Rights that has a remedy in it. All the rest of the Bill of Rights is about prohibiting the government from doing stuff. The Takings Clause doesn't say you can't take property for public use it just as when you take property for public use, you have to pay just compensation. And so the Supreme Court has always has long said that that's just a self executing part of the Constitution, you have to pay compensation, there doesn't need to be a statute authorizing compensation. The Constitution itself gives rise to the remedy. And it's a fundamental principle, going back to Magna Carta. When the government takes property, the government owes prompt payment right then in there as a matter of inherent right. And the opinion just didn't grapple with any of that. So being IJ lawyers, we instantly got in touch with the plaintiff's lawyers and figured out what was going on in the case. And it's a standard issue inverse condemnation case. The gist of it is a number of years ago, the Texas Department of Transportation was doing some work on Route 10 outside of Houston. And in order to keep part of the road drive during heavy weather, they

built basically a dam, a three to four foot high dam running down the middle of Route 10. And the result of the dam is exactly what it was designed to do. It stops water. It means the south side of Route 10 stays dry at the expense of making the north side of Route 10 really, really wet. Water that used to drain south into the Gulf of Mexico is now dammed up on the north side. And when hurricanes and tropical storms hit, it means days on end of flooding that ruins farmland, that kills livestock. And it's a classic property rights case about a government caused flood. There are dozens and dozens of these throughout sort of the property rights canon. And the property owners did what you're supposed to do. They filed a lawsuit in state court that said the Fifth Amendment is self executing. This is a taking; you took our land. You can turn our land into a lake for the public use if you need to, but you have to buy the land; you can't just flood it. But because there's a Fifth Amendment claim, Texas removed. There's a federal claim under federal law that you're allowed to remove that case to federal court. And once they got to federal court, the state of Texas said, wait a minute, the only way you can vindicate your constitutional rights is by suing under the Civil Rights Act under Section 1983. And the only people you can sue under Section 1983 are people, are individual government officials, local governments, counties, cities, things like that. You can't sue the state under Section 1983. Right.

A Anthony Sanders 08:00

That's just because in 1871, Congress didn't say that, like they could have, but they didn't. And so there's no claim against the state.

B Bob McNamara 08:11

Right, 1983 says you can sue a person. The Supreme Court has said, look, a state isn't a person, you can't sue them.

A Anthony Sanders 08:19

A county or city is a person, but not a state.

B Bob McNamara 08:19

I know, she was so excited that I got an order from the Fifth Circuit on her birthday. She's nine, and all she cares about is appellate procedure. So on March 23, we got another order denying rehearing en banc again. But this time, the Fifth Circuit had taken a poll, someone sua sponte had just asked for a poll to see if they could take this en banc a second time, and the poll was unsuccessful. A majority didn't vote to rehear it, but there were now three opinions about the denial two of the judges sitting on the original panel. Judge Higginbotham and Judge Higginson both entered individual concurring opinions explaining why this one sentence of analysis was right in their view. They don't seem to totally agree with each other, but they agree with the one sentence. And then Judge Oldham joined by four other judges of the Fifth Circuit wrote a dissent basically saying that this is crazy, that this eviscerates the Takings Clause everywhere in the Fifth Circuit, very kindly, I would note, pointing out that it was kind of ridiculous to deny IJ's motion to file an amicus brief since it seemed like a perfectly good amicus brief to him. All

