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SPEAKERS

Robert Fellner, Anthony Sanders, Jaba Tsitsuashvili



Anthony Sanders 00:00

"Another of his sayings was that most men were within a finger's breadth of being mad. If, then, anyone were to walk along stretching out his middle finger, he would seem to be mad, but if he put out his forefinger, he would not be thought so. Those words are from *Lives and Opinions of Eminent Philosophers* by Diogenes Laërtius, describing the Cynic philosopher Diogenes of Sinope. It seems that stretching out one's middle finger has been a part of Western culture for over 2,000 years. That tradition continued recently in Des Moines, Iowa, where someone extended their middle finger and, in response, the police trumped up charges and beat him up. They may also have racially profiled him. We'll talk about that case from the Eighth Circuit, and another First Amendment retaliation case from the Sixth Circuit, where someone's pension was taken away. This week 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, March 12, 2025, and I have two of my Institute for Justice colleagues with me to discuss these matters and whatever else is going on in the world. They are Jaba Tsitsuashvili and Robert Fellner—welcome to you both. Now, Jaba is an old-timer on Short Circuit, and we'll get to him in a moment for the Eighth Circuit case. But we also have our first-timer, Robert. So, Robert, you're now working at the Institute for Justice, you're a graduate of George Mason Law School just down the street, but before that, you spent a good deal of time out west in Nevada. Is that right?



Robert Fellner 02:10

Yeah, I was living in Nevada for about 17 years prior to coming out here to go to law school at George Mason and then landed my dream job here at the Institute for Justice. Nevada is awesome, not least of which, because it has no state income tax, which moving to Virginia has made me appreciate greatly. But it's such a great town. I mean, obviously it's very hot, but I like it. It's dry heat and that does matter. No humidity means no bugs and no mosquitoes.



A Anthony Sanders 02:40
And its not hot at night, right?

R Robert Fellner 02:45
Right. I mean, although in the summer it is brutal, the lows at night are still like 85-90 degrees. But if you're in the casinos, it's air conditioned. And I just love, the scenery, the red rock mountains, the desert is beautiful. And having said all that, 17 years is a long time to be out there, and you do kind of miss the seasons, because it's either sunny and hot or sunny and cold. So it's nice to see the vegetation and have real seasons again.

A Anthony Sanders 03:20
My favorite constitutional fact about Nevada is this, so let's see if you know. Can you name one of the stenographers of the first Nevada Constitutional Convention, which I think was like 1862-63

R Robert Fellner 03:38
Yeah, you lost me as stenographers.

A Anthony Sanders 03:41
Well, it's a little bit of a trick question where you just wouldn't know, because one of the stenographers was Samuel Clemens, otherwise known as Mark Twain, and pretty early in his career, his brother was like part of the proceedings. So he got the job as a stenographer, which I don't think he was super happy about. I think later, he was very much more okay writing than doing shorthand. I don't even know if he did shorthand actually, because he said that he was not a fond of this job, but he did say that Nevada was a good word because you didn't have to lift your fingers, and dot the I's across the T's. So I guess he was just writing it long hand, it seems. Anyway, this is not about Nevada. This is about Des Moines, Iowa, where Jaba is going to take us. For this young man, who maybe made not the right choice in what he did with his middle finger, but certainly did not deserve what happened to him afterward.

J Jaba Tsitsuashvili 04:46
Yeah well, right or not, what he did was constitutionally protected. So just to walk through the sequence of events here: he's driving down a road at night, and the police- before he even does anything- begin to follow him. I think this is where the initial racial profiling aspect comes in. Before he makes any gesture, they're already tailing him. Then, as he continues driving- I'm not sure exactly how long, but for several blocks- he has his middle finger raised at them as he goes about his business. They keep following him. Now, let's ask ourselves: why are they following this guy who's just driving with his middle finger up? Obviously, it's because they're

upset about the gesture. But they can't constitutionally stop him for that alone. So, if they can manufacture some sort of probable cause to think he committed a traffic violation, no matter how minor, then they can stop him- and at that point, all bets are off.

