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NEPA, Endangered Species Act, Charleston development, Northern Long-Eared Bat, environmental review, TVA vs. Hill, snail darter, federal court, state court, remand, federal officer, pharmacy benefit managers, opioid litigation, forum shopping, Coinbase case.

SPEAKERS

Ben Field, Anthony Sanders

00:00

A Anthony Sanders 00:16

When Renfield saw me, he became furious, and had the attendant not seized him in time, he would have tried to kill me. As we were holding him, a strange thing happened. He suddenly redoubled his efforts and then, just as suddenly, grew calm. I looked around instinctively but saw nothing. Then I caught the patient's eye and followed his gaze. At first, I could see nothing in the moonlit sky- until I noticed a large bat flapping its silent, ghostly way to the west. Bats usually wheel and dart about unpredictably, but this one flew straight ahead, as if it knew exactly where it was going or had some purpose of its own. Now, that was a reading from Bram Stoker's Dracula you all might know, does that refer to a few bats outside of Charleston, South Carolina that we're going to discuss today? Or does it refer to the National Environmental Policy Act and the wings of that Act, which flap down and prevent housing from being built all across the country, including for over a decade in Charleston. We're going to discuss that in the Fourth Circuit and another Fourth Circuit case 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 are recording this on the afternoon of Tuesday, February 11, 2025 now that means that our original recording, which was going to be tomorrow, Abe Lincoln's birthday, could not happen due to an impending snow pocalypse in our nation's capital, which is where our main studios are, and my good friend and colleague, Ben field, who is sitting in one of them.So, we were going to have a full compliment with two IJ attorneys guests, but we couldn't do that because tomorrow, apparently they're not going to be able to move around the area at all, and snow is going to shut down everything, and there might be zombies walking around in the snow. So instead, we're doing it today, and Ben has bravely stayed at the studio where he is going to record this, and then I think he and everyone else are going to flee for the hills and try to survive this snowpocalypse. So Ben, how are things going today? Do you have your canned goods and your shovel ready?

B Ben Field 02:45

I do. There were flurries starting when I came into the studio. So hopefully by the time we're done, there's not three feet on the ground, and I'm not stuck at headquarters surviving on La Croix and granola bars.

A Anthony Sanders 02:59

Well, yeah, I mean, that's the thing. I think there's Sun Chips too right around the office.

B Ben Field 03:02

Yeah I won't starve.

A Anthony Sanders 03:05

That's so good to hear. I'm sure our audience is happy too. Of course, our audience is going to be listening or watching this number of days from now, and probably there was no snow at all, or it all melted within a couple hours, or whatever usually happens with those snow storms. Although I know school was shut a couple weeks ago in the DC area for some people, so I won't belittle that. So we have 2 Fourth Circuit cases today, and as I was intimating the one Ben is going to talk about is one of these crazy National Environmental Policy Act decisions that I don't want to belittle the interests of the animals, but often really, the animals are kind of a sideshow, and what the case is really about is just preventing development. In this case, the building of some homes, which we've been talking about in recent years, as kind of an important thing. So Ben, what's the real story here in Charleston, South Carolina?

B Ben Field 04:02

So I think to set the stage, it's important to realize what the stakes are. As you were saying, building houses is particularly important in fast-growing communities. I looked up Charleston's metropolitan statistical area's growth, and they've essentially been growing 20% per decade for the last 20 years. We're talking about adding hundreds of thousands of people, and they need to go somewhere. This case is about whether there's anywhere to put them, and it touches on the National Environmental Policy Act and the Endangered Species Act-how sometimes, as you said, those are used as cudgels when the real goal is nimbyism and stopping development. It won't be Dracula, but it will be somewhat like The Godfather Part II because we're going to have an extended retrospective in the middle of our story. Nice.

A Anthony Sanders 04:57

How's your Italian?