after we had filed our cert petition when en banc was denied in January, we took the court at its word, we filed the cert petition on schedule, as you do. And after that cert petition, the Fifth Circuit issued more opinions about the en banc decision. Exactly. The result you would expect based on the definition of person in 1871. Whether that's right or wrong, a state and state agencies and state officials are not a 1983 person. They can't be sued under Section 1983, and Texas said that's the end of it. The only place you can sue is Section 1983. Section 1983 doesn't apply to us, so you can't sue us under the Fifth Amendment. And the magistrate judge said that's crazy. That's my gloss on his opinion, a very thoughtful opinion. He said look, the Supreme Court says the Fifth Amendment is self executing. The Supreme Court says you don't need legislative authorization to bring a takings claim, and so of course you can sue under the Takings Clause directly. It's self executing. That's what it means. You don't need 1983. This can just proceed. And then Texas took an interlocutory appeal. They said this is an important question. This is a case deciding question. We want to go straight to the Fifth Circuit on the motion to dismiss. And that appeal is what led to this one sentence of analysis that said nope, you can't sue under the Fifth Amendment. And so I just got in touch with the property owners lawyers. They sought rehearing en banc. We filed an amicus brief, and in early January, rehearing on bonk was denied. We had an order that said no poll was taken. None of the judges on the Fifth Circuit wanted to take a vote about whether to rehear this en banc, and IJ's motion for leave to file an amicus brief was denied. We weren't allowed to file the brief we wanted to file. We took that personally, and took over the case, and filed a petition for certiorari, saying, basically, look, you have said that nobody needs a statute to sue under the Takings Clause, and a lot of state Supreme Courts have taken you at your word and said, no, we have to let people proceed directly under the Fifth Amendment. The Fifth Circuit now says that's wrong with the upshot being that now you just can't sue states under the Takings Clause in the Fifth Circuit at all because, as we've seen here, the Fifth Circuit has sort of invented one weird trick to avoid government accountability. If someone sues you in state court and invokes the Fifth Amendment, you can then remove that case and have the federal court extinguish the Fifth Amendment claim. It turns federal courts from places where you're supposed to be able to go to vindicate your constitutional rights and to places the government can go to extinguish your constitutional rights, even if other courts want to respect them. And it's not the magistrate judge was right. This is nuts. So we filed our petition for certiorari, which brings us to last week, March 23, which is also my daughter's birthday.

A Anthony Sanders 11:08

What a great birthday present. And then in the meantime, it's not like the court said, oh, by the way, we're working on another denial order. So your time limit for when you have to go to the Supreme Court has been stayed or anything like that. Just out of nowhere you get this after you timely have already filed your petition.

B Bob McNamara 13:06

It was unexpected. It's always welcome. Any judge who wants to issue a dissent from denial of rehearing and an IJ case should feel free to issue that anytime. We always welcome opinions. As Judge Oldham notes in his dissent, one of the problems with doing things this way is the property owners had to file a petition for certiorari before anyone explained what the one sentence opinion was supposed to mean, or tried to justify it, which is backwards. That's not how litigation is supposed to work. I think Judge Oldham is correct. That's not how the litigation

is supposed to work. But as far as I can tell, the original opinion has a sentence of analysis, and there were no amicus briefs because the panel denied our motion for leave to file an amicus. So all you had was this one sentence opinion that went around the court, went through everyone's chambers, and everyone kind of looked at it and said, this is one sentence about how you can't sue a state, and there are lots of reasons why you can't sue a state. There's the Eleventh Amendment, there's sovereign immunity, it's probably one of those. And so this doesn't seem like a very big deal. And we don't need to go en banc is honestly I think what happened. If you just read the one sentence, it could be a bunch of reasons why you can't sue Texas, and it's probably one of the good ones, right? We're just not going to rehear this. And then somebody noticed. Someone on the Fifth Circuit noticed the the actual implications of this opinion, which is you can't file inverse condemnation claims against states anywhere in the Fifth Circuit anymore under the US Constitution and said, wait a minute, guys. This can't possibly be the law. That's correct. It can't possibly be the law except it is the law. It's the binding law, the Fifth Circuit, unless the Supreme Court steps in and says all those times that we said the Fifth Amendment was self executing mean that the Fifth Amendment is self executing.

A Anthony Sanders 14:55

So I want to dig into the Fifth Amendment stuff with you in a moment. There's so much we could dig into about what's going on here. For our en banc fans listening and who know in an episode not too long ago, we really dug into some of this en banc procedure stuff. The normal course is how en banc review works, where you have a three judge panel and then you don't want to go to the Supreme Court, but you want to go to the full set of judges in the US Circuit Court of Appeals, is you file your petition for en banc review and then that is either granted or denied. And if it's denied, then the case is really over at the Circuit Court of Appeals. But that also can happen by a judge sua sponte on his or her own, asking for en banc review, even without the parties asking for it. So it sounds like what happened here is the parties asked for en banc review. That was denied. So you go on your merry way getting a cert petition ready. And then someone had a second bite of the apple, which we're happy they did, to have a poll and basically do the same thing again. So my question for you is, I know you've probably only been involved in this type of procedure for a few days now because it kind of came out of nowhere, but do you know of this ever happening anywhere before? Because it seems like they must have started writing this, it's like 45 pages with everything together, well before you filed the cert petition. But they must have known that that might happen during the time they're writing it. Is this something you've heard up before? Or is this just really things going differently in the Fifth Circuit?