A

Anthony Sanders 06:19

And if it's a pretext, that's totally fine.

J

Jaba Tsitsuashvili 06:21

Well, according to the Supreme Court, even if it's a pretext, it's still legal. There's a case called *Whren* that says pretextual stops are totally fine under the Fourth Amendment- as long as the officer has probable cause for any traffic violation, no matter the real motive. Here, you can imagine two potential pretexts: one, the initial racial profiling, and two, the more obvious one- the fact that he was flipping them off. So the police continue to follow him, clearly trying to manufacture a reason to stop him. They know that if he drifts even slightly over a lane marker, that gives them a hook for a traffic stop. Once that happens, they can pull him over, maybe even try to arrest him or search his vehicle. It's a cascading effect rooted in what's come to be known as "contempt-of-cop" behavior- where police punish someone not for violating the law, but for being disrespectful. And things got worse. Before we even get to the prosecution, they rough him up. Body cam footage later shows officers saying they would've let him go with just a warning had he not been disrespectful. A news article reported that during the stop, the officers made clear they were reacting to his attitude. So what starts as an act of expression becomes a pretext for abuse. He's charged with making a right turn on red that supposedly forced another car to brake- though the turn itself was legal. That charge gets amended to a different one later, seemingly just to find something that might stick. He gets convicted, but during the prosecution, neither the dash cam nor body cam video is released. That dash cam would've shown exactly what happened: that the other car didn't actually have to brake significantly, and more notably, that the police- after the plaintiff turned- made the exact same turn, swerved into oncoming traffic, and aggressively cut off the very car they claimed he had endangered. So if anyone drove dangerously or caused a safety issue, it was the police. Eventually, the dash cam is released after the conviction, and he gets it set aside. He then brings a Section 1983 lawsuit for constitutional violations including First Amendment retaliation, illegal search and seizure, and excessive force- they slammed him against the hood during the arrest. It's not just about the stop; it's about the cover-up, the refusal to release exculpatory footage, and the broader abuse of power. When the officers are sued, they claim qualified immunity. The district court denies it, and the Eighth Circuit affirms that denial. So in the end, we get the right outcome- but keep in mind, this decision just came out a couple weeks ago, and the incident happened in summer 2020. We're still just trying to get this case to trial nearly five years later

A

Anthony Sanders 13:45

Well, sorry to correct you, I think it was 2018.

J

Jaba Tsitsuashvili 13:54

Yeah, so even more time has passed than we might expect, and that's really the broader point- this isn't some one-off or rare case. It's a pattern we see over and over again: officers who, whether for racist reasons, First Amendment retaliation, or simply because they don't like someone's attitude, use the pretext of a traffic stop to escalate the situation. They can gin up a minor violation, use that to justify pulling someone over, potentially search their car, rough them up, and maybe arrest them. Then the burden shifts entirely to the individual to beat the charges, avoid prosecution, and- if they want to sue- overcome the massive barrier of qualified immunity. One thing we'd be remiss not to highlight, especially given IJ's work in the immunity and accountability space, is that if he hadn't gotten his conviction overturned, many or all of his Section 1983 claims could've been barred under Heck v. Humphrey. That doctrine essentially says you can't bring a civil rights claim that would imply the invalidity of a conviction unless that conviction has already been overturned. And remember, the only reason he was able to overturn that conviction was because the dash cam footage was eventually released- footage that had been withheld during the original prosecution. So without that footage, not only would his conviction have stood, but he likely wouldn't have had access to the courts to hold these officers accountable at all. All of these layers- prosecutorial discretion, withheld evidence, qualified immunity, and the Heck bar- compound to make justice in cases like this incredibly difficult to achieve.