B Ben Field 04:59

Ben Field 04:59

Not great, but I don’t know what the current tolerance is for Italian stereotypes. Fortunately, we’re on video, so you can at least see me making the hand gesture when appropriate. That was good. So, the case is South Carolina Coastal Conservation League v. United States Army Corps of Engineers. As we've been saying, it takes place in Charleston, where an area annexed into the city has historically been used as a timber farm. In the yimby world-or in the world of wanting to build stuff-a timber farm in this fast-growing area was probably not its highest and best use. Instead, they were trying to develop it into 9,000 homes, plus schools, city services, and a medical center-lots of the housing and services a growing jurisdiction like Charleston needs. They started this process in 2012, going through Clean Water Act permitting, Endangered Species Act permitting, and environmental assessment. By 2022, they had everything squared away and were ready to go. But then things took a turn when an animal in the general area—the northern long-eared bat-was added to the endangered species list. This triggered further review under the Endangered Species Act to ensure the bat was appropriately protected. In general, if there’s an endangered species in the area, the government can create an ESA exception for the so-called *take* of the species, which is a statutory way of saying anything from harassing it to killing it.

A Anthony Sanders 06:57

Defining take is like a huge deal in these cases, sometimes

B Ben Field 07:01

Exactly. And it really is all-encompassing- anything you do to the bat that the bat doesn't like counts as a take. In general, in Endangered Species Act cases, if you're going to allow some takes for a particular project, you need to define the specific number of animals that will be taken. But that’s not particularly feasible in this case because this bat has never actually been seen on the property at issue. And, well, it’s a bat- it flies around, as your poetic introductory quote suggests. Exactly. They don’t really stay in one place. So in situations where it's not feasible to count individual bats or animals, you can use a proxy- in this case, the number of disturbed acres. After this review, the government imposed conditions: you can’t take down trees at certain times of the year when the bat is most sensitive, you have to put up artificial habitats to replace lost trees, and other similar measures. The government determined that if all these conditions were met, the bat would be adequately protected. And then, as always happens at this point, a friendly neighborhood conservation group filed a lawsuit seeking to enjoin the project and demanding yet more years of environmental review. So let’s put a pin in that and flash back to the 1970s- to a very famous case, Tennessee Valley Authority v. Hill. This case involved another critter, the snail darter, which, if you don’t like bats, is an even less romantic species. It’s a tiny fish that lived in a single lake in Tennessee, which was set to be flooded by the Tennessee Valley Authority’s Tellico Dam. A local conservationist discovered this species and had it classified as endangered since that lake was its only habitat. By the time the litigation began, the dam was about 80% complete. The Court of Appeals enjoined its completion. At that time, Congress had already passed the Endangered Species Act, which initially had no exceptions- so if a project was going to harm an endangered species, it had to stop. The case went to the Supreme Court, which had to determine whether an almost-finished dam really had to be abandoned just to save this tiny fish. It became a landmark case in textualism and the shift from the Warren Court’s purposive statutory interpretations to the modern Court’s textualist approach. The purposive arguments all pointed to the absurdity of

halting a nearly completed dam for a single fish that few people cared about, but the text of the law was clear. Exactly. The text imposed an absolute prohibition. Other arguments- like the fact that Congress had continued funding the dam, implying they intended it to be finished- were dismissed. The Court held that appropriations bills wouldn't be read as implied repeals of the Endangered Species Act. The case stands as a prime example of pure textualism, where justices, even those whose policy inclinations may have led them elsewhere, followed the text wherever it led- even to unexpected places. And as it turned out... We called it the damn the dam case. And another fun thing about the 70s is that, back then, Congress passed laws. So actually, in response to this, Congress passed the law exempting the teleco dam from the Endangered Species Act, and then over the years, they added additional exemptions, like the ones that are at issue in this Fourth Circuit case, so it was a less ridiculous barrier. But this actually has been in the news recently, because in January, The New York Times had this small, bombshell expose, at least it was a bombshell expose among folks who are interested in property rights that it turns out that this snail darter was never actually a distinct species.

