ShortCircuit371

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SPEAKERS

Anya Bidwell, Eugene Volokh, Raffi Melkonian

00:00

A Anya Bidwell 00:12

Hi everyone, welcome to the anniversary edition of Short Circuit. We are live at the Studio Theater in Washington, DC, with two amazing guests who need no introduction to the Short Circuit audience: Eugene Volokh and Raffi Melkonian. John Ross first cold emailed Eugene, now a Distinguished Fellow at Hoover, ten years ago, asking him to post about the Bullock Conspiracy. John wasn't sure he'd even get a response, but within minutes, Eugene opened up his large platform for us to spread our word on it. The Bullock Conspiracy has since moved from the Washington Post to Reason, but Eugene took us with him, and we're proud to be there. Raffi and Short Circuit also have a long-standing relationship to this day. When John finalizes the newsletter, he cross-references the cases he selected with Raffi's posts on X. If there's a case John didn't put in the newsletter but Raffi did, John revisits it, reads through it, and invariably adds it to the newsletter- except for that one case we'll be discussing today. Raffi is John's backstop, and we couldn't be happier that he and Eugene are here with us to celebrate our anniversary. Welcome both of you! We don't have much time, so let's jump right in. Eugene, what do you have for us?

E Eugene Volokh 01:53

I have Duncan v. Bonta, which may end up just being called Duncan, because it seems like it might be the end of the line- unless the Court takes it, but it could be called Duncan X, that is to say Duncan 10, as I count it, because there are references to earlier opinions, both at the circuit level and the district court level, up to Duncan 9. So I think this is Duncan 10, unless it's Duncan 11 because of the accompanying set of opinions regarding this weird en banc procedure issue, which I will largely set aside. So, it's a case that has a history, and it's a case that created a lot of disagreement. It has to do with a California law that bans gun magazines

that carry more than 10 rounds. The majority and many others call them large capacity magazines. The dissents call them standard capacity magazines. They say that these magazines, like 17 rounds, 20 rounds, and such, are actually kind of the norm, especially in the three-quarters of states that don't regulate magazine size. It's regular for manufacturers of semi-automatic guns to distribute them with magazines that have that many rounds, but California said, 'No, you have to cap it at 10 rounds.' So this was challenged under the Second Amendment. And, of course, in the several years that this case has been going up and down, things have changed in Second Amendment law. The current Second Amendment test basically has two points. The first one is supposed to ask whether the Second Amendment's plain text covers the conduct, and then, if it does, the government must then show that the regulation is consistent with this nation's historical tradition of firearm regulation. So this is sometimes called the text-in-history test. It's actually quite analogous to the law of many other constitutional provisions- Confrontation Clause, Criminal Jury Trial Clause, Seventh Amendment, Double Jeopardy, and such. It's a highly historical inquiry into late colonial and early American legal practices in all of those areas on the theory that those were the practices the framers constitutionalized in enacting the Bill of Rights. Of course, it's also quite unlike the way, say, free speech law operates, or equal protection law. There, it's a lot less historical, a lot more focused on things like strict scrutiny, intermediate scrutiny, etc. So the majority consists of seven justices, which is to say the Chief Judge Murguia, Judge Wardlaw, and five senior judges—Sidney, Thomas, Graber, Paez, Berzon, and Hurwitz. That itself is a matter of some controversy in that accompanying opinion, which I said I won't talk much about except to say that there's an argument about whether senior judges should be able to sit on an en banc while active judges, because they have been on a previous en banc. So now you have a situation where the majority doesn't, perhaps, represent- or perhaps it does represent- hard to know the views of the active judges on the court. But let's bracket that for now. They upheld the law and concluded that the law could be upheld in one of two theories they gave, both said in the alternative. One is that magazines aren't really arms. They're rather accouterments or accessories, and you can imagine maybe a strap for holding, although, of course, the typical semi-automatic gun won't operate the same way without the magazine, and some of them are even set up with a magazine interlock that keeps them from operating at all without the magazine as a safety feature. So the magazine is a necessary part. But, of course, a 17-round magazine or a 20-round magazine isn't necessary. The court acknowledges that magazines, even if you view them as accessories or accouterments, are protected by an implicit corollary right to bear the components or accessories necessary for the ordinary functioning of the firearm. But that corollary right only applies to the necessary items. So a ban on guns as such would be a ban on arms, and that would be, at the first step, categorically covered by the Second Amendment, presumptively unconstitutional. But a ban on certain kinds of magazines, well, that's only presumptively unconstitutional if they are necessary to the functioning and reasonably necessary, perhaps. But the court says, 'Look, one rarely needs more than 10 rounds for self-defense, so it's a minor burden. It isn't really necessary.' In the alternative, the court says, 'Even if such magazines were arms, regulating them is still consistent with the historical tradition.' So it points to traditions of restrictions on gunpowder storage, on the theory that that's an early tradition of laws seeking to protect innocent persons from devastating harm by regulating a component necessary to the firing of a firearm. There was accidental harm, not intentional harm. But they say that's a close enough analogy, especially if you couple this with laws that ban, for example, automatic trap guns or laws that ban weapons that have been found to be dangerous, like lances, pocket pistols, daggers, Bowie knives, and slung shots. I like it because you think it's a slingshot- it's not. It's like a cosh of some sort. Those have little self-defense value, minimal value in self-defense. Likewise, note the analogy to the claim that larger capacity magazines, magazines with more than 10 rounds- standard according to the dissent- are not really that necessary, at least marginally, compared to the 10