B Bob McNamara 16:59

So this isn't unique, and you can understand judges on the Fifth Circuit care about kind of maintaining coherent law within the Fifth Circuit more than they care about kind of Bob McNamara's schedule for writing a cert petition. And so if there's a problem with Fifth Circuit law that they see they're going to fix it and they're going to try to fix it, they're going to try to get it right. It happened a few years ago. There was a case involving a lawsuit against DeRay McKesson, the Black Lives Matter activist who was sued by police. The allegation was that he organized a protest and therefore could be held vicariously liable for crimes committed by the people at his protest. And that kind of went up to the Supreme Court, and while the cert

petition was pending, the Fifth Circuit took another poll to take it en banc. I think from the published opinions, Judge Willett wrote a new opinion pushing for en banc review. And then the en banc review was denied in an evenly split vote because Judge Ho wrote an opinion basically pointing out that McKesson should win under a doctrine that neither party had invoked, but they could easily invoke in the District Court. And so they didn't need to go en banc because, Judge Ho and he was right, Judge Ho had solved the problem for them. All of that was while the cert petition was pending, so it does happen where judges on the circuit level will kind of see things or notice that something was done incorrectly and try to fix it while the case is pending in the Supreme Court. Which is why actually an in Supreme Court procedure on cert petitions, there's just a blanket rule that allows for supplemental briefs at any point. It's not a formal process where they're disfavored. The court just says, look, if something happens after you file the cert petition, you can just tell us about it. It's easy enough because sometimes things happen. Remember, this case itself, the DeVillier case, is up on an interlocutory appeal, so there are still proceedings in the District Court. It's not like everything's frozen in amber. And so the the Fifth Circuit is trying to get things right. I guess if it had gone en banc, it would have mooted the cert petition. And then you do the en banc argument and maybe somebody doesn't use their petition. But as it stands, it's opinions that we'll think of as amicus briefs, very high powered amicus briefs, both for and against the cert petition that the Supreme Court will now get to consider.

A Anthony Sanders 19:29

It's always lovely to get amicus briefs written by judges. So as far as the merits, the thing I am thoroughly confused by and I'm sure the listeners are confused by is when these poor property owners filed their case in state court, raising federal and state claims. In state court that is a proper claim, so then it gets removed to federal court. Usually, if you sue in state court and your case gets removed to federal court, your cause of action just kind of goes with you. So say, Bob, say you and I get in a car accident. I live in Minnesota, and you for purposes of this are going to live in the great state of Wisconsin. So we get in a car accident. I sue you in federal court with diversity jurisdiction, or actually, I sue you in state court for more than $75,000. It's a bad accident, I have a really nice car, and you remove it to federal court. It's not like we have to then go find some federal cause of action that would work. It's just the Wisconsin or Minnesota statute for filing that kind of negligence action, or just a common law cause of action that just follows us to federal court. Why didn't that happen in this case? And why all of a sudden is Texas like, oh, no, you need Section 1983, and that doesn't work so you lose.

B Bob McNamara 21:04

Because there isn't a cause of action. It's not like there's a Texas state law where there's the Texas Civil Rights Act that explicitly allows you to litigate federal constitutional claims and state courts.

A Anthony Sanders 21:16

Is there an inverse condemnation statute?

B Bob McNamara 21:21

Inverse condemnation, Texas has said, arises directly under the Constitution. They have said exactly what the Supreme Court said. You sue directly under the Fifth Amendment. And Texas has said, look, the Takings Clause requires a remedy and so that's self executing. And because it's self executing, you don't need a statutory cause of action. You just sue under the Fifth Amendment.