R

Robert Fellner 15:49

Can I ask a legal question? Am I correct that the dash cam video had to show that the officers had no probable cause to pull them over, because if they did have probable cause, wouldn't that be the Nieves rule that defeats a claim for retaliatory arrest.

J

Jaba Tsitsuashvili 16:16

So you're asking whether the Nieves rule of probable cause for arrest would defeat the retaliation claim. Right?

R

Robert Fellner 16:33

Right, because the video shows that maybe he did do something wrong in terms of-

A

Anthony Sanders 16:38

- he went over a white line

J

Jaba Tsitsuashvili 16:39

Yeah. So I get what you're getting at, which is the question of probable cause. And yes, and in the Eighth Circuit's opinion, what they say is that the district court held that there were fact disputes as to whether or not there was actual probable cause to pull them over. So now mind you, in the criminal proceeding, it ended with an indication of innocence, but obviously

probable cause and ultimate innocence/guilt are not quite the same. But yes, the dispute of fact that remains in the trial court, when this goes back down, which is going to go to a jury, is whether there was, in fact, probable cause for the stop.

R

Robert Fellner 17:28

So if the jury says there is, then the cops are immune?

J

Jaba Tsitsuashvili 17:34

I think it's less a question of immunity at that point. It's more of a substantive issue that the Supreme Court created, like you noted in the Nieves, if you have probable cause for an arrest, then it becomes much harder to make out a First Amendment retaliation claim. Now we've succeeded in our Gonzalez case of last term in paring that back a little bit. And so the question of how broadly to interpret Nieves' rule about probable cause always or sometimes or never, defeating a retaliatory arrest case is still being kind of hashed out. But yeah, Nieves did create that rule.

A

Anthony Sanders 18:22

That's a great point, Robert, and bringing up Nieves is especially relevant here- even if the case doesn't go deep into it- because there are so many constitutional landmines just sitting in the background of this case. First, you have the qualified immunity hurdle, then the question of whether there was even a constitutional violation (which, after watching the video, seems pretty obvious), and then Nieves v. Bartlett, which says that as long as there's probable cause for an arrest, a First Amendment retaliation claim usually can't proceed- unless you fall into one of the exceptions. And on top of that, as Jaba mentioned earlier, you've got the looming threat of the Heck bar, which could have blocked most of the claims entirely if the conviction hadn't been overturned. So this guy had to navigate all of that, just to get to the starting line of a civil rights lawsuit. As for your question, yeah- it's pretty remarkable. From what I understand, he was indeed pro se for at least part of the process, and after his conviction he filed a motion to reconsider in the trial court, rather than pursuing a full appeal up to the Iowa Court of Appeals. It seems like the state finally turned over the dash cam video after the conviction, possibly due to pressure or procedural requirements, and once that happened, he was able to use it to successfully argue for setting aside the conviction. That kind of post-conviction motion isn't common in traffic cases and definitely isn't easy to win- so it speaks volumes that he pulled that off, especially if he was doing it without a lawyer. It really underscores just how stacked the system is against people trying to hold the government accountable, and how crucial even a single piece of withheld evidence can be in turning the tide.

J

Jaba Tsitsuashvili 19:50

Yeah, I didn't dig too deep into the how that all came about, but I think your intuition was kind of mine too, which is that, once they secure the conviction, and they thought that they were kind of free and clear. Maybe their stonewalling kind of crumbled a little bit more. Because you've got to remember at the end of the day that he had a right under state law, to get that

video. But what happens is a lot of times when these, good laws get passed for transparency- be it about body cam videos, dash cam videos, police department, Sheriff departments- who will then institute their own policies about the circumstances in which they'll actually comply with that law and release these videos. And you won't be shocked to hear that those policies usually mean, "oh, we're we're only going to release it if we feel like it."

A

Anthony Sanders 20:45

I do have to say it's good that when he flipped the bird, that he only did it with one hand, because a long time ago, a friend of mine had a story that there was kid grew up with in town who saw the cops when he was driving a car, and he flipped the cop off with both hands. And then he was pulled over and ticketed for driving without any hands on the wheel.