rounds. Now, one thing the dissent talks about is that magazines are very common. And the court had talked about that guns in common use cannot be forbidden. But the majority says, 'Well, you know, that was said in Heller as to handguns. It has to be understood in that context. Here, California bans only one type of optional accessory to some firearms, and that's not quite the same as banning something that is in common use, that is an actual arm.' So that's the majority. Now, the dissent- let's say the primary dissent- was written by Judge Bumatay, joined by Judges Ikuta, R. Nelson, and VanDyke, who disagreed on all of those facets. First, it said, 'Look, we acknowledge that the court had often said that the Second Amendment only protects weapons that are in common use, as opposed to those that are highly unusual or dangerous and unusual weapons. But this is extremely common. It says more than 100 million of these magazines exist in the country today. By the most conservative estimates, probably about half of all the magazines in the US. They're legal, as I mentioned, in three-quarters of the states.' And the dissent says, 'Look, the court has always grouped dangerous and unusual together. It's not enough that they're dangerous. All arms are dangerous. They have to be dangerous and unusual, and these aren't.' And that the accouterments point- it said, 'Look, you look at dictionaries of the era, they suggest it's things that are related, perhaps, to the military or to weapons, but they don't talk about these kinds of things as accouterments.' So it gives an example from a military dictionary that accouterments were things like belts, pouches, cartridge boxes, saddles, and bridles, and the like. They talked about how they had to be made out of good leather. So, in any event, that's the principal dissent. But what I think people are really interested in is Judge VanDyke's solo dissent. So first, the chief argument it makes is that, under the majority's view, really any part of a gun is going to be viewed as an optional accoutrement, because all parts of the gun pretty much can be swapped out. You can replace a trigger with another trigger. You can replace sights with other sights. You can replace a grip with another grip. You can replace a barrel with another barrel. And I think that's quite right, but Judge VanDyke thought, reasonably, that it wasn't enough to tell; it needed to be shown. So the dissenters included an 18-minute video of him going through his personal gun collection, which might seem large to most, but is small by some standards. He may have borrowed some from friends. In the video, he demonstrates how this happens. It's a visual illustration of what he was saying in the text. It was understandable that this might be a valuable feature, but it's certainly unusual. Judges and lawyers don't typically like unusual things. Some people probably scratched their heads, thinking it was odd. As a result, the concurrence called it egregious, stating that he had appointed himself as an expert witness, which they deemed impermissible. He also questioned where the videos would be stored for later access, how their contents would be searched, and how they could be cross-referenced. However, the same criticisms could be applied to pictures included in opinions, which is becoming more common. Judge VanDyke argued that the video didn't specifically show expertise; he said it wasn't necessary for an expert witness. The text of his opinion conveyed the same points. The majority didn't criticize the video, and the concurrence presumably didn't either because it's legitimate for judges to do this kind of historical analysis, as the majority did. Expert witnesses may be used in areas like economics, but many judges discuss law and economics. Similarly, expert witnesses on corpus linguistics are sometimes used, but some of the earliest opinions on it were written by judges who were considered experts in the field without needing to qualify as expert witnesses. The same applies to statistics. There's an interesting case from 100 years ago where Justice Brandeis used his fluency in German to identify a mistranslation in a German-language publication, suggesting the judge and jury could have caught the error by comparing the translation with the original German. While unusual, I don't think this is impermissible behavior for a judge.