A Anthony Sanders 21:41

And this happens all the time. It's Texas state court.

B Bob McNamara 21:46

But what the Fifth Circuit has said, basically, is that Texas is wrong. That's not how the Fifth Amendment works, you do need a cause of action. The only federal cause of action that's relevant is Section 1983, and you can sue under Section 1983. So it's not just a circuit split, it's a split between Texas and the Fifth Circuit. So if you litigate it exactly this case, exactly this case in Texas state court all the way up to the Texas Supreme Court, the Texas Supreme Court would say, yep, you invoked the Fifth Amendment. That's how you bring an inverse condemnation claim under the US Constitution, you sue directly under the Fifth Amendment. That's great. We're going to adjudicate this case. But if the case is removed to federal court, the federal courts say no, no, you don't sue directly under the Fifth Amendment. You need Section 1983. And so that means that if you're a state defendant in a takings case, anywhere in the Fifth Circuit, you get to pick what the law is, if you stay in state court, the law is property owner friendly. If you remove, it's government friendly. And so the government's going to remove every state takings case because then they don't have to pay for stuff and nobody likes paying for stuff, Anthony Sanders. Nobody wants to pay for it.

A Anthony Sanders 22:52

And this is even more of a problem in Louisiana, I understand. Tell us why that is.

B Bob McNamara 22:59

Louisiana has a constitutional provision that prevents it state courts from enforcing judgments against the government. So if you have a court case against the government, it can be just a straight condemnation. Forget about flooding, it's just the government files an eminent domain case against you and takes your property for public use. And then the court says, okay, the government took your property, we value your property at a million dollars, and you go to the government. You say I have this court judgment for a million dollars. I'd like you to pay me. The government can just say no. And the court can't put a lien on anything. It can't garnish anything. It's a totally unenforceable judgment, unless and until the Louisiana legislature decides to vote to pay you.

A

A Anthony Sanders 23:44

And they're not very good at doing that I've heard.

B Bob McNamara 23:47

Yes. It turns out to not be a top priority to pay money that no one can make them pay. And so you have all of these judgments in Louisiana, takings judgments, that just don't get paid for years. And it turns into basically a negotiating tactic, where I condemn your land, the judge says it's worth a million dollars. So how about we start the bidding at 500,000, the judge said it was worth a million, but you can't enforce the million, so let's just negotiate a much lower number. When you're supposed to have an enforceable court judgment, that is the starting point for negotiation. And now, the new rule in the Fifth Circuit is that there's no way to ever get that claim into federal court or if that claim arrives in federal court, it's going to be extinguished because only 1983 matters. It transforms the federal courts from a place where people are supposed to go to get their federal rights vindicated into a place where the government gets to go to make those rights disappear. And it's just an utterly backwards way of thinking about federal constitutional protection, where you have these federal plaintiffs who are I'm sure going to be desperately trying to find ways to stay in state court because the federal courts no longer think their rights exist. And that's just not what federal constitutional law is for.

A Anthony Sanders 25:05

And that's it. I mean, that's exactly against what the court was trying to do I get it's a different context. But trying to do a couple years ago in the Knick case, where there used to be this other rules that we don't have to get into today, which meant you had to go to the state court to vindicate your federal takings rights. And now, the court said, ah, you can go to a federal court now. But now, apparently, when you sue the state and not a city or county, you are back in state court and might as well not even raise federal claims because then you'll have to go to federal court where you'll lose.

B Bob McNamara 25:39

Yes. And that's one of the things Judge Holden points out in his dissent in the DeVillier case. One of the things that the Supreme Court is worried about in Knick was there was a lot of gamesmanship and takings cases in the old regime where he had to go to state court first, and it made it really hard for people to vindicate their rights. But at least in theory, under that old regime, you could get to federal court sometimes. And under this new system, I guess it's Williamson County on steroids. Now, you just can't litigate these in federal court. As soon as you set foot in federal court, they vanish into thin air, right?