J

Jaba Tsitsuashvili 21:11

That makes more sense to me. And the other thing that I wondered about was how they could if he was doing it within the car. It was nighttime, so I was wondering if he had his left hand out the window, or if it was the right hand in the car. Because if it was his right hand in the car, that also makes me believe is that the cops were shining a light into his car, because at night, you usually would not be able to see that.

A

Anthony Sanders 21:36

And it's a little more understandable at that point why he would be like, "What is going on"

J

Jaba Tsitsuashvili 21:41

Exactly. And I'm not sure what of the answer to that, but there's a lot of aspects of this that make it clear that it should have never gotten to this point. He had every right to flip off officers that following him, possibly like shining a light into his car, or in some other way, making him feel uncomfortable and harassed.

A

Anthony Sanders 22:07

Well, someone else who felt harassed was Dwayne Seals. And this is a case from the Sixth Circuit, Seals v. Wayne County, who is one of our favorite defendants at the Institute for Justice. Wayne County, Michigan, which is where Detroit is. And this man was complaining about how people were being treated with their pensions, and Wayne County did not take too kindly to that. So Robert, what's going on with this guy?

R

Robert Fellner 22:36

First, that was just an incredible transition. Anthony, very well done.

A

Anthony Sanders 22:40

Well, let's see what you can do now.

R

Robert Fellner 22:44

So yeah, in Wayne County, Michigan, there's a government employee, Dwayne Seals, who worked for Wayne County for just under 11 years. He retired and began collecting a \$65,000 a year pension. About two months later, he goes back to work, but prior to going back to work, he wants to make sure he can still collect his full pension while drawing his full salary and benefits for this new job.

A

Anthony Sanders 23:14

Which I have to say, is a pretty sweet deal. You go back to work kind of at the same job with a full pension, but we're not getting into pension policy here today.

R

Robert Fellner 23:22

That's a shame, because I love pension policy. But yes, what's legally relevant is the statute that enabled him to do that. What's funny to me about this statute is that normal government employees don't get this perk. It says that if you have a pension and work more than 1,000 hours a year, you lose your pension while employed. You get it again when you ultimately retire, of course. So anyone working full-time exceeds 1,000 hours annually and therefore can't collect both a pension and a salary. There's an exception to this 1,000-hour rule for high-ranking officials, for some reason. Specifically, the statute says elected officials and appointed county officials are exempt, so they can draw both. The statute doesn't define what an appointed county official is, but everyone agrees this new job qualifies, so he's collecting both. He raises a complaint with the Wayne County Employee Retirement System, which is a separate, independent agency from Wayne County and not under its control. The man who appointed Dwayne to this new job tells him, "Dwayne, please stop bringing up these complaints. You're ruffling feathers. I'd appreciate it if you didn't." Dwayne agrees. About two years later, Dwayne takes a different job in Wayne County, working in the County Clerk's office- possibly as the financial officer- and begins raising the complaints again. He writes to the board saying the way they're calculating benefits is wrong. He notes that it doesn't really affect him- it reduces his pension by about \$38- but he's concerned about retirees being deprived of their rightful benefits. This goes on for a couple of months, and then the Retirement Board asks, "Didn't he change jobs recently?" They know his old job qualified for the exemption, but they question whether the new one does. The record evidence is clear- they're not doing this out of concern for taxpayer dollars. They even say something like, "This will shut him up if we can cut his pension." The retirement system, lacking legal authority themselves, asks Wayne County Counsel- a separate government entity- for a legal opinion because the statute is vague. The lawyer opines that the new job doesn't qualify for the exemption. HR is notified and tells Dwayne, "If you keep working past 1,000 hours, you'll lose your pension." He does, and the retirement system stops paying. Dwayne sues. He wins \$180,000 from the jury after the district court held as a matter of law that he was engaged in constitutionally protected speech, which