Anya Bidwell 13:48

Anya Bidwell 13:48

The most disturbing part of the video to me was when he was calling out a lawyer arguing for the government. As he is making this video, they cut to the argument that the lawyer was making, and how the judge was pushing back against the lawyer. I know that people can hear the oral arguments, and they're available to live stream, but there's something really scary about the judge basically cutting straight to you and saying, "This is the part that I'm really interested in." Which was what you said, "and I wasn't satisfied with your answer." And now it lives forever on YouTube with ads.

E Eugene Volokh 14:31

That's the nature of our commercial media.

R Raffi Melkonian 14:34

As a workaday appellate litigator, my big reaction is, do I really have to start watching three hours of videos a week whenever judges make their dissents and opinions include video additions? I don't really care about this video, though I did enjoy seeing the AK-47 mounted over the judge's desk. But if it became more common, I think that would be a bad way of doing judicial work, at least from the perspective of a regular lawyer.

A Anya Bidwell 15:13

What did you think about the other portions of the opinion, for example, Judge Berzon talking about the problems that she saw.

R Raffi Melkonian 15:22

I can understand why she was so shocked by it. I mean, no one has really done that before, except for Judge Posner. We were talking before this recording about a video Judge Posner from the Seventh Circuit made about donning and doffing under the Fair Labor Standards Act. So that's one example, but generally speaking, judges don't do videos. I think it's a reasonable reaction from judges to novelty, especially in a case like this. So I wasn't surprised that judges found it somewhat problematic.

A Anya Bidwell 15:58

Judge Bumatay also had a table in his dissent, and in that table, he compared the previous en banc decision that was GDR'd by the Supreme Court, with the decision that they wrote. And he basically said they didn't change anything. What did you think about that? That was a bit of, kind of a raw calling out, too. It felt kind of edgy.

E Eugene Volokh 16:24

Well that's a separate question. Yeah, there was edginess in all the opinions. And that table

Well that's a separate question. Yean, there was edginess in all the opinions. And that table seemed totally legit. I think therewere some adjectives that were used at times by the judges about the other judges opinions that struck me as perhaps better avoided, in a way that the table did not.

A Anya Bidwell 16:50

Do you think that the concurrence on the video brought more attention to the video?

R Raffi Melkonian 16:58

I think he would have gotten plenty of views. A Federal Circuit Judge making a 20 minute video about his gun collection is unusual enough that I think anyone would have watched that.

E Eugene Volokh 17:10

In particular, gun people who are quite active online. I should have checked the comments.

A Anya Bidwell 17:26

So what is your verdict overall on the decision? Do you think the United States Supreme Court, if it were to take it up, would have something different to say?

E Eugene Volokh 17:36

It's hard to say. I've always been somewhat sympathetic to arguments that say, look, you have an important right- the right to bear arms- and other rights as well, but there may be some regulations on them that are permissible as long as they don’t excessively burden the exercise of the right. Limiting magazine size to 10 rounds probably won’t do much good, but it’s also unlikely to cause much harm. It is very rare that people need more than 10 rounds for self-defense. Judge VanDyke gave an example of an incident where the person defending himself shot off all 10 rounds and needed more, getting badly injured but thankfully not dying, because he ran out of ammo. He could have had a spare magazine. My sense is that most people would rather not need to carry extra magazines if they have a gun, but millions of people do carry concealed weapons every day, so carrying a spare magazine is a practical option. It does impose some burden, but probably not a great one. It might be like what the court upheld in Bruin, where it said that fees and delays in getting a concealed carry permit are okay because we need a system to ensure you're not a felon or something beyond a standard background check. But once it becomes too great, then it becomes unreasonable and should be struck down. Courts might apply that reasoning here. At the same time, Judge VanDyke plausibly pointed out that if California can cap magazines at 10 rounds, what if they said 5? Or 2? In principle, 2 might be too little, and 5 might not be enough, but 10 could be reasonable. You could use statistics on how many shots are typically fired in a defense situation, though that’s