A Anthony Sanders 26:14

Well, we definitely, not just because it's an IJ case, we'll be watching this on Short Circuit. And this really goes to a lot of the issues of immunity and accountability that we've talked about many times in the past that you've heard my colleagues and Bob's colleagues Anya Bidwell and

Patrick Jaicomo talk about in their project about immunity and accountability. So I think this will get a lot of attention in the Supreme Court. We'll see if they actually bite at this one. But it in the meantime, I'm going to make sure that I don't buy property in the Fifth Circuit. So otherwise, though, something that maybe I would want to buy some time would be an antique, although it probably would not be a 6000 year old idol. So this is now going to bring us to the Second Circuit and the other piece of time travel that we have to talk about this week. The case is a interesting mix of New York mundane New York state law and international antiquities, the International antiquities market. The case is Republic of Turkey vs. Christie's. Christie's, the auction house, is involved and also a gentleman named Michael Steinhardt. So to get a sense of what's going on in this case, we will first start 6000 years ago, in Western, that becomes very relevant, Western Anatolia, what today is the modern Republic of Turkey, also called Asia Minor. Archaeologists think not too far from the city of Troy, known to myth and also somewhat to fact, on the eastern side of the Aegean Sea. So what was going on back then 6000 ish years ago? Well, there was a culture there that produced these very stylized idols. They're called idols for lack of a better term. Like a lot of things in archaeology, we don't exactly know what these were used for. But they're usually not found when they're dug up, usually not found in intact; they're often found broken. And so archaeologists think they actually were maybe broken as part of some ceremony, so they had the religious significance. If you've seen what's called cycladic, I'm getting that pronunciation wrong, but cycladic, I think it's called, artwork, which actually was an inspiration for some of Pablo Picasso's sculptures, you get a sense of what it looks like. We'll put a link in the show notes to the opinion. You can also just just google this type of artwork, but it's called a Kalia type idol from Anatolia. They're made of marble. And this particular item that's an issue in this case is about nine inches tall. It's a very well preserved example of this. And it was probably again made in eastern Anatolia about 6000 or 5000 years ago. So flash forward from that time period to 1961. In 1961, and arts dealer in the New York art market, whose name was J.J. Klejman. I'm gonna mispronounce it.

B Bob McNamara 30:10

You thought saying DeVillier was the hard part of this podcast.

A Anthony Sanders 30:13

We haven't even gotten started yet with this case. He had this item and sold it to a couple, the Martins. The Martins were, I guess, well known antiquarians of the time. They took this item, and they owned it for many years. They were good, according to what Indiana Jones would say. They allowed it to be displayed at the Met, The Metropolitan Museum of Art, so the public could see it. It was examined, it was written about in many different scholarly journals, and also in the popular press, eventually that was even in Turkey. So if you are in the modern day Republic of Turkey in the 1990s, there examples of it been being written about and discussed. According to the archaeologists, it is a very well preserved example of this artwork. Now, one thing about this artwork is it doesn't seem like it was really traded in antiquity a very long time ago, like say Greek pottery was shipped around the Mediterranean, but it could have been, and it wouldn't have been crazy for it to could have been. So the item that this Leishman had a 1961, nobody knows if he had just dug it out of the ground in Turkey the year before or bought it from someone who did, or if thousands of years ago, it was brought somewhere else, say Greece, Italy, wherever, and then was found by some antiquarian and sold at a later time. That becomes very relevant in a moment. Anyway, in 1993, it's then sold by the Martins through a