A Anthony Sanders 12:15

I think that's been known for a long time, but it was like more powers that be were admitting to it or something,

B Ben Field 12:21

It's always been suspected, you're right. There was a splashy New York Times story about it that delved into the internecine fights within the conservation world. You've got some people who are eager to discover new species because it's a way to block development- once a species is classified as endangered, it becomes a powerful legal tool. Then there are others who don't want to take that approach. They even have names for these factions- "splitters" and "lumpers." Apparently, within this world, being called a "lumper" is a serious insult because it means you're undermining the discovery of new species that could be used for environmental litigation. This story, of course, flattered libertarian and property rights sentiments, but I dug a little deeper. A well-known practitioner named Adam Munichowski, who runs a legal blog- very creatively titled Adam's Legal Newsletter- did an extensive Substack post about this. He has a scientific background, and with some help from AI, he reviewed the relevant studies. His take was more nuanced- he pointed out that, in the 1970s, the debate was understandable because scientists had to rely on physical characteristics like tail length to determine whether darters were distinct species. But now, with advanced genetic testing, we have much more precise ways to classify them. His take was that it's really more of a sign of scientific development, and that we now just have better ways to tell how different species are.

A Anthony Sanders 14:15

Aside from environment or endangered species stuff, that's a huge debate these days amongst geneticists and biologists, on if species can interbreed. Then that not a species, and that would mean a lot of things we think of as separate species, like, say, lions and tigers wouldn't be separate species, because they actually can interbreed. So how you define a species is not actually like a super scientific basis. There's a huge amount of gray area there, and I can see how it that changes with scientific progress, and then it it interacts with public policy, right?

B Ben Field 14:58

And the Endangered Species Act doesn’t have a particularly precise definition, so it’s really open to debate. Adam’s Substack newsletter actually dives into this issue, explaining how sometimes you’ll have species A that can breed with species B, and species B can breed with species C, but A and C can’t interbreed- is that close enough to be considered the same species? It’s an ongoing debate. But circling back to the Fourth Circuit case in Charleston, this is a prime example of how these issues are actually wielded in litigation. Here, we have a piece of property that’s currently a timber farm, set to be transformed into homes, hospitals, and schools. The bat in question has never actually been seen on the property, and yet, despite 12 years of environmental review, conservationists are using its potential presence as a legal tool to block the development. And they do have a point, at least procedurally- there’s another Fourth Circuit case involving the same bat, where the court struck down the use of a proxy instead of counting the actual number of bats affected. The conservationists argue that this case is directly on point- "Bada bing, bada boom," to bring back our Italian references- and say that precedent should control here. But the Fourth Circuit, at least in this preliminary injunction stage, disagrees. The district court had actually considered that precedent and distinguished it, noting that the previous case involved a much smaller area of land, located near known bat hibernation sites, making it feasible to count the bats. In contrast, this case involves a much larger area where the bat has never even been documented, making it reasonable for the government to rely on a proxy. So the court allows the project to move forward. Then, as you mentioned, there’s also a National Environmental Policy Act (NEPA) claim, though it plays a secondary role in this case. The argument there is that while the government conducted an Environmental Assessment (EA), the conservationists insist they should have performed a full Environmental Impact Statement (EIS). This is a classic example of how NEPA litigation can be weaponized- not because anyone actually cares about the difference between an EA and an EIS, but because requiring an EIS means adding another 1,000 pages of paperwork and significantly delaying the project. These cases are frustrating because courts always start by saying that NEPA is a procedural statute, not a substantive one- it’s just about making sure the government takes a "hard look" at environmental impacts, not dictating outcomes. But in practice, courts sympathetic to the challengers often say, "Well, if you’d just added another 100 pages of studies, you could have analyzed these issues more thoroughly," and there’s always something more that could be studied. Here, however, the court takes NEPA deference seriously and rules that the agency’s decision to rely on an EA was reasonable. They consulted numerous stakeholders, and the only entity that actually requested an EIS was the lead plaintiff in this case. Given that the project has already gone through 12 years of environmental review, the court finds that, at least at this preliminary injunction stage, enough is enough.