hard to estimate. Courts might apply that reasoning, but some justices, if they agree to take the case, might argue that we shouldn’t be in the business of line-drawing. Magazines are arms and should be protected, regardless of size.

A Anya Bidwell 20:09

Finally, because we did start as an en banc project, I have to ask you about Judge Nelson's dissent and the issue that he took with that.

E Eugene Volokh 20:21

It makes my brain hurt! En banc is usually a process courts use to ensure that decisions made by three-judge panels reflect the broader views of the court, meaning the views of the active judges on the court. This is especially true in courts like the Ninth Circuit, which has 29 judges. Statistically, it happens quite often that three-judge panels may be far removed from the center of the court on a wide range of issues. The en banc process, which in the Ninth Circuit involves only 11 of the 29 judges, is meant to correct this by bringing decisions closer to the center. For that reason, senior judges are generally not selected for the en banc court, although they are often selected for panels. There are rules allowing senior judges to be on the en banc court if they were on the panel, or if they were active judges at the time the case was heard. The question, though, is whether this should extend to judges who were active in an en banc court years ago, and now, as senior judges, are brought back to the en banc court. This is a controversial issue because some argue that the case should go back to a three-judge panel first, then be considered by the en banc court.The complication is that after being senior for five years, judges could end up back on the en banc court, and that could result in a situation where a significant number of the en banc court’s judges are senior judges, making it, at least in theory, less representative of the broader court. I’m not sure it’s a problem in practice in this particular case, but it’s a tricky issue. Let me just close with a fun fact: district courts can sit en banc too. Most people don’t know that! I think Mistretta, from the late 1980s, was the first challenge to the sentencing guidelines. That case was initially heard by a district court en banc, even though the guidelines were later struck down on other grounds. Sometimes judges in district courts say, "This issue keeps coming up, and we need to settle it once and for all for our district," so they can convene en banc. It doesn’t happen often, and there aren’t specific rules for it like there are for circuit courts, but they apparently have inherent power to do it. So, a rare bird- the district court en banc!

A Anya Bidwell 23:24

You heard it here, folks. So now we're going to transition from a casethat shed the light on facts through word and through images- to a case that kind of didn't really even discuss facts. That's kind of why we missed it when we were looking at cases to put into the newsletter. Rafi tell us about Edith Jones' opinion.

R Raffi Melkonian 23:52

The case is called Sullivan v. Feldman, a published opinion from last week in the Fifth Circuit, and it happens to be my case. I’m discussing it with my client's permission and blessing, but I’ll