couple of transactions to the present owner. Who is, again, Michael Steinhardt, to him and his wife. And then they own it for a few years. It's in the Met. it's very public. And in 2017, for whatever reason, he decides to put it up for auction through Christie's Auction House, and then the Republic of Turkey gets interested. And my guess is they got interested because it actually did get bidded at an auction, and it sold for $12.7 million. Now, the day before the auction, the Republic of Turkey filed a lawsuit, saying that it is actually the rightful owner of this piece of art. Now, why did they do that? Well, why they do it is, I think, probably because of 12.7 million big ones. But the claim is that actually under the way the law works in the art market and the fear of stolen artworks that very much exists in the art world. Under a decree that was made by the Ottoman Empire in 1906, if this artwork was removed from the now Republic of Turkey, since 1906, so if it was dug out of the ground since 1906, it's properly actually the property of the Turkish government, under the the laws of who would own that item if it was dug out of the ground in the Republic of Turkey. So they go to New York and file suit in federal court. The unknown buyer does offer $12.7 million, but because of this lawsuit, it was never transferred. And it goes to two Southern District of New York judge who they have a trial and rules two things. One is that under New York state law, Turkey did not meet its burden that it is the lawful possessor of this item. This sounds like a kind of a mundane part of state law, but it's important for what then happens at the Second Circuit. And essentially, under New York state law, you need to have an initial showing that you are the rightful possessor of artwork, and this is a different level than you would need if say it's just a normal item of personal property. Like I own that DVD player that you possess and then you have to give the evidence for why it's actually your yours and not your neighbors, or whatever it might be. With artwork, because the buyers and sellers are pretty sophisticated parties and often there is thievery in that field and often there have pretty high value, there's a little different standards. You can kind of go after something years after it was it was taken. And the court says, you didn't meet your initial showing, which you need to have a preponderance of the evidence, and it seems like both parties kind of are 50/50 on what the evidence is. And so you don't win. Turkey appeals that and says, no, actually how it works is you need an initial showing of evidence, but that doesn't have to be 50/50. It's kind of like probable cause with the police to get your toe in the door. You just need a colorable claim and then at that point, the burden shifts to who has the artwork to show it's more likely than not that they actually have it legitimately. So the Second Circuit goes into this area of New York state law and says the district court was wrong. And so we're not going to say whether Turkey met their burden or not, but it infected its entire analysis. Nevertheless, the decision is affirmed. So why is that? And that's because of this thing called laches. Laches is something that you hear about in law a lot, but usually doesn't make a difference. Courts don't like to say that someone wins under laches, for whatever reason. But laches are the idea that you have slept on your rights. So maybe the statute of limitations hasn't run for when you can bring a claim and whether it's a claim to recover property or a claim about, say, a negligence claim that damage has been done to you or what have you. But the time hasn't run on your claim. But you have slept on your rights. You knew you've known about it for a long time. You should have brought it earlier, and that has prejudiced the other side. And so they say Republic of Turkey, you have known about this, or should have known about this, since at least the 1990s when it's being talked about in scholarly journals. And when it was sitting in the Met, you didn't do anything. You could have; you didn't. There's no evidence he even wrote a letter to the museum politely asking for it back like Greece has done with the Elgin Marbles, which were taken 200 years ago from the city of Athens. In this case, you didn't do anything. And then along the way, the original guy in 1961 popped up with the article, he has died. So have the buyer, the original buyers, the Martins they've both died. And so the current owner of the statue doesn't have them to fall back on to get the story about where this thing came from. And therefore, laches should apply. Now, the interesting thing about laches applying here is usually when the government's involved you can't use laches. If

the United States has a claim against me, usually, almost always I'm not going to have a chance of raising a laches claim that say the government should have sued me years ago or what have you. But I think because it is a government, but it's not like it's the government, right? It's just happens to be the government of Turkey as kind of a private party going into New York and saying this is ours for whatever the reasons are. Laches is found to apply. And also, the facts aren't great for the Turkish government here, for obvious reasons. And so they've said, no, you've slept on your rights. You should have bought this claim many years ago. You don't get it. The auction can go forward once again. Since this case came out just a couple of weeks ago, it looks like Turkey has filed a petition for en banc review, as we talked about earlier in a different case. But I'm a little doubtful whether that's going to succeed, but we shall see. And so that's how Turkey travelled through time, but travelled through time a little too long to be able to get this ancient idol.

B Bob McNamara 39:28

I'm just excited to see a case about laches, My civil procedure professor told me that laches is Latin for it's never laches. I think this is the first time I've actually seen like someone in the wilds lose on laches grounds.

A Anthony Sanders 39:44

It's nice to see that it was a state actor too.