A Anthony Sanders 19:19

So this was all on a preliminary injunction. It'll go back down and then they'll go forward. But, I would think the record is all pretty much done because of all this environmental review that's been done. So they'll kind of get to a final judgment, but likely it's not going to be very different, and then they could appeal that. And the writing on the wall seems that's not going to be very different either.

B Ben Field 19:48

Yeah, I think that's right. And obviously the real action, in these cases, is getting the TRO or the preliminary injunction, because the goal is to stop the development. Once everything is built, a court is not going to order them to tear down a hospital that's already been built.

A Anthony Sanders 20:07

And plant all the trees and bring the bring back the bats

B Ben Field 20:10

Notwithstanding, TVA vs. Hill, I don't think that would be a successful lawsuit for these conservationists.

A Anthony Sanders 20:16

Exactly. It really underscores how much discretion the government has in these cases- you could easily imagine a different group of agency officials taking a more conservative approach, saying, Well, let’s do just a bit more surveying for bats, just to be sure, and that decision, in turn, could stretch the review process out for years. And if developers challenged that decision, the court would likely respond with the same level of deference, saying, We don’t second-guess agency experts on scientific matters. So in a lot of ways, the outcome isn’t necessarily dictated by the hard science but rather by the instincts and priorities of the particular bureaucrats involved. That’s not to say it’s arbitrary- agencies do have guidelines and precedent to follow- but within those boundaries, there’s a lot of room for interpretation. In this case, the agency took a more flexible approach, relying on a proxy rather than direct bat counts, and the court deferred to that decision. But if the agency had taken the opposite approach, the court may well have deferred to that, too. It’s an interesting dynamic because it means that, in practice, the regulatory process itself can be as much of a battleground as the legal challenges that follow- it’s not just about whether a project is environmentally sound but about how the government chooses to evaluate that question in the first place.

B Ben Field 21:25

Yeah, I think that's right. And I mean, to a certain extent, that's sort of the nature of the beast. These are discretionary calls, so how much harassment of the bats is too much and how do you trade that off with other considerations of what's actually feasible. And to a certain extent, the problem with NEPA and the Endangered Species Act litigation, is just that, when you add in the litigation on top of having these non expert judges weighing in on top of the agency, you're just multiplying the number of veto points and making it very difficult for a developer to predict what's going to happen. Right, because, I mean, it's kind of amazing this developer hasn't run out of money to do all this in the 14 years or so that this process has been going on. It's a huge development-it sounds like acres and acres of homes and businesses-so they're probably going to make a lot of money off it. Maybe that's what allows it to keep moving forward. As a final point, I'd say that this is an example of how, despite all the gloom and doom from certain quarters when the Chevron case was overruled recently by the Supreme Court-which now means that federal courts don’t have to defer to agency interpretations of statutes-there’s still