and it happens to be my case. I'm discussing it with my client's permission and blessing, but I'll try to be as fair as possible to the facts, which are extraordinary, even if you disagree with me entirely about how it should have turned out. It's an astonishing mess that the Fifth Circuit tried to resolve, and I hope they did. The background is that my client, Mr. Feldman, controls a series of companies offering insurance products with tax benefits for various businesses. A group of doctors hired him for this work, and in their commercial agreements, there was an arbitration provision, which is common in agreements between sophisticated parties. However, this particular arbitration provision was unusual. It stated that if the arbitrator did not finish the case within four months of submission, any party could remove the arbitrator and appoint a new one. This became problematic when none of the arbitrators finished the job within the four months, and a series of arbitrators were replaced, leading to 10 active arbitrators, all of whom rejected the four-month limitation and proceeded with the arbitration. The case eventually went to federal district Judge Lee Rosenthal in the Southern District of Texas, who allowed four of those arbitrations to proceed simultaneously. The arbitrators rented a room in the most expensive resort in Houston to hear evidence, with each arbitrator issuing different rulings on the same evidence. There was a significant divergence in how the case was handled: one arbitrator, Mr. Jones, initiated a class action, while another, Mr. Glasser, ruled that the arbitration agreement didn't allow for class arbitration and vacated Mr. Jones's class arbitration. Sanctions were imposed by one arbitrator against another, and the arbitration proceeded in this chaotic, multi-week, quadruple arbitration. Four different arbitration awards were issued: the best for my client was a $1.5 million award with no class arbitration, and the worst was Mr. Jones's $90 million award plus approximately $40 million from the class, plus fees. As expected, each party rushed to the district judge to confirm the arbitration award that was favorable to them, making the award a final judgment enforceable under federal law. We argued that Mr. Glasser's ruling should be confirmed, while our opponents argued for Mr. Jones's. Judge Rosenthal ruled that the arbitration provision was drafted by the parties, and because the Federal Arbitration Act did not provide grounds to vacate an arbitration simply because it was unreasonable, she confirmed all of the awards. So we had a internally inconsistent final judgment, the final judgment that said both X and not x; not just not x, but like x vacates that.

A Anya Bidwell 28:48

What do you tell your clients?

R Raffi Melkonian 28:54

My client in this case, is a lawyer, so he understood perfectly well what had happened. And he's a very smart lawyer, so, you know, he got it. I told him, we will have to go see what the Fifth Circuit does with this situation. So when we went and argued the case, we offered them two patents. One we said is, look, this final judgment defends Article Three. Like it can't be that there's an eternally inconsistent final judgment. Vacate the final judgment and ask the district judge to pick one of the arbitrators or and as an alternative path. And this comes out of my deep love for the Lord of the Rings. I said there ought to be a final arbitration to rule them all. And so let's do one more arbitration that picks which of these arbitrations is the correct one. So the opinion came out about 10 days ago, almost two weeks ago. The opinion affirms the final judgment, but then says there really ought to be a final arbitration to rule them all. They don't quite say that- Judge Jones, apparently, is not a Lord of the Rings fan. And the court says, these are internally inconsistent, there should be this final arbitration. So that's one thing to take away from this case. I don't think that has ever happened before in an arbitration proceeding.

The other point to take is that the court's opinion identifies a clear and deep circuit split about class arbitration. Four Courts of Appeals have held that if you merely incorporate the rules of the American Arbitration Association, you are consenting to class arbitration, and you're consenting to delegate that question of class arbitration to the arbitrator. Four Courts of Appeals have held exactly the opposite, that if you want to choose class arbitration, you need to say, "We consent or we delegate class arbitration to the arbitrator." And the reason is, there's a Supreme Court opinion called Lamps Plus Inc. v. Varela that says, "Look, class arbitration is extraordinarily different than bilateral arbitration. There needs to be a heightened standard for getting into that." And so the Fifth Circuit opinion identifies the circuit split. And obviously we are going to proceed on that point and seek en banc reconsideration of that and see if it goes anywhere. But it's a fascinating case. I know commercial cases are not Short Circuits, usual grist for the mill, but I thought it was worth talking about.

E Eugene Volokh 31:25

So I have two questions. One, is the final judgment, if it's the one to rule them all, will it get at the end of the story, dropped into the volcano?

R Raffi Melkonian 31:35

I'll have to put together a fellowship. Maybe the appellate lawyer who's my friend on the other side, Will and I will go together.

E Eugene Volokh 31:45

And the other question is, well, you should have had the arbitrators sitting in bank like the district. Although that would have, I'm sure, have caused even more bad blood than we saw in Duncan v. Bonta.

A Anya Bidwell 32:00

And who knows, maybe there will be a Supreme Court opinion to rule them all on this issue as well.

E Eugene Volokh 32:05

Right? Yeah, keep your eyes open.

A Anya Bidwell 32:08

Well with that, I think it's a really good note to end on. Thank you very much for being here with us to celebrate our anniversary. Raffi and Eugene-

E Eugene Volokh 32:17

Thanks for having us.

R Raffi Melkonian 32:18

Yeah, thanks for having us. This was a lot of fun.