B Bob McNamara 39:49

Exactly. It's always nice to see the government lose, anyone's government anywhere. But one interesting thing I thought was happening in this case is judges seem to have real difficulty with these statutory systems where someone has to come in and make a preliminary showing, and the preliminary showing is less than the merits. Like you see this in forfeiture cases. IJ has had forfeiture cases where the way the system is supposed to work is you show up and you make a preliminary showing that the property being forfeited is yours, and then you litigate about whether the property is forfeitable. That showing is just supposed to be like, hey, that's mine, there's some reason to prove that I'm the guy who gets to be in court, which it sounds like is what the New York statute here is doing. It's just you have to establish that you're the right guy to raise this claim, and then we'll have a fight about who wins the claim, but we want to make sure you're the right claimant. And it seems really hard for judges to kind of divorce that you're the right claimant inquiry from the ultimate inquiry of who does this thing belong to? So I guess I get the impulse the panel has in trying to correct that and parse out the two separate inquiries, even though as the concurring opinion points out, none of it is necessary because of the claim is barred by laches. You can just say the claim is barred by laches and stop.

A Anthony Sanders 41:07

Yeah, I get the sense that we could see this coming again. We see that judges are going to be confused as you just articulated, this was a smart federal judge. It wasn't just any old case in state court. But state laws are pretty clear that that's not how it works, and we're going to

correct it before it happens again. Whether that's a proper role for the court or not, we could argue about, but that seems to be the motivation. The underlying argument that Turkey had was really fascinating that this 1906 decree by the sultan of the Ottoman Empire impacts this case, but apparently both sides agreed that that was the correct law to look to. There just wasn't evidence about where the heck this statute came from, and so they had to make do on what they had.

B Bob McNamara 42:15

I was kind of waiting for that in the opinion too. Everyone seemed to agree that this case is governed by I think they called it Turkey's patrimony law, which seems perhaps contestable. If this object wasn't in Turkey when the sultan made his decree, can the sultan of the Ottoman Empire make extra territorial legislation? Anthony, I think that's really that's the lurking question in this case that we need to get to the bottom of.

A Anthony Sanders 42:43

And the funny thing is in 1906, of course, as students of history would know, the Ottoman Empire was much bigger than the modern day Republic of Turkey. I think both sides are pretty agreed that it is in the modern day Republic of Turkey where this thing would have been made 6000 years ago. It's just whether it would have turned up somewhere else. The real kind of thing lurking in the background here I think the fact that was on the state of Turkey's side is that there's no record of this thing anywhere before 1961. And there probably would be if had it been circulating right in art markets, or some scholar had seen it, or it was in a museum or what if. There would be record of it, but it just kind of turned up and 1961 which makes you think in 1960, someone dug it up, and you know, looked left, looked right, put it in their duffel bag, flew to New York, and that's how he acquired it. I think there's probably a good suspicion there about its origin, but there's no evidence. Yeah, I mean actually don't know. I think there's a tendency sometimes in the internet age to just assume like, oh, surely someone would have written down the existence of this object. But maybe not. Maybe it could have been private collection for 100 years. It's not like in 1904 someone was posting to Instagram and you can sort of look through all the photographs to see whether in someone's private museum this particular statue exists. It's a question without an answer, which is why who bears the burden of proof is really important because you can't infer that much from their art records about this from the early 20th century.

B Bob McNamara 42:43

To bring it back to laches, that's why sleeping on your rights is important because people die and knowledge and even Instagram goes out the window and is deleted. Therefore, we just don't know. Laches needs to make a comeback too. Laches and the extraterritorial jurisdiction of the sultan are the two legal questions that really matter.

A Anthony Sanders 44:58

I'm glad that those two maybe I can make a comeback sometime soon. I'm also glad that Bob McNamara made a comeback by getting them back on Short Circuit. We'll be sure to do that

McNamara made a comeback by getting them back on Short Circuit. We'll be sure to do that again in the not too distant future. In the meantime, we'll be watching Bob's case as it percolates at the Supreme Court. So, thanks again for coming on, Bob. We'll keep our listeners updated about that.

B **Bob McNamara** 45:24

Sounds great. Thank you very much.

A **Anthony Sanders** 45:26

And for everyone else, whenever you do listen to this and it actually goes on onto your podcast feed, we hope that everyone gets engaged.