all kinds of deference to agencies, like whatever the studies were here, and so that's not going away. As long as you have big agencies, courts are going to want to defer to them because, wow, that looks really hard- figuring out all the science about bats, and the law says they have to look at the bats, so it's going to happen. It's just not going to happen in the same way. Charleston is a beautiful town, by the way. It has lots of forests around it. When my family and I went there a couple years ago, we visited one of those plantations nearby in the forest- I doubt that's what's being developed here, but it was very pretty. Shout out to the Graham family of South Carolina, who are developers in the Charleston area and very, very pro-YIMBY. I don't know their thoughts on this case, but they're very pro-YIMBY overall. So, we're going to move on from exciting bats and environmental review and building homes to something in some ways much less important, but very important in terms of how our federal court system works- our Federalist system, I should say, with state and federal courts. This is the kind of case we don't usually cover on Short Circuit, but I think it will be interesting, especially to two sets of people. One is specialized appellate practitioners-we know some of you listen to us, and you're going to like the nuance of how this appeal went in the Fourth Circuit-but also people who aren't even lawyers but enjoy learning about how the court system works and what it means to be in state court versus federal court. This might put a little flesh on the bones of some of the mystery that seems to go on behind the scenes in litigation. This case is a very small slice of a huge issue that's been going on in the courts for years-litigation regarding the opioid crisis. There was a Supreme Court case last term about a massive bankruptcy involving a pharmaceutical company that was making a lot of the opioids that people were overprescribing and overusing. The book we talked about last week, the one we had the author Rebecca Hall Allensworth on for, details a lot of the Tennessee doctors who overprescribed opioids. There's all kinds of litigation about the opioid crisis, and this is a small part of it. The city of Martinsville, Virginia- if you're wondering where that is, it's in very southern Virginia, not in Ben's area of Virginia, it would take him a long time to get there, kind of in the shadow of the mountains, very close to North Carolina. And Martinsville, Virginia, population 13,000 or so- thought they had a claim against some of the big pharma industrial complex folks. So, they filed all this litigation in state court, basically saying they suffered expenses because of the opioid crisis and overprescription and want some of their money back. The case was removed to federal court, with big pharma and other players as defendants. A lot of those claims stayed in federal court, but some were remanded. Now, what does remanded mean? If you start a case in state court, sometimes cases can be in state or federal court- most federal cases could also be in state court, they just happen to be in federal court. If you have a civil rights action under federal law, or another federal claim, or if the parties are diverse-citizens of two different states-but suing over enough money, the case can be in either court. If a case starts in state court but qualifies for federal court, the defendant can remove it simply by filing paperwork in federal court, and hey presto, it's in federal court. But then the plaintiff, who wants to stay in state court, can argue it doesn't belong in federal court, and if the federal court agrees, it sends the case back- that's called a remand. In this case, it was originally removed but then remanded. Then, five years go by- sometimes the case was stayed, sometimes things were happening in state court- but for whatever reason, the defendants, two pharmacy benefit managers (PBMs)- one of which is Express Scripts- argued they should now be in federal court again. Not because of diversity jurisdiction or a federal claim, but because they claimed they were federal officials. Yes, federal officials. We talked a couple months ago about the Georgia state criminal prosecutions of Trump folks like Mark Meadows, who argued he could move his case to federal court because he was a federal official. The statute for that removal is the same one Express Scripts is relying on here. Their argument? The Supreme Court has said this statute should be interpreted broadly, and since they had Department of Defense contracts, and many servicemembers were prescribed opioids through them, they were effectively acting as federal officials. It's not a crazy argument- there are cases across the country debating similar claims tied to government

contracts through Medicare, Medicaid, or, in this case, the Department of Defense. Martinsville, of course, opposed this, arguing that just because Express Scripts had a government contract, that didn’t make them a federal officer. The federal district court agreed and, for the second time, sent the case back to state court. Normally, that would be the end of the road. On Short Circuit, we don’t often discuss appellate review of removal, because usually, when a case is remanded, that’s it- federal law says remand orders are not appealable, to prevent endless jurisdictional ping-pong. But there are exceptions, one of which is when removal is based on the federal officer statute- like in this case- so Express Scripts appealed to the Fourth Circuit. The question before the court was whether Express Scripts' connection to the Department of Defense was enough to qualify as a federal officer under the statute. The Fourth Circuit said no- just having a government contract doesn’t turn a company into a federal officer. Their argument that they were helping the government distribute medication wasn’t enough, because they weren’t closely supervised or delegated actual federal authority, as the statute requires. So, they lost, and the case stays in state court. The broader takeaway is that this fits into a larger trend of aggressive removals, where private companies with government contracts try to stay in federal court under the federal officer statute. Sometimes courts buy the argument, but this case shows there’s a limit. It also highlights how procedural fights over jurisdiction can drag on for years, even in massive litigation like the opioid crisis, frustrating the parties trying to resolve substantive claims while appellate lawyers delight in the nuances of removal and remand.