seems like an uncontroversial finding. The court also held that the retirement system took an adverse action by cutting his pension, and the jury apparently concluded that this was in retaliation for his speech. The Sixth Circuit affirms, with very little analysis- particularly on the adverse action element, which they uphold in a single paragraph, saying any time an employer cuts pay, it's an adverse action. I don't dispute that the Retirement System was motivated by retaliatory animus in response to his speech. But what makes this case interesting- and what I think deserved more analysis- is that I don't see the adverse action as the pension cut itself. I see it as the request for a legal opinion. The retirement system doesn't have the authority to decide who gets a pension; it has a ministerial duty to follow the statute. In this unclear situation- where no one knows what an appointed county official is- they sought outside legal advice, which is important. If that advice is correct, then even though the action was in response to his speech, it amounted to the system bringing itself into compliance with the law. It just seems odd that complying with the law is considered a harmful action that entitles someone to keep receiving a pension they were never actually entitled to. It's almost like malicious prosecution, where there's an intervening force making the key decision- in that case, the prosecutor, and here, outside counsel. But even that analogy is imperfect, because prosecution is inherently harmful, whereas stopping pension payments to someone not entitled to them is arguably a good thing from a taxpayer perspective. So I found these aspects of the case interesting, and I think the court should have analyzed them more thoroughly.

A

Anthony Sanders 29:31

Jaba, your thoughts?

J

Jaba Tsitsuashvili 29:34

So, I think, Robert, it may inadvertently be blessing the logic of Nieves outside the criminal context. I think the point you're making is that it's analogous to saying, well, if there was probable cause to terminate the pension, then should you be barred from bringing a retaliation claim? And I don't think that's right when Nieves says it, and I'm not sure it should be right in this context either. The mere fact that there may be a question about the propriety of terminating the benefits shouldn't defeat the retaliation aspect of the case. To bring it back to the prosecution and criminal context- the Fourth Amendment and the First Amendment protect different interests. So there may be probable cause under the Fourth Amendment, but why does that necessarily- or entirely- determine the validity of a First Amendment retaliation claim? It shouldn't. And I think a similar point can be made here: yes, I take your point that the question of whether he was entitled to the benefits under the statute is one piece of it, but there's still a second, equally important piece- what was the actual basis for taking that action? What was the sequence of events that led there? That First Amendment retaliation question can and should be separated from the underlying merits of whether the benefits were properly terminated.

A

Anthony Sanders 31:32

So Jaba, I know there's a number of reasons why it didn't come up in this case. Could be that defense counsel were not very good. But that the fact that the Nieves-type question doesn't come up here- obviously, it's not an arrest, it's just loss of this benefit- and that kind of doctrine

that some people think is just so obvious, like Nieves, isn't coming up in this other context because those kind of castles on clouds haven't been created over there, when we're talking about pensions, but have been created when we're talking about arrests,

J

Jaba Tsitsuashvili 31:33

Right. And I think that Robert's concern is actually more captured within the kind of causation aspect of the retaliation kind of analysis, right? Because there's these three steps that the court sets out right, the second one is adverse action. And so, the question of, well, was the causal force of the elimination of the pension, retaliation, or was it something else- that gets captured in the third step, and the jury there made the determination that the causal force, was retaliatory. And so I think that aspect of it gets accounted for in the First Amendment analysis. And, yeah, I think, Anthony, you're totally right that that's the normal sequencing, and that's the normal course of events outside of the criminal context- outside of this kind of construct that Nieves created.