A Anthony Sanders 29:48

You cannot appeal a remand decision, so when the federal district court sends a case back to state court, that's usually the end of the line. If you're there for, say, diversity purposes, you're done. But there are exceptions. One is for civil rights cases and one is for federal officers. In this case, the defendants, who were pharmacy benefit managers (PBMs), argued that they were federal officers and appealed. Two days after the remand order came down, they appealed, and they asked the district court for a stay, so the case wouldn't go back to state court during the appeal, but the district court denied the stay. An example is say, you get a judgment against you for $100,000 and you're in federal court and you're appealing that because you don't want the judgment against you. But in the meantime, you also need to stay the judgment, and usually you have to post a bond or something like this. If you don't move the state of the judgment, if you just go on your merry way and appeal to the Court of Appeals, even though the appeal is going on, the plaintiff can use the judgment to seize your bank account and get the money for himself, and then you're meanwhile, trying to reverse the judgment that he already has the money for. So its a very ordinary thing to what try to stay that judgment. Denying a motion to stay is pretty standard, but the court gave them 30 days to appeal. After 30 days, they mailed the remand order to state court. So now, the case is technically in state court, and the Court of Appeals doesn’t have jurisdiction over it. However, there's a statute that says you can appeal if you're a federal officer. So what happens? That finally brings us to the actual opinion, which is not technically an opinion on whether they could be in federal court under the federal officer jurisdiction, but on the immediate question of whether they needed a stay or if the case is now technically in state court and they can't do anything. Two judges in the majority believe the case is properly before the court in federal court, while the dissenting judge, Judge Winn, argues that they have no authority to even be discussing this. It all turns on the interpretation of a recent case called Coinbase from the Supreme Court, which dealt with cryptocurrency and arbitration agreements. The case revolved around a situation where a party wanted to move a case to arbitration and the court said no, and the party argued they should be able to immediately appeal the decision. The Supreme Court agreed under the Federal

Arbitration Act. On the other hand, there's case law about moving to stay a judgment when appealing, which is black letter law. Those two precedents kind of run against each other. And so what the majority says, Judge Richardson says, is that under Coinbase and the implications from that, and this older case called Griggs. They said, under the Griggs principle, when you appeal a case, the district court doesn't have jurisdiction over that issue anymore. That's kind of how it works with an appeal. The district court might have jurisdiction over ancillary matters like enforcing a judgment or awarding attorney's fees, but not the heart of what's being appealed. Because of what's being appealed, the remand can't happen, so it doesn't matter that they later mail the piece of paper to the state court. The implication is that they didn't need to move to stay because it's an automatic stay once the appeal is filed. The dissent disagrees, arguing that it doesn't make sense and that everyone understands that you have to specifically move to stay, especially in exceptions. The Coinbase case is really meant to be read about the Federal Arbitration Act and doesn't apply here. Thus, whether or not the district court gave a stay does matter. Why is this important? This likely will affect many litigations, especially cases where defendants desperately want to move from state court to federal court. For example, pharmacy benefit managers may argue they are federal officers, even though it sounds odd. There are other entities that might claim they are federal officers due to federal contracts, and this decision could allow them to stay out of state court. This issue might be something the Supreme Court will need to address soon. This is an example of Congress doing contradictory things. The statute says that an order remanding a case to state court is not reviewable on appeal, but it includes exceptions for federal officer jurisdiction, which are explicitly reviewable. Congress doesn't do this often, so it's odd that if a district court denies a motion to stay, you could not appeal- after 30 days, they could just send the case back to state court, and the appeal would be null. I think the majority's ruling is probably right, but they may have complicated things by relying on the Coinbase case. This decision could create confusion in appellate procedures, and we'll have to see how it shakes out. Ben, you used to worry about huge corporate clients like this- does it bring back any memories or thoughts for you?

B Ben Field 39:31

Absolutely. Lawyers often say that procedure can trump substance, and often, that's the case in the world of removal. After the financial crisis, everybody was suing the entities that issued mortgages, and there's still asbestos litigation going on from decades ago. A lot of times, the forum you're in, if not the deciding factor, dramatically affects what the plaintiff will get. It's kind of a dirty little secret within the judicial system. Depending on the circumstances, you could tell stories from both sides, but it's a world where plaintiffs often want to be in state court. Imagine, for example, a town suing a pharmacy benefit manager over opioids. A local judge, elected by the same people who elect the city attorney bringing the case, could be more sympathetic. And the jury pool, which is pulled only from that town, might be more likely to give a very large verdict.

A Anthony Sanders 40:50

Yeah, they might all have relatives who have been involved in this stuff.

B Ben Field 40:54

Exactly, the plaintiff's lawyer would argue that this is exactly what the jury system is meant to

do: the community is weighing the claims. The defense, on the other hand, would say, well, they're letting a motion get the better of them. If they could be in federal court with a judge who has lifetime protection, drawing from a broader jury pool, it would be more neutral, and they would get a fairer shake. You can see this in settlement amounts, too. Certain jurisdictions will work better for plaintiffs, and it's riskier for a defendant to roll the dice by going to trial. This has been happening a lot recently. At least in the last couple of years, the Supreme Court has intervened in climate litigation coming out of state courts, where BP and other oil companies want to remove cases to federal court, often coming up with creative theories like the officer removal doctrine. I think the fact that people keep coming up with these theories and litigating these issues just shows that the forum can be as important as the law in determining the ultimate outcome.

A Anthony Sanders 42:10

I think I've mentioned on this show in years past, that I was astounded when the Fani Willis case in Georgia came up, and those defendants might be able to get to federal court. Our friend Andrew Fleischman in Atlanta kept telling everyone- he even got featured in the New York Times- that, yeah, they might be able to do that. We were all like, "What?" But it's based on this statute and the federal official theory, which is read very broadly. The original intent of the statute was to keep federal officials from getting stuck in state courts-especially back in the post-Reconstruction South, where a federal official, perhaps involved in civil rights work, could be stuck in some small, local kangaroo court and they want to be able to allow him to get into federal court to get a fairer forum. But now, it's gotten to the point where BP and pharmacy benefit managers are being considered federal officials. I don't know if BP has ever claimed to be a federal official, but...

B Ben Field 43:24

They had a federal question-type argument. The idea was that interfering with the entire energy economy was so huge and destructive that it necessarily raised a federal issue. If you'll allow me one brief diversion, I think my favorite example of forum shopping comes out of Federal Energy Regulatory Commission (FERC) and pipeline litigation. Essentially, whenever FERC makes a decision, whether it's setting a rule or something else, energy companies sue on one side, and environmentalists sue on the other. They all have their preferred courts. Energy companies generally want to be in the Fifth Circuit, which is more conservative, covering Texas, Louisiana, and Mississippi- more friendly to the energy industry. Meanwhile, environmentalists prefer a circuit like the Fourth, which has historically, at least recently, been made up mostly of Democratic appointees. So, whenever a decision is made, lawsuits are filed across the country, and then they literally have a lottery to determine which court will hear the case. Clark will like pull a circuit out of a hat or something.

A Anthony Sanders 44:33

Like it has to be a ping pong ball machine.

B Ben Field 44:36

Right. Which, one, I find delightful. And two, a repeat guest and friend of the show, Sean Marotta, who was a colleague of mine before I came to IJ, had a niche part of his practice, which was figuring out the ideal way to game the system, to try to get yourself in the most favorable court.

A Anthony Sanders 45:03

Yeah, my biggest disappointment about that is they don't, they don't live cast it. It's, it's done in the clerk's office somewhere, see, so you can't watch it. But I love that Sean is world famous for knowing how the ping pong ball mechanism works so well. That's great that we got to talk about the ping pong ball machine once more. And also some of you know a little bit more about how a case goes from state to federal court and vice versa. And some of you know a little bit more about bats in Charleston, South Carolina, and also the snail darter. So thank you Ben for taking us down that Sicilian saga. We will back to the 70s. We will maybe update folks later how you're doing, snow bound in your in your cabin that you're you're heading to now. But in the meantime, please be sure to follow short circuit on YouTube, Apple podcast, Spotify and all other podcast platforms, and remember to get engaged you.