R

Robert Fellner 32:11

Well, one thing I'd add is, and I'm not sure I have a position on this, but I think it's worth discussing: the Sixth Circuit is citing employer actions- specifically adverse actions- which all involve discretion. And I guess that's the wrinkle I'd like to see fleshed out. I know the jury found causation, but what I'm saying is that if the law says you're not entitled to the pension, the retirement system's decision to cut it is ministerial; they have no discretion in that. So to me, that doesn't map neatly onto the typical employer adverse action retaliation cases, which all involve discretion, where the employer is taking some harmful action. Here, what's happening is, yes, their motivation to check whether they were complying with the law was bad, but once they learn they're not in compliance with the law, that act- cutting the pension- is seen by the jury as caused by retaliatory animus. It's hard for me to reconcile finding that you have a legal obligation to stop making payments being driven by animus, rather than a legal duty to comply with the law.

A

Anthony Sanders 34:35

Well, it could be. So this may be really splitting hairs, but I wonder if this is what was going on with the jury. The court doesn't get into this, but the jury's award wasn't some kind of judgment or direction that his pension had to be reinstated. It was a jury verdict for \$180,000, which I'm guessing represents lost pension benefits. So it could be that, legally, under Michigan law, or whatever, his pension has to stop- that's not something the federal court can change, they're not going to rewrite the statute. But still, it could have been wrong for him to lose the pension because of retaliation. Therefore, the remedy is this chunk of money, which essentially functions as the same thing as getting the pension back. Who knows what he's doing now? Maybe once he stops working that job- or the hours- he'll actually get the pension back as part of his retirement. So I wonder if that's just the way they "split the baby," so to speak, without actually "killing" the baby.

R

Robert Fellner 35:44

Yeah, I know. It just feels weird that the government coming into compliance of the law in a way that's like a public good, not spending taxpayer money on things that it shouldn't is an adverse action like these employers who fire people or cut their pay. I thought there was more room to discuss.

A

Anthony Sanders 36:13

It's definitely trickier than the cop arresting someone for what- sure is a violation of the law- but has discretion to do that in all kinds of ways. Its kind of like these police officers and in Des Moines we were talking about earlier.

J

Jaba Tsitsuashvili 36:27

The same exact argument can be levied there, which is, arresting someone who committed a traffic violation is for the good of the public, sure. Well, that

A

Anthony Sanders 36:43

I think Robert's point is that these people on the Pension Board, once they receive that information, they're legally obligated, however the cop is not legally obligated to pull that fellow over.

R

Robert Fellner 36:56

You know, I don't buy the fiction- and I don't think most people do- that rigid enforcement of the infinite number of criminal laws actually promotes the public good. But I think this is a very narrow circumstance where you have a taxpayer-funded program, and the government is operating that program in excess of its statutory authority. Taxpayers are footing the bill without even knowing it, and that's wrong- we want government to be fiscally responsible. I think there are legitimate reasons to say that's a good thing. It's analytically different from the criminal context, because criminal laws impose real costs, and I don't think most people believe that every criminal law exists to be maximally enforced. In fact, if that did happen, it might ironically help our cause, because people would start to embrace the idea of limited government. But anyway, that's just part of it.

A

Anthony Sanders 38:02

Part of what's going on in my head is, as a former ERISA lawyer, thinking of the trustees of the trust fund. And like, you know how they're thinking of this versus the First Amendment concerns, and so they're going to be, they're going to be thinking of, it's a fiduciary duty. They have to cut it off, right? So there's a lot, a lot of play. It's not, not to say that they they should have cut this guy's benefits off once they knew it, even though they was for perhaps unconstitutional or even even more heinous reasons, like we could come up with with some hypotheticals, but those, I think those are the interests that are, that are being balanced in a

way there also say that, like this is a jury verdict. So these and this could be why this is also an unpublished opinion that the jury found for this guy, once a jury makes a ruling, unlike in all these summary judgment qualified immunity appeals that we often deal with on this show, the jury is actually spoken here, and they spoke that this guy was wronged, and they're going to give him a verdict. Well, we will needle more on the next Short Circuit, but for now, I welcome my colleagues in this debate that we've had today and the discussion of retaliation in two different contexts. So please stay tuned for next time, and